

(1967) 08 CAL CK 0036
In the Calcutta High Court
Case No : Civil Rule No. 1798 (W) of 1966

Jyoti Prakash Mitter

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-08-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Companies Act, 1956 — Section 111
Constitution of India, 1950 — Article 103, 103(1), 103(2), 123, 124(2)
General Clauses Act, 1897 — Section 3(60)
Government of Union Territories Act, 1963 — Section 44(1)
Public Servants (Inquiries) Act, 1850 — Section 15
Specific Relief Act, 1963 — Section 34

Citation : 71 CWN 926

Hon'ble Judges : D. Basil, J

Bench : Single Bench

Advocate : J.P. Mitter in person, for the Appellant; Sankardas Banerjee (Advocate General) and Salil Kumar Dutta, for the Respondent

Judgement

D. Basu, J.—This case has assumed historic importance for reasons more than one.

This is the first case where the President's power under clause (3) of article 217 has been exercised to determine the age of a High Court Judge, after the insertion of that clause by the Fifteenth Amendment of the Constitution, and the first case where the interpretation of that provision has been called for. The instant case has a long history behind it, travelling through various Courts and Benches, over a controversy which arose in the year 1961, in this way :

The petitioner was appointed an Additional Judge of the Calcutta High Court in 1949 and made permanent on 21.1.50. He then gave his date of birth as the 27th December 1904, and in 1956, he declared it formally. In 1959, the Government of India, in pursuance of an anonymous letter, sought to reopen the question of the petitioner's age. pointing out that a higher age than that which

had been declared by the petitioner, was stated in his Certificate for the Matriculation Examination. Thereafter, the Government of India held the petitioner's correct date of birth to be the 27th December 1901, and, in pursuance of that decision, the Home Secretary to that Government wrote to the petitioner on 16.5.61, asking him to demit his office after Court hours on the 26th December 1961 [vide text of the order at page 179 of (1) Jyoti Prokash Mitter Vs. H.K. Bose, Chief Justice of the High Court, Calcutta, Jyoti Prokash Mitter Vs. The Hon'ble Mr. Justice H.K. Bose, Chief Justice of High Court, Calcutta, in accordance with the decision of the Government of India as to the age of the petitioner, on the basis of his Matriculation Certificate granted by the Patna University and as published in the Bihar and Orissa Gazette of 26.6.18; and the records of the U. K. Civil Service Commission relating to the Indian Civil Service Examination of 1923.

This opened what I call the first Chapter of the litigation, leading up to (3) Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, We are now on the second chapter, starting from after the said decision of the Supreme Court.

The stages in the first chapter were as follows:

(i) A proceeding under article 226 of the Constitution before the Punjab High Court in November, 1961.

In this petition, the petitioner prayed for a declaration against the Union of India that he was entitled to hold his office till 27.12.64 (when he would attain 60 years, according to the date of birth declared by himself) and a writ in the nature of Mandamus to restrain the respondent not to give effect to its decision conveyed by the Home Secretary's letter of 16.5.61, referred to earlier.

The Punjab High Court issued Rule on 16.11.61 but discharged it as not maintainable on 4.12.61.

(ii) Failure of the petitioner to obtain special leave from the Supreme Court to appeal against the preceding order of the Punjab High Court [vide (4) Himansu Kumar Bose Vs. Jyoti Prokash Mitter,

(iii) A petition under article 226 before Banerjee, J., of the Calcutta High Court under article 226, presented on 2.1.62 (Matter No. 11 of 1962).

It appears that a copy of the letter of the Home Secretary of 16.5.61 had been forwarded to the Chief Justice of the Calcutta High Court and, in pursuance thereof, the latter withdrew the Orderlies of the petitioners and gave directions that no cases would appear in the Daily List in the petitioner's Court from after the Christmas Vacation, on the assumption that the petitioner retired on 27.12.61, as directed by the Government of India [vide (1) Jyoti Prokash Mitter Vs. H.K. Bose, Chief Justice of the High Court, Calcutta,

This led the petitioner to bring the petition under article 226 before Banerjee, J.,

asking for appropriate writs to compel the Chief Justice of the High Court (who was the sole respondent) to treat him as continuing in office even after 27.12.61 and to allocate judicial work to the petitioner, urging that the decision of the Government of India, in pursuance of which the Chief Justice had been so acting, was illegal, arbitrary and unconstitutional, and that the Chief Justice had no jurisdiction to act upon the same in the manner he had done.

Banerjee, J., however, dismissed the petition in limine on 3.1.62, by a judgment, reported as (1) Jyoti Prokash Mitter Vs. H.K. Bose, Chief Justice of the High Court, Calcutta,

(iv) Appeal against the order of Banerjee, J., to a Divisional Bench of this High Court, under the Letters Patent. There was difference of opinion between the two learned Judges Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice H.K. Bose, C.J. of the High Court, Calcutta,

(v) The said appeal was, accordingly, referred to a Special Bench of three Judges. The Special Bench of three Judges (P. N. Mookerjee, S. P. Mitra and R. N. Dutt, JJ.) allowed the appeal and directed that a Rule should issue in favour of the petitioner [vide (2) Jyoti Prokash Mitter Vs. The Hon"ble Mr. Justice H.K. Bose, Chief Justice of High Court, Calcutta,

(vi) Appeal before the Supreme Court against the preceding decision of the Special Bench, by the Chief Justice of the Calcutta High Court, which was dismissed by the Supreme Court on 14.10.63 [vide (4) Himansu Kumar Bose Vs. Jyoti Prokash Mitter,

At this stage, I must mention a change in the constitutional background which took place when the appeal before the Supreme Court was being argued [vide p. 1642 of (4) Himansu Kumar Bose Vs. Jyoti Prokash Mitter, On the 6th of Oct. 1963 i.e., only a week before the Supreme Court could pronounce its judgment on the appeal from the decision of the Special Bench in the matter of Rule nisi, the Constitution (Fifteenth Amendment) Act, 1963 was passed and assented to by the President, by which was inserted clause (3) to article 217, in the following terms :

If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

(vii) The appeal against the judgment of the Special Bench of this Court having been dismissed by the Supreme Court, Rule nisi was issued on 28.3.63 against the Chief Justice of this Court, as directed by the Special Bench.

(viii) The Rule was then heard by a Special Bench of five Judges of this Court (P. N. Mookerjee, Mallik, Banerjee, Das Gupta and Chatterjee, JJ.). There was again a difference of opinion, - the majority of 4 dismissed the petition under article 226 and discharged the Rule, - P. N. Mookerjee, J., dissenting [vide unreported Judgment, dated May 21, 1964 a copy of which has been presented before me at

the hearing, by the petitioner].

(ix) Appeal by the petitioner to the Supreme Court, by special leave, against the majority decision of the Special Bench, just referred to. Disposal of the appeal by the Supreme Court on 9.11. 64, on certain terms [(3) Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, rejecting the view taken by the majority of the Special Bench.

It transpired in course of the litigation in the first chapter that the letter issued by the Home Secretary on 16.5. 61 had, in fact, been issued in pursuance of an order of the President made on 15.5.61. This order is referred to in the opening paragraph of (3) Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, It appears that after the correct date of birth had been determined by he Home Minister to be 27.12.01, it was proposed to convey to the Petitioner that, according to the aforesaid decision, the petitioner should demit his office on the afternoon of 26.12.61, - placing before the President a note together with the draft of the letter which was eventually issued by the Home Secretary on 16.5.61. The proposal of the Home Minister was agreed to by the Prime Minister and then "approved" by the President on 15.5.61.

I shall have occasion to refer more fully to the text of the note just referred to and the nothings on the File which culminated in the order of "approval" of the President, dated 15.5.61, which are fully set out at pages 39-42 of the cyclostyle copy of the unreported judgment of P. N. Mookerjee, J., dated May 21 and 22, 1964.

In view of the fact that the Constitution (Fifteenth Amendment) Act. 1963 inserted, with retrospective effect, article 217(3), and that this provision was relied upon by the Union of India to uphold the validity of the President's order dated 15.5.61, just mentioned, the Supreme Court was called upon to determine whether this order of the President, though made in 1961, could be upheld as a decision of the President under article 217(3), in view of the fact that it was retrospective in operation. The Supreme Court negatived this contention, holding, inter alia, that -

(a) A judge does not cease to be a Judge merely because a dispute has been raised about his age and the same is being considered by the President (p. 697, para. 24, *ibid*).

(b) A decision of the Home Minister, even though it is made by the Home Minister, after consulting the Chief Justice of India, and approved by the President, does not become a decision of the President under article 217(3) [paragraph 26, *ibid*].

(c) The Executive could not determine the age of a High Court Judge, whether before or after the insertion of article 217(3), inasmuch as that would impair the independence of the Judiciary (paragraph 29, *ibid*).

(d) Nor could this be done by arbitration, even though directed by the President (paragraph 27, *ibid*).

(e) The age of a High Court Judge can, however, be determined by the President, provided he complies with the following requirements, which follow from article 217(3). expressly or impliedly -

(i) that, before giving his decision, the President consults the Chief Justice of India, formally (paragraphs 21, 27, *ibid*);

(ii) that the Judge in question is offered a reasonable opportunity to put before the President his contention, his version and his evidence, in accordance with the requirements of natural justice (paragraphs 21, 29, *ibid*).

(f) Since the impugned order of the President of 15.5.61 did not comply with the foregoing requirements, it could not be upheld as a decision of the President in terms of article 217(3). After this finding, normally, the Rule obtained by the petitioner should have been made absolute, with a direction upon the Union of India not to enforce the said order of the President. It appears from the concluding paragraph of the judgment (paragraph 31, *ibid*), however, that instead of urging for that order, the petitioner consented to an order to the effect that the matter would again be placed before the President for his formal decision in accordance with the requirements of article 217(3), as interpreted by the Supreme Court. In the end, the Court gave the following direction -

..... the Union of India will place the matter before the President within a fortnight after the pronouncement of our judgment inviting him to decide the question about the appellant's age under article 217(3).

As to the consequences that would result from the fresh decision of the President as aforesaid, it appears that the Court recorded a consent order to the following effect:

Both parties have agreed before us that -

(i) in case the decision of the President is in favour of the appellant, the appellant will be entitled to claim that he has continued to be a Judge notwithstanding the order passed by the Chief Justice of the Calcutta High Court and will continue to be a Judge until he attains the age of superannuation;

(ii) on the other hand, if the decision of the President goes against the appellant, the said order of the Chief Justice of the Calcutta High Court would be held to be valid and proper.

2. The instant petition before me opens the second Chapter. - being a sequel of the decision of the Supreme Court, reported in (3) *Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, - a decision to which I shall have to refer frequently in course of my judgment, with reference to pages of the 1965 Supreme Court Volume of the All India Reporter.

In pursuance of the direction in (3) Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, the Home Ministry initialed the steps for placing the matter over again before the President. Since the relevant File of the Home Ministry (Judl. I/3/10/64) has been produced before me at the hearing, it would be convenient to refer to the important steps appearing from this File (hereinafter referred to as "the File" with reference to pages of this File) - though, it must be said at the outset, all of the relevant materials contained herein were not disclosed to the petitioner until the File was produced in Court.

(a) On 17.11.64, the Secretary of the Home Ministry drew up a note (pages 1-2), stating the history of the litigation up to the decision of the Supreme Court in (3) Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, and invited the President to determine the age of the petitioner, under art. 217 (3). As a first step towards such determination, the President was requested to -

authorise the Secretary. Ministry of Home Affaris, to issue notice in the matter to Sri J. P. Mitter as in the draft attached.

The draft referred to is to be found at pages 2-3n of the File. The note of the Secretary, with the request was submitted to the President through the Home Minister and the Prime Minister and on 21.11.64, the President acceded to the request by signing the order at p. In., by which he directed the Secretary of the Home Ministry to call upon the petitioner to make "such representation as he may wish to make in the matter and produce such evidence as he may desire to produce in support of his claim that his correct age should be determined on the basis of his date of birth being taken as 27th December 1904."

(b) In compliance with the notice issued, accordingly, by the Home Ministry, on 24.11.64 (pages 60-62 of the petition), the petitioner, on 7.12.64, submitted his representation (pages 65 - 82 of the petition), with the forwarding letter at p. 5/ c of the File. With the representation, he annexed Photostat copies of the documents on which he relied, namely, an almanac and a horoscope and some affidavit (vide p. 19 of the File).

In the forwarding letter, the Petitioner prayed for an oral hearing before the President -

(i) to adduce his evidence and to produce, in original, the documents in the Annexures; and

(ii) to make submissions in support of his case.

He repeated these prayers in a letter addressed to the Secretary to the President the same day (p. 9n. of the File).

(c) On 9.12.64. the Secretary of Home Ministry wrote to the petitioner to send the originals of the annexures to his representation, for being placed before the

President (p. 7n).

On the same date, the Home Secretary also supplied to the petitioner a copy of his note of 17.11.64, seeking the determination of the President, and copy of the President's directive dated 21.11.64, in compliance with the request made by the petitioner on 1.12. 64 (p. 4n.), for copies of these documents.

(d) On receipt of the copies just mentioned, the petitioner, on 10.12.64. submitted an additional representation (pp. 94-101 of the petition; pp. 13-18n. of the File), stating that he had to make this additional representation inasmuch as the copies in question were not supplied to him when he was originally called upon to submit his representation (p. 99 of the petition).

On the same date, the petitioner also submitted to the Home Secretary originals of the documents relied upon by him in his original representation.

(e) On 14.12.64, the petitioner addressed a letter to the Secretary to the President, forwarding a copy of his additional representation, for being placed before the President, with a request that the original documents, which he had handed over to the Ministry of Home Affairs, should be called for from that Ministry for being placed before the President (p. 100 of the petition).

(f) On 21.12.64, the Secretary to the Home Ministry sent a reply (p. 201 c of the File) to the letter addressed by the petitioner to the Secretary to the President on 7.12.64. The draft of the letter was, of course, shown to the Secretary of the President and the Chief Justice of India before issue. In this letter, the petitioner was directed to send all the evidence that he wanted to rely upon, to the Home Secretary. It was also indicated that no oral evidence of witnesses would be received but that the petitioner was free to submit the affidavits of witnesses he relied upon. As to the personal hearing sought for by the petitioner, the reply was as follows:

As to the question of hearing you personally, the President will decide after considering the evidence produced by you whether any personal hearing would be necessary. Should he decide that you should be heard in person, you will be informed in due course.

(g) On the 31st December 1964, the originals of the horoscope and the almanac in Bengali which had been submitted by the petitioner were sent to the Director of the Central Forensic Institute, Calcutta, by the Home Ministry, by the forwarding letter at p. 21n of the File, with the request that the horoscope and the entry in ink in the margin of the almanac should be examined "with a view to determine its genuineness with particular reference to (1) the age of the paper on which the horoscope had been prepared, (2) the age of the ink used, and (3) the age of the writing" with a similar report as to the genuineness of the entry in ink in the almanac. The forwarding letter also stated the matter in dispute and gave the versions of the petitioner and the Government as to the petitioner's date of birth.

(h) On 4.1.65, the petitioner submitted 4 additional affidavits of witnesses including himself, wherein he stated that the writing on the margin of the almanac against the date 12 Paus, 1311 B.S., was that of his maternal uncle, Jadunath Bose, who had died when the petitioner was a student at Oxford, -

which must be long before he was appointed a Judge of the High Court.

(i) Coming to know that the originals of the documents submitted by him to the Home Secretary had been sent to a forensic expert to test their genuineness, on 3.2.65, the petitioner wrote to the Home Secretary (p. 40n. of the File; pp. 112-3 of the petition), in which the petitioner -

(1) protested against the reference of the documents to the expert, after obtaining them on the representation that they "were required to be placed before the President";

(2) asked for a copy of the order of the President by which such reference to the expert had been made;

(3) asked for copies of the correspondence or orders by which the procedure to be followed at the inquiry had been laid down;

(4) asked for copies of the correspondence between the Home Ministry and the expert to whom the documents had been sent;

(5) suggested that had he been informed before the documents had been sent to the Government expert, the petitioner would have asked for a joint examination of the documents by experts nominated by both the parties and

(6) asked for a return of the originals of the documents so that he might have them examined by an independent expert, either in India or abroad, who would, after his examination, give evidence as to his opinion, by affidavit or otherwise.

(j) In reply to the preceding letter of the petitioner, the Home Secretary wrote the letter at p. 42n. of the File. He did not send any copy of any order having been made by the President on any of the matters referred to in the petitioner's letter but stated -

(1) What procedure was to be followed and what opportunities were to be given to the petitioner "are entirely dependent upon the discretion of the President as has been pointed out by the Supreme Court."

(2) "The question of returning the documents produced by you before the determination of the matter, now pending before the President, is completed does not arise at this stage."

(3) "The question of your offering any expert evidence would be considered in due course."

(4) "There is no doubt that you will be given an opportunity to put forward your case about the evidentiary value of the documents produced by you and any

decision thereon would certainly be arrived at by the President after affording you reasonable opportunities in this behalf."

(k) In the meantime, some correspondence took place between the Forensic Institute and the Home Ministry. In his letter of 5.1.65 (p. 37n.), the Commandant of the Institute wrote that "it is extremely difficult to solve dating problems in a completely satisfactory manner", and then sought for instructions whether he was at liberty to deface or mutilate the documents, because the test required could not be made without extracting parts of the documents.

No reply having been forthcoming, on 20.1.65, the Director of the Institute, Mr. Iyengar wrote to the Joint Secretary of the Home Ministry (p. 38n.) that mutilation of the documents by the chemical test suggested in the earlier letter was not desirable. "Moreover, by such application it will not be possible to give an absolute date to the document". He, therefore, intimated that he was applying other modes of examination and that he would submit his report, on hearing from the Home Ministry.

Thereupon, the Home Ministry, on 1.2.65, requested the Director "to send your report to the extent of the limited, examinations you consider possible" (p. 39n.).

The Director, Mr. Iyengar, therefore, submitted "my report on limited examination that could be carried out" (pp. 43n.-45n.). In this report of 12.2. 65, which we may call his first report he stated that -

(i) It was "not possible to give any opinion as to the age of the ink writing on the almanac."

(ii) "It appears that the horoscope could not have been written earlier than 1909", because the paper on which it was written contained bamboo pulp, which was not brought into use for the making of paper earlier than 1912, by the Titaghur Paper Mills. He said nothing about the age of the ink in which

the horoscope had been written.

(1) On receipt of this first report from Dr. Iyengar, there was inter-departmental consultation between the Home Ministry and the Law Ministry, in course of which the Law Minister, on 19.2.65, advised that the age of the writings on the horoscope and almanac should be ascertained from the Director of the Institute by sending him some admitted writings of the years 1904, 1949, 1950 and 1959 (p. 18 of the File). The object was to compare the age of the ink used in the disputed documents with other contemporaneous documents, as will appear from the note of the Joint Secretary of the Home Ministry of 27.2.65 (p. 20 of the File).

The Home Ministry, accordingly, sent a Top Secret letter to the Director, forwarding some old writings of 1904, 1949, 1950 and 1959 and requested him to determine the age of the writings of the disputed horoscope and marginal note in the almanac, by comparison (p. 53n of the File). The reply of Dr. Iyengar, dated 17.4.65, is significant from many points of view (p. 58n.). He writes -

(i) "It is impossible to give any definite opinion by such comparisons particularly when the comparison writings are not made with the same ink on similar paper and not stored under the same conditions as the documents under examination."

(ii) "..... it will not be possible for a Document expert, however reputed he might be, anywhere in the world, to give any definite opinion on the probable date of the horoscope and the ink writing in the margin of the almanac."

(iii) "I invite your attention to your letter..... dated 31st December 1964 (vide p. 21n. of the File), where it is stated that Sri Mitter claims that the horoscope was prepared at the time of his birth in December 1904. My detailed report sent to Secretary, Ministry of Home Affairs..... dated 12th February 1965 (pp. 43n.-45n.) furnishes clear scientific evidence against this claim. The horoscope could almost certainly not have been prepared in 1904. As bamboo was used as paper-making material..... for the first time in 1912 the horoscope could not have been prepared before this date."

(m) After the second report was received, the Law Ministry raised the question as to what opportunities should now be given to the petitioner before the President to come to his determination under article 217(3) (pp. 23-26 of the File). It was decided to refer the question to the Chief Justice of India for his "advice" and this had the approval of the President (p. 27). On 24.7. 65, the Chief Justice of India gave his advice as to the procedure to be adopted hereafter (pp. 28-29 of the File). When the matter came up before the Law Minister again (p. 30), the Minister suggested that the date or year of the horoscope should be ascertained from the petitioner himself. The Home Ministry accordingly wrote to the petitioner on 31.7.65 (p. 61n. of the File) and the reply of the petitioner, dated 4.8.65 p. 64n), was that it was not possible for him to give definitely the date or year of the horoscope but he asserted that it was at least in existence in the year 1921 when it was consulted on the occasion of his marriage. He also stated that his parents had died in 1932-33 and the maker of the horoscope had also died two years ago, as supported by the affidavit of Keshab Rakshit who was the manager of the family estate.

(n) In the meantime, the "petitioner became impatient of the delay in the disposal of the matter and on 23.2.65 he sent a telegram direct to the President for an early decision of the question of his age (p. 50/c of the File), and on 15.3.65 he sent another telegram to the President for leave to produce further documentary evidence which was stated to be available from East Pakistan (p. 56 c of the File). On 28.4.65, however, he wrote to the Secretary, Home Affairs, to say that owing to lack of co-operation on the part of the people in East Pakistan it was not possible to get that evidence which was mentioned in his letter to the President, He added,-

I must, therefore, content myself with the evidence I have already produced which I consider overwhelming. You can, therefore, take it that I have no further evidence to produce on the subject of my age, unless I am driven to call an

expert or experts as indicated by me in my letter to you, dated 3rd February 1965" (pp. 59-60/c).

(o) On 13.8.65, the two reports of the Director of the Forensic Science Laboratory were forwarded by the Home Secretary to the petitioner with a forwarding letter (p. 66/c of the File; p. 122 of the petition), by which the Petitioner was informed that -

- (1) "if you have any comment's to make on the opinion expressed by the Director, they may be sent to me";
- (2) "you may also adduce evidence in rebuttal, if you so desire, in the form of expert opinion supported by proper affidavits";
- (3) "your comments, evidence and affidavits, if any, may be sent within one month of the receipt of this letter."

Copies of the three documents which showed that his date of birth was the 27th December 1901 were also forwarded with this letter to the petitioner, - (a) relevant extracts from the Bihar and Orissa Gazette of 26.6.18, (b) a letter from the Civil Service Commission, London, (c) regulations for examination for the Indian Civil Service.

(p) On receipt of the preceding letter of the Home Secretary the petitioner sent a telegram to the President (p. 69/c) and a letter to the Home Secretary (p. 71/c of the File and p. 128 of the petition) on the same date - 1.9.65. In the telegram, he stated-

reports of Dr. N. K. Iyengar as to family almanac and my horoscope support that case I have throughout made and corroborate the evidence tendered earnestly pray that your gracious self be pleased to call for all papers and documents, if not already sent, and to grant me an audience, if at all necessary.

These statements were elaborated in the letter as follows:

(a) "Dr. Iyengar's report supports the case I have throughout made and corroborate the evidence I have tendered. It will be my submission to the President of India that my evidence as to the question of my age is conclusive. Accordingly, there is no question of adducing any further evidence or any" evidence in rebuttal." The statement that was made in the Home Ministry's letter to Dr. Iyengar dt. 31.12.64 that "Sri Mitter claims that the horoscope was prepared at the time of his birth in December, 1904", was wholly incorrect and that as far back as 1961 he had, in his writ petition before the Punjab High Court, stated that the horoscope in question was prepared "while the Petitioner was but a few years old". Hence, Dr. Iyengar's conclusion that the horoscope could not be prepared before 1912 or, at the earliest, 1909, was not inconsistent with the Petitioner's statement in the writ petition referred to inasmuch as the Petitioner was only a few years old in 1909 or 1912, if born in 1904.

(b) As to the entry in the Bihar and Orissa Gazette, the Petitioner stated that the

copy of the extract sent by the Home Ministry did not tally with the photograph of the entry in the Gazette of the same date which the Petitioner had in his possession. He also reiterated the statement he had made in his first representation to the President that in the absence of the records of the School where the Petitioner had been educated an entry in the Gazette giving the age of the candidate did not furnish any basis for determining the correct age of the person. He also reiterated his earlier statement that there was no requirement under the Civil Services Regulations to make any declaration of the age of a candidate and that the letter from the Civil Service Commission could not constitute primary evidence, so as to override the contemporary evidence tendered by the petitioner as to the date of his birth. At the end, the Petitioner added that since a considerable time had elapsed since the decision of the Supreme Court, "all relevant documents be now placed before the President of India. He may be graciously pleased to grant me an audience for the purpose of deciding the question of my age.

(r) Upon receipt of the foregoing letter of the petitioner the File was submitted to the President and the President, on 16.9.65, referred it to the Chief Justice of India - "I would be grateful for the advice of the Chief Justice of India on the question that has arisen as to the age of Shri J. P. Mitter" (p. 36 of the File).

(s) The Chief Justice of India, on 28.9.65, recorded on the file his advice that the question about the petitioner's age "should be decided on the basis that he was born on 27.12.1901" (pp. 37-40). The Chief Justice of India forwarded the file direct to the President but it appears from the noting at page 41 of the File that the "Secretary to the President" sent the File to the Secretary of the Home Affairs "for putting it up to the Home Minister before it is submitted to the President." The Home Secretary, accordingly, on 29.9.65, put up the matter before the Home Minister with the following note -

A summary of the case will be found at slip "Z" The Chief Justice of India has offered his advice in his minute from p. 37/n. after going into the relevant material. H. M. may recommend to the President that the age of Sri J. P. Mitter may be determined in accordance with the advice of the Chief Justice of India.

The Home Minister and thereafter the Prime Minister countersigned the above note to signify their assent and thereafter the matter was presented before the President on the same date. i.e., 29.9.65, and the President recorded his decision as follows:

I accept the advice tendered by the Chief Justice of India and decide that the age of Shri J. P. Mitter should be determine on the basis that he was born on the 27th December 1901.

29.9.65.

(vide Ann. Y to the additional counter affidavit of the Deputy Secretary of the Home Secretary).

This order of the President, determining the age of the petitioner, was not supplied to the petitioner, when the communication at p. 133 of the petition- p. 75/c of the File was sent to him. It (Ann. Y) has been furnished in course of the hearing before me, with the Additional Affidavit of the Deputy Secretary of the Home Ministry as late as the 23rd February 1967 together with a copy of the advice tendered by the Chief Justice of India (Ann. X) to the President in that behalf.

(t) As just stated, after the President recorded his decision, the Home Secretary communicated to the petitioner the purport of that decision by his letter dated 13.10.65 (p. 133 of the petition) as follows :

I write to inform you that the President has, after consultation with the Chief Justice of India, decided that you should be treated as having reached the age of sixty years on the twenty-seventh December nineteen hundred and sixty-one on the basis that you were born on the 27th December 1901.....

(u) Before the petitioner received the foregoing communication from the Home Secretary, the petitioner was apprised of the fact through the Press that the President had made a decision adverse to him. He, therefore, by his letter of the 15th October 1965 (p. 132 of the petition) addressed to the President prayed that his decision, which had been made without offering him an audience, should be reopened and that he should be granted an audience in the presence of the Chief Justice of India and a representative of the Home Ministry.

(v) On 10.11.65, the Home Secretary, informed the petitioner (p. 134 of the petition) that the President's decision was final and could not be reopened. It was added that though offered the opportunity of commenting on the opinion of the Government expert, the petitioner had by his letter of 1.9.65 (p. 128), declined that offer.

(w) On 26.7.66, the petitioner demanded justice by his notice at p. 136 of the petition, and on 3.8.66, he brought the instant petition under article 226 against the Union of India.

3. The substantial ground in the petition, as in his demand for justice, is that the impugned order of the President does not constitute a decision in terms of article 217(3) of the Constitution. The other grounds urged will appear from my judgment. The petitioner prays, inter alia, that the respondent should be directed not to give effect to the impugned order.

4. The Union of India opposes the petition by its affidavit-in-opposition dated 3.10.66. Subsequently, an additional affidavit-in-opposition was filed on 23.2.67, to which the petitioner submitted his rejoinder on 24.2.67.

I shall deal with the various points urged on either side, under separate heads.

5. The learned Advocate-General has placed a number of hurdles in the way of the petitioner towards the merits. The first of these is that this court has no

jurisdiction to entertain the instant petition.

The question of jurisdiction.

6. The jurisdiction of this court has been questioned both from the substantive and adjective points of view [paragraphs 3 (a)-(b) of the counter-affidavit].

7. (a) The question as to the territorial jurisdiction may be disposed of with a fewer words.

It has been urged that the impugned determination by the President having been made at Delhi and acted upon by the Union of India having its seat there, the High Court of Calcutta has no jurisdiction to question the validity of the impugned order. This might have been the law on the point prior to the insertion of clause (1A) in article 226 of the Constitution, by the Constitution (Fifteenth Amendment) Act, 1963, with effect from 6.10.63. But the new clause says-

(1A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

8. We have, therefore, to find out whether the petitioner's cause of action arose, even in part, within the territorial jurisdiction of the Calcutta High Court.

9. It is evident from the decision in (3) Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, that the previous decision of the Government of India in pursuance of which the Chief Justice of the Calcutta High Court asked the petitioner to retire from his office with effect from 27.12.61 was reopened by the Supreme Court on the finding that the decision of the Government of India on the basis of which that order of the Chief Justice of the Calcutta High Court had been made could not be upheld as an order of the President under article 217(3), even though that provision had been given retrospective effect. It is clear that so long as a valid order under article 217(3) was not made, the petitioner must be deemed to have continued in his office until he attained the age of superannuation according to the date of birth as it had so far been accepted. It is as a result of the impugned order at p. 133 of Ann. A to the petition, dated 13.10.65, that the petitioner's service as Judge of the Calcutta High Court has terminated and that is how the cause of action for the present petition has arisen in part in Calcutta, even though the order itself might have been issued at Delhi.

10. This preliminary point must, therefore, fail.

11. (b) From the substantive standpoint, the learned Advocate-General contended that to entertain this petition would be to question the propriety of what the President, the Head of the State, has done, and to grant any relief to

the petitioner would amount to compelling the President to do it once again according to the directions of this Court; but this could not be done because the President is not subject to the jurisdiction of this court. Since this argument has been advanced with all seriousness, I beg to be excused for dealing with it at the basic level.

12. This argument overlooks the express provisions of the second proviso to article 361(1) of our Constitution and, further, suffers from the obsession of the Hobbesian Leviathan and the politico-theological doctrine of the Divine Right of Kings which lay at the foundation of monarchical absolutism in England which was transmitted to India through Imperialism. But the fathers of our Nation have replaced that imperialism by a Republican form of Government prescribed by the Constitution of Free India. Our President is the Head of our State not by virtue of birth but because of the love and admiration of the multitude of this sub-continent. He is not there by sufferance or because of fear, but as "the majesty of the people incarnate" (cf. Borgan, *Government of the People*, p. 118). As such he is worthy of respect from the administrator, legislator and Judge alike. In England, it was held that the prerogative writs cannot issue against the Crown itself because it cannot be proceeded against in contempt which is the sanction to enforce obedience to such writ [(6) *R. v. Powell*. (1841) 1 QB 352(361)]. The doctrine was so extended by the aid of the maxim "King can do no wrong" that mandamus was not available even against a public servant or any other agent of the Crown [(7) *R. v. Secretary of State*, (1891) 2 QB 326(334) CA], unless constituted a separate legal entity by statute. In the result, a person aggrieved by the action of the Crown or its servants could expect any relief only ex gratis, as a suppliant, by the undemocratic procedure of a Petition of Right, until the maxim "King can do no wrong" was exploded by Parliament after three hundred years of struggle, by enacting the Crown Proceedings Act, 1947.

13. The Constitution of India also offers personal immunity to the Heads of the State, namely, the President and the Governors of States, but it is not founded on such technical and narrow grounds; to subject the constitutional heads of the State to the jurisdiction of the courts for their official acts would be contrary to the very republican system which has been set up by the Constitution. But this is not to render the individual who is affected by any such act remediless. A steadfast adherence to that ideal, to-day, would not defile but hallow the "image of India" and install it in the foremost rank in the democratic world.

14. The second proviso to article 361 says -

Provided further that nothing in the clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

This proviso makes it clear that the personal immunity of the head of the State does not bar any suit being brought or any writ being issued against the Government, where the suit or proceeding would have been otherwise

maintainable against the Government. In cases in which action lies against the Government the action of the President or the Governor, as the case may be, may, therefore, be scrutinised by the Courts in order to give relief to the individual against the Government.

15. To do so would be to show no disrespect to the President but only to demonstrate that his acts are impersonal and that the Government of this country under the Constitution is a "Government of laws, not of men". These words, put into the Massachusetts Declaration of Rights by John Adams, are not peculiarly American, but form the crux of the political and judicial system which has been adopted, in its essence, by the makers of our Constitution.

16. That indeed is the precise meaning of the expression "Rule of Law" which stands at the foundation of the constitutional system adopted by us, - a meaning not often realised by many who utter the expression as a slogan. The concept of Rule of Law, necessarily involves Judicial Review, - not to enthrone the Judiciary over the Executive or the Legislature, - but for the purpose of maintaining the Law, which is "the King" in a Republican country, as Thomas Paine asserted, with all seriousness (see Corwin, the Higher Law Background of American Constitutional Law, 42 Harv. Law Review, 149). Even in a regime of absolute monarchy, this was the answer of Chief Justice Coke to the ambitious James I who claimed to dispense Justice by virtue of his Divine Right and Wisdom in the case of (8) Prohibitions Del Roy, (607), to which I shall advert presently.

17. In deciding causes against the State, in particular, a Judge has often to choose between allegiance to his oath and judicial conscience on the one hand and allegiance to his employer on the other; between the grace of his Creator and the pleasure of the "power that be", but he can ill afford to forget that at the foundation of his office lies his solemn pledge "to uphold the Constitution and the laws" "without fear or favour." Nor can he turn a deaf ear to what the most celebrated of Judges ever born said at a time when the darkest of clouds loomed over Justice and the Rule of Law -

..... true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience.....; that the law was the golden met - wand and measure to try the causes of the subjects.....; with which the King was greatly offended and said, that then he should be under the law, which was treason to affirm.....; to which I said, that Bracton saith, quod Rex debet esse sub homine. sed sub Deo et lege." [Coke, C.J. in Prohibitions del Roy, (1607) 12 Co. Rep. 63.]

18. More curiously, in performing its task to maintain the Rule of Law, Courts have sometimes to interfere with what would otherwise appear to be the will of the Legislature itself. But that, as has been said by Shastri, C.J., of our Supreme

Court [(9) *State of Madras Vs. V.G. Row*, is done "not in a crusader's spirit," but because it has, under the Constitution of the realm, the duty to do so. Even under an unwritten Constitution, similar is the apology for interference with legislative acts in proper cases and at the proper stage, - as offered by the Court of Appeal in (10) *R. v. Electricity Commissioners*, (1924) 1 KB 171 (213).-

If that be the true view of the statute, the interference of the Court in such a case as this, and at this stage, so far from being even in the most diluted sense of the words a challenge to its supremacy, will be of assistance to Parliament. It will relieve each House to some extent at least from the risk of having presented to it for approval by resolution schemes which go beyond the powers committed by the state to the Commissioners who made them.....

19. Nor are the Judges themselves above the Rule of Law. Under the Anglo-Saxon system of justice which we have adopted, a Judge looks not to the face of the suitors before him nor of those who are likely to be affected by his awards but to the scriptures to administer which he has taken his oath. It is from this fountain of immutable justice that sprang a case like (11) *Dimes v. Grand Junction Canal Company*, (1852) 3 HLC 758, where a decree of the Lord Chancellor Cottenham, in a Chancery suit, was quashed on the ground that the Lord Chancellor had an interest in the plaintiff company, unknown to the defendant, even though "no one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern." The Judges of the King's Bench who advised that the very existence of the interest made the decision of the Lord Chancellor violable were answered by the fact that the Lord Chancellor was the most powerful dignitary under the English system, - stalking over all the three branches of the Government, - the head of the Judiciary to whose recommendation all the other Judges owe their appointment, the Chairman of the Upper House of the Legislature and a member of the Cabinet which wield the Executive power.

20. (c) Fortunately for us, maintainability of proceedings against the Union of India for an order made by the President, even in his quasi-judicial capacity, is not without a precedent in our Reports. Kapur Singh, a member of the Indian Civil Service was dismissed by the President, after an inquiry made against him under the Public Servants (Inquiries) Act, 1850. This order of the President was challenged by the Civil Servant by a petition under article 226 of the Constitution on the ground, inter alia, that he had not been given a reasonable opportunity within the meaning of article 311(2) and the case went on appeal to the Supreme Court. Though the Court dismissed the appeal [vide the Report in (12) (1960) 1 SCA 680, which reproduces the judgment in full] on the merits on the ground that the requirements of natural justice had not been violated in the facts of the case (p. 698), it was assumed that "natural justice" had to be complied with in the proceedings (pp. 695, 698) before the President could award any punishment under article 311(2). and nobody did suggest that the impugned order was immune from the jurisdiction of the court under article 226 because it

had been made by the President.

21. (d) It will be evident from the Supreme Court judgment in (3) Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, itself that relief can be given to the petitioner without issuing a command upon the President to revise his decision. From that judgment it would appear that in 1961 too, though it was the Home Minister who had decided the date of birth of the petitioner, he also obtained an endorsement of "approved" from the President (p. 968). But the Supreme Court held that this did not amount to a "decision" of the President within the meaning of article 217(3). Eventually, therefore (p. 968), the Court passed the following order-

.....the Union of India will place the matter before the President within a fortnight after the pronouncement of our judgment inviting him to decide the question of the appellant's age under article 217(3).

22. There is no reason why this court cannot pass an order against the Government of India, if that Government be subject to its jurisdiction and if the petitioner succeeds on the merits to establish that the impugned order too, does not constitute a "decision" of the President under article 217(3).

23. (e) Learned Advocate-General, however, contends that, by the insertion of article 217(3), the Constitution has excluded a Judge of a High Court from the protection of the words "any person" in the proviso to article 361(3).

Such a contention, however, would, apart from any other consideration, impute to those who brought about the amendment a flagrant discrimination against a Judge of a High Court, for, the corresponding provision regarding a Judge of the Supreme Court, in article 124(2A), has been made dependent upon Parliamentary legislation which has not been so far undertaken and may never be undertaken as there is no machinery provided by the Constitution to compel the initiation of such legislation.

24. If the decision of the President under article 217(3) be completely non-justifiable, another unreasonable intention shall have to be imputed to the authors of article 217(3), namely, that the position of the Judges of the highest tribunals, instead of being the most secure and independent, as was sought to be ensured by other provisions of the Original Constitution, such as tenure on good behavior subject only to impeachment, guaranteeing salary etc, against legislative interference, - would be less enviable than that of a man in the street, for, while the latter has the right to have his age, when questioned by anybody else in the world, determined by a court of law, the Judge will have to submit to the non-justiciable award of the President, made in camera, - even where it appears not to be a decision in conformity with the requirements of the constitutional provision which empowers the President in this behalf. If the position was like that, the Supreme Court itself, in (3) Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, could not possibly refer the matter again for a proper decision of the

President under article 217(3).

25. (f) More serious is the point raised by the learned Advocate-General that in view of the word "final" in article 217(3), the decision of the President cannot be questioned by any court on any ground whatever.

I must at once say that the contention is right in so far as it asserts that the petitioner cannot any longer have a determination as to his real age from any tribunal other than the President and that, accordingly, the President's decision as to the date of birth of the petitioner cannot be reviewed by any court on any ground. In other words, no court can sit as a court of appeal over the finding of the President as to the petitioner's date of birth. But this is not the same thing as to say that a competent court, having jurisdiction over the Government of India, cannot say that the impugned order is not a "decision" of the President in terms of article 217(3) itself. It is only a decision which is in accordance with the provisions of article 217(3), which acquires the "finality" conferred by it.

26. As a device to exclude the jurisdiction of courts, the "finality" clause is not a new one, and there has been a mass of legal literature as to its effects. Where a statute uses this word, it has been held that the finality or immunity operates only if the impugned order is intra vires the statute which confers the power and renders it "final". The reason is that the special provision which excludes the jurisdiction of the ordinary courts to determine an otherwise justiciable question will apply only where the act in question comes within the purview of the statute and complies with its requirements [(13) *Goldsack v. Shore*, (1950) 1 All ER 276(278) CA. (14) *Secretary of AIR 1940 105* (Privy Council) (16) *Barnard v. National Dock Labour Board*, (1953) 1 All ER 1113]. Where a statutory tribunal or authority acts contrary to the substantive or procedural provisions of the statute which confers power or jurisdiction upon it [(17) *Hubli Electricity Co. v. Province of Bombay*, AIR 1949 PC 138; (18) *Secretary of AIR 1924 175* (Privy Council) it does not act "under the Act" but "in violation of it" *Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and Others Vs. The Administrator, Municipal Committee, Ludhiana*, so that the protection of "finality" conferred by that Act cannot be by such ultra vires action.

27. The majority judgment in *Ridge v. Baldwin*, (1963) 2 All ER 66 (81-82; 110; 116; 119) HL is authority for the further proposition that where the function is quasi-judicial, a "finality clause" in the governing statute cannot preclude judicial review to determine whether the principles of natural justice have been violated inasmuch as such violation renders the decision a nullity, which cannot be cured by any finality clause. In that case, section 2 of the Police (Appeals) Act, 1927 provided for an appeal to the Secretary of State from an order of dismissal of a member of the police force made by the Watch Committee, and sub-section (3) of that section provided that the decision of the Secretary of State on such appeal was to be "final and binding upon all parties". The House of Lords (with one dissent) held that the procedure adopted by the Watch Committee in the case before them contravened the principle of natural justice and that,

accordingly, the order of dismissal was null and void (p. 82, *ibid*), notwithstanding the fact that the appellant had, in fact, appealed to the Secretary of State and his appeal had been dismissed, with the statutory finality attached to it. Lord Reid considered a compliance with natural justice a jurisdictional requirement:

The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case (p. 81).

28. Even the dissentient Lord Ever shed (p. 93), who thought that noncompliance with natural justice only rendered the decision voidable and not void, had to concede that if the result was to render the decision void, the finality attached to the appellate order could not save either the original or the appellate order. So said Lord Ever-shed -

I agree that if it had been made out that the proceedings of the Watch Committee were nullity, then the appeal and the result of the appeal might well be regarded equally as a nullity.

29. What is to be noted is that-

(i) Ridge's case, along with (19) *Spackman v. Plumstead Board of Works*, (1885) 10 App. Cas. 229(240), lays down that -

There would be no decision within the meaning of the statute if there was anything done contrary to the essence of justice.

(ii) Ridge's case, which was an action for declaration and damages, lays down that where a quasi-judicial decision contravenes natural justice, even an ordinary civil court may say that it was "no decision" or that it was a nullity, notwithstanding that the statute makes the decision final.

30. There is, indeed, a deep-seated reason why the courts thrust themselves into an arena which the Legislature has sought to protect against judicial encroachment by the use of the word "final", - thereby apparently nullifying the intention of the sovereign law-making body. The reason is that the foundation of the English legal system has been acknowledged to rest on several principles, which cannot be subverted by the Legislature without demolishing the entire edifice. The foremost of these are -

(i) Every citizen has a right to have his legal dispute decided by the courts of law.

(ii) The safeguards for proper administration of justice are impartiality and openness, which are that inseparable attributes of the courts of law, as distinguished from any other tribunal.

31. (i) On the first point, I am tempted to reproduce the words of Romer, L.J. in (20) *Lee v. Showman's Guild*, (1952) 1 All ER 1176(1188) CA -

The proper tribunals for the determination of legal disputes in this country are

the courts, and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates, are fitted for the task. The courts jealously uphold and safeguard the prima facie privilege of every man to resort to them for the determination and enforcement of his legal rights.

And this was the right which was sought to be guarded against legislative discrimination, by our Supreme Court in (21) *Ram Prasad v. State of Bihar*, (1953) SCA 578(584, 592).

32. (ii) On the second principle, it would suffice to refer to the observations in (22) *Scott v. Scott*, (1913) App. Cas. 417, where it was held that subject to limited exceptions, - "every court of Justice is open to every subject to the King" (p. 440), because "in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect" (p. 463); "where there is no publicity there is no justice" (477).

33. It is, therefore, the constant endeavour of the English Judiciary, to save these two basic principles of their Constitution, which is otherwise unwritten. In the illuminating words of Lord Shaw in (22) *Scott v. Scott*, (pp. 477-8) -

The right of the citizen and the working of the Constitution..... have upon the whole since the fall of the Stuart dynasty received from the judiciary and they appear..... still to demand of it - a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of the judges themselves.

34. In their zeal to protect the foregoing cherished principles, Courts have laid down two canons of interpretation,-

(i) that "the subject's" recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words" (23) *Pyx Granite Co. v. Ministry of Housing*, (1959) 3 All E.R. 1 (H. L.);

(ii) that even where the Legislature uses express exclusionary words, such as "final", "conclusive", the Courts will seek to maintain the Rule of Law by insisting upon its right to interfere wherever the act of the subordinate authority or tribunal is ultra vires the statute which conferred the finality [vide (24) *Taylor v. National Assistance Board*. (1957) 1 All E.R. 183(185) C.A.; (25) *Ridge v. Baldwin*, (1963) 2 All E.R. 66 (107, 116) H.L.; (14) *Secretary of AIR 1940 105* (Privy Council) *Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and Others Vs. The Administrator, Municipal Committee, Ludhiana*, ; (27) *Collector of Kamrup v. Kamakhya* (1964) S.C. C.A. 412/62, unreported.

35. In the words of Denning, L.J., in the Court of Appeal in (24) *Taylor's* case, (1957) 1 All ER 183(185) are unequivocal-

The remedy is not excluded by the fact that the determination by the board is by statute made "final". Parliament gives the impress of finality to the decisions of

the board only on the condition that they are reached in accordance with the law; and the Queen's courts can issue declaration to see that this condition is fulfilled.

36. (g) If such be the jurisdiction of the ordinary courts, the jurisdiction of a Court empowered by the Constitution under Art. 226 cannot be lesser. That the word "final" is uttered by the Constitution itself, in Art. 217(3), makes no difference in this respect, if the connotation of the word "final" does not change because it is used in the Constitution as distinguished from an ordinary statute.

37. But, the Advocate-General argues, Art. 217(3) operates as a pro tanto repeal of Articles 136 or 226.

(i) That there is no express repeal is evident from the text of clause (3) of Art. 217, which does not use words such as "notwithstanding anything in Art. 136 or 226" or "notwithstanding anything in this Constitution" as at the opening of Art. 329 - vide interpretation thereof in (28) N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others,

38. It cannot be overlooked, in this context, that where the makers of the Constitution intended to make any question non-justiciable and thus to exclude even the constitutional remedies, they have used a different expression, namely, "shall not be inquired into in any court" (or an equivalent expression), as in arts. 74 (2); 77 (2); 166 (3); 329 (1); 363 (1). That the effect of such an expression is to exclude even the jurisdiction under Arts. 131-136 or Art. 226 has been held by the Supreme Court in (29) Meghraj v. Delimitation Commission. AIR 1966 SC 669(674, paragraph 16); (30) State of Seraikella Vs. Union of India (UOI) and Another, But any such expression has not been used in article 217(3).

39. (ii) The contention of the learned Advocate-General, in substance, is that the word "final" means the same thing as "shall not be questioned in any court", or that the very insertion of clause (3) in article 217 to determine the age of a Judge should be interpreted as an implied repeal of article 226 to the extent that article 217(3) goes.

40. To any such contention, - apart from the deliberate use by the makers of the Constitution of the word "final", which has a settled meaning, - the decision of the Supreme Court in (3) Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, itself offers a conclusive answer. The learned Advocate-General relied upon the opening of words in paragraph 29 of the decision (ibid) that -

the decision under article 217(3) is final, and its propriety, correctness, or validity is beyond the reach of the jurisdiction of courts.

But the words "propriety, correctness or validity" refer to the correctness of the President's determination, on the merits and, if these words are read with the rest of the contents of paragraph 29, it would be abundantly clear that it was never intended by the court that the President's decision would be non-

justiciable altogether or that competent courts would not be entitled to examine whether a particular decision, which is challenged, constituted a "decision" under article 217(3) or not. If that was the intention of the Supreme Court, the result of the case in (3) Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, itself must have been otherwise. The reason is that clause (3), with the word "final", had been inserted in article 217 by the Fifteenth Amendment, with retrospective effect, so as to render final any decision purported to have been made by the President even prior to the date of the Amendment Act. It was not only conceded by the Union of India but held by the court that notwithstanding the Amendment, the court had the jurisdiction to hold that that impugned order did not operate as a "decision of the President" under article 217(3). So observed the court in the concluding paragraph of the judgment (p. 970, *ibid*) -

The appellant has contended before us that if we hold that the impugned decision of the President does not amount to a decision under article 217(3), he is entitled to have a formal decision of the President in terms of the said provision. The Attorney-General has conceded that this contention of the appellant is well-founded. He, therefore, stated to us on behalf of the Union of India that in case our decision on the the main point is rendered against the Union of India, the Union of India will place the matter before the President within a fortnight..... inviting him to decide the question about the appellant's age under article 217(3).

41. It is to be noted that the foregoing order was made by the Supreme Court on an appeal from an order of the High Court under article 226. It is, therefore, open to this court to make a similar order, in case the petitioner succeeds in establishing that the impugned order is not a decision under article 217(3).

42. (h) The most radical contention of the learned Advocate-General was that a decision of the President under article 217(3) was non-justiciable even if the President violated its express requirement, namely, that the President could arrive at his decision only "after consultation with the Chief Justice of India. This contention, again, is precluded by (3) Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, where it was categorically stated -

consultation with the Chief Justice of India is clearly a mandatory requirement of clause (3)..... the Parliament thought it necessary to provide that having regard to the gravity of the problem covered by the said provision, it is essential that the President should have the assistance of the advice given by the Chief Justice of India.

43. It would be an absurdity in the world of Jurisprudence if the Supreme tribunal of the land held a constitutional requirement as "mandatory" and the courts bound by that interpretation, under article 141 of the Constitution, were to stand as silent spectators even where it was plainly transgressed.

44. The next preliminary question raised by the learned Advocate-General is as to the petitioner's locus standing to bring this petition under article 226.

The question of locus standi.

45. The main prayer of the petitioner is that the impugned order of the Government of India conveyed by the letter dated 13.10.65, which is at Ann. A, p. 133 of the petition be cancelled or revoked. It communicates that the President has decided that the date of birth of the petitioner was 27.12.1901 and that, accordingly, he had reached the age of 60 years on 27.12.61. The petition under article 226 was presented and Rule obtained on 3.8.66.

46. The learned Advocate-General has argued that the petitioner has no locus standi to bring the petition or that no relief can be granted on this petition inasmuch as the Rule has become in fructuous or the matter has become academic at the time of the judgment of this court. This argument has been leveled from different angles.

47. Firstly, it has been urged that the words "age of a Judge of a High Court" in article 217(3) indicate that the President's power is to determine the age of a "sitting Judge" and that, accordingly, only a person who is still a Judge can question the decision of the President. Assuming that the first part of this assertion is correct, the second part does not necessarily follow from the first part. The reason is that as soon as the President decides that the age of the person is such that he has already crossed the age specified in article 217(1), he *prima facie* ceases to be a Judge. If the locus standi of the petitioner, then, depended upon the very fact that some determination has already been made by the President, the decision in (3) *Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose*, Chief Justice, High Court, Calcutta and Another, should have been otherwise. That decision shows that even where a determination appears to have been made by the President, it is open to the Judge in question to contend before a competent court that the alleged determination is not a "decision" under article 217(3) and that, accordingly, he still continues to be a Judge until there is a proper decision in conformity with article 217(3).

48. This result would also follow from general principles, as explained by Lord Keith in (31) *Vine v. National Dock Labour Board*, (1956) 3 All ER 939 (949) HL. Under our Constitution, a Judge of a High Court has the constitutional right to continue in his office as a Judge until he reaches the age specified in clause (1) of article 217, unless of course he vacates his office in any one of the modes specified in the proviso to that clause. There is no doubt that this gives the Judge a "status", secured not by the ordinary law but by the organic law itself, which takes Judges of the superior courts out of the reach of the doctrine of, tenure "at pleasure" which is applicable to other employees of the Government, under article 310(1). Though an adverse decision of a question as to a Judge's age under clause (3) of article 217 is apparently innocuous, and is not included in the proviso to clause (1) of that article, there is no doubt, as I have shown in

another context, that such a decision interferes with the status of the Judge to continue in the office until he reaches the age specified therein, because it makes the Judge vacate his office on a date earlier than when he would have retired but for the decision under article 217(3). If, therefore, the Judge can show that the impugned decision is a nullity, he is entitled to have his remedy from the court. Though Vine's case was one for a declaration, before the civil court, there is no reason why the principle as laid down by the House of Lords (p. 949, *ibid*) should not be applicable to the writ jurisdiction conferred upon this court by the Constitution of the land. These observations of Lord Keith (p. 949) are -

The scheme gives the dock-worker a status,..... and he has a right and interest to challenge any unlawful act that interferes with this status. If the acting's here complained of were a nullity. Mr. Vine..... has a clear right to have the fact declared by the court.

49. But, then, the learned Advocate-General contends that to maintain a petition under article 226, the petitioner must not have crossed the age specified in article 217(1), at the date of the petition, - according to his own version as to his age. Now, the case of the petitioner is that he was born on 27.12.04 (*vide* Ann. A, p. 60, to the petition). If that were so, he reached 60 on 27.12.64. On the date of the petition (3.8.66), the petitioner had, therefore, ceased to be a Judge, on his own account. This argument, however, is not acceptable to throw out the petition as not maintainable in view of the fact that before the petitioner reached the age of 60 (27.12.64, according to his own case), art. 217 (3) was amended by the Constitution (Fifteenth Amendment) Act, 1963. with effect from 6.10.63, raising the age of retirement of a Judge from 60 to 62 years.

50. The learned Advocate-General contends that as soon as the President made the impugned determination on 29.9.65, that determination related back to the original order of retirement of the petitioner dated 16.5.61 [*vide* paragraph 3(c) of the Counter-affidavit] which was controverted up to (3) *Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, and that, accordingly, the petitioner is not entitled to draw to his benefit of the extension of the age of superannuation which was effected by the 15th Amendment of the Constitution subsequently to the date of that initial order of retirement. Attractive as it seems, this argument, too, cannot be accepted for the simple reason that the concluding words of paragraph 31 of *Commissioner of Income Tax, Madras Vs. K.H. Chambers, Madras*, were based on the assumption that the fresh determination by the President would be in conformity with the requirements of article 217(3); the petitioner has now come to court on the allegation that the impugned determination by the President (dated 29.9. 65) is not, in law, a "decision under article 217(3)". If he succeeds in showing this, he would still remain a Judge on 6.10.63, when the Constitution (Fifteenth Amendment) Act came into operation, so that he could not be said to have ceased to be a Judge before 27.12.66, when he would have reached the age of 62, according to the date of birth as given by himself, - the impugned order

being out of his way. Whether the petitioner succeeds in establishing his case that the impugned order is not in accordance with article 217(3) is a question to be decided by the court on the merits, but the petition cannot, for the matter of that, be thrown out in limine, on the ground of want of cause of action, because the petitioner was, on his own version, still within 62 years on the date of the petition, i.e., 3.8.66.

51. Lastly, it has been contended by the learned Advocate-General, that even if what has been stated so far be correct, the court cannot give any relief on the Rule on a date when the petitioner has crossed the age of 62 years according to himself, even if the decision of the court on the merits be in the petitioner's favour to remove the impugned order out of way of the petitioner, - because the order of the court would bring no practical relief to the petitioner.

52. But this argument, too, is not sound inasmuch as though the petitioner cannot be reinstated as a Judge after having already reached the age of 62 years, he can still obtain other substantial reliefs, if eventually the fresh determination of the President is in the petitioner's favour. Whether that will be so, is not for this court to anticipate. "We are at present discussing the question whether the Rule has become in fructuous or academic. The observations of the Supreme Court in the unreported case of (32) Saxena v. of Madhya Pradesh, (decided on 30. 1. 67, in CA 670 of 1965) show that the question as to the correct date of retirement is not of a mere academic interest to a person who has already reached the age of retirement at the date of the judgment of the court, even on the petitioner's own showing. That was a case where the petitioner challenged the validity of an order of compulsory retirement at the age of 55 years, on the ground of ultra vires, - and that was upheld by the court. The petitioner had, before the judgment, crossed the age of 58 years, even if his case on the merits were accepted, - so that "it is not possible to direct the State to put him back in service." Nevertheless, the Supreme Court allowed the appeal, holding that "the appellant will be deemed to have continued in the service of the Government in spite of the order", which was found to be ultra vires, and directing that "he will be entitled to such benefits as may accrue now to him by virtue of the success of the writ petition."

That "pension" is, inter alia, such a benefit for which a person may challenge a termination of his service is also evident from the decision of the House of Lords in (25) Ridge v. Baldwin, (19-63) 2 All ER 66 (73; 82). Delay.

53. Allied is the contention of the Advocate-General that the petition should be thrown out on the ground of delay. The instrument which is sought to be got rid of in the petition is the communication of the Home Secretary (p. 133 of the petition), dated 13.10.65, but the petition was filed in this court only on 3.8.66, i.e., some 10 months thereafter.

54. In my opinion, this argument can hardly be advanced by the respondents who did not supply the petitioner even with a copy of the President's order until

at the hearing (vide additional affidavit filed by the Deputy Secretary of the Home Ministry on 23.2.67). It was essential for the petitioner, who sought to challenge the President's decision under article 217(3) as "no decision", to know in what form it had been made and whether it was a "speaking order" and, if so, what were the reasons given therein. It is said in the counter-affidavit of the Deputy Secretary that the omission to supply a copy of the President's order, even after the petitioner's demand, was due to a "lack of appreciation". But, assuming that "it was due to a "lack of appreciation", it cannot but be characterised as grievous, particularly in view of the history of the litigation, the imputations made against the Home Ministry and the petitioner's refusal to abide by an "executive determination", - which was upheld by the Supreme Court in (3) Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, - and the host of legal advisers available to the Government of India.

55. Be that as it may, it was reasonable on the part of the petitioner to wait for some reasonable time after having asked for the copy by his letter dated 14.12.65 (p. 135). He waited until 26.7.66 and then made the demand for justice by his letter at p. 136 of the petition. Having regard to the slowness of the machinery of the Government, this period of waiting cannot be said to be unreasonable.

This objection must, therefore, be rejected.

56. All the preliminary objections having thus failed, we must enter into the merits.

57. The question on the merits before me is whether the impugned order is "in terms of the provisions of article 217(3). Fortunately for me, these terms have already been interpreted by the Supreme Court and, under article 141 of the Constitution, the interpretation of the Supreme Court of article 217(3) in (3) Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, constitutes "law declared by the Supreme Court", which is binding on this court. Under the Constitution, thus, this court has not only the jurisdiction but also the duty to inquire whether the terms of article 217(3), as explained by the Supreme Court, have been complied with in arriving at the impugned order.

58. But before entering into that question, it is necessary to dispose of the question, hotly debated at the hearing, whether the function of the President under article 217(3) can be called "quasi-judicial".

Whether function under article 217(3) quasi-judicial.

59. It has been vehemently urged by the learned Advocate-General that President, acting under article 217(3) is neither a "tribunal" so as to attract article 136, nor a quasi-judicial authority, so as to attract article 226 of the Constitution, but is an authority which is sui juris, - a like of which is not to be

found anywhere else under the law.

60. This argument cannot, however, be accepted, if, after applying the well-established tests, the only conclusion that can emerge is that the function of the President under article 217(3) is stamped with the quasi-judicial obligation. In fact, such an argument was advanced with respect to the Electricity Commissioners against whom a writ of prohibition was sought for in (10) R. v. Electricity Commissioners, (1924) 1 KB 171 (CA), and I cannot resist the temptation of reproducing the memorable words with which Bankes, L.J. dismissed the contention -

There can, of course, be no exact precedent, as the Electricity Commissioners are a body of quite recent creation. It has however, always been the boast of our common law that it will, whenever possible, and where necessary, apply existing principles to new sets of circumstances.

In the same breath we should reiterate the words of Parker, J. in (33) R. v. Manchester Legal Aid Committee, (1952) 1 All ER 480 (489) -

... the duty to act judicially may arise in widely different circumstances which it would be impossible, and indeed inadvisable, to attempt to define exhaustively.

61. But before we can launch into the realm of jurisprudence to discover the tests to be applied to determine the indicia of a quasi-judicial obligation, we have to cross what, apparently, is an almost insurmountable barrier. The learned Chief Justice of India, who had delivered the unanimous opinion of the court in (3) Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, was consulted by the Government of India, with the approval of the President, as to the proper procedure to be followed by the President in coming to his decision under article 217(3), particularly with respect to the right of personal hearing claimed by the petitioner which had, in fact, been assured by the Home Ministry in some of their earlier correspondence with the petitioner. While giving his advice on the Home Ministry File (pp. 28-29), which I shall have occasion to refer again hereafter. His Lordship made the following observation -

In regard to the question as to whether a personal hearing should be given to Mr. Mitter, all I can say is that the enquiry of this kind should not tend to become a formal inquiry in the sense that the President holding the enquiry could be described as a Tribunal exercising quasi-judicial functions.

62. The question of personal hearing will be dealt with by me separately. In the present context, we are concerned with the question whether the function of the President under Art. 217 (3) is "quasi-judicial" and, on that question, we have got the non-judicial opinion of the Chief Justice of India, which may be said to be his personal interpretation of the relevant observations of the Court in (3) Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, which were set forth in the File (pp. 25-26), while

seeking his advice. Though this informal opinion of the learned Chief Justice was not relied upon by the Respondents in their Affidavit because they had not, until then, disclosed the Chief Justice's advice to the Petitioner, I would respectfully give my reasons why I do venture to dive into the legal principles relating to the question, notwithstanding the aforesaid opinion of the learned Chief Justice, for, now that a copy of the advice has been supplied to the Petitioner, it has been relied upon by the learned Advocate-General at the hearing:

(i) The said opinion is the individual opinion of one of the Bench of five which delivered the judgment in (3) Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, As the Chief Just note at pp. 28-29 of the File itself shows, the learned Chief Justice was oppressed by the fact that the proceeding was moving very slow and was more anxious to have it expedited; apparently, he was also embarrassed by the fact that his advice as to the procedure was sought at that stage than at the final stage before the President was to give his decision. This is illustrated by the following words at the end of his note-

Having regard to the past history of this matter, I am reluctant to express and definite opinion even as to the procedure which the President may adopt. All that I wish to emphasise is that I am anxious that this matter should be disposed of without any further delay.

When the President refers the case to me for my opinion, I will consider the whole question on the merits and express my opinion.

(ii) It is an opinion expressed by the learned Chief Justice out of court, and without hearing the party going to be affected by the opinion. None can say whether his Lordship himself would have given a different answer to the question put, if the question of law had been canvassed in court, with the assistance of the parties interested.

Under the English system of administration of justice, a Judge is not bound (nor the parties) by the opinion expressed by him out of court (vide He-wart, The New Despotism, 1929, pp. 115, 123, 125, 126, 129, 137, 140) nor even by his opinion expressed in a previous case [cf. (34) Thetford Corporation v. Norfolk County Council, (1898) 2 QB 468 (483)] except where it is binding by the law of precedents, res judicata, or the like.

(iii) Under article 141 of the Constitution, it is the law declared by the Supreme Court which is binding upon this court and not the opinion of members of the court rendered out of court. Though, of course, the opinion of a jurist of the eminence of the learned Chief Justice of India, even in his non-judicial or private capacity, is bound to carry great weight and persuasion, it cannot Stand as a bar to the examination of the legal principles bearing upon the question of law properly brought before a court. Under the English system of justice, judicial pronouncements are a source of law, no less than the edicts of the Legislature and, accordingly, the pronouncements of a superior court are binding upon a

subordinate court by the law of precedents, so as to preclude further inquiry upon questions already decided by the superior court, - but not so the opinions of members of the superior court, expressed non - judicially.

63. This is my respectful apology in approaching the question as to quasi-judicial obligation being involved in the function under article 217(3), on the platform of well-established legal principles, apart from the view taken by the learned Chief Justice in his non-judicial advice.

64. (I) We can ill afford to overlook that, in giving its interpretation of article 217(3), - which interpretation is binding on this court, - the Supreme Court has more than once uttered the words "natural justice" as being an implied requirement of exercise of the power under article 217(3) (paras. 21; 29 of *Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*,

65. Once, however, it is acknowledged that a statutory authority is bound to comply with the principles of natural justice, the conclusion is irresistible that it is because of the fact that its function is "quasi-judicial" that it is required to comply with the requirements of natural justice before coming to its decision, for, there is no such obligation attached to a "purely administrative" determination.

66. I am not unmindful of the fact that in *Radeshyam Khare and Another Vs. The State of Madhya Pradesh and Others*, Das, C.J. said that though a particular act was "administrative" and not quasi-judicial, it did not mean that the administrative authority "has not to observe the ordinary rules of fair play". Be he was cautious enough to explain, at the same time, that this "fair play" was not co-extensive with the requirements of natural justice which required "the well-ordered procedure involving notice and opportunity of hearing necessary to be followed before a quasi-judicial action, open to correction by a superior court by means of a certiorari, can be taken." In my opinion, Das, C.J.'s observations as to "fair play" in administrative action did not go any further than what was meant by Lord Radcliffe in (36) *Nakkuda Ali's case*, [1951 AC 66 (77) PC] when he said -

Can one not act reasonably without acting judicially?

A close study of the judgment in *Nakkuda Ali's case* will show that Lord Radcliffe was applying the interpretation of the word "reasonable" as given in (37) *Liversidge v. Anderson*, (1941) 3 All ER 338 to hold that the existence of this word in relation to a statutory power indicated that the power was to be exercised, not capriciously, but honestly and in good faith, even though there was no quasi-judicial obligation. I would venture to submit that this condition attaches to any statutory power. even without: the word "reasonable" to explain the conditions for the exercise of that power. The House of Lords itself observed in (38) *Westminster Corporation v. L. & N. W. Ry.*, (1905) AC 426(428) that it is a condition for the exercise of all statutory power that-

... it must be exercised (a) bona fide, (b) reasonably and (c) with out negligence.

67. The first two aspects were explained in (39) *Short v. Poole Corporation*, (1926) 1 Ch. 66, as meaning that a statutory power, even though discretionary, must not be exercised "arbitrarily" or "capriciously"; and in (40) *Associated Picture Houses v. Wednesbury Corporation*, (1947) 2 All ER 680(682. 685) CA, it was explained that "reasonableness" in this context meant that the statutory authority must taken into account matters which the statute requires to be considered in exercising the power and must not take into account matters which are not germane to the exercise of the power according to the statute. The court may interfered not only where the authority acts contrary to the foregoing conditions in coming to his decision but also where, as observed in (41) *Sharp v. Wakefield*, 1891 AC 173, the authority, from relevant premises, arrives at a conclusion or decision "that no reasonable man could have come to" from those premises. "Good faith", to a certain extent, overlaps with the condition of reasonableness and implies that the authority must apply its mind to the statutory conditions [(42) *Stuart v. Anderson*. (1941) 2 All ER 665(671); (43) *Sukhbans Singh Vs. State of Punjab*, and must not use the power for a purpose other than for what it was given by the Legislature [(44) *Galloway v. Mayor of London*. (1866) 1 HL 34(43)].

68. If by "fairness" is meant all this, every statutory authority must observe it even where there is no quasi-judicial duty. But nobody has said that the burden of "natural justice" founded on the twin principles of "hearing" and "impartiality" (or want of bias) attaches to the exercise of a purely "administrative" function, e.g., in the matter of making a deportation order against a foreigner (45) *Re. Venicoff*, (1920) 3 KB 72, or an order of preventive detention against a person who is dangerous to the collective security [(46) *Sadhu Singh Vs. Delhi Administration*, *Liversidge v. Anderson*, (1942) AC 206].

69. On the contrary, it is established by a consensus of authority that the obligation to comply with the requirements of natural justice can be predicated only where the statutory authority exercises a quasi-judicial, not administrative, function, so that from the repeated use of the expression "natural justice" in (3) *Jyoti Prokash Mitter Vs. Hon''ble Mr. Justice Himansu Kumar Bose*, Chief Justice, High Court, Calcutta and Another, , the only conclusion that can emerge is that the Supreme Court, in that decision, interpreted article 217(3) as imposing a quasi-judicial obligation upon the President in the matter of exercise of the power conferred by that provision.

70. In this context, I would refer to the well-known pronouncements in cases dealing with the "quasi-judicial" doctrine :

(i)..... a quasi-judicial officer in exercising his powers must do it in accordance with the rules of natural justice" [Greer, L.J. in (47) *Errington's case*, (1935 1 KB 249 (268)].

(ii) "..... there are no limitations imposed by natural justice on the action the

Minister takes administratively

[(48) *Miller v. Minister of Health*, (1946) 1 KB 626 (630)].

(iii) "In my opinion, no judicial, or quasi-judicial duty was imposed on the respondent, and any reference to..... bias is irrelevant in the present case. The respondent's duties..... are.... purely administrative.

My Lords, I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office....." [Lord Thankerton in (49) *Franklin v. Minister of Town Planning*, (1947) 2 All ER 289 295-6) HL].

(iv) In (50) *University of Ceylon v. Fernando*, (1960) 1 All ER 631(637) PC, the Judicial Committee entered into the question whether "the claims of natural justice had been fully satisfied" "on the footing that these functions were quasi-judicial", - not administrative.

(v) An administrative decision is called quasi-judicial when there is an obligation to adopt the judicial approach and to comply with the basic requirements of justice; when there is no such obligation, the decision is called "purely administrative"; - there is no third category. This is what was meant by Lord Reid in (25) *Ridge v. Baldwin*. (1963) 2 All ER 66 (73-74) -

In cases of the kind with which I have been dealing the Board of Works..... was dealing with a single isolated case. It was not deciding, like a Judge in a law suit, what were the rights of the person before it. But it was deciding how he should be treated - something analogous to a judge's duty in imposing a penalty..... So it was easy to say that such a body is performing a quasi-judicial task in considering and deciding such a matter and to require it to observe the essentials of all proceedings of a judicial character - the principles of natural justice. Sometimes the functions of a minister or department may also be of that character and then the rules of natural justice can apply in much the same way.....

As our Supreme Court put in (51) *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*,

The concept of a quasi-judicial act implies that the act is not wholly judicial, it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive power. The aforesaid decisions accept the fundamental principles of natural justice that in the case of quasi-judicial proceedings, the authority empowered to decide the dispute between opposing parties must be one without bias towards one side or other in the dispute.

71. It follows from the above that the quasi-judicial obligation to follow the

principles of natural justice attaches to a function or the exercise of a power; and much of confusion would arise if it is supposed to attach to an office. It is possible for a judicial officer to pass a particular order which is ministerial and for an administrative officer to make an order or arrive at a decision in a quasi-judicial manner [(47) *Errington v. Minister of Health*, (1935) 1 KB 249; (36) *Nakkuda Ali v. Jayaratne*, (1950) 54 CWN 883 (887) PC]. Put otherwise, an administrative authority may be under a duty to proceed quasi-judicially at a particular stage of the proceedings before him, e.g.. in making an inquiry or hearing objections to a proposal [(47) *Errington v. Minister of Health*, (1934) 1 All ER 154(161; 163) CA; (52) *Robinson v. Minister of Town and County Planning*. (1947) 1 All ER 851] though the ultimate decision may be administrative, being governed by subjective or policy considerations [(33) *R. v. Manchester Legal Aid Committee*, (1952) 1 All ER 480 (489); (53) *R. v. Registrar of Building Societies*, (1960) 2 All ER 549 (560) CA; *Johnson v. Minister of Health*. (1947) 2 All ER 395].

72. It is indeed impossible to contend, after what Lord Hodson has said, in (25) *Ridge v. Baldwin*, (1963) 2 All ER 66 (113), that the President's function under article 217(3) cannot be quasi-judicial merely because he is the head of the Executive. This observation also shows the link between quasi-judicial duty and natural justice :

.... the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity, as if that was the antithesis of a judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial, but rather executive or administrative, have been held by the courts to be subject to the principles of natural justice.

73. The antithesis between an administrative or quasi-judicial function, as I shall show, is that in performing a "purely administrative" function, the authority is guided slowly by considerations of policy and subjective opinion; when he has to proceed objectively and to approach the question in a judicial manner, - which implies conformity with the standards of natural justice, - the function is called "quasi-judicial."

74. There is, in fact, no charm nor odium attached to the word "quasi-judicial", and the first man who uttered the word "quasi-judicial" may not be discovered readily, as it has been born in course of the natural evolution of the law. Originally, any authority, other than the courts were described as "administrative" and, when it was required to make a determination affecting the rights of parties, it was stated, in the earlier cases, that it must proceed or act "judicially", e.g., Byles, J. in (55) *Cooper v. Wandsworth Board*, (1863) 14 CB (NS) 180; in the same case, Erle, C.J., said that the matter in question must be decided "according to judicial forms." In 1878, the Privy Council described the function of a Governor to declare a lease forfeited on the ground of abandonment as "a function of a judicial nature" which must be exercised in conformity with

the elementary principles of natural justice [(56) *Smith v. The Queen*, (1878) 3 App. Cas. 624]. In 1890, Wills, J. [(57) *Hopkins v. Smethwick Local Board*, (1890) 24 QBD 712, affirmed on appeal at 716 of the same Report] said that "in condemning a man to have his house pulled down a judicial act is as much implied as in fining him ?5." In 1915, it was held that "the duty of deciding an appeal" must be performed "judicially" [(58) *Local Government Board v. Arlidge*. (1915) AC 120(132)]. even though the authority vested with the appellate power was an administrative body.

75. But it was soon realised that an administrative authority, even when it has to decide a question according to judicial forms, could not be described as performing a "judicial" function, because that was an attribute reserved exclusively for the courts of law, - the regular judicial tribunals of the realm. Jurists were thus led to invent the word "quasi-judicial", - the word "quasi" meaning literally, "not exactly". It is commonplace to state that an authority is described as quasi-judicial because it has some of the attributes or trappings of a "court" but not all [(59) *Jaswant Sugar Mills v. Lakshmichand*, A. 1963 SC 677 (685. para. 19); (60) *Bharat Bank v. Employees*, A. 1950 SC 188 (95).]

76. The first public use of the word "quasi-judicial" appears in the report of the Donoughmore Committee on Minister's Powers, (1932) Cmd. 4060, at p. 73 at which the Committee analysed the characteristics of a "true judicial decision" and summed up the characteristics the presence or absence of which stamped a decision as "quasi-judicial". The term quasi-judicial was soon used by Greer, L.J. in the Court of Appeal in. (47) *Errington v. Minister of Health*. (1935) 1 KB 249 (258-9) CA -

in deciding whether a closing order should be made inspite of the objections which have been raised by the owners the Minister should be regarded as exercising quasi-judicial functions.

77. The analysis of "judicial" and "quasi-judicial" functions as made by the Donoughmore Committee came to be recorded judicially in the case of (15) *Cooper v. Wilson*, (1937) 2 All ER 726 (740) CA, in the judgment of Scott. L.J. who had taken a leading part in the Donoughmore Committee. He described the Watch Committee in the case before him (p. 740), *ibid*) as obliged to make a "quasi-judicial approach" which meant that they were "exercising nearly judicial functions", though "not tied to ordinary judicial procedure". Lord Maugham in the Judicial Committee, in *Estate and Trust Agencies v. Singapore Improvement Trust*, (1937) 3 All ER 324 (PC), picked up the words of Greer, L.J. in (47) *Errington's* case, (1935) 1 KB 249(259) and said that, in deciding whether after considering the objections of persons affected, a declaration that building is unfit for human habitation should be revoked or submitted to the Governor-in-Council for his approval, the Improvement Trust "must be regarded as exercising quasi-judicial functions." In 1940, (15) *Cooper's* case, (1937) 2 All E.R. 726 was followed by another judgment of the Court of Appeal, where the Master of the Rolls said that a local authority, while exercising the statutory power to demolish

an unlawful construction, was "acting in a quasi-judicial capacity" so that it could act only after giving the person concerned an opportunity to show cause why such steps should not be taken (62) *Urban Housing Co. v. Oxford City Council*, 1940 Ch. 70 CA.

78. Notwithstanding such copious instances, for some time, Judges like Lord Greene or Cohen L.J. in (54) *Johnson v. Minister of Health*, (1947) 2 All E.R. 395 (400-402; 405), made fun of this intruder in the realm of jurisprudence, - the word "quasi" and demonstrated the ludicrous extent to which its use might be carried if applied to other legal terms. But the days of sarcasm are over and the word "quasi-judicial" has entrenched itself in textbooks as well as judicial decisions e.g., (36) *Nokkuda Ali v. Yayaratne*, (1951) A.C. 66 (77); (49) *Franklin v. Minister of Town and County Planning*. (1947) 2 All E.R. 289 (295) H.L.; (50) *University of Ceylon v. Fernando*, (1960) 1 All E.R. 631 (637) P.C.; (25) *Ridge v. Baldwin*, (1963) 2 All ER 66, 75(1); 86 (C); 109 (H).

79. It follows from the respectable body of judicial decisions so far discussed that though the word "quasi judicial" has not been uttered by the Supreme Court in (3) *Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose*, Chief Justice, High Court, Calcutta and Another, -by interpreting Art. 217 (3) as impliedly requiring a compliance with the requirement of natural justice (p. 966, *ibid.*), the Court was laying down that the function was to be exercised by the President quasi-judicially because it was acknowledged on all hands that the doctrine of natural justice is not attracted where the function is "purely administrative" as distinguished from "quasi-judicial".

80. II. The learned Advocate-General seeks to avoid this conclusion by urging that the words referring to natural justice in para. 21, at p. 966 of the report are a surplusage or recommendatory in nature. He relies on the opening words of the paragraph, which have been referred to earlier, in connection with the question of jurisdiction, namely, that-

the decision of the President under article 217(2) is final, and its propriety, correctness, or validity is beyond the reach of the jurisdiction of courts.

81. According to the learned Advocate-General, if the decision of the President be beyond the jurisdiction of the courts, it matters little whether the President has, in any particular case, complied with the rules of natural justice or not, even though the Supreme Court may consider it desirable that the President should do so. I am unable to accept this argument of the learned Advocate-General, for reasons more than one:

Firstly, as has already been pointed out by me, what is excluded from the jurisdiction of the courts, is the finding of the President as to the age of the Judge in question, assuming that it is a decision in accordance with the requirements of the relevant constitutional provision; the words relied upon do not bar the courts from inquiring whether the decision of the President in any particular case is "a decision under article 217(3)."

The opening words of the paragraph [(3) Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, standing alone, might have suggested that the power of the President under article 217(3) is absolute. But the succeeding words in the same paragraph make it clear that there are two limitations imposed by article 217(3) on the President's power, - one express and the other implied:

(a) The express limitation is that "before he reaches his decision," the President "has to consult the Chief Justice of India". If the President's power under the provision were absolute, it would have been meaningless for the court to say, next, that "consultation with the Chief Justice of India is clearly a mandatory requirement of clause (3)" [(3) Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, Nor can there be any sense in describing a statutory or constitutional requirement as mandatory if it is not enforceable by the courts.

I have not the least doubt that if, in any case, it is alleged and established that the President did not consult the Chief Justice before making his decision, it would be the bounded duty of any competent court to hold that the decision in question is not a decision under article 217(3), and then give the Judge in question the appropriate relief that follows from such a finding.

(b) The implied limitation, according to the Supreme Court, is "the requirement of natural justice that the Judge must have a reasonable opportunity to put before the President his contention, his version and his evidence....." (para. 21 of Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another,

To the contention of the learned Advocate-General that these words of the Supreme Court must be taken to be in the nature of obiter inasmuch as article 217(3) itself does not lay down any obligation except to consult the Chief Justice, I need only refer to the observation of Lord Hodson in (25) Ridge v. Baldwin, (1963) 2 All ER 66(113) that -

....the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity, as if that was the antithesis of a judicial capacity. The cases seem to show that persons acting in a capacity which is not on the face of it judicial, but rather executive or administrative, have been held by the courts to be subject to the principles of natural justice"; and to the observation of the Earl of Selborne in the (19) Plumstead Board case, (1885) 10 App. Cas. 229 (240), which I have reproduced in another context, that the silence of the Legislature, in this context, instead of repelling natural justice, might itself suggest that the Legislative considered it unnecessary to state expressly that "the essence of justice" must be ensured by the authority which was required to "decide" an objective question.

I hope I need not point out that the above principles, which are applicable to a function imposed by an ordinary statute, are not inapplicable to a function

merely because it is imposed by the Constitution, because whether or not there is any express declaration to this effect as in article VI (2) of the American Constitution, the Constitution is nothing but the "supreme" or "organic" law of the land made by a constituent body in place of the ordinary Legislature, and also that the ordinary canons of interpretation of a statute and statutory powers are available for the interpretation of the Constitution, except where the Constitution indicates otherwise [vide (30) *State of Seraikella Vs. Union of India (UOI)* and *Another*, Whatever might be the basis of the foregoing proposition under other Constitutions, little doubt on this point is left by the makers of our Constitution, who have imported the codified law of interpretation of statutes in the matter of interpretation of the Constitution, by article 367(1), as if it was an "Act of the Legislature of the Dominion of India.

Secondly, if my conclusion above that of the two conditions for the exercise of the power under article 217(3), as mentioned in paragraph 21 of (3) *Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose*, Chief Justice, High Court, Calcutta and *Another*, the express condition, namely, to consult the Chief Justice of India is mandatory and justiciable be correct, I find nothing in the said paragraph from which it may be held that the second condition, which is said to be implicit, namely, to comply with the requirements of natural justice, is recommendatory and nonjusticiable.

Thirdly, there is no reason to suppose that the Supreme Court made redundant observations, if, apart from the observations of the Supreme Court, it would appear that there is intrinsic guide in article 217(3) itself, which when, properly interpreted, can lead to the only conclusion that the Legislature intended that the function should be exercised quasi - judicially.

82. III. It is commonplace to say that even where a statute does not expressly impose upon an administrative authority the obligation "to hear" before making an order, a quasi-judicial obligation may be raised by the courts by interpreting particular expressions in the statute, which would impliedly require a hearing of the party to be affected before making of the statutory order, and thus, import the quasi-judicial obligation [vide (64) *General Medical Council v. Spackman*, (1943) 2 All ER 337 (339); (65) *Shivji Nathubhai Vs. Union of India (UOI)* and *Others*, In the instant case, the words "question" and "decided" are sufficient for that purpose.

83. On this point, it is profitable to refer at once to the statutory provision in section 7(3) of the (English) Education Act, 1902, which was interpreted by the House of Lords in (66) *Board of Education v. Rice*, (1911) AC 179(181-2), because the language used is strikingly similar to the language used in article 217(3) of our Constitution. Section 7(3) of the English statute provided-

If any question arises under this section between the local education authority and the manager of a school not provided by the authority, that question shall be determined by the Board of Education.

From the two words "question" and "determined". Lord Loreburn deduced the quasi-judicial obligation in this way :

Comparatively recent statutes have extended..... the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds..... It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact..... In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything..... if the court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari. (p. 182).

84. The word "decides" also leads to the same conclusion, for, as Lord Loreburn says, in the foregoing passage, the duty to "fairly listen to both sides" is a "duty lying upon every one who decides anything".

85. Similar meaning had been deduced from the word "decide" by another Lord Chancellor (the Earl of Selborne) in the earlier case of (19) *Spackman v. Plumstead Board of Works*, (1885) 10 App." Cas. 229. The statutory provision there was the Metropolis Management Amendment Act, 1882, which provided -

That no building..... shall, without the consent in writing of the Metropolitan Board of Works be erected beyond the general line of buildings....." and that - "such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works.

From the foregoing words. Lord Selborne held, inter alia, that-

(a) "..... "decided" implies that there is matter which may admit of difference, which may require determination" (p. 235, *ibid*).

(b) "What is the general line of buildings must be decided by the superintending architect" (p. 237, *ibid*).

(c) "And when the statute says that the architect is to decide the line of building it appears to me to impose upon him a duty to decide it to the best of his judgment independently and impartially" (p. 239, *ibid*).

(d) "No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person to whom authority has not been given by law.....

Therefore this argument as to silence (of the statute "as to how the architect was to proceed") does not appear to be of any real weight" (p. 240, *ibid*).

(e) "There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice" (p. 240. *ibid*).

That a "right or duty to decide" questions affecting individuals attracted certiorari because of the quasi-judicial obligation was pointed out by Moulton, L.J., in (63) *R. Woodhouse*, (1906) 2 KB 501 (535) and this test was applied by Scrutton, L.J. in (67) *R. v. L. C. C.*, (1931) 2 KB 215 (234).

None of the foregoing mass of respectable authority was considered when Fazl Ali, J. sought to explain the meaning of the word "decision" from the standpoint of common parlance", in (68) *Province of Bombay v. Khusaldas*, (1960) SCR 621 (642).

86. A most crucial instance of deducing quasi-judicial obligation from the word "decide" is to be found in the unreported judgment of our Supreme Court in (69) *Lakhanpal v. Union of India*, (Writ Petition No. 258 of 1966, decided on 7.3.67). The question was whether the function of review by the State Government under rule 30A(9) of the Defence of India Rules, 1962, which uses the word "decides," was to be construed as quasi-judicial. In a previous case brought by the same petitioner (70) *P.L. Lakhanpal Vs. Union of India (UOI) and Others*, though the court held that the function was to be performed objectively, by a consideration of "the material circumstances", the question whether it was quasi-judicial was kept open. But in the later decision, dated 7.3.67, the Division Bench of the Supreme Court has definitely laid down that though the function at the earlier stage of issuing a detention order under rule 30(1) (b) was administrative being dependent on subjective considerations, the word "decide" in rule 30A (9), *inter alia*, indicated that the function of review of that order was to be exercised objectively and, therefore, quasi - judicially and in conformity with the rules of natural justice, even though the function related to detention without trial in the interests of the security of the State, - a subject which had been completely tabooed against judicial review by many a forerunner of this case.

87. It is true that the word "decide" alone in a statute is not conclusive to brand a function as quasi-judicial, for the Legislature may have used a function as quasi-judicial, for the Legislature may have used it loosely, but it is certainly one of the tests, the cumulative effect of which will postulate a quasi-judicial obligation, according to the dictum of Subba Rao, J. in (35) *Radeshym Khare and Another Vs. The State of Madhya Pradesh and Others*, and all subsequent pronouncements of the Supreme Court, which particularly go to obliterate the core of what was held in the case of (68) *Khusaldas*. (*ibid*), which we shall see more fully hereafter.

88. Of course, in order to attract certiorari, the determination or decision must be in respect of a "question" affecting the rights of subjects [(10) *R. v. Electricity Commissioners*, (1924) 1 KB 171(198; 205) CA]. It is because of the absence of

such a "question" that Lord Radcliffe, speaking for the Judicial Committee, in (36) *Nakkuda Ali v. Jayaratne*. 1951 AC 66(78), said -

It is that characteristic that the Controller lacks in acting under reg. 62. In truth, when he cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege.....

and held that there was, accordingly, no quasi-judicial obligation imposed upon the Controller under the Defence Regulations before the Judicial Committee in that case.

89. But no "executive action" is involved in the determining a person's age which is certainly not a matter of "privilege" but a question relating to his status and the determination of such question will affect his civil rights. As the opening words of article 217(3) make it clear it is a "question" which is to be decided under that provision. The use of the word "question" thus, adds to the number of indicia which lead to the conclusion that the function under article 217(3) must be held to be "quasi judicial."

90. IV. Irrespective of the particular words used in article 217(3), a quasi-judicial obligation would be implied from the very nature of the function involved.

A. In England, the doctrine of "legal authority to determine questions affecting the rights of subjects" as a test of quasi-judicial obligation was pursued in (10) *R. v. Electricity Commissioners*, (1924) 1 KB 171 CA and (71) *R. v. Legislative Committee of the Church Assembly*. (1928) 1 KB 411 CA, but the horizon was clouded for the time being by the added qualification inserted in these two cases that there must, in addition, exist a duty to act quasi-judicially, imposed by the governing statute. This duty was for some time supposed to be founded on an express statutory provision by decisions of the highest authority in England in [(49) *Franklin v. Minister of Town Planning*, (1947) 2 All ER 289 (296); (36) *Nakkuda Ali v. Jayaratne*, (1951) AC 66(78)] and in India [(68) *Province of Bombay Vs. Kusaldas S. Advani and Others*, the result of which was that express statutory provision, requiring a judicial procedure to be followed by a statutory authority was regarded as the only source of quasi-judicial obligation, forgetting, for the time being what Lord Loreburn had said, not long ago [(66) *Board of Education v. Rice*, 1911 AC 179(182)]. namely, that that obligation was a concomitant of the very "power to decide anything", not to speak of the ancient words Willes and Byles, JJ., in (55) *Cooper v. Wandsworth Board*. (1863) 14 CB (NS) 180-

"..... a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that rule is of universal application, and founded on the plainest principles of justice" (Willes, J.).

"..... although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the

legislature" (Byles, J.).

91. The doctrine of "supplying the omission of the Legislature", though it started in the sphere of administrative action affecting immovable property, has not rested there. It was soon extended to the sphere of action imposing any pecuniary liability [(57) *Hopkins v. Smethwick Local Board*. (1890) 24 QBD 713], such as a municipal rate [(72) *R. v. Dublin Corporation*. (1878) 2 LR Ir. 371 (376)] or loss [(73) *Wilkinson v. Barking Corporation*. (1948) 1 KB 721]. In the Irish case of (74) *R. v. Local Government Board*, (34 ILT 196). which was referred to by the House of Lords in the (75) *Frome Breweries case*. [(1926) AC 586 (602-603)], it was held that the function of fixing the remuneration of a transferred official on the basis of increase or diminution of his duties was a quasi-judicial function. It was thus extended to determinations which might entitle a person to some pecuniary benefit [e.g., (76) *R. v. Postmaster General*. (1928) 1 KB 291; (77) *R. v. Boycott*. (1939) 1 KB 651; (33) *R. v. Manchester Legal Aid Committee*, (1952) 1 All ER 480].

92. In this context, the right to earn one's livelihood has come to be protected on the analogy of a proprietary interest [vide (78) *Weinberger v. Inglis*. (1919) AC 606(636); (79) *Amalgamated Society of Carpenters v. Braithwaite*, (1922) 2 AC 440; Lord Sumner, in (75) *Frome United Breweries v. Bath Justices*, (1926) AC 586(611)].

In (80) *Abbott v. Sullivan*, (1952) 1 All ER 226(234) CA, Denning, L.J., observed-

"The right of a man to work is just as important to him as, if not more important than, his rights of property";

"These bodies..... with the power of depriving a man of his livelihood, must act in accordance with the elementary rules of justice",

and he reiterated this in (20) *Lee v. Showman's Guild*, (1952) 1 All ER 1175(1181) CA.

The reason why the doctrine has been extended from property to livelihood has thus been explained by a notable English Jurist-

"To distinguish cases affecting property from cases affecting liberty or livelihood would be as illogical as saying that only offenders against property should have trial by jury, or should be presumed innocent until proved guilty" (Wade, *Administrative Law*. 1961, p. 163).

93. There is another line of cases which extends the principle to any statutory tribunal which is "invested with authority to adjudicate upon matters involving civil consequences to individuals" [(81) *Wood v. Wood*, (1874) LR 9 Ex. 190(196); (82) *Lapointe v. L'Association*. (1906) AC 535(540) HL] e.g., a statutory power to remove an employee for a "cause" [(83) *Osgood v. Nelson*, (1872) LR 5 HL 636 (649)].

English courts are, indeed, constantly endeavoring to extend the quasi-judicial

obligation to hear to newer categories outside the field of express statutory requirement. As Lord Mac-Dermott, in his Hamlyn Lectures, 1957. - "Protection from Power", - has said-

But where does the administrative end and the judicial begin ? The problem here is one of demarcation and the courts are still in the process of working it out.

94. Reviewing all the foregoing decisions, it has been established, beyond doubt, in *Ridge v. Baldwin*, (1963) 2 All ER 66 (73; 78; 80; 104; 107; 108;109; 111; 114) HL, that express statutory provision is not the only source of quasi-judicial obligation and that even where the statute is silent as to the procedure to be adopted, a quasi-judicial obligation may be inferred by the court -

- (a) if the function is such that it has to be determined objectively;
- (b) the decision affects the civil rights of an individual.

95. The rehabilitation of (55) *Cooper v. Wandsworth Board* by the House of Lords in (25) *Ridge v. Baldwin*. (1963) 2 All ER 66(79) HL, has indeed widened the entire perspective as to quasi-judicial obligation and natural justice. We would be oblivious to reality if we shut our eyes to this remarkable change which was pointed out in (84) *Associated Cement Companies Ltd. Vs. P.N. Sharma and Another*, , thus:

In other words, according to Lord Reid's judgment at p. 79 of (1963) 2 All ER 66, the necessity to follow judicial procedure and observe the principles of natural justice, flows from the nature of the decision which the Watch Committee had been authorised to reach u/s 191(4). It will thus be seen that the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently, the horizon of the writ jurisdiction has been extended in a corresponding measure.

96. In fact, even before the clearing of the weeds by the House of Lords in (25) *Ridge's* case, there had been raised, in India, a protest against the sweeping suggestion made in (68) *Khusaldas's* case as to quasi-judicial obligation being confined to cases where the statute laid down such duty expressly. Thus, in ((35) *Radeshym Khare and Another Vs. The State of Madhya Pradesh and Others*, *Subba Rao, J.*, in the minority, said-

the duty to act judicially may not be expressly conferred but may be inferred from the provisions of the statute. It may be gathered from the cumulative effect of the nature of the rights affected, the manner of the disposal provided, the objective criterion to be adopted, the phraseology used, the nature of the power conferred or the duty imposed on the authority and other indicia afforded by the statute. In short, a duty to act judicially may arise in widely different circumstances and it is not possible or advisable to lay down a hard and fast rule or an inexorable rule of guidance.

This minority observation, fortunately, has not been lost in the wilderness but

has been adopted in all subsequent decision [(85) Board of High School and Intermediate Education, U.P., Allahabad Vs. Ghanshyam Das Gupta and Others, ; (86) The Board of Revenue, U.P. and Others Vs. Vidyawati and Another, ; (87) The Board of High School and Intermediate Education U.P. Vs. Bagleshwar Prasad and Others, ; (88) Calcutta Dock Labour Board v. Imam, (1965) II SCA 226(230); (89) Shri Bhagwan and Another Vs. Ram Chand and Another, ; (90) Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, so that it is now safely entrenched.

97. The functional test has, indeed, been pushed so far in recent cases that a conclusion, just the converse of what was stated in cases like (68) Province of Bombay Vs. Kusaldas S. Advani and Others, has been arrived at, namely, that if an administrative action affects an individual's liberty, property or livelihood, the function must be held to be quasi-judicial, unless the Legislature has provided to the contrary - [as in (91) Patterson v. District Commissioner, (1948) AC 341(348)]. This principle has been adopted not only in New Zealand and Canada, as pointed out by Prof. Wade (Administrative Law. p. 165), but also in India in the case of (92) Harinagar Sugar Mills v. Shyam Sundar, AIR 1964 SC 1669 (1675-6), where the following propositions have been laid down:

(a) If there is a dispute relating to civil rights, and a statutory authority is empowered to determine that dispute, according to law. as opposed to policy, or, in other words, it has to consider and decide the proposal and the objections in the light of the evidence, the function must be exercised quasi-judicially, unless of course the statute directs otherwise, e.g.. if the statute requires the power to be exercised on the subjective opinion of the statutory authority [(91) Patterson's case, *ibid*].

(b) Once the above test is satisfied, the mere fact that the statute provides that the proceedings shall be "confidential", as in the case of an appeal before the Central Government u/s 111 of the Companies Act, 1956, will not immune the authority from the quasi-judicial obligation.

98. It follows that the mere fact that the determination under article 217(3) of the Constitution relates to a Judge of the superior court or that the object of the insertion of that provision was to withdraw the matter from the ordinary courts which are exposed to the public gaze, is a consideration irrelevant in determining whether the function under the provision is such that it must be performed quasi-judicially.

99. In the latest decision available, our Supreme Court [(93) State of Orissa v. Binapani, 1967 SC in CA 499165, dated 7.2.67] has summarized the position thus:

.... the rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences, it is one of the fundamental rules of our constitutional set-up that every citizen is

protected against exercise of arbitrary authority by the State or its Officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed; it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity.

100. Once this proposition is established, the other generalisation that the contents or requirements of natural justice in a particular case depend upon the statutory provisions constituting the tribunal, must also be understood in a modified sense. The generalisation in question was made by Sinha, J., (as he then was) in the case of (94) *N. P. Transport v. N. S. Transport*, (1957) SCA 178(185). thus:

.... the question whether the rules of natural justice have been observed in a particular case must itself be judged in the light of the constitution of the statutory body which has to function in accordance with the rules laid down by the Legislature and in that sense the rules themselves must vary.

But, with respect, as has been pointed by the court itself in the twin cases of 1962 [(85) *Board of High School v. Ghanshyam*, AIR 1962 1110(1113); (86) *The Board of Revenue, U.P. and Others Vs. Vidyawati and Another*, such a generalisation leaves out of account the situation which arises when the relevant statutory provisions are silent as to the procedure to be followed by the statutory authority. As was concisely put by Wanchoo, J., as he then was, for the unanimous court in the latter case (p. 1220, *ibid*).

.... the question whether an authority, like the Board of Revenue, acts judicially is to be gathered from the express provisions of the Act in the first instance.

Where however the provisions of the Act are silent, the duty to act judicially may be inferred from the provisions of the statute or may be gathered from the cumulative effect of the nature of the rights affected, the manner of the disposal provided, the objective criterion to be adopted, the phraseology used and other indicia afforded by the statute.

The true proposition, to-day, thus, is that "the requirements of natural justice must depend upon the circumstances of each case" [(95) *Russell v. Duke of Norfolk*, (1949) 1 All ER 109(118), approved by the Privy Council in (50) *University of Ceylon v. Fernando*, (1960) 1 All ER 631 (637) PC; (96) *State of M. P. v. Chintaman*, AIR 1961 SC 1623(1629)].

B. In some earlier cases, again, it was supposed that the quasi-judicial obligation was dependent upon the existence of a *Us* or a contest between two parties and it is in this sense that it was stated in 1931 [(67) *R. v. L C. C.*, (19-31) 2 KB 215 (233)], that the quasi-judicial duty meant the duty "to decide on evidence between a proposal and an opposition," but it has been established by later decisions that the *lis*, if it is essential for the purpose, need not be between two

private litigants as in an action at law, but one of the parties in a quasi-judicial proceeding may be the statutory authority itself who is vested with the power to adjudicate the dispute [(54) *Johnson v. Minister of Health*, (1947) 2 All ER 395(401-5) (CA); (33) *R. v. Manchester Legal Aid Committee*, (1952) 1 All ER 480(489-490)]. The question or issue may be raised even without the consent of the individual who is interested [(97) *R. v. Westminster Assessment Committee*, (1941) 1 KB 53(62) CA], as in the case before me. It is not two parties which is essential; what is essential are-

(a) that there is a "proposition" or "opposition" on a question affecting the civil rights of a party;

(b) that the relevant statutory provision does not empower the authority to determine the question solely on his subjective satisfaction or on considerations of policy; mere silence of the statute as to the procedure to be followed is not enough [vide (35) *Radeshyam Khare and Another Vs. The State of Madhya Pradesh and Others*, In (25) *Ridge v. Baldwin*, (1963) 2 All ER 66(113), Lord Hodson has clearly observed-

..... absence of a lis or dispute between opposing parties is not a decisive feature to determine whether the principles of natural justice have to be followed by a statutory authority [see also (85) *Board of High School v. Ghanshyam*, A. 1962 SC 1110(1115)].

102. What is decisive is whether the authority has to arrive at his decision objectively [cf. (92) *Harinagar Sugar Mills v. Shyam Sundar*, AIR 1964 SC 1669(1675); (84) *Associated Cement Companies Ltd. Vs. P.N. Sharma and Another*, i.e., "upon a consideration of facts and circumstances" [(72) *R. v. Dublin Corporation*, (1878) 2 LR Ir. 371(376), approved in (75) *Frome United Breweries v. Bath Justices*, (1926) AC 586(602)], or "evidence", - as opposed to a matter which calls for a "policy" determination [(49) *Franklin v. Minister of Town Planning*, (1947) 2 All ER 289(295; 297), HL; (99) *Labour Relations Board v. J. E. I. Works*, (1949) AC 134(149); (99) *R. v. Statutory Visitors*, (1953) 2 All ER 766(768)] or other matter which the Legislature requires to be determined by the specified authority subjectively, i.e., upon his individual judgment or satisfaction [cf. (91) *Patterson v. District Commissioner*, (1948) AC 341; (46) *Sadhu Singh Vs. Delhi Administration*, .

103. If this test is satisfied by the function dealt with by article 217(3), there is no bar to a quasi-judicial function to be attached merely because the President is at the head of the Executive organ of the Union and is, as such, vested with "executive power," by article 53(1) of the Constitution.

Nature of the function under article 217(3).

104. It can be asserted with little hesitation that a person's age is a question relating to his "status" or "legal character", so that if it is disputed by anybody, he can bring a declaratory suit in a civil court, asking for proper consequential

reliefs against the person who disputes the age as alleged by him. In India, this is made clear by the provisions of section 34 of the Specific Relief Act, 1963, read with section 9 of the Civil Procedure Code.

105. It is also clear, that a person's age is an objective fact, a dispute as to which may be decided only on evidence of the parties interested to propose and to oppose, and not on the subjective estimate of any person. Nor is there any question of State policy involved in determining the age of Judges or of a particular Judge in a manner different from that which should be followed in determining the age of any other human being.

106. A person does not cease to be a "person" on being appointed a Judge of the High Court. It was, therefore, competent for him, prior to the insertion of cl. (3) in Art. 217 of the Constitution, to bring a declaratory suit u/s 42 of the Specific Relief Act, 1877, against any person, including the Government of India, who was interested to dispute his age as asserted by him. This right which belongs to every man in the street, has been taken away by the Fifteenth Amendment of Constitution, from a Judge of the High Court, "impliedly" within the meaning of s. 9 of the Code of Civil Procedure, by setting up a constitutional tribunal for deciding the question about the age of a High Court Judge and by making the decision of such tribunal "final".

107. The change is notable also from the point of view of the disputant. As pointed out by the Supreme Court (3) AIR 1985 SC 961, paras. 20, 28, prior to the insertion of art. 217 (3), a person who disputed the right of a High Court Judge to act as a Judge on the ground that he had crossed the constitutional limit of age in this behalf, could do this only by means of a proceeding for Quo Warranto under Art. 226, as in a similar case against any other public official.

This means that any decision against the Judge could be arrived at only by a court of competent jurisdiction, proceeding objectively. By setting up a special tribunal for this purpose, the Constitution Amendment Act has pro tanto replaced the remedy of Quo Warranto, according to the Supreme Court. In the result, anybody in the world is now competent to throw a squib against a Judge of the highest tribunal of the State without remaining responsible in any way for his act, even if mischievous. That this is a real apprehension is proved by the very facts of the instant case, for, here the ball was set in motion by an anonymous letter. The gravity of the situation is enhanced by the observations of the Supreme Court at paragraph 24, *ibid*. In the case of an ordinary employee of the Government, there cannot be any order of suspension of his duties until formal proceedings with definite charges are undertaken and the relevant departmental rules sanction such a course of action. But, in the case of a High Court Judge, though the Court holds that he does not cease to be a Judge "merely because a dispute has been raised about his age and the same is being considered by the President", at the same time, the Court observes, that on considerations of prudence or expediency, the Chief Justice of the High Court concerned may "refuse to assign any work" to such Judge as soon as the President has taken up

the consideration of such dispute. Whatever be the expediency, the result is patent ignominy to the Judge which will end only when a decision is arrived at by the President, rejecting the dispute raised, and this will evidently take time, as the proceedings of the instant case demonstrate. Does not all this warrant the conclusion that from the very cognisance of a dispute down to the conclusion arrived at by the President, the proceedings must throughout be conducted objectively and as nearly as possible in the judicial manner, if the independence of the judiciary, which the Supreme Court was so anxious to maintain (para. 29, *ibid.*), was to be adequately safeguarded? If that is not done, what will remain of "the respect in which Judges of the High Courts are held by the litigants and the public in this country"? A disgruntled litigant will find it easier to threaten the Judge with an anonymous complaint than fight out his cause in Court.

108. I have also pointed out that the same Amendment Act has differently treated a Judge of the Supreme Court who, with respect, cannot in any way be differently situated so far as the present question is concerned, because a Judge of either the Supreme Court [Art. 124(2)] or a High Court [Art. 217(1)] holds office until he attains the age specified in the Constitution in this behalf. Parliament, when enacting the Constitution (Fifteenth Amendment) Act, 1963, was no doubt prompted to make some provision in the Constitution in October, 1963, because of the very instant dispute as regards the age of the Petitioner, which had by that time travelled through several Courts and was actually being argued in the Supreme Court in the appeal on the question of issue of Rule by the Calcutta High Court on the Petitioner's previous Petition under Art. 226 [vide (4) *Himansu Kumar Bose Vs. Jyoti Prokash Mitter*, . But while drafting the Amendment Act, it was properly realised that if any provision were to be made regarding Judges of the High Court, some provision should be made as regards Judges of the Supreme Court, as well, because of the similarity of the problem involved. It is curious, however, to note that quite different solutions were offered by the Amendment Act in the two cases. Until and unless Parliament makes a legislation similar to the provision in Art. 217 (3), if at all, the pre - amendment position as regards Supreme Court Judges will continue, so that a question as to his age cannot be decided extra - judicially.

The Fifteenth Amendment of the Constitution not only takes away the jurisdiction of a civil court as well as the High Court, exercising its constitutional jurisdiction under Art. 226, to determine the question of age of a High Court Judge as in the case of all other persons, but pro tanto dispenses with the procedure for impeachment, which was so far the only mode for removing a Judge under the Constitution, even where the allegation was that his real age was other than what he had declared it to be. We shall also see that the conventional procedure for impeachment, unless Parliament legislates to the contrary, under Art. 124(5) [which it has not done during the last 17 years of the working of the Constitution], is a quasi-judicial investigation of the charges brought against the person impeached, followed by a legislative vote and address to the Head of the State.

109. Once it is held that a person's age is an objective fact, which can be determined only on evidence and that such determination would affect his civil rights, the quasi-judicial obligation would descend from the heavens, if not from the statute which confers the power to determine it. Of the various authorities, establishing this proposition, a notable one of early origin is the observation of May, C.J., in (72) R. v. Dublin Corporation, (1878) 2 L.R. Ir. 371 (376), which was quoted, with approval by the House of Lords in (75) Frome United Breweries v. Bath Justices, (1926) A.C. 586 (602):

In this connection the term "judicial" does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by a competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimate to impose a rate on a district, it would seem to me that the acts of such a body involving such consequence would be judicial acts.

The duty to "decide on evidence", in such circumstances, was pointed out also in (67) R. v. L. C. C. (1931) 2 KB 215 (233) and. in this country in Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others,

110. The test that the question, by its nature, can be determined only objectively was applied in England with respect to the Legal Aid Committee in the (33) Manchester Legal Aid case, (1952) 1 All. E.R., (1952) 2 Q.B. 413(431), in these words:

They cannot refuse legal aid because the fund is becoming depleted or because they think that certain forms of action should be discouraged. They have to decide the matter solely on the facts of a particular case, solely on the evidence before them and apart from any extraneous considerations.

In a recent case [(101) Lawlor v. Union Post Office. (1965) 1 All. E.R. 359 (362)], similarly, it has been observed that an appellate function is by its nature quasi-judicial, because the decision has to be performed "objectively" as distinguished from an "opinion" which is "subjective". The same test, namely, that the function in question cannot be determined otherwise than objectively has also been applied by our Supreme Court in (92) Harinagar Sugar Mills Ltd. Vs. Shyam Sundar Jhunhunwala and Others, to hold that the appellate function of the Central Government under s. 111 of the Companies Act. 1956 must be exercised quasi-judicially in these words-

The proviso to sub-sec. (8) of s. 111 indicates that in circumstances specified therein reasonable compensation may be awarded in lieu of the shares. This compensation which is to be reasonable has to be ascertained by the Central Government; and reasonable compensation cannot be ascertained except by the application of some objective standards of what is just having regard to all the relevant circumstances of the case.

At another place it was said (para. 10, *ibid.*) -

The extent of the power which may be exercised by the Central Government is not delimited by express enactment, but the power is not on that account unrestricted. The decision has manifestly to stand those objective tests, and has not merely to be founded on the subjective satisfaction of the authority deciding the question.

This decision is remarkable because it was made in the face of an express statutory provision that "all proceedings in appeals under sub-sec. (3)..... shall be confidential".

111. After all this, it is difficult to maintain that a person's age could be determined, under Art. 217 (3) of the Constitution by considerations of administrative policy or expediency or in any manner otherwise than by the application of an objective standard to the evidence placed before the authority empowered to determine the question. And, if so far as established, the conclusion is irresistible that the function is that of a quasi-judicial authority. In this connection, I may, once again, refer to the observations made in the (92) Harinagar Sugar Mills case, (p. 1676, para. 16), where the Court rejected the contention that the Central Government, was not a tribunal but an executive body, exercising the statutory power in question:

If it be granted that the Central Government exercises judicial power of the State to adjudicate upon rights of the parties in civil matters when there is a lis between the contesting parties, the conclusion is inevitable that it acts as a tribunal and not as an executive body.

112. In the case before me, how-over, it is not necessary to call the President a "tribunal" when exercising the power under Art. 217 (3); it will be enough if it be held that the function in question has a quasi-judicial obligation attached to it and is not an "executive function" within the meaning of art. 53 (1), read with Arts. 74, 77 or the like. I have already discussed several tests leading to an affirmative answer to that question.

Consequences of the President's determination.

113. Let us now see what happens to a Judge when the President makes a decision under Art. 217 (3) of the Constitution, which is adverse to him. or in other words, which fixes a date of birth earlier than what is asserted by the Judge, as in the Petitioner's case.

My burden on this point is lessened by the observation of the Supreme Court itself in *Jyoti Prokash Mitter Vs. Hon''ble Mr. Justice Himansu Kumar Bose*, Chief Justice, High Court, Calcutta and Another, that -

The question concerning the age of the appellant on which a decision was reached by the President..... affects the appellant in a very serious manner....

I have, therefore, only to analyse the reasons why and how it affects the

petitioner very seriously.

114. (i) The obvious result of such a decision will be that the Judge in question will have to retire earlier than when the Judge would have retired but for the President's decision. In short, the consequence of the adverse decision is a premature termination of service, by a procedure other than the only means provided by the Constitution until the insertion of article 217(3), for the premature termination of the service of a High Court Judge against his will, namely, the difficult process of impeachment before Parliament [vide proviso (b) to article 217, read with article 124(4)]. I may assume in this context that the expression "proved misbehaviour" would include suppression by a Judge of his true age, which would certainly bring his "office into disrepute" or "show him unfit" for the office [vide Willoughby, Constitution of the United States, Vol. 3, p. 1450].

115. If it be contended that an adverse decision under article 217(3) does not contain an aspersion as in the case of impeachment, I would refer to the statements in paragraphs 18-19 of (3) Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, After the order of May 15, 1961 had been made, the petitioner saw the Chief Justice of India, with the permission of the Prime Minister "to place his case before him." The Chief Justice of India asked the petitioner, verbally as well as in writing, not to press the matter further, because "it was in consonance with the policy adopted by the Government of India" to act according to "the date of birth disclosed by his Matriculation certificate", and, further.

The Chief Justice assured the appellant that it was not the intention of the Government of India to do anything to cast aspersions on the veracity of a Judge of a High Court, and he indicated that without going into the correctness of the age given by the appellant, it was desirable that he should retire on the basis that the Matriculation certificate correctly represented his age.

It would require little argument to assert that the position is altogether different in a proceeding under article 217(3). If there is a dispute raised by somebody that the age as given by a Judge is not correct and that question is decided against the Judge, after rejecting his representation and evidence adduced to support his own declaration, there is necessarily an adjudication to hold that the Judge's declaration or version is not correct and there is an inevitable aspersion against his character and conduct.

116. Let us now look into the procedure adopted for impeachment in the United Kingdom and the United States of America from where the precedent has been adopted by our Constitution. As pointed out by May in his Parliamentary Practice (13th Ed., 1924, pp. 650- 651) the procedure for impeachment in the English Parliament is a "judicial" procedure, under which the person impeached has the right to be heard, with the assistance of a counsel. Though the ultimate verdict is a legislative vote, the verdict can be arrived at only when the House or Houses

have investigated into the allegation judicially, after giving the person impeached a proper and personal hearing, and even the verdict of the House of Lords which tries the impeachment is called a "judgment".

The American procedure is not dissimilar.

"Though the Senate is under no obligation to follow all the technical rules of judicial procedure, it accords to the accused the rights he would have in a law court, including benefit of counsel and compulsory process for obtaining witnesses" (Pritchett, American Constitution, 1959, p. 179; Willoughby. Constitution of the United States, Vol. 3, p. 1450, article 932).

So long as our Parliament does not legislate to lay down a contrary procedure, under article 124(5), it may safely be assumed that it would follow a quasi-judicial procedure as in England or America where from the system of impeachment, has been imported. It is also to be noted that the special majority that is required by article 124(4) shows that it may not be an easy matter to secure the removal of a Judge by impeachment. So far as any questionable conduct of a High Court Judge relating to age is concerned, the Fifteenth Amendment of the Constitution, by inserting article 217(3), thus, dispenses with the judicial cum legislative procedure of impeachment, for the premature removal of a Judge, on the ground of having made a wrong declaration as to his age.

117. It is true that the above situation has been created by the Constitution itself by inserting article 217(3), but the interpretation of that provision can hardly overlook the above background and that is why the Supreme Court has said that it is an implied condition of the exercise of the power under article 217(3) that it must be in conformity with the requirements of "natural justice", which, as I have shown, means the same thing as to say that it must be exercised quasi-judicially.

118. (ii) That the case of retiring a Judge by an adverse order under article 217(3) of the Constitution is a case of premature retirement is evident from the fact that if it had been the case of any other Government servant, it would have been called "compulsory retirement" under the relevant Service Rules applicable to such Government servant, and, - as held by the Supreme Court in the case of (93) State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, - if such retirement is to be ordered on the ground that the age of the Government servant in question is other than what was declared by him. such order can be made, apart from anything laid down in the Rules, only after making an inquiry in conformity with the requirements of natural justice.

119. That the impugned order of the President merely decides a dispute as to the petitioner's age is not all will appear when we consider the consequences which will ensue from the decision being adverse to the petitioner as indicated in the concluding paragraph of Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, namely, that it

would validate, with retrospective effect, the order of the Chief Justice of the Calcutta High Court, by which effect was sought to be given to the previous decision of the Government of India of May 15, 1961, - an order issued through the Secretary to the Chief Justice, - the text of which is to be found at Ex. F. at p. 41 of the Paper Book in the appeal before the Supreme Court against the judgment of the Special Bench dated 7.3.62. It quoted the direction issued by the Government of India and interpreted it as meaning that "His Lordship (i.e., the petitioner) retires with effect from the 27th December 1961", and the Registrar and other officers concerned were informed accordingly. This order is being ratified by the decision of the President which is challenged before me. The meaning of the words "demit his office" in the letter of the Home Secretary to which the Chief Justice sought to give effect could not be otherwise, though apparently euphemistic.

In effect, thus, the impugned decision of the President, communicated by the Home Secretary, constitutes an order of compulsory retirement of the petitioner upon the basis of the adverse finding of the President as to his age.

120. (iii) Notwithstanding the nature of the task performed by a Judge of the High Court, there is no denying the fact that he is an employee of the Government [article 217(1)]. and the services rendered by him are not gratuitous. Whether it is held by a person who was a member of the Judicial Service, or by a member of the Bar, in either case, the person who is appointed to the office, comes with a normal expectation as to tenure with the emoluments which have been guaranteed by article 221(1), read with the Second Schedule of the Constitution, in order to keep him aloof from the worries about a means of livelihood, - without which no human being can afford to keep his limbs together, or those of his dependants. - however noble his profession might be.

121. The seriousness of affecting one's "livelihood" by a statutory decision was pointed out by Lord Sumner in the (75) *Frome Breweries* case, 1926 AC 586(611).

That in modern times, it has taken the place of mediaeval property and has assumed a like importance has been pointed out in England by Denning, L.J. in the Court of Appeal in (80) *Abbott v. Sullivan*, (1952) 1 All ER 226(234) -

The right of a man to work is as important to him, if not more important than, his rights of property.

Similar are the observations of our Supreme Court in the case of (88) *Calcutta Dock Labour Board Vs. Jaffar Imam and Others*, where it has been observed that a person's employment being his "livelihood", cannot be taken away, upon an allegation, without complying with the requirements of natural justice "if the rule of law has to prevail."

122. (iv) Of course, the petitioner's services have not been terminated upon an allegation of any misconduct. But that does not make much difference, for two

reasons:

Firstly, though the literal meaning of the maxim "audi alteram partem" is simply "hear the other side", in the earlier cases, it was associated with the idea of hearing the person who was sought to be condemned or punished and that is how Lord Coke in his Institutes (Co. Inst. IV, 37), paraphrased the famous words of Chapter 29 of the Magna Charta as meaning that-

no man ought to be condemned without answer.

The primary application of this principle, therefore, is in the sphere of criminal law,-

that every man ought to have an opportunity of being heard before he is condemned [R. v. Gaskin, (1799) 8 TR 209].

It is natural, therefore, that on the civil side, its initial application was in those cases where the person was condemned in his person or property, on the ground of some "alleged misconduct", e.g., negligence in the performance of a statutory duty [(102) Capel v. Child, (1832) 37 RR 761].

123. But it was soon realised that the principle had no necessary connection with any allegation of misconduct; it applied wherever a person was going to be affected by a statutory decision, either in his property, e.g., (103) Bonaker v. Evans, (1850) 16 QB 162(171); (55) Cooper v. Wandsworth Board of Works. (1863) 14 CB (NS) 180; or in his livelihood, e.g., the determination of an application for the grant or renewal of a licence to carry on a business or profession was to be determined [(63) R. v. Woodhouse, (1906) 2 KB 501; (104) R. v. London County Council (1931) 2 KB 215 (CA); (75) Frome United Breweries v. Bath Justices. (19-26) AC 586(591; 602-3; 610)] or involving other civil consequences, e.g., assessment of a rate or tax [105) R..v North Worcestershire Assessment Committee, (1929) 2 KB 397(406)]; in determining whether legal aid should be granted to a litigant [(33) R. v. Manchester Legal Aid Committee, (1952) 1 All ER 480(491)]; in fixing a general building line [(19) Spackman v. Plumstead Board of Works, (1885) App. Cas. 229(240)]; - regardless of any legal element being involved in such determination.

124. Secondly, whether a proceeding is punitive or not is a question of substance, not of form. As I have already said, if the determination of the person's age is adverse to him and it leads to an earlier termination of his service career, it means that, according to the authority who determined the age, the statement or assertion of the person as to his age and the evidence adduced by him in support of it is false and that, accordingly, he must quit his service on the date of superannuation following from the adverse determination. It matters little to him whether such termination is brought about by levelling a formal charge of having suppressed his real age or not.

125. In this connection, it may be recalled that at the time of the previous determination of May. 1951, the then Chief Justice of India had assured the

petitioner that no aspersion was intended to be cast upon the Judge whose age was in question and that is why the Government of India had adopted the policy of determining the age in all such questions on the basis of the Matriculation Certificate; - "in order to save the Judge himself and the Government from any embarrassment in court and out of court this policy has been adopted" [vide (2) Jyoti Prokash Mitter Vs. The Hon''ble Mr. Justice H.K. Bose, Chief Justice of High Court, Calcutta, But this can no longer be said of the procedure to be adopted under article 217(3) as explained by the Supreme Court in Jyoti Prokash Mitter Vs. Hon''ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, under which the question of the Judge's age has to be decided by the President, not according to any policy, but objectively and in accordance with the principles of natural justice. In an adverse decision, in such a proceeding, there is an imputation necessarily involved.

126. The genius of English law, which we must still brag of. notwithstanding radical political changes, is that it looks more to the substance than to the form [cf. (106) *Parkin v. Thorold*, (1852) 16 Beav. 59]. In this context. I am tempted to quote the observations of Lord Atkinson in the (75) *Frome United Breweries case*. (1926) AC 586(601), as to the nature of the act of a compensation authority under the English Licensing (Consolidation) Act, 1910, in refusing to renew a liquor licence to a hotel:

I think one should bear in mind what is the real nature of the decision of the compensating authority. It was, in effect, a decision confiscating a substantial interest of the appellants in their own property. It is common knowledge that a hotel is of much more value if licensed to sell intoxicating liquors than if not so licensed. If, therefore, the compensating authority makes a decision, the consequence and direct effect of which is to deprive the owner of the house of the privilege of carrying on therein a business of a certain kind, the loss of which privilege lessens the value of his house to a considerable extent, then the decision involves in a sense a compulsory diminution in value or confiscation of the subject's property. That should be done, if at all, properly in due form of law. The fact that the public good may follow is no excuse for committing an illegality to secure it.

127. (iv) In an ordinary case of termination of employment, the question involved is solely individual, namely, that the employee concerned loses his means of livelihood. In the case of a Judge, not only is the individual element present, but there is something else super-added, namely, the interest of the public in the matter of ensuring security of tenure to a Judge of a superior court, in particular, which in our country has been manifested by constitutional safeguards, referred to earlier.

129. Considering the power under article 217(3) from the various relevant aspects, namely, phraseology used in that provision, nature of the function and the consequences involved, together with the interpretation already by the Supreme Court in *Jyoti Prokash Mitter Vs. Hon''ble Mr. Justice Himansu Kumar*

Bose, Chief Justice, High Court, Calcutta and Another, I submit, there is no other alternative than to conclude that the power must be exercised quash-judicially. Recommendation of the Home Minister and Prime Minister.

130. I. It is firmly settled that when the law vests in a specified authority the power to decide anything, the decision must be his uninfluenced, in any way, by any other person, - irrespective of the altitude of such person to the person to be affected by the exercise of the power.

(a) In (82) *Lapointe v. L'association*. (1906) AC 535(538), the Privy Council had to deal with the power to determine the right to gratuity or pension of an employee who had resigned.

The Privy Council held that the function of determining whether pension should be refused could be exercised only quash-judicially by the Board of Directors who were vested with the power and that even a decision by the vote of the entire body of members of the Society could not be a valid substitute for the decision of the Board of Directors, because that would be "abnegating their judicial duties altogether."

(b) This was put pithily by the Earl of Selborne in (19) *Spackman v. Plumstead Board of Works*, (1885) App. Cas. 229(240) thus-

.... in the absence of special provisions as to how the person who is to decide how to proceed.... he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law.

(c) In (107) *Middlesex County Valuation Committee v. West Middlesex Assessment Committee*. (1937) 1 All ER 403, where the function of assessment was vested in the Assessment Committee, the question arose whether the presence of the Valuation Officer or other representative of the County Valuation Authority would vitiate the decision of the Committee. The Court of Appeal answered the question in the affirmative, Lord Wright (p. 410, *ibid*) observing :

The decision which the assessment committee is arriving at is the decision of the committee itself. The county valuation committee has nothing to do with the formulation of the decision. which is purely the function of the assessment committee itself as a judicial body, and it would be improper, on general principles of law, that extraneous persons, who may or may not have independent interests of their own, should be present at the formulation of that judicial decision.

(d) (15) *Cooper v. Wilson*, (1937) 2 All ER 726(732) CA, was a case of dismissal of a constable. By section 191 of the Municipal Corporation Act, 1882, "the power to dismiss any constable whom they think negligent in the discharge of duties" was vested in the Watch Committee of the Borough. In exercise of his power to make regulations u/s 4 of the Police Act, 1919, the Secretary of State provided that the power of dismissal could be exercised by the Chief Constable, "subject

to confirmation by the Watch Committee." The Court of Appeal held (p. 730) that if the Regulations meant that the power of dismissal was given to the Chief Constable, then the Regulations would be ultra vires the statute, and, that, notwithstanding the Regulations (which must be interpreted so as to remain intra vires) -

There can be no doubt that power of dismissal in boroughs remains solely in the Watch Committee.

The Court, therefore, set aside the order of the Watch Committee on the ground, inter alia, that they had allowed the Chief Constable to sit with the Committee while the latter were hearing the proceeding for confirmation of the Chief Constable's provisional decision (pp. 735; 741).

(e) The decision in (64) *General Medical Council v. Spackman*, (1943) AC 627. that a statutory tribunal is not absolved of its duty to decide the question which has been entrusted to it even where the question has already been decided by a court of competent jurisdiction was founded on the reason thus given by Lord Atkin (p. 637, *ibid*) -

Now, it is plain that the throws on the council and on the council alone the duty of holding the inquiry and of judging guilt (as to the infamous conduct of the medical practitioner). They cannot, therefore, rely on inquiry by another tribunal or a judgment of guilt by another tribunal.....

If this is inconvenient it cannot be helped. It is much more convenient that a medical practitioner should be judged guilty of an infamous offence by any other than the statutory body.

(f) The shadow of *Spackman's* case, (*ibid*), may, with respect, be traced in (88) *Calcutta Dock Labour Board Vs. Jaffar Imam and Others*, - where the Supreme Court refused to agree that where an Advisory Board under the Preventive Detention Act had found an employee to be guilty of violent anti-social activities, his services could be terminated on the sole basis of that finding of the Advisory Board, however impartial it might be. Natural justice demanded that the employer, before taking such action, must hear the employee independently on the said charge, and then "come to a decision of his own.

131. It is clear from the above that there is a denial of natural justice in such a case even though such extraneous person has no interest or bias against the person going to be affected by the exercise of the power. The case becomes more serious where the extraneous person has an interest or case against the latter. In such a case, even though the extraneous person does not offer any advice at all or advises only on matters of procedure, the decision would be vitiated, and prohibition or certiorari (as the case may be) would be [*R. v. Salford Assessment Committee*, (1937) 2 All ER 98(109)].

132. Where the extraneous person does participate in the making of the decision, the case is worse [(110) *R. v. East Kerrier, JJ.* (1952) 2 All ER 144

(146)], though even the mere presence of the extraneous person at the time of deliberation is sufficient infringement of natural justice, because "if the clerk retires with the justices, people will inevitably form the conclusion that the justices' clerk may influence the justices". As was observed in the (107) Middlesex County Valuation Case (1937) 1 All ER 403, even where the extraneous person has no interest of his own, his presence when the quasi-judicial decision is to be "formulated," vitiates the decision, on the ground of possibility or reasonable likelihood of bias [(111) R. v. Sussex J J. (1924) 1 KB 256(259)]

133. The case is the worst where the extraneous person is a party to the dispute or litigation [vide (15) Cooper v. Wilson, (1937) 2 All ER 726 (735-6) CA]. But even where a person is not a formal party to the case, he may have an interest in the cause [(67) R. v. L. C. C. (1892) 1 QB 190], and such interest need not be a personal or pecuniary interest. As illustrated by the case of (75) Frome United Breweries v. Bath Justices, (1926) AC 586, a person may be held to have a "legal interest" in a cause by reason of his having taken a decision or view in favour of or against a party to the cause, at an earlier stage. In that case, the Licensing Justices referred an application for the renewal of a licence to the Compensation Authority for its decision and authorised a solicitor to appear before that authority and to oppose the application. Subsequently, those very Licensing Justices sat and voted as members of the Compensation Authority by virtue of their office. The House of Lords, reviewing a number of earlier decisions, set aside the decision of the Authority on the ground that the Licensing Justices were disqualified to sit as members of the Authority, having taken a decision to oppose the renewal of the licence and thus prejudged the cause (pp. 591, 593, 609, 618). As Lord Carson put it in that case (p. 618), even "excellent motives and feelings" on the part of such interested persons could not save them from the disqualification because it "affected the character of the administration of justice". Much stronger were the words of Lord Atkinson (p. 609), the temptation to quote which it is different to resist-

The licensing justices obviously took up the position (by directing the solicitor to oppose the renewal) towards the applicants for those licences of hostile litigants and sustained that character to the end. They thus became at once to a certain extent prosecutors and judges in the same cause.

The foregoing principle, relating to what is known as "legal interest" in a cause, has been thus summed up in the Danoughmore Committee's Report on Minister's Powers [(1932) Cmd. 4060]

.... in any case in which the Minister's Department would naturally approach the issue to be determined with a desire that the decision should go one way rather than another, the Minister should be regarded as having an interest in the cause.

This is what happened in the instant case.

134. In this context, we are to see how the order prior to Jyoti Prakash Mitter Vs.

Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, had been made. I shall presently make a graphic comparison as to the procedure adopted at the two stages,- prior to and subsequent to the decision of the Supreme Court, - to show that little substantial change has taken place, in the present context. Suffice it to say. for the present, that at the prior stage, a Note was put up by the Ministry of Home Affairs, determining the age of the petitioner adversely to him, which was approved by the Home Minister and the Prime Minister. On these facts. Banerjee, J., in this Court [(1) Jyoti Prokash Mitter Vs. H.K. Bose, Chief Justice of the High Court, Calcutta, described it as a "decision by the Ministry of Home Affairs" and that description was upheld by the Supreme Court (AIR 1965 SC 968-9), making it clear that the determination arrived at was the determination of the Home Minister and not that of the President, - even though the "approval" of the President was obtained to the recommendation of the Home Minister or his Secretary, and even though "the decision was reached by the Home Minister" "after consulting the Chief Justice of India" (p. 968, *ibid*).

135. If that be so, it must be held that when "the second Chapter" was reached, the Home Minister or his Secretary who had made the previous determination, was already a person not only interested in the cause but also interested in maintaining their previous decision, so that if the same procedure is repeated, namely, that those persons participate in the inquiry and formulate the order proposed to be made by the President, the resultant order of the President must fall, in accordance with the decision in cases like (107) *Middlesex County Valuation Committee v. West Middlesex Assessment Committee*, (1937) 1 All ER 403; (75) *Frome United Breweries v. Bath Justices*, (1926) AC 586, which I have just reviewed. Upon the above facts, it is impossible to explain away the bias of the Home Ministry as an excusable "official bias"; it is a "legal interest" in the dispute within the meaning of the decisions of the line of the *Frome Breweries* case. (*ibid*), inasmuch as it was the Home Ministry who had, at the previous stage, decided the question against the petitioner.

136. It is to be noted in this context that the foregoing principle is not necessarily dependent upon the statutory power being quasi-judicial. It extends to any statutory power, whether it is quasi-judicial or administrative. The reason is that-

if the statute directs that certain acts shall be done in a specified manner or by certain persons, their performance in any other manner than that specified or by any other person than one of those named is impliedly prohibited (*Crawford on Statutory Construction*, 1940 Ed., p. 335).

137. The result is that if a statutory power or discretion is vested in a specified authority, there is no exercise of that discretion if the specified authority acts at the instance of or under the influence or instructions of a person or authority not named in the statute. This principle was laid down by a Division Bench of three Judges in (112) *Sims v. Minister of Labour*. (1946) 2 All ER 201 (205). There, the

National Service Officer had the statutory power to give certain directions in the matter of dismissal of a workman. The Officer issued a direction according to instructions received from the Minister which were not statutory orders which the Minister was authored by the statute to issue. The court held that "in our view, the national service officer has not exercised his discretion..... In our view, the Minister cannot by instructions limit the duties or limit the discretion of his natural service officer."

This principle was followed by our Supreme Court in the early case of (113) Commissioner of Police, Bombay Vs. Gordhandas Bhanji, where Bose. J., speaking for the court, held that the order of cancellation of a licence by the Commissioner was not an exercise of his statutory power in that behalf because it was made in pursuance of "instructions" received from the Government, - with the following observations-

.... the Commissioner did not in fact exercise his discretion in this case and did not cancel the licence he granted. He merely forwarded to the respondent an order of cancellation which another authority had purported to pass. It is evident..... that the Commissioner had before him objections which called for the exercise of the discretion regarding cancellation specifically vested in him by rule 250. He was therefore bound to exercise it and bring to bear on the matter his own independent and unfettered judgment and decide for himself whether to cancel the licence or reject the objections.

This principle has also been applied in (114) Mahadaya Premchandra Vs. Commercial Tax Officer, Calcutta and Another,

138. A corollary which follows from the above principle is that where a statute provides that a statutory power shall be exercised in consultation with another specified authority, conciliation of some other authority, whether in substitution of or in addition to the specified authority, makes the resultant act ultra vires and, consequently, any Rule which permits such consultation of an extraneous body must be condemned as ultra vires. This pronouncement was made by the Supreme Court [(115) Chandramohan v. State of U. P., AIR 1966 SC 1987] in connection, with the power conferred by article 233(1) of the Constitution, as applied to rule 13(c) of the U. P. Higher Judicial Service Rules, which empowered the Governor to appoint a person as District Judge in accordance with the selection "made by a Committee consisting of two Judges of the High Court and the Judicial Secretary to the Government."

Article 233(1) of the Constitution says-

Appointments of persons to be, and the posting and promotion of district Judges shall be made by the Governor of the State in consultation with the High Court.

The Supreme Court held, inter alia, that the Rule, in so far as it included the Judicial Secretary, a person not specified in article 233(1) as a person to be consulted, was unconstitutional for contravention of the mandate of article

233(1). The following observations of Subba Rao, C.J., speaking for the court, are relevant for our purposes:

The constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of a District Judge in consultation with the High Court

This mandate can be destroyed by the Governor in two ways, namely, (i) by not consulting the High Court at all, and (ii) by consulting the High Court and also other persons. In one case he directly infringes the mandate of the Constitution, and in the other he indirectly does so, for his mind may be influenced by other persons not entitled to advise him.....

To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D."

The principle laid down in (115) Chandramohan's case, AIR 1966 SC 1987, has been reiterated by the Supreme Court in (116) Prem Nath v. State of Rajasthan, CA 93/66. decided on 15.3.67.

139. It would follow from the above that consultation by the President with any authority other than the Chief Justice of India would make a decision under article 217 (3) prima facie unconstitutional. As the Court insisted in (3) Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, itself, the decision under article 217 (3) must be a decision of the President himself.

140. The principle applies with greater strength where the statutory function is quasi-judicial. In such a case, "any extraneous guidance by the executive or administrative wing of the State" renders the quasi-judicial decision void, for, such interference is "completely inconsistent with the well-accepted notions of judicial process" [(117) B. Rajagopala Naidu Vs. State Transport Appellate Tribunal and Others,

141. II. The question then arises, if the President has to exercise his functions with the aid and advice of the Council of Ministers, as indicated by article 74(1) and as held in (118) Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, why should an exception be made in the case of the function vested in the President by article 217 (3)?

142. (a) The answer is given by the observations in (118) Ram Jawaya's case itself (ibid). It is abundantly clear that the relevant observations which explain the relationship between the President and the Council of Ministers under article 74(1) have been made with reference to the "executive power of the Union" which has been vested in the President by articles 53 (1) and 73(1) of the Constitution (vide pp. 230-1, ibid), for "policy decisions". Thus, observed Mukherjee, C.J., in that case (pp. 236-7, ibid):

In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature? Under article 53(1) of our Constitution, the executive power of the Union is vested in the President but under article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet....

The Cabinet enjoying as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.

That the President may have "judicial powers" under the Constitution, apart from the "executive power" just referred to is made clear by the observation at p. 236 of the judgment-

It can also, when so empowered, exercise judicial functions in a limited way.

No doubt is left as to what is meant by the Supreme Court by the words "executive power" or "executive function" (p. 236, *ibid*) -

The executive function comprises both the determination of the policy as well carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State.

At another place, in (118) *Ram Jawaya's* cases (para. 235, *ibid*), the executive function is described as a "residuary function" but that only means what remains after taking away legislative and judicial functions. It is clear, therefore, that the constitutional obligation to act upon ministerial advice would not extend to judicial or quasi functions, specifically vested in the President by the Constitution itself.

143. In this context, I should say a word as to the applicability of the recent decision of the Supreme Court in (51) *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, where it has been held that where a statute vests a function in the "State Government" e.g., s. 68(2) of the Motor Vehicles Act, such function may be delegated by the Governor to his Ministers by making rules under Art. 166(3) of the Constitution, even though such function has to be performed judicially. What is to be noted is that the function was, in that case, (a) vested by a statute and that (b) it was vested in the "State Government", impersonally. There was no question of any confidence being reposed in Governor personally. The "Governor," came in the decision only by interpretation of the term "State Government" according to

section 3(60) of the General Clauses Act. It was held that any function vested in the State Government could be allocated to a Minister under Art. 166(3) because that provision spoke of the allocation "of the business of the Government of State" and did not take out a quasi-judicial business vested in the "State Government" from the scope of that provision. This decision, I submit, applies only where the quasi-judicial function is vested in the "State Government" and not where it is vested in the President or Governor or, specifically, by the Constitution itself, because in that case such function or power ceases to be "executive power of the Union" or of the State [under article 53(1) or 154(1), as the case may be], with respect to which the President or the Governor has to seek the advice of his Ministers (under article 74 or 163) or which he may allocate to his Ministers (under article 77 or 166).

The recent decision in (119) *Bijoya Lakshmi Cotton Mills v. State of West Bengal*, [(1967) SC (CA 216-7) 64. decided on 18.1.67] does not militate against the view just taken by me, because, in that case, though the question arose as to an executive function to be exercised on subjective satisfaction, the function was vested, by s. 4 of the West Bengal Land Development And Planning Act. 1948, in "the State Government". The court held that the statute did not mean the personal satisfaction of the Governor and that, accordingly, it could be allocated to a Minister under article 166(3) of the Constitution.

144. The ratio decidendi in the two foregoing cases, as expressed in paragraph 25 of *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, is that when the Legislature vests a power or function in the State Government, it is doing so in favour of an "impersonal body", but this feature is absent when the Constitution vests a quasi-judicial function in the President or the Governor, personally. If, it were otherwise, there was no reason why a fresh determination by the President was required by *Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, That decision, it is to be remembered, was not a decision prior to the introduction of clause (3) in article 217, but is a commentary on that provision. The substance of the decision of the Supreme Court was that where a Minister or Ministry decided the question about a Judge's age, it could not be the decision of the President as required by article 217 (3). If the new provision contemplated that the President could discharge that function either by acting according to the advice of his Ministers or by allocating it to a Minister under article 77(3), there was no need to have a fresh determination by the President as directed by *Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, because article 217 (3) was retrospective in operation and would validate the decision of the Home Minister either on the footing that the President had, by his approval, acted according to his advice, or that it was such a function as could be performed by a Minister if it had been formally allocated under article 77 (3). If either of the two courses were open under article 217 (3) it would remain an "executive determination" of a Judge's age, which the Supreme Court could not uphold in

Jyoti Prokash Mitter Vs. Hon''ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, and that is why a "decision" by the President himself was insisted upon.

(b) Nor is it unthinkable that the "President" may be burdened with a quasi-judicial obligation, when that has been done by various statutes and even subordinate legislation, - not to speak of the Constitution.

145. One illustration may be cited from the Central Civil Services (Classification, (Control and Appeal) Rules, 1957, made by the President himself under article 309 of the Constitution. Under rules 23 (2) (b) and (3) of these Rules appeal lies to the President when a member of the Central Civil Service belonging to the superior classes is visited with any of the penalties enumerated in rule 13, which even includes "withholding of increments", and the procedure to be followed and the statutory factors to be taken into consideration by the President in the exercise of this appellate function are specified in rule 30. It is now settled both in England [(58) *Local Government v. Arlidge*, (1915) AC 120(132; 150)] as well as in India [(120) *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, that a statutory power of appeal even when vested in an administrative authority, must be exercised quasi-judicially, because of the very nature of the appellate function. I have no doubt that the appellate power under rule 23, read with rule 30 of these Rules, must be exercised quasi-judicially and this is evident from the requirements of the proviso to sub-rule (2) of rule 30 itself, which even provides for an inquiry by or under orders of the appellate authority.

146. If, therefore, in disposing of an appeal from an order withholding the increment of an administrative officer, the President has the obligation to proceed quasi-judicially, it would be too much to suppose that Parliament, in enacting article 217 (3), intended that in "deciding" a question which might end the career of a Judge of a superior tribunal, the President might proceed administratively. Had this been the intention of Parliament, it would have, in article 217 (3), inserted such language as has been used in rule 3 of the Central Civil Services (Safeguarding of National Security) Rules, 1953; rule 30(1) of the Defence of India Rules, 1962 or the like.

147. (c) That the taking out of the quasi-judicial functions of the President would not necessarily detract from the principle of ministerial responsibility introduced by our Constitution would be evident from a specimen of recent legislation by Parliament, namely, section 44(1) of the Government of Union Territories Act, 1963, by which the principle of ministerial responsibility has been introduced in providing for a Council of Ministers in each of the Union Territories to which article 239A of the Constitution applies. This provision says:

There shall be a Council of Ministers in each Union Territory with the Chief Minister at the head to aid and advise the Administrator in the exercise of his functions except in so far as he is required by or under any law to exercise

judicial or quasi-judicial junctions.

It is evident that this provision follows the pattern of section 74, with the addition, *inter alia*, of the underlined words. These words, in my opinion, do not introduce anything new, but state what was already implicit in Art. 74(1), for, the word "function" in Art. 74(1) must necessarily refer to the functions reliable to the "executive power" of the Union which is vested in the President by Art. 53(1), at the very outset of Part V of the Constitution. This power, as I have already said, would exclude the judicial or quasi-judicial functions which may be vested in the "President" by the Constitution or any ordinary law, - because of the personal confidence reposed in the President by the makers of those laws.

148. (d) It is true that there is no discretionary sphere, under Art. 74(1), in which the President is free to act without seeking the advice of his Council of Ministers.

149. But it would be equally untrue to suppose that there is no arena whatever the President can do without ministerial advice. Firstly, there are certain circumstances, where in the nature of things, ministerial advice is not available, notwithstanding the universal statement in article 74(1). Such matters, e.g. are -

(i) The choice of a new Prime Minister;

(ii) Refusing dissolution to a defeated Ministry.

Secondly, there are provisions in the Constitution itself, which suggest that the President cannot possibly act upon ministerial advice in the exercise of those functions.

150. The most crucial instance of this type is the provision in Art. 103 (1), corresponding to Art. 192(1) at the State level, which has been authoritatively interpreted by the Supreme Court. Before going to that interpretation, I would like to place the text of Art. 192(1), side by side with that of Art. 217 (3):

Article 192(1) -(2). Article 217 (3).

(1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final. If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

Commenting on the underlined words in article 192(1), the Supreme Court said, - in (121) *Brundaban Nayak Vs. Election Commission of India and Another*,

..... any question of the type contemplated by clause (1) of article 192 shall be decided by the Governor and Governor alone; no other authority can decide

it..... but that decision has to be in accordance with the opinion of the Election Commission..... When the Governor pronounces the decision under article 192(1), he is not required to consult his Council of Ministers.....

The function under article 103(1) or 192 (1) is thus out of the scope of Ministerial advice, though there is no express exclusion thereof either in those articles or in art. 74 or 163 (as the case may be).

What I rely upon in the foregoing observation in (121) Brindaban's case, (ibid), is that there may be functions under our Constitution where the President or the Governor has to act without consulting his ministers, even though the Constitution does not expressly state that he is to exercise such function "in the exercise of his individual judgment," because the "decision" required by the Constitution in regard to that function must be that of the President or the Governor, named, specifically. On this point, the provision article 217 (3) stands at par with that in articles 103(1) or 192(1), namely, that a question as to a Judge's age has to be "decided" "by the President".

There is, of course, difference, on another point, between article 103(1) or 192(1) and article 217 (3), namely, that under the former the eventual decision is not that of the President but that of another authority, - the Election Commission, - whose judgment is to be pronounced as that of the President or the Governor (as the case may be), whereas under article 217 (3) the President has only to consult the Chief Justice, but is not bound to act according to the advice tendered by the latter. But as to the exclusion of the Council of Ministers, there is no difference in the language of articles 192(1) and 217 (3), but such exclusion is drawn by the Supreme Court in (121) Brindaban's case, (ibid), from the words "the question shall be referred for the decision of the Governor", and the corresponding words in article 217 (3) are even more emphatic-

the question shall be decided by the President.

The difference lies only in this, - that, under article 217 (3), after excluding the Ministers, the President Shall consult the Chief Justice and then decide the question personally, because it is a quasi-judicial function and the Constitution does not oblige him to act according to the decision of some other specified authority, as does clause (2) of article 103 or 192.

151. (e) Further, the Constitution makes a distinction between powers vested in the Union (i.e., the Government of India) and powers vested in the President specifically.

It would not be out of place, in this context, to refer to the decision of the Supreme Court in (122) Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and Others, which, though dealing proximately with the problem of delegation, explains the significance of vesting particular powers or functions in the President as such. One effect of this distinction is that though article 258(1) authorises the President to delegate functions relating to "the executive power of the Union",

the President cannot delegate, under that provision, those functions which are vested in him specifically, by articles such as 123, 309, 356, 360, because these are the powers of the President, not of the Union, even though such powers may be executive in nature (p. 656, *ibid*).

Now, some of the powers so vested in the President may be quasi-legislative or quasi-judicial in nature; whether they are of such nature or of the purely executive type, would, of course, depend on the nature of the subject-matter and their impact upon the citizens' rights. In the words of Shah, J., (p. 656, *ibid*),-

The character of the exercise of the function so entrusted must depend upon the field in which it operates and its impact upon the citizens' rights.

I have referred to the foregoing observation only for showing that-

(i) When the Constitution vests a function in the "President" as distinguished from the "Union", a special significance attaches thereto.

(ii) It does not, however, follow that every function which is vested in the President by the Constitution (or, for the matter of that, by a statute) must be quasi-judicial, merely because it is entrusted to the President.

(iii) If, however, the nature of the function and the consequences of the exercise of such function as well as the other indicia which are relevant to impose a quasi-judicial obligation are present, the President has to comply with the requirements of such obligation and cannot shake off that obligation solely on the ground that the Constitution vests in him "the executive power of the Union", by article 53, - an opening provision in Chapter I of Part V of the Constitution. Even a power vested by a statute in the "Central Government" may be quasi-judicial [*vide* (92) *Harinagar Sugar Mills Ltd. Vs. Shyam Sundar Jhunjhunwala and Others*, but in such a case, that function may be performed by a Minister, according to the decision in (57) *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, which we have already noticed.

(iv) When a function is vested in the "President", as such it cannot be delegated to any other person, unless the Constitution itself so provides [(122) *Jayantilal's case*, *ibid*, pp. 656, 664].

152. III. Though I have already explained the reason why I hold that the function under article 217 (3) of the Constitution is quasi-judicial, I would recapitulate them again in the present context to show why they stand outside the ambit of articles 74-75.

(i) By its nature, it is not an administrative or executive function, such as the appointment of a Judge. It is the "decision" as to the "age" of a Judge, which, - but for article 217 (3), - could be decided only by a court of law.

(ii) The decision of the "age" of a person is necessarily objective and involves no executive or administrative policy, such as in the matter of an appointment or of

conducting the external relations of India, - for the determination of which the Council of Ministers have been set up by the Legislature under a Parliamentary system.

(iii) The decision may bring upon the Judge concerned "serious" consequences, affecting his civil rights.

(iv) By article 217 (3), the Constitution has taken away a justiciable question from the courts of law and vested it in the President, not because he is at the head of the Parliamentary executive but because of the confidence reposed by the Constitution-makers in him personally as best fitted because of his unquestionable impartiality, - to decide a question of prime importance, as a special tribunal, - in conformity with the rules of natural justice, and after consulting the Chief Justice.

That the above object would be defeated if the President were to give his ultimate decision in accordance with the advice tendered by the Council of Ministers, may be demonstrated from the other end. It is one thing if the President, after applying his mind and independent judgment to the evidence on the records, comes to a conclusion different from that arrived at by the Chief Justice. As I shall show more fully hereafter, the President has the freedom, under article 217 (3), to decide according to his independent judgment, even though it is contrary to the advice offered by the Chief Justice; because what is mandatory is to consult the Chief Justice and not to act according to the advice tendered by him. But is it open to the President to act contrary to the advice tendered by the Chief Justice simply because the Council of Ministers or the Prime Minister advises him otherwise ? The answer can never be in the affirmative because the only advice that a Council of Ministers is competent to offer is one prompted by policy and not by objective considerations, - for the sake of which the President has been in a case under article 217 (3), required to seek the advice of the Chief Justice of India. Therefore, to hold that it is competent for the Council of Ministers to come in to override the advice given by the Chief Justice, on political grounds would be to defeat the very object of article 217 (3), - a construction which no court of law can be induced to make.

153. IV. If, in the exercise of his function under article 217 (3), the President was to act according to the advice of the Council of Ministers, the resultant decision would have been a decision of the "Government of India", but that is the very thing to avoid which the Supreme Court directed the matter to be placed before the President again, - to obtain a decision "of the President", - which object would not be fulfilled even by referring the question to the arbitration of an authority like the Chief Justice of India (vide pp. 968-9 of *Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose*, Chief Justice, High Court, Calcutta and Another,

Having considered the matter from all possible points of view, thus, I cannot but reject the contention of the learned Advocate-General that article 217 (3) is governed by article 74 (1).

154. V. It is true that in some other quasi-judicial spheres, it has been held that it is competent for the quasi-judicial authority to take the assistance of some other person to inquire and report. But in all such cases, it has been held, at the same time, that the quasi-judicial authority must retain to himself the power to decide, after applying his mind to the report of the inquiring officer and the other materials on the record; otherwise the resultant decision will be invalid, for contravention of natural justice [(123) Pradyat Kumar Bose Vs. The Hon^{ble} The Chief Justice of Calcutta High Court, ; (124) State of Orissa v. Govindadas, (1958) SC (CA 288/58, unreported); (125) D.S. Garewal Vs. The State of Punjab and Another, ; (126) Union of India (UOI) Vs. H.C. Goel, (58) Local Government Board v. Arlidge, 1915 AC 120(133)]

153. Whatever might have been the justification if the Home Ministry had rested with the mere collection of materials by way of assisting the President, the recommendation by the Home Minister and the Prime Minister of the particular decision to be made by the President as proposed by the Home Secretary, introduced an untenable position.

(i) Though attempts have been made in extra-judicial circles to take up the question of relationship between the President and the Council of Ministers, from the political standpoint, the judicial interpretation which stands is that of the Supreme Court [(127) Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, , that the President is a constitutional head who, with respect to matters coming under article 53(1), is bound to act according to the advice tendered by the Council of Ministers so long as they command the confidence of the majority in Parliament. It may be that in some marginal cases, as I have already said, such as in the matter of dissolution or selection of a Prime Minister after a general election, the President may have some discretion to exercise, for reasons explained by me earlier, but, outside those exceptional cases, whose ambit is very narrow, it is evident that the Constitution does not specify any matter where the President may in the exercise of the "executive power of the Union" act according to his discretion, as it was done in the case of a Governor, in article 163(1), read with a provision like article 239(2). and the like. In the result, in normal circumstances, it is for the President to act according to the advice tendered by the Council of Ministers, with respect to the exercise of "the executive power of the Union." The Prime Minister is the spokesman of the Council of Ministers. When, therefore, the Prime Minister recommended, in the instant case, that the action as proposed should be taken, the only course of action left to the President, unless he was prepared to face an impeachment, on the charge of unconstitutional conduct, was to accept the recommendation. As I shall show hereafter, the advice of the Ministers was sought either by the President or on his behalf and it never arose in the mind of the President that this was a quasi-judicial matter which he was to decide on his individual judgment, independent of the advice of his Ministers.

In such a state of affairs, it can hardly be argued, that any room was left for the

President to make the decision which he had, by the Constitution, been empowered to make.

(ii) The observations of the House of Lords in (66) Board of Education v. Rice, (1911) AC 179(182), that a quasi-judicial tribunal "can obtain information in any way they think best" and in (58) Local Government v. Arlidge, (1915) AC 120(132), that "what the procedure is to be in detail must depend on the nature of the tribunal" are often relied upon rather loosely, to assert that a quasi-judicial tribunal is free to adopt any procedure it likes. Such an assertion overlooks the other part of the same observations that this statement is subject to the condition that "the principles of natural justice are followed and adequate opportunity of presenting his case is given" to the person going to be affected [vide (95) Board of High School and Intermediate Education, U.P., Allahabad Vs. Ghanshyam Das Gupta and Others, . The freedom to adopt a procedure at its option does not override the other principles subject to which only a statutory power or quasi-judicial function can be exercised.

(iii) The reason why the Supreme Court, in AIR 1965 SC 965 (969, para. 29), did not accept the previous determination of the Home Ministry as a determination made by the President even though the proposal of the Home Ministry was stamped with the "approval" of the President, has been explained by the Court itself, namely, that the determination of the age of a High Court Judge, involving his premature retirement, could not be left to be determined by the Executive, without impairing the independence of the Judiciary, which underlay the judicial fabric set up by our Constitution. It is indeed expressly safeguarded by guaranteeing a security of tenure subject only to the difficult process of impeachment [article 124(4)] as well as their salary and emolument against legislative interference [article 125)]. That there has been no substantial improvement in the impugned proceeding from the foregoing standpoint will be evident as soon as we compare the background in which the two orders of the President, - before and after Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, -have been made.

The noting on the File on both the occasions are before me. Though a half-hearted attempt was made in the instant case to withhold parts of the File on the ground of "privilege", I find to my surprise that the previous File was presented before the Special Bench of this Court in Matter No. 11 of 62, without demur, and the text of the relevant noting is reproduced at pp. 39 and 40 of the cyclostyle copy of P. N. Mookerjee, J.'s judgment, and the effect of the President acting upon the proposal of the Home Minister and the Prime Minister was commented upon throughout the judgment in (3) Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, , beginning from paragraph 17 thereof. It is also to be noted that in answer to the Rule nisi issued by me. the respondent produced the entire File together with the Supplementary Affidavit to which was annexed copies of the advice given by the learned Chief Justice of India and the order of the President (vide order of this

court dated 23.2.67) and it is only in course of the inspection of the File by the petitioner that "privilege" was claimed by the learned Advocate-General, not in respect of the entire File but in respect of five sheets of paper included in Annex I to the File (vide later order of 23.2.67). There was a formal application on this behalf filed on 8.3.67 and my order of that date states the grounds upon which the privilege was claimed and the reasons why they were unacceptable to the court. But even though that claim was rejected, the five sheets in question were kept sealed with the officer of the court and I have not referred to them in my judgment nor was there any occasion to open the cover again. What I want to say is that as regards the rest of the File, no privilege was claimed by the respondent and both parties have freely referred to its contents at the hearing. I want to make it clear that it was never contended by the learned Advocate-General that the court could not enter into the advice given by the Ministers in view of article 74(2). Be that as it may, I have already held that article 74 applies only in respect of those functions which fall within article 53(1), being related to the "executive power" of the Union and not to the matter covered by article 217 (3). I say all this even though article 74(2) was never uttered before me in order to avoid any controversy over it at any later stage of the proceeding.

157. For a proper understanding of what improvement, if any, has been effected after *Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, I would place the relevant portions on the noting, on the two occasions, in a tabular form:

Re. President's order of 15.5.61. Re. President's order of 29.9.65. (File No. Home Affairs Judl. 1/3/10/64.)

(1) (2)

Proceeding initiated [vide *Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, by a Note put up by Secretary, Minister of Home Affairs, through Home Minister "for approval of Prime Minister and President." Proceeding initiated by a similar note put up by Home Secretary before President for authorisation to issue the draft notice, through the Home Minister and Prime Minister (pp. 1-2 of the File).

It recited as to how the question as to petitioner's age was raised by an anonymous complaint and referred inter alia, to the fact that the Matriculation age of the petitioner, as would appear from the Bihar Gazette, was different from the age declared by the petitioner and that the then Chief Justice of India (S. R. Das, C.J.) had advised that the petitioner must be told to accept his Matriculation age to be correct age for superannuation.

It further recited that the petitioner had refused to accept arbitration by the succeeding Chief Justice of India (B. P. Sinha, C.J.) and, on the other hand, failed to produce any evidence in support of the age as declared by himself.

In the circumstances, the Secretary proposed to send a letter to the petitioner of

which the draft was annexed to the Note (reproduced at pp. 42-44 of the cyclostyle judgment of P. N. Mookerjee, J.). The substance of the draft was that, the Government of India had determined the correct date of birth of the petitioner to be 27.12.01 (on the basis of the Matriculation age), and that, accordingly, the petitioner should demit his office of puisne Judge of the Calcutta High Court on 26.12.61, when he would attain the age of 60. It was further stated that the draft had been approved by the Law Minister and Home Minister and the action proposed had also been agreed to by the present Chief Justice of India (B. P. Sinha, C.J.). The Note now requested the approval of the Prime Minister and the President in these words : "The approval of the P.M. [President is requested to the action proposed to be taken." Under the above Note, the then Prime Minister of India wrote- "I agree. Sd. J. Nehru 12.5.61." Then came the President's order "Approved. Sd. Rajendra Prasad 15.5.61." After collecting the Government expert's opinion, the Home Secretary forwarded the file with a summary of facts and legal questions involved (vide Appendix to Notes of the File) to the President "to endorse the File to the Chief Justice of India for advice", as advised by the Law Ministry (p. 35 of the File). After the Chief Justice's advice was received, the Secretary to the President, instead of putting it up before the President, sent it to the Home Ministry "before it is submitted to the President". The Home Secretary there noted that the Home Minister- "may recommend to the President that the age of Shri J. P. Miner may be determined in accordance with the advice of the Chief Justice of India." This note was endorsed by the Home Minister and the Prime Minister, on 29.9.65 and below that, the President recorded his decision- "I accept the advice tendered by the Chief Justice of India and decide that the age of Shri Jyoti Prakash Mitter should be determined on the basis that he was born on the twenty-seventh December, Nineteen hundred and one. Sd. Radhakrishnan 29.9.65". (page 41 of the File).

[vide Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, also paragraph 20 of the summary at page 6 of the Appendix to the Notes in the File 3/10/64 (Judl. I)].

158. It has been rightly contended by the petitioner that, as the foregoing comparison shows, the only change effected in the impugned proceeding subsequent to Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, is that while previously the Home Minister decided with the support of the Prime Minister and the President "approved", in the impugned proceeding, the Home Minister and the Prime Minister recommended and the President accepted that recommendation. As I have already said, once the President treated this to be a matter which came within the purview of article 74 (1), he was not only morally but constitutionally obliged to act according to the advice riven by the Ministers, on pain of incurring the liability of impeachment [article 56, proviso (b), read with article 61], and, in such a contingency, the resulting decision of the President ceases to be his decision. In this context, we have to refer to the situation introduced by the note of the Home Secretary dated 29.9.65. which is at page 41 of the File. The Chief

Justice of India, who received the File from the President's Secretariat on 16.9.65, returned the File, with his advice, direct to the President's Secretariat, on 29.9.65. It appears from the note of the Home Secretary, dated 29.9.65, that on receipt of the File,-

Secretary to the President has sent this File to me for putting it up to the Home Minister before it is submitted to the President.

No writing of the Secretary to the President being on the File, it is not possible to ascertain whether the Secretary to the President consulted the President before sending the File to the Home Secretary, that is to say, whether it was the President himself who sought the advice of the Home Minister, or the Secretary to the President did it in his administrative capacity, to see that all papers, to which article 74(1) applies, are countersigned by a Minister before being put up before the President for his orders :

(a) If it was done at the direction of the President, it would show a disinclination on the part of the President to treat this as an exceptional case where he was required to decide on his personal responsibility.

(b) On the other hand, if the Secretary to the President did it on his own initiative, such act of his, together with the introduction of the recommendation of the Home Minister and the Prime Minister, constituted an illegitimate interference with the exercise of the quasi-judicial function of the President and the application of his own mind to the problem and the materials before him.

In either way, the impugned decision ceases to be the decision of the President.

159. In fairness to the petitioner, I must mention that, apart from the above, the petitioner has pointed out certain other facts, disclosed by the noting on the File, to show that his apprehension that the Home Ministry was tainted by partisanship was not imaginary but real. Though all these facts are not of equal moment, they may be referred to in brief to show that the Home Ministry, apart from doing the ministerial part of the work, took the initiative and piloted the entire proceeding, with the advice of another Ministry of the Government of India. - the Law Ministry. These facts, pointed out by the petitioner are -

(a) Of course, it was said in (3) *Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose*, Chief Justice, High Court, Calcutta and Another, that what procedure should be adopted in collecting the statement and evidence of the petitioner was "for the President to decide." But the initial suggestion that the Home Secretary should do this came not from the President or from anybody on his behalf but from the Home Secretary himself who drafted the notice to be issued upon the basis of such authority which was rather presumed (p. 2 of the File), because the draft and notice were to have the imprimatur of the Home Minister and the Prime Minister, before it was placed before the President.

(b) In the preceding note, the Home Secretary only quoted the words of the concluding paragraph 31 of *Jyoti Prokash Mitter Vs. Hon"ble Mr. Justice Himansu*

Kumar Bose, Chief Justice, High Court, Calcutta and Another, but did not refer to anything of paragraph 21 or 29 thereof which pointed out that the President was to comply with the requirements of "natural justice", whatever procedure might be adopted by him. From this, the petitioner has argued that the Home Secretary did not even give the President to realise his responsibilities in the matter of devising the procedure to be adopted.

(c) When the petitioner wrote to the Secretary to the President (letter of 7.12.64, pp. 9-10/c of the File), praying for an audience before the President, the latter referred this question to the Home Ministry, along with other procedural questions (p. 8/c of the File), even though the Supreme Court in *Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, as well as the learned Chief Justice in his advice had pointed out that it was for the President himself to settle the procedure to be adopted by him, including the question of personal hearing. If in doubt, the President might have consulted the learned Chief Justice, but the reference of these questions to the Home Ministry the petitioner argues, demonstrates not only the hold of the Home Ministry over the entire matter but also the reliance of the President upon ministerial advice, which was foreign to his function of "deciding" under article 217 (3).

(d) The reference of the petitioner's documents to the Government expert was also made at the instance of the Ministry and not the President (pp. 5. 8-9 of the File) and the File was then shown to the President's Secretary and not the President himself (vide para. 2 of the Home Joint Secretary's note dated 13.2.65 at p. 17 of the File) and all this was done without giving the petitioner any idea about it (p. 40/c of the File, dated 3.2.65).

(e) When a question was raised by the Forensic Department as to whether portions of the disputed documents could be cut out for the purpose of chemical examination, the question was not placed before the President but the Law Minister gave the necessary directions (pp. 13-14 of the File).

At a later stage the draft proposed to be issued was shown to the "Vice-President of India", who had no part in the matter of decision under article 217 (3) (vide p. 22 of the File).

(f) The Home Joint Secretary, Sri Dave, expressly used the words "our own case" in his note dated 27.2.65 (vide p. 20 of the File).

(g) When specifically asked for his opinion as to whether personal hearing was to be given to the petitioner, the learned Chief Justice of India wrote on 24.7.65 that though the enquiry was not to be a "formal enquiry" as before a quasi-judicial tribunal, whether personal hearing was to be given was "a matter for the President to decide". The petitioner's grievance that this question was never put up before the President and his orders obtained, appears to be true. After the learned Chief Justice gave his aforesaid opinion, the Ministry took the initiative of enquiring from the petitioner the year when the horoscope had been made. On

11.9.65, the Secretary of the Law Ministry wrote that in the circumstances of the case, no personal hearing before the President need be offered; on the other hand, since the President was shortly to go abroad, the case should be submitted immediately for his decision under article 217 (3). Upon this note, the Law Minister advised that the File should be sent to the President so that he might forward to the Chief Justice of India "immediately". Upon receipt of the File, it was, accordingly, referred to the Chief Justice for his "advice" on the question of the petitioner's age. Though there is a note to this effect signed by the President himself, dated 16.9.65 (p. 36 of the File), there is no statement therein as to the President's decision on the question whether the petitioner should be heard by him or not. There was no further discussion on this question, since after the Chief Justice's advice, it was placed before the Home Minister and the Prime Minister and, upon their recommendation, the President gave his decision as so recommended. In fact, though the Chief Justice of India had previously recorded (on 24.7.65, p. 29 of the File) that he would reconsider the matter again when the question was referred to him finally, it was not possible for him on 29.9.65, to advise, if he so liked, that the petitioner should be heard personally by the President before he arrived at his decision, for, it was known to everybody from the note of the Law Secretary dated 11.9.65 (p. 35) that no time was to be lost in view of the fact that "the President is shortly going on tour outside India."

(h) Even the subsequent conduct of the Home Ministry, the petitioner submits, is not free from the alleged adversity of interest, - as disclosed by the refusal to supply a copy of the order of the President himself under article 217 (3), even after a formal written demand (p. 135 of the petition), - a demand which was acknowledged as legitimate at the hearing, with the self-criticism of "lack of appreciation" at the earlier stage.

160. The net result of the procedure adopted after the judgment of the Supreme Court in (3) Jyoti Prakash Mitter Vs. Hon^{ble} Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, which culminated in the recommendation of the Home Minister and the Prime Minister (p. 41 of the File), is that it does not in any way improve upon the vices of the procedure previously adopted, which the Supreme Court could not accept as a due compliance with the requirements of article 217 (3). And if I am bound to implement the declaration of the law laid down in AIR 1965 SC 9C1, - as to which I have no doubt, by reason of article 141, - I am bound to hold that the impugned order in the instant case too, cannot be accepted as a decision under article 217 (3), as it does not, in any material particulars, make any improvement upon the previous proceeding which was commented upon in Jyoti Prakash Mitter Vs. Hon^{ble} Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another,

Is consultation with Chief Justice sufficient for the "decision" of the President ?

161. The gravity of the President's function to "decide" under article 217 (3) may be appreciated from another standpoint, namely, whether he can discharge his burden by simply acting upon the advice tendered by the Chief Justice of

India, without independently applying his mind to the question before him and the materials on the record. If this were sufficient, arbitration by the Chief Justice would have been the best solution of the problem, which was indeed suggested to the petitioner at an early stage but eventually rejected [vide para. 5 of the petition and para. 27 of *Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, and thereafter the insertion of article 217 (3) in the Constitution was resorted to. If Parliament wanted to introduce compulsory arbitration or to make the decision of the Chief Justice binding as in the case of the decision of the Election Commission under article 103(2) or 192(2), it would have used similar language in article 217 (3), instead of introducing the words "after consultation with," - which words have a different implication, as will appear from the observations of the Supreme Court itself in *Jyoti Prakash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*,

It is difficult to imagine that if the President were to act under article 217 (3), he could or would ask the Judge concerned to refer to arbitration.

162. I would respectfully add that if the President could not, under article 217 (3), directly refer the matter to the arbitration of the Chief Justice, he could neither give his decision in such manner as would, in substance, look like an acceptance of the award of the Chief Justice, - without an independent consideration of the various materials on the record which are relevant. A "decision", as has been amply demonstrated by the authorities cited, can never be mechanical.

(i) On this point, the decision of the Supreme Court in (128) A.N. D'Silva Vs. Union of India (UOI), is of great assistance inasmuch as it interprets the parallel provision in article 320(3) of the Constitution, which also uses the word "consult". Art. 320 (3) (c) says-

The Union Public Service Commission or the State Public Service Commission, as the case may be, consulted-

* * * * on all disciplinary matters affecting a person serving under the Government of India or the Government of State in a civil capacity, including memorials or petitions relating to such matters.

In D'Silva's case it was pointed out that the function of the Public Service Commission was only advisory and that the President was not bound by the advice tendered by the Commission. It follows that though the President must take into consideration the advice of the authority whom he is bound to consult according to the mandate of the Constitution, he cannot act mechanically upon the advice so tendered but must apply his own mind and come to a decision on his own responsibility.

On this point, no difference can be drawn from the fact that while in D'Silva's case, (ibid), it was held that non-consultation of the Commission altogether did

not invalidate the order of the President (129) *State of U. P. v. Srivastava*, A (1957) SC 1130 (1133), in the case under art. 217 (3), consultation with the Chief Justice has been held to be mandatory, so that non-consultation with him would invalidate the decision of the President *Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose*, Chief Justice, High Court, Calcutta and Another, see in this connection, (130) *Port Louis Corporation v. Attorney-General of Mauritius*, (1965) 3 WLR 67 (72) PC.

(ii) It has been stated earlier that whenever any statutory power is vested in a particular individual, then, in the absence of anything in the statute itself to indicate the contrary, the power must be exercised by that individual in which the confidence of the Legislature has been imposed. The principle is reinforced when the statutory function is quasi-judicial. In support of this proposition. I may refer to the celebrated observations of Lord Atkin in (108) *General Medical Council v. Spackman*, (1943) AC 627(637-8), where the House of Lords held that notwithstanding the fact that a medical practitioner had been adjudged guilty of adultery in a divorce suit before a competent court, the Medical Council could not take disciplinary action against the practitioner on the very same ground without taking fresh evidence as might be adduced by him and without coming to an independent finding as to his guilt even though the proceedings in the divorce suit might be considered as *prima facie* evidence in the disciplinary proceeding. The reason given by Lord Atkin for this conclusion was that "the statute throws on the council and on the council alone the duty of holding due inquiry and of judging guilt. They cannot, therefore, rely on inquiry by another tribunal or a judgment of guilt by another tribunal."

(iii) Even where the quasi-judicial authority is empowered by the statutory provision itself to obtain the assistance or advice of some other person, the authority must apply his mind to the question and form his independent view and give his decision accordingly, irrespective of the advice tendered by that other person. This is illustrated by (131) *Nelsovil v. Minister of Housing*, (1962) 1 All ER 423(426). Section 33 of the *Caravan Sites and Control of Development Act*, 1960, provides for an appeal to the Minister of Housing against an enforcement notice served on the owner or occupier of a premises affected by the notice. In such an appeal, the Minister ordered for a local inquiry to be held by an Inspector, who recommended that a temporary planning permission should be granted. The Minister refused to accept the recommendation of the Inspector on the ground that such permission, if granted, might cause nuisance to the neighbors and dismissed the appeal. On appeal to the High Court, it was contended that the Minister should have given his decision in accordance with the Inspector's report. Rejecting this contention, Widgery, J. observed-

.... as a matter of law, the minister, far from being so bound, is bound, to form his own independent view, giving such weight as he thinks proper to the recommendations and findings of the Inspector.

(iv) As pointed out, earlier, the same view has been taken by our Supreme Court

in connection with disciplinary proceedings against public servants, while acknowledging that it is permissible for the President or the Governor, as the case may be, to have the inquiry conducted by another authority or tribunal, before the matter comes up before him for adjudging the guilt of the delinquent and awarding the punishment or otherwise [(123) Pradyat Kumar Bose Vs. The Hon"ble The Chief Justice of Calcutta High Court, ; (125) D.S. Garewal Vs. The State of Punjab and Another, ; (132) Jagannath Prasad Sharma Vs. State of Uttar Pradesh and Others, ; (126) Union of India (UOI) Vs. H.C. Goel, (108) State of Assam and Another Vs. Bimal Kumar Pandit,

163. The position emerging from the above is not displaced by the fact that the Constitution itself has, in article 217 (3), laid down that before deciding the "question", the President must consult the Chief Justice of India. If it was the intention of Parliament that the Judge's age should be decided by the Chief Justice of India, out of court, the Constitution might have vested the function under article 217 (3) in the Chief Justice exclusively, or liad down that the President must give his decision in accordance with the advice given by the Chief Justice, and a precedent for the latter alternative is to be found in the Constitution itself, in article 103(2), which provision has already been discussed. The result, under article 103 (2), has been, as pointed out by the Supreme Court in (121) Brundaban Nayak Vs. Election Commission of India and Another,

The object of this provision clearly is to leave it to the Election Commission to decide the matter, though the decision as such would formally be pronounced in the name of the Governor.

In the absence of a provision corresponding to clause (2) to article 103 or 192, it would be illegitimate to conclude that article 217 (3) merely intends that the President shall give his stamp to the decision of the Chief Justice, which would be the same thing as saying that the Chief Justice would "pronounce" his decision "in the name of the President, or that the President will, in his name, pronounce the opinion of the Chief Justice. In other words, in the absence of any such overriding provision in article 217 (3), the decision under that provision must be governed by the well-established meaning of the word "decide" namely, that it must be a decision of the President and him alone, though he has to take into consideration the "findings and recommendations" tendered by the Chief Justice of India, as observed by Widgery, J. in (131) Nelsovil v. Minister of Housing, (1962) 1 All ER 423(426), referred to earlier.

164. Apart from the difference in the language used in the two articles, I am unable to arrive at the same conclusion under article 217 (3) as under article 192(2) inasmuch as the Supreme Court in (3) AIR 1965 SC 965 did not indicate that the President was only to pronounce the decision of the Chief Justice in his name. In paragraph 21 (ibid) the Court uses the words "have the assistance oj the Chief Justice of India". We cannot also overlook the fact that the previous decision was not accepted by the Court as a decision of the President even though it was a decision advised by the Chief Justice of India which the President

had approved. In fact, from the recitals at p. 965 of *Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, it appears that at that time, it was "the advice given by the Chief Justice of India" which had been "agreed to" by the Home Minister and "approved" by the President (paras. 15, 17, 25, *ibid*).

In paragraph 29 of *Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, the court clearly stated that one of the reasons why the court could not accept the foregoing order of the President as an order under article 217 (3) was that it-

must be held to suffer from the serious infirmity that the evidence of the appellant was not available to the President when he reached his decision.

It is needless to say, this very observation makes it clear that in the fresh proceeding directed by the court (paragraph 31), not only should the evidence on the record be placed before the President but an opportunity must be given to the President to consider that evidence in the quasi-judicial manner in order to come to his decision, unless the obligation to make the evidence "available" to the President is to be treated as an empty formality, which indeed, could never be intended by the court in *Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*,

165. It is firmly established that where an authority seeks to exercise statutory power, - whether quasi-judicial [*R. v. Walsall*, (1854) 18 J.P. Jo. 754; *R. v. Holborn Licensing JJ.*, (1926) 136 LT 273(281)] or purely administrative [(135) *Lawrence Joachim Joseph D'souza Vs. The State of Bombay*, ; (136) *Puranlal Lakhanpal Vs. Union of India (UOI)*, ; (132) *Jagannath v. State of Orissa*. AIR 1966 SC 1141(1142)], without applying his mind to the considerations relevant to the exercise of the power and the facts and circumstances of the case before him. it ceases to be an *intra vires* or *bona fide* exercise of that power [(137) *Karanpura Development Company v. Kamakshya Narayan*. 1956 SCR 325 (337)]

166. It is, however, needless to go to the extent of holding that the President did not apply his mind if it appears from the circumstances of the instant case that reasonable time and opportunity was not given to him "to consider the evidence" which was assured to the petitioner by the Home Secretary's letter dated 21.12.64, or to exercise his "judgment independently" as was said in the *Plumstead Board* case. (1885) 10 App. Cas. 229(239), or after taking into consideration "the findings and recommendations" [as observed in (131) *Nelsovil's* case, (1962) 1 All ER 423(426)] made by the Chief Justice of India.

167. It appears from the impugned order of the President (p. 41 of the File) that the President simply "accepted" the advice given by the Chief Justice and repeated the words in the last paragraph of the Chief Justice's advice at p. 40 of the File. As Lord Reid pointed out in (25) *Ridge v. Baldwin*, (1963) 2 All ER 66(81, I), in such a situation, it cannot be said that the President has given his "independent decision" and the "operative decision" remains that of the Chief

Justice, which the President has merely endorsed. It may be that the President was not obliged to give reasons for his acceptance of the Chief Justice's advice, - a point on which judicial decision has not yet firmly settled down, - though legislation in the United Kingdom [section 12, Tribunals and inquiries Act, 1958] and the U.S.A. [section 8(b): Administrative Procedure Act, 1946], has taken the lead in this behalf. But the situation becomes otherwise if the President had no time to consider the evidence and to determine whether he would accept the advice or not. As has been pointed out by the petitioner, the noting on the File show that the File, with the recommendations of the Prime Minister reached the hands of the President on 29.9.65 and that very day the President had to record his decision, before flying to Bombay for going abroad. It has, of course, been urged by the learned Advocate-General that the File had been before the President on some previous occasions, and the petitioner himself had been forwarding copies of his letters direct to the President. But whatever might have been the situation at any earlier stage, as I have already pointed out as soon as the File had been received in the President's Secretariat with the advice of the Chief Justice of India on 29.9.65 it was immediately forwarded to the Home Minister to have his advice, before "it is submitted to the President", and that it was disposed of by the President -as soon as it was received back, from the Home Minister, through the Prime Minister. All these movements of the File and the transactions through different persons sitting at different places, took place on the same day, before the President had to leave for Bombay. Having regard to the gravity of the question and the nature of the materials to be considered it is difficult to conclude, in these circumstances, that sufficient time and opportunity was afforded to the President, on the 29th September, either to consider the materials or the advice given by the Chief Justice of India, or to arrive at his independent judgment in the matter.

Whether petitioner should have been allowed to make arguments before the President.

168. It has been contended by the learned Advocate-General that even if the President had any quasi-judicial objection, there has been no denial of natural justice in the facts of the instant case.

On this point, reliance is placed on the fact that the petitioner refused to tender rebuttal evidence to counteract the evidence sought to be used against him, when that opportunity was offered to him. It may be recalled that on 3.2.65, coming to know that the Home Ministry had referred his horoscope and almanac to the Forensic Institute to test their genuineness, the petitioner requested that the documents might be returned to him so that he might have them examined by an expert of his choice (p. 113 of the petition). On 15. 3.65, the petitioner sought for leave to produce some additional documentary evidence alleged to be lying in East Pakistan (p. 56c of the File), but later intimated that those documents were not available and that accordingly he had no further evidence to produce "unless I am driven to call an expert" (pp. 59- 60/c of the File). But

when, after the report of the Forensic Institute was obtained by the Government and the petitioner was asked to offer his comments on the opinion of the Government expert or to adduce the evidence of his own expert, if any, by affidavits (p. 122 of the petition), the petitioner stated (1.9.65) that there was no question of his tendering any evidence in rebuttal inasmuch, as according to him, the opinion of the Government expert "supported" the petitioner's case (p. 128 of the petition). He also declined to offer any additional evidence to counteract the three documents relied upon by the Government, to prove his age at the time of the Matriculation Examination and the Civil Service Examination, on the ground that they were not primary evidence.

169. The petitioner, of course, has argued, that the opportunity to call an expert of his own was unreal unless his original documents were returned to him for examination by his own expert. It is true that the originals were never returned to the petitioner prior to the close of the case by the impugned order, even though the petitioner had asked for their return as early as 3.2.65 and on 17.2.65 (p. 42/c of the File) and the Home Secretary had suggested that the documents would be returned when an opportunity would be offered to the petitioner to produce expert evidence of his own, after the examination of the Government expert was over and his opinion considered by the President. But, instead of assigning this reason or repeating his demand for return of his documents, the reason given by the petitioner for declining to adduce any further evidence was that the Government expert's opinion really supported the petitioner's case and, hence, it was unnecessary for him to adduce any further evidence. If this be his stand, the petitioner cannot, as the learned Advocate-General contends; seriously urge at the same time that he has not been allowed to refer the disputed documents to his own expert, or that the opportunity of rebuttal given was unreal.

170. It is however, open to the petitioner still to urge that he should have been heard by the President orally before making the impugned order, so that he could make his submission and convince the President that the Government expert's opinion was really in the petitioner's favour. The learned Advocate-General contends that once the petitioner was given the opportunity of offering evidence to contradict the materials sought to be used against him and also to offer his written comments upon these materials, the requirements of natural justice were satisfied and that he was not entitled to complain of any refusal of oral hearing, which was not an essential ingredient of natural justice (paragraph 14 of the Counter-affidavit).

We have, therefore, to inquire-

- (i) Whether an oral or personal hearing may be required by the principles of natural justice under any circumstances;
- (ii) Whether any such special circumstances were present in the instant case.

171. The learned Advocate-General, has relied upon certain observations in (66)

Board of Education v. Rice, (1911) AC 179(182) and (58) Local Government Board v. Arlidge, (1915) AC 120(132), which prima facie support his contention. But, nevertheless, we have to dive deeper into the law on the subject, for the following reasons:

I. As has been seen already, the law relating to quasi-judicial obligation has since developed, both in England and in India, remarkably, both as regards the sources from which such obligation may be drawn by the courts as well as the contents of such obligation.

The reason behind this development, as pointed out by jurists and Judges, is quite obvious. The traditional glory of English common law, boasted of by Prof. Dicey, was that all legal causes were friable by the ordinary courts of law. The encroachment upon that exclusive jurisdiction by administrative or statutory tribunals is only a recent growth, but, beginning from an apologetic stage, it has assumed such magnitude that it has attracted the attention not only of text-book writers but also of Parliament itself, as to the need for bringing it adequately under the Rule of Law, - the glory of the English legal system. Naturally, the Judges who were conservative in their outlook when the encroachments had been working on the fringes, have had to forsake their natural shyness, as soon as they threatened to eat into the vitals of the common law system. To quote the picturesque language of Lord Reid in Ridge v. Baldwin, (1963) 2 All ER 66 (76) HL-

in dealing with new types of cases the courts have had to grope for solutions, and have found that old powers, rules and procedures are largely inapplicable to cases which they were never designed or intended to deal with.

I have already pointed out that the result of this development as summarised by our Supreme Court in the case of (84) Associated Cement Companies Ltd. Vs. P.N. Sharma and Another, has been that-

The area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently, the horizon of the writ jurisdiction has been extended in a corresponding measure.

172. II. Of course, there are occasional generalisations to the effect that a right to be heard orally or an oral interview is not an essential ingredient of the rules of natural justice [(138) A.K. Gopalan Vs. The State of Madras, ; (139) Madhya Pradesh Industries Ltd. Vs. Union of India and Others (UOI), ; (140) F. N. Roy v. Collector of Customs, (1957) SCA 764 (771); (141) S. Kapur Singh Vs. Union of India (UOI), But generalisations in this sphere it is submitted, can only convey a fractional truth as in other spheres of human problems, for, as has been pointed out in other cases there is no uniform or universal standard of natural justice applicable to all cases coming within the purview of the doctrine and that the question as to the quantum of hearing to be afforded is to be determined not by a prison considerations, but upon a consideration of the circumstances of each case.

It cannot be overlooked that the observations of our Supreme Court, in the cases just referred to, were made in cases where the question as to oral hearing was not examined at any length because there were other factors for consideration. Thus,

(i) In (138) A.K. Gopalan Vs. The State of Madras, the subject-matter was an order of preventive detention, which must necessarily be dealt with on the subjective decision of the authority responsible for maintaining the collective interest and the relevant provision in article 22(5) conferred upon the detenu in question only the right to make "a representation" against the order. On this background. Kania, C.J. observed-

Again, I am not prepared to accept the contention that a right to be heard orally is an essential right of procedure even according to the rules of natural justice. The right to make a defence may be admitted, but there is nothing to support the contention that an oral interview is compulsory.

It must be noted that Kania, C.J. refused to accept the requirement of oral interview as compulsory in every case. He did not rule out the possibility that it might not be required by natural justice in particular circumstances other than preventive detention which were not before the court in Gopalan's case.

(ii) In (140) F. N. Roy's case. 1957 SCA 764(771), again, the appeal was already barred by limitation, and the petitioner, in fact, declined to accept the offer of personal hearing which was made to him, more than once (p. 765).

The short dictum that-

there is no rule of natural justice that at every stage a person is entitled to a personal hearing,

is, therefore, to be read in the light of the particular facts of that case which are narrated along with the dictum referred to.

(iii) In (141) S. Kapur Singh Vs. Union of India (UOI), in a disciplinary proceeding against a civil servant, an inquiry under the Public Servants (Inquiries) Act, 1850 was ordered. On receipt of the report of the Inquiry Commissioner, the punishing authority, namely, the President, consulted the Union Public Service Commission and passed the order of dismissal against the delinquent civil servant. In a petition under article 226 of the Constitution, the delinquent challenged the order of the President as unconstitutional on the ground that before making such order, the President should have, - (a) examined afresh the witnesses examined before the Commissioner and (b) allowed the delinquent to make oral submissions to the President. This contention was rejected by the Supreme Court in these words-

Whether opportunity afforded to a public servant in a particular case is reasonable must depend upon the circumstances of that case. The enquiry in this case was held by the Enquiry Commissioner who occupied the high office of the Chief Justice of the East Punjab High Court. The appellant himself examined 82

witnesses and produced a large body of documentary evidence and submitted an argumentative defence which covers 321 printed pages. An opportunity of making an oral representation not being in our view a necessary postulate of an opportunity of showing cause within the meaning of article 311 of the Constitution, the plea that the appellant was deprived of the constitutional protection of that article because he was not given an oral hearing by the President cannot be sustained.

The following points are to be noted in respect of the particular facts of this case in the background of which the foregoing observation was made by the Supreme Court:

(a) The matter came before the President in Kapur Singh's case, at a second stage, after a full-fledged inquiry had been held before an Inquiry Commissioner, where the delinquent not only examined his witnesses but also submitted his arguments (vide p. 495, para. 3, *ibid*).

In the instant case, the President is both the primary and the final authority, under article 217 (3) of the Constitution, there being no provision for any factfinding inquiry before the matter comes up to the President for his decision. The Chief Justice of India, it must be noted, is not an Inquiry Commissioner under article 217 (3) but is only a consultative authority like the Public Service Commission, in Kapur's case.

(b) To be more precise, the matter came up before the President, in (141) Kapur's case, after the issue of the "second show cause notice" required under article 311(2) of the Constitution. At that stage, though the delinquent is entitled to challenge the findings in the Inquiry Report as to his guilt, apart from the punishment awarded, he has no right to have the fact-finding inquiry repeated, before the punishing authority. This had been laid down, long ago by the Privy Council in the case of AIR 1948 121 (Privy Council) thus :

If the civil servant has been through an inquiry.....it would not be reasonable that he should ask a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry.

What the Supreme Court said in (141) Rajamanicka Mathurar Vs. Dharmaraj and Others, was that at the stage starting with the second show cause notice, the right of the delinquent to represent need not be a right to make oral representation, particularly when the delinquent had submitted a written representation running into 321 pages (p. 496, *ibid*) and had made oral arguments at the initial stage [see also (142) A. Parameswara Iyer Vs. State of Kerala, ; (143) Balkishan Chaturvedi Vs. The Chief Secretary, Govt. of Bhopal and Another, ; (144) District Controller of Stores Eastern Railway, Lillooah, Howrah and Another Vs. Ram Govinda, (145) Altafur Rahman Fazlur Rahman Vs. Collector Central Excise, Allahabad,

It has nowhere been stated in Kapur Singh's case that no opportunity to make oral arguments need be given at any stage of the proceeding under article 311, particularly when section 15 of the Public Servants (Inquiries) Act or rule 55 of the Civil Services (Classification, Control and Appeal) Rules confers such a right, at the Inquiry stage; and in fact, the delinquent had availed of that opportunity in Kapur Singh's case.

It will be seen presently that there are other cases where it has been held that at the stage when the inquiry into the charges is made, in a proceeding governed by article 311(2), the delinquent has the right not only to confront witnesses but also to submit his explanation of the evidence taken by the inquiry officer, at a personal hearing [e.g., (144) District Controller of Stores Eastern Railway, Lillooah, Howrah and Another Vs. Ram Govinda,

My conclusion, accordingly is that the decision in Kapur Singh's case does not foreclose the question before me, relating to article 217 (3), but only interprets the expression "reasonable opportunity of showing cause" in article 311 (2), - in relation to the second stage which follows the inquiry into the charges.

(v) The observations in the recent case of (139) Madhya Pradesh Industries Ltd. Vs. Union of India and Others (UOI), again, were made on the basis of the express provision in the proviso to rule 55 of the Mineral Concession Rules, 1960, which gave to the person affected nothing more than the right to make a representation. It runs thus :

Where a petition for revision is made to the Central Government.... it may call for the record....., and after considering any comments made on the petition by the State Government...., may confirm, modify or set aside the order.....

Provided that no order shall be passed against an applicant unless he has been given an opportunity to make his representation against the comments, if any, received from the State Government....." Interpreting the foregoing proviso, the court observed-

It is no doubt an essential principle of natural justice that a quasi-judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him. Indeed, rule 55..... recognises the said principle..... The said opportunity need not necessarily be by personal hearing. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal. The facts of the present case disclose that a written representation would effectively meet the requirements of the principles of natural justice.

It is obvious that the foregoing observation of Subba Rao, J. related to a statutory right to "make representation." Far from ruling out the possibility of a personal hearing being required by the principle of natural justice in the special circumstances of a given case, it does indeed lay down that whether it would be

required or not "depend" upon the facts of each case.

173. It would, therefore, not be illegitimate, on the very authority of the decisions of our Supreme Court, to inquire whether there was anything special in the facts of the instant case which required a personal interview being granted to the petitioner before the President made the impugned order.

III. Before going to those facts, I consider it necessary to analyse the English decisions on the subject, since almost all the cases in England and India [e.g., (138) A.K. Gopalan Vs. The State of Madras, which speak of oral hearing not being essential to natural justice, follow the following observation of Viscount Haldane in (58) Local Govt. Board v. Arlidge, (1915) AC 120(134),- which has been relied upon on behalf of the respondents before me:

I do not think the Board was bound to hear the respondent orally, provided it gave him the opportunities he actually had.

174. Apart from the reservation contained in the foregoing observation in Arlidge's case, we have to read it in the background of the pronouncements made in the earlier cases of high authority, since (102) Capel v. Child, (1832) 149 ER 235, which have been restored to their pristine glory by the House of Lords in (25) Ridge v. Balwin, (1963) 2 All ER 66.

That the contents of natural justice cannot be condensed into by rigid formula and may vary according to the nature of the function and the nature of the rights affected was thus unequivocally put by Lord Atkin, in Spackman's case, 1943 AC 627(638) -

..... I cannot think that the procedure which may be very just in deciding whether to close a school or an insanitary house is necessarily right in deciding a charge of infamous conduct against a professional man.

It is for this reason that Lord Atkin (p. 638, *ibid*) refused to accept as a universal truth the generalisation which Lord Loreburn had made in the year 1911 in (66) Board of Education v. Rice, 1911 AC 179(182), that administrative tribunals "have no power to administer an oath, and need not examine witnesses". As will be shown presently, today there are very many tribunals both in England and in India which differ from courts only in name and follow a procedure which closely stimulates a trial. In Spackman's case, (*ibid*), thus, it was held that the Medical Council had the power and duty to examine witnesses, if offered, notwithstanding the fact that evidence had already been taken by a court of law, on the question involved. Thus observed Lord Atkin-

I would, therefore, demur to any suggestion that the words of Lord Lore-burn, L.C. in Board of Education v. Rice, afford a complete guide to the General Medical Council in the exercise of their duties. As I have said, it is not correct that they need not examine witnesses". (p. 638, *ibid*).

That there is no formula "of universal application" as to the requirements of

natural justice and that-

the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case on the point," has been laid down by the Privy Council in (50) *University of Ceylon v. Fernando*, (1960) 1 All. E.R. 631(637) P.C., referring to (95) *Russell v. Duke of Norfolk*, (1949) 1 All ER 109(118) and other cases; and by our Supreme Court in cases like (96) *State of M. P. v. Chintaman*. A 1961 SC 1623(1629).

The correct position was thus expressed by Viscount Kilmuir in (31) *Vine v. National Dock Labour Board*, (1956) 3 All. E.R. 939(943):

.... the presence of the qualifying word "quasi" (in quasi-judicial) means that the functions so described can vary from those which are almost entirely judicial to those in which the judicial constituent is small.

Thus, it has been held that in some circumstances the minimum requirement of affording an opportunity of making a written representation against the action proposed to be taken would meet the demands of natural justice [(36) *Nakkuda Ali v. Jayaratne*. (1951) AC 66; (50) *University of Ceylon*, (1960) 1 All ER 631 (639) PC; (146) *Handy v. Minister of Local Government*, (1952) 1 All ER 1293(1297); (139) *Madhya Pradesh Industries Ltd. Vs. Union of India and Others* (UOI), while there are quasi-judicial tribunals which are required to proceed almost in the same manner as in a trial before a court of law [(147) *Ellerby v. March*. (1954) 2 All ER 375 CA; (148) *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, The difficulty arises as to the intermediate cases, to determine what would be the precise requirements of natural justice in the circumstances involved.

175. (i) As early as 1854, in (133) *Walsall's case*, (1854) 18 J.P. J.O. 757, it was held that the function of granting or refusing statutory licence, being a judicial act, the licensing justices could not refuse a licence, on the basis of a pre determined rule issued by them, without examining the facts and circumstances of each case before them. Rejecting the contention that the application of each applicant already contained the grounds upon which he sought to maintain his case, it was held that the Magistrates could not exercise their quasi-judicial power, without hearing the arguments advanced on behalf of each applicant:

They cannot exercise the discretion reposed in them unless they hear the facts and arguments which the applicant is prepared to adduce.....

(ii) In (83) *Osgood v. Nelson*, (1862) LR 5 HL 636, the question before the House of Lords was whether the power to remove a Clerk of the court for "a reasonable cause", under 13 and 14 Vict. c. 61, had been lawfully exercised by the County Court. The Judges, who were consulted by the House, and with whose opinion the House agreed, opined that in such a case, the employee concerned was entitled to a reasonable opportunity to defend himself which included a right to

address the Court on the evidence adduced, but that such opportunity had been offered, in the facts of the case before the House. So observed Baron Martin, speaking for the Judges (p. 646):

There can be no doubt..... that the person it was proposed to remove should have every opportunity of cross-examining the witnesses brought forward against him, or of otherwise opposing the case set up against him;..... that he should have every possible opportunity which a person can have..... of defending himself and of establishing that he is not liable to a motion.....

But we are of opinion, that in the proceedings before the committee..... every possible opportunity that could be given to any man was given to Mr. Osgood in this matter. He was allowed to cross-examine witnesses, he was permitted also to call as many witnesses as he pleased. He was repeatedly asked whether he had any further evidence to produce, and he was permitted to address the court himself and to state his view of the matter, and comment on the evidence.

It might be asserted from the above observations that it was assumed that the right to defend, in a proceeding where evidence was taken, included the right "to state his view of the matter and to comment on the evidence." Does not the language in *Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose*, Chief Justice, High Court, Calcutta and Another, "his contention, his version and his evidence" - echo the words just quoted from Osgood's case, (ibid) ?

(iii) In (19) *Spackman v. Plumstead Board of Works*, (1885) 10 App. Cas. 229(240), the question before the House of Lords was what procedure should be followed by the Superintending Architect of a Local Authority in deciding how "the general line of buildings" had to be fixed, - the relevant statute being silent as to the procedure. The Lord Chancellor (Earl of Selborne) said-

No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter..... There would be no decision within the meaning of the statute if there were anything..... done contrary to the essence of justice. But it appears to me to be perfectly consistent with reason, that the statute may have intentionally omitted to provide for form, because this is a matter not of a kind requiring form, not of a kind requiring legation at all, but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him.

This case (ibid) is thus clear authority for the proposition that when a question has to be decided objectively, the quasi-judicial tribunal must-

(a) fix a date of hearing;

(b) notify the date to the party going to be affected by his decision (which would be necessary only if such person is going to be heard personally);

(c) allow such party an opportunity to place his case by oral arguments and the like, on such date.

There is no reason to suppose that a different conclusion was intended by our Supreme Court in *Jyoti Prakash Mitter Vs. Hon"ble Mr. Justice Himansu Kumar Bose*, Chief Justice, High Court, Calcutta and Another, when they used nearly the very words of Earl of Selborne in the foregoing case-

.....the requirement of natural justice that the Judge must have a reasonable opportunity to put before the President his contention, his version and his evidence, is implicit in the provision [article 217 (3)] itself.

(iv) In the (75) *Frome Breweries case*. (1926) AC 586(591-3), Viscount Cave L.C. deduced from the expression "opportunity of being heard" in section 19(2) of the Licensing (Consolidation) Act, 1910, an opportunity to make oral arguments on behalf of the applicant for renewal of licence and other persons interested in the matter, in the following words :

The Bath Justices, when sitting as the compensation authority..... are performing a judicial act. for it is their duty after hearing evidence and listening to arguments to pronounce a decision which may vitally affect the interests of the persons appearing before them.

One would not be wrong in inferring from the above mat the Lord Chancellor assumed that the listening of arguments was a concomitant of coming to a decision after hearing evidence in a case where serious consequences affecting the civil rights of a party would follow from the decision.

(v) So far as the appellate function is concerned, there is a number of cases which suggest that a statutory tribunal vested with this function does not discharge his duty by merely reading the memorandum of appeal and the reply of the respondent, but must give the parties notice of a date of hearing when the parties would have a right to make oral arguments. It is true that in (58) *Local Government Board v. Arlidge*, (1915) AC 120(132, 150), Viscount Haldane said that "what the procedure is to be in detail must depend on the nature of the tribunal", but these words are to be read with the preceding words imposing the basic obligation upon a statutory authority who is vested with the "duty of deciding an appeal," namely, that it "must give to each of the parties the opportunity of adequately presenting the case made."

176. The question is, how far would this right of "adequately presenting the case" go so far as an appellant is concerned ? Would it be exhausted by merely placing his memorandum of appeal before the appellate tribunal ? If so, no question of "adequacy presenting his case" may possibly arise because every appellant has the right to file the memorandum of appeal which starts the proceeding, as a plaint starts an original action. The answer to the negative is

offered by other cases:

(a) In (149) R. v. Archbishop of Canterbury, (1359) 1 E & E 545(559, 561), it was held that disposal of an appeal upon a perusal of the written statements on either side was no hearing of the statutory function of appeal from an order of revocation of the licence of a curate. Lord Campbell, C.J., observed-

The appellant here has not been heard. In his petition, he denies almost everything charged against him. specifically, and asks the archbishop to appoint a time and place at which he may be heard and adduce evidence in his behalf. Without any communication with him. his judge decides against him. That was not a hearing at all.

The above observations are applicable to the case before me, for, as will be shown presently, even though the petitioner offered to tender no evidence of his to controvert the expert's report relied upon by the President, he was insisting all the time that he would show that the report actually went to support his case and till the last pressed upon an oral interview with the President to explain this contention but such interview, though promised earlier, was not offered before the President made his decision.

As pointed out by Crompton, J., in the case cited [(1859) 1 E. & E. 545 (561)] the right to make oral argument is in depend of a right to adduce evidence:

The appellant wishes to show that, on these original documents, his admissions have been misunderstood by the bishop, and wrongly acted upon; and he has a clear right to be heard for that purpose.

(b) In (150) R. v. Housing Appeal Tribunal. (1920) 3 K.B. 334, the majority of the Court held that though there was no provision for a public inquiry as a part of the appellate proceeding, the administrative Appellate Tribunal could not dispose of the appeal without communicating to the appellant the date fixed for hearing of the appeal, so as to give him an opportunity of appearing on that date and to make arguments on the grounds taken in the memorandum of appeal (Para. 343, *ibid.*) and observed that the maxim "*audi alteram partem*" applied to an appellate proceeding as in the case of a tribunal of the first instance. The words of the Earl of Reading. C.J., are illuminating-

Now, that being so, does that principle apply equally to the hearing of an appeal? I think it does. I see no reason why the right to sufficient hearing should be limited to an inquiry by a tribunal of first instance. I do not mean that the extent of the right is precisely the same before both tribunals, for when the matter comes before the Appeal Tribunal there has already been a hearing before the tribunal appealed from. But even so, I cannot think that the appeal Tribunal is at liberty to cut down the right of appeal, that is to say, the right to have an adjudication on the subject-matter of the appeal upon the materials which the appellant desires to place before the tribunal and which are properly admissible before it..... There was no reason why the Appeal Tribunal should not, within the

twenty-five days that elapsed between 3rd April and 28th April, have given notice to the parties that they would determine that appeal on a specified day, and that if either of the parties had any further facts to bring forward or arguments to urge they should give notice of them to the tribunal. Such a notice would not have delayed the determination of the appeal.

(c) The view taken in *R. v. Housing Tribunal*, above, that a quasi-judicial obligation may not be fully discharged by a consideration of the written representation of the party affected even at an original hearing where a decision involves consideration of evidence is brought to a bolder relief in (157) *Stafford v. Minister of Health*, (1946) KB 621, in regard to the Minister's function of hearing objections against a notice of compulsory purchase under the Housing Act. 1936. In that case, what the Minister did was to reject the appellant's objection to the notice simply upon a perusal of his written objection and the written statement of the local authority to that objection and it was contended on behalf of the Minister before the King's Bench that going through his written objection was to hear the objector's case. This contention was negated by the court with the following comments:

The appellant's objections are simply blank statements or contentions..... To my mind it is going a great deal too far to say that once grounds of appeal have been put forward - considered as grounds of appeal such as are put in an ordinary King's Bench action - no argument or elaboration is needed, and that the grounds constitute the case with all its evidential statements.

As I have already said, the mere giving of the notice of objection, in accordance with the statutory requirement, and setting out the grounds of objection is not an adequate presentation of the appellant's case.

Under the Housing (Temporary Provisions) Act, 1944, the Minister had a discretion not to hold a public inquiry and in *Stafford's* case, (*ibid*), the Minister exercised that discretion. The court held that, nevertheless, the Minister was bound to allow the objector an opportunity of adequately presenting his case apart from the written objection which he had already filed :

It is clear that there is absolute discretion in the Minister whether to hold a public inquiry or not. The appellant has, however, the inalienable right of every citizen to have his case considered before the adjudicating authority comes to a decision.

177. It may not be out of place to point out, in this context, that in the United States, too, it has been held that though the right to present oral argument is not an invariable content of "due process", it may be required to satisfy "due process" in particular circumstances [vide (152) *Londoner v. Denver*. (1908) 210 US 373; (153) *Morgan v. U. S.*, (1937) 304 US 1]. In the latter case, it was observed -

The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposite party and to meet

them. The right to submit argument implies that opportunity : otherwise the right may be but a barren one.

However ill-defined the right might have been in the United States prior to 1946, the Administrative Procedure Act, 1946 has put it on a statutory footing. Thus, section 6 (a) of that Act says-

Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding.

The contents of the right to be heard, again, are to be found from section 5(b) which says-

The agency (i.e., the quasi-judicial authority) shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments where time, the nature of the proceeding, and the public interest permit.

178. The foregoing authorities establish that though there are cases where an opportunity to make a written representation would suffice to offer natural justice to a person aggrieved and a consideration of that written representation or memorandum of appeal might exhaust the quasi-judicial obligation of the administrative authority, there are cases where the fixing of a date of hearing with notice thereof to such person and the hearing of the oral arguments advanced by him must be considered to be of the essence of natural justice, - whether the statutory authority is exercising original or appellate function.

179. V. In my opinion, not only in certain classes of cases, but also in certain circumstances, the hearing of oral arguments may be necessary if the party's case has to be adequately considered by the statutory tribunal.

It is in view of the above consideration that some statutes or statutory instruments offer to the person affected an opportunity of oral hearing, where he requests the tribunal for it, that is to say, in those cases where he feels that he cannot meet the case against him until his case is presented and his comments on the evidence gathered or the report of an expert received, are laid before the tribunal, verbally, e.g.-

(a) The (English) National Insurance (Industrial Inquiries) Acts, 1946 to 1950 [(154) R. v. Deputy Industrial Injuries Commissioner, (1962) 2 All ER 430(432; 435)].

(b) The Medical Act, 1956, - section 37.

(c) In India, a right to make oral defence [which obviously includes argumentation or oral representation, vide (141) S. Kapur Singh Vs. Union of India (UOI), is given to the delinquent officer, after the case for the prosecution is closed, at an inquiry under the Public Servants (Inquiries) Act. A personal hearing is obligatory in a disciplinary proceeding under Reg. 861 (e) of the Bengal Police Regulations [vide (155) Prafulla Mohan Mukherjee Vs. The Inspector General of Police, Govt. of West Bengal and Others,

A most crucial instance of a person having a right to be heard orally at his own seeking is to be found in certain statutory rules governing ordinary Government employees, e.g., rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1965 [under rule 14(18) of these Rules, the delinquent has, in every case, an opportunity of orally explaining any circumstances appearing in the evidence against him]; rule 1709 of the Indian Railway Establishment Code. It is obvious that where any such right is denied, the quasi-judicial proceeding must be struck down [(156) State of Bombay (Now Maharashtra) Vs. Narul Latif Khan, What is worthy of notice in the present context is that, in the cited case, the Supreme Court has observed that such statutory rules are "plainly based on natural justice and fairplay (p. 143, *ibid*).

180. Once it is established that an opportunity to be heard personally is "based on natural justice and fair play", it need not be dependent on express statutory provision. It would follow from common law in those cases where natural justice can properly be invoked. In fact, oral argumentation or submission is included in particular cases, in the opportunity of "explaining the evidence" adduced against the person affected, of which the Supreme Court spoke in earlier cases, such as Union of India (UOI) Vs. T.R. Varma, (96) State of M. P. v. Chintaman, AIR 1961 SC 1623(1629).

That the right of oral argumentation is independent of and in a sense more important than the right to adduce evidence would be apparent from the following observation of a Division Bench of the Allahabad High Court, which echo the words of Crompton, J., in the leading case of (149) R. v. Archbishop of Canterbury, (1859) 1 E & E 545 (561). In the Allahabad case State of U.P. and Another Vs. C.S. Sharma, Mukherji, J. says-

When a man is heard in person he has a wider and more extensive opportunity of meeting the accusation made against him than when he gives evidence for evidence even given in person has got to be confined to facts, while a "hearing" is not confined to facts only but can be utilised for reasoning out a matter.

Therefore, a denial of this right may in some cases,..... amount to a denial of reasonable opportunity.

This is, indeed, supported by the observation of Subba Rao, J., in (51) Nageswara Rao's case [AIR 1963 SC 308 (327)]-

Personal hearing enables the authority concerned..... to clear up his doubts during the course of the arguments and the party appearing to persuade the authority by reasoned argument to accept his point of view.

Similar view as to the meaning of "reasonable opportunity", in relation to the first stage where the charges are to be inquired into on evidence has been taken by various High Courts, e.g., in (159) State of Punjab Vs. Karam Chand, ; (144) District Controller of Stores Eastern Railway, Lillooah, Howrah and Another Vs. Ram Govinda, ; (160) Ramesh Chandra Verma Vs. R.D. Verma and Others, ;

(161) C.S. Sharma Vs. State of Uttar Pradesh and Another,

181. I would be imputing irrationality to the constituent body which inserted article 217 (3) to hold that it intended to deny this right to a High Court Judge, having a tenure guaranteed by the Constitution, - who had all through been praying for an oral interview with the President, though a similar right would be available to a ministerial officer when he was going to lose his job by reason of an adverse decision by the authority concerned. The silence of the Constitutional provision may be due to the need for brevity of language in an organic instrument. In any case, it would not be material if the circumstances of the case were such that "natural justice and fair play" would require such an opportunity being given to the Judge.

182. In fact, where the requirements of natural justice are codified, by laying down the procedure to be followed, the principle to be applied is one of ultra vires and it is not necessary to invoke the principles of natural justice. Sometimes, the expression used is laconic, e.g., "due inquiry", in which case, the Court may be called upon to interpret the expression used by the Legislature, to see whether the decision in question has been rendered ultra vires by failure to comply with the requirements of that expression, as properly interpreted by the Court [vide (64) General Medical Council v. Spackman, (1943) AC 627 (640) HL; (25) Ridge v. Baldwin, (1963) 2 All ER 66 (120/c)]. Of course, even in such cases, there is nothing to prevent the court from reinforcing its decision by relying both upon ultra vires and natural justice [e.g., in (88) Calcutta Dock Labour Board v. Imam, (1965) II SCA 226(232-3); (25) Ridge v. Baldwin, (1963) 2 All ER 66(81, 104, 107, 109 (N), 116(D)]. The real utility of the doctrine of natural justice, however, arises where the statute is silent, because whether the statute is silent or not, the "substantial requirements of justice" must be complied with, once the function is held to be quasi-judicial. The argument of "silence" of the Legislature was indeed raised before the House of Lords in (19) Spackman v. Plumstead Board of Works, (1885) 10 App. Cas. 229(240) and the explanation given for such silence by the Earl of Selborne is unsurpassable-

But it appears to me to be perfectly consistent with reason, that the statute may have intentionally omitted to provide for form, because this is a matter not of a kind requiring form.....

There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice. (p. 240, *ibid*).

183. Nor is it correct to suppose that the right of personal hearing has any necessary connection with an accusation or disciplinary proceeding. It has been acknowledged by the Legislature and the Courts in various other proceedings, e.g., in the matter of objections to a scheme under the Motor Vehicles Act, 1939 [cf. (51) Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, ; in the matter of fixing "the general line of

buildings" [(19) Spackman v. Plumstead Board of Works, (1885) 10 App. Cas. 229, - a case which has been referred to earlier]; in the matter of making an order against a building society, to protect the interests of investors, under the proviso to section 11(1) of the Prevention of Fraud (Investments) Act, 1958 [vide (53) R. v. Registrar of Building Societies, (1960) 2 All ER 549 (551; 557; 558; 559; 564)].

184. It has been acknowledged that even where there is no statutory right to be heard orally, much less to be assisted by a lawyer, there may be circumstances where professional help must be offered to a person charged to make his right to be defended a real one, e.g., where the subject-matter of inquiry is technical or complicated [(162) Nitya Ranjan v. State, AIR 1962 Ori 78 (84)]; or where the evidence is voluminous [(163) Nripendra Nath Bagchi Vs. Chief Secretary, Govt. of West Bengal, ; or where an expert has been examined in support of the charge [(164) Harischandra v. Registrar, (1966) 12 FLR 141 (144)] or where the case of the petitioner was that the inquiry was the result of a pre - conceived plan and the petitioner sought to challenge the opinion of a Medical Board [(165) Dr. K. Subba Rao Vs. State of Hyderabad (now Andhra Pradesh) or where the inquiry involved a question of law [(166) Jagmohandas Jagjivandas Mody Vs. State of Bombay (Now Gujarat State),

The reason is that what constitutes a, "reasonable opportunity" to defend would depend upon the circumstances of each case as the Supreme Court has observed even in (141) S. Kapur Singh Vs. Union of India (UOI),

In the instant case, the petitioner did not ask for representation by counsel. He only wanted to explain his case and the evidence before the President, including the expert's reports. What advantage could eventually be gained by the petitioner from such oral interview is not a relevant consideration in this context.

185. It may, however, be still contended that persuasion by argument need not necessarily be oral; it may be made by writing as well.

The foundation of such contention is the observation of Hamilton, J. in (74) R. v. Local Government Board, (1914) 1 KB 160 (192-3) CA, which has been cited by the learned Advocate-General:

It is said that a written argument is an illusory thing, that there is no eloquence or at least no persuasion but in speech.....

The appellant desires to enjoy what Mr. Upjohn felicitously calls "the bound and rebound of ideas and arguments between the Bench and the Bar". This invests with authority a practice..... of judges, which I had believed to be pardonable and hoped to be not without its uses, but I am unable to see that it is the very pith of the administration of natural justice.

The above observation of Hamilton, J. received approval from Viscount Haldane, on appeal. It is also true, as the learned Advocate-General has pointed out, that even the majority Judge Vaughan Williams, J. in Arlidge's case [(1914) 1 KB

160(180)] said that the appellant had no right "to see the judge face to face or to address him viva voce" but was entitled only "to have placed before the personal judge who was going to pronounce a decision on a written argument."

But we cannot overlook, at the same time, that while approving of the above viewpoint and the observations of Hamilton, J. just cited, the Lord Chancellor, on appeal [(58) Local Government Board v. Arlidge, (1915) AC 120(134) HL] said-

I do not think the Board was bound to hear the respondent orally, provided it gave him the opportunities he actually had.

It is obvious, *ex facie*, that the Lord Chancellor (Lord Haldane) did not intend to lay down any universal proposition but only laid down that in view of the opportunities which the respondent already had at the stages prior to the matter coming up to the Board of Local Government, he was not entitled, further, to an oral hearing before the Board itself. It is, therefore, not possible to appreciate the implication of Lord Haldane's observation in question, without examining the facts of that case as would appear when (1915) AC 120 is read with the judgment of the Court of appeal in (1914) 1 KB 160.

186. In fact, the observations of Viscount Haldane in Arlidge's case, (1915) AC 120(134), have been misunderstood in some cases, both in England and in India, simply because they were not elaborated, and the time has come to reconsider the implications of the laconic expressions used by the Lord Chancellor in that case, in the light of the weighty observations of Sankey, J., in (150) R. v. Housing Tribunal, (1920) 3 KB 334(345),-

In Arlidge's case, it will be observed that Mr. Arlidge had obtained what has been denied to the appellant in the present case. There the order of the Local Government Board which was complained of was made after a full and careful consideration of the report of their inspector, and the evidence and the documents accompanying those reports. A large number of observations and objections put forward by Mr. Arlidge's solicitors were also considered, and before a final determination was come to Mr. Arlidge was invited to place before the Board for their consideration any further statement which he might desire them to consider.

The following were the facts in Arlidge's case on the point before me :

(a) The Local Government Board, headed by the Minister, was vested by the relevant statute, with appellate power.

(b) The Board had the power to direct a public inquiry to be held by the Health Inspectors before disposing of the appeal. Such public inquiry, where held, would thus be a part of the appellate proceedings before the Board itself, - the Health Inspectors being a limb of the appellate authority.

(c) At such public inquiry, any party interested was entitled to appear and state his case orally.

(d) In Arlidge's case, the appellant did actually appear before the Inspectors and argue his case through his solicitors, apart from laying evidence.

(e) The Board acted upon the report of the Inspector without hearing the appellant orally again.

It was on the above facts that the House of Lords [(1915) AC 120(134)] held that since the appellant had the opportunity to present his case orally before the Inspectors appointed by the appellate authority at the public inquiry, he could not insist that he should have a subsequent additional hearing before the Board, analogous to a proceeding before a court of law. The inquiry by the Inspectors was treated as a part of the appellate proceeding on the ground that the Minister was not in a position to do everything personally in view of his other commitments. The House of Lords did not say that the appellant need not have any opportunity of presenting his case orally at any stage of the appellate proceeding but merely said that because such an opportunity had been offered at an earlier stage and availed of, there was no obligation, in the absence of an express provision in the statute that the appellant should again be heard by the Board itself.

187. The decision in Arlidge's case is thus no authority for the proposition that an appeal can be disposed of without hearing arguments on behalf of the appellant which he desires to advance, when notified of the date fixed for hearing of the appeal. What it lays down is that if such arguments have already been heard before a limb of the appellate tribunal which makes a public inquiry and takes evidence, it need not be repeated when the appellate tribunal gives its decision on the basis of the report of that limb of the appellate authority itself.

The observation of Lord Haldane in question may indeed be likened to the observation in (167) AIR 1948 121 (Privy Council) which I have referred to in another context. But, as I have said, there are no two stages in the proceeding under article 217 (3); the responsibility is solely that of the President from the beginning to the end and it is he who has to decide on the basis of the materials on the record, together with the advice tendered by the Chief Justice of India.

188. Whatever be the strength of the case for oral argument in ordinary cases, it is definitely irresistible where the evidence relied upon against the person affected is expert evidence which has been taken in the absence of that person.

189. It is a basic principle of natural justice, that, ordinarily, no material testimonial or documentary, evidence should be collected at the back of the person against whom it is sought to be used [(47) Errington v. Minister of Health, (1935) 1 KB 249(CA); (97) R. v. Westminster Assessment Committee, (1940) 4 All ER 132; (157) Union of India (UOI) Vs. T.R. Varma, ; (168) Dhakeswari Cotton Mills Ltd. Vs. Commissioner of Income Tax, West Bengal, There may, however, be cases where it is not possible to take the evidence in the presence of the accused. In such cases, the requirement of natural justice may be satisfied if the affected person is offered an adequate opportunity of rebutting such material

[(78) Weinberger v. Inglis, (1919) AC 606(636); (66) Board of Education v. Rice, 1911 AC 179(182); (169) Mahadaya! Premchandra Vs. Commercial Tax Officer, Calcutta and Another, ; (170) R. v. Padding ton Rent Tribunal, (1949) 1 All ER 720 (727)].

The question, therefore, arises as to what would be a reasonable or adequate opportunity to rebut such material which has been so collected against the person to be affected by it. Ordinarily, such opportunity is given by communicating to him the evidence so collected and calling upon him to adduce any evidence of his own which he may like to tender to rebut the material in question. But it is not correct to say that the fight of the person, so affected, is confined to mere cross-examination or tendering counter-evidence. As pointed out in (154) R. v. Deputy Industrial Injuries Commission, (1962) 2 All E.R. 430, the person affected may, instead of or in addition to producing evidence of his own, make his submissions on the evidence so collected. The latter right becomes all the more important where it is an expert evidence, such as that of a forensic expert, which has been collected in the absence of the aggrieved person,- as in the case before me. In the case just cited, the statutory tribunal, after the close of the hearing, consulted a medical specialist on the question whether the applicant's arthritis could be caused by reason of his being inoculated, at the instance of his employers, against poliomyelitis, and, gave his decision on the basis of the advice given by that specialist, without either communicating it to the applicant or giving him an opportunity of "commenting on it". Certiorari was granted, quashing the decision of the tribunal.

In the case before me, this right of "commenting and making submissions" on the report of the Government Expert, Dr. Aiyengar, has been denied to the petitioner, because the petitioner sought to do it verbally and he was never told that the decision would be arrived at without giving him any oral interview.

190. VI. The special circumstances of the instant case which called for an oral interview with the President before the impugned decision was made, to satisfy natural justice, thus, are :

(a) The nature of the evidence sought to be used against him.

From the Home Secretary's letter at p. 122 of the petition, it is clear that the Government proposed to rely not only upon the documents produced on its behalf to show the petitioner's age at the time of the Matriculation and the Civil Service Examinations, but also on the failure of the petitioner to substantiate his own case, since the horoscope and almanac, relied upon by the petitioner were apprehended to be got-up for the purpose of supporting his case, having regard to the fact that the document; could not have been prepared contemporaneously with the date of his birth, as given by the petitioner.

Apart from the fact that the Government expert's opinion was hesitant as he had expressed the opinion several times that the age of the disputed documents could not be definitely ascertained by any expert in the world (vide p. 58 of the

File), it was coloured by the statement by the Home Ministry that the petitioner's case was that the horoscope had been prepared contemporaneously with his birth (pp. 21, 58 of the File). If this assumption was wrong, the inference drawn from the opinion of the Government expert that the horoscope had been prepared in 1909 or 1912 must to that extent fail. Whether this contention of the petitioner was right or wrong on the merits, it is no business of mine to determine in this proceeding.

191. Suffice it to say that it would have been possible for the petitioner to point out to the President, had a personal hearing been offered to him, that he had never stated that the horoscope in question was prepared at the very moment of his birth, and to point out that as far back as 1961, he had stated in his writ petition before the Punjab High Court (vide p. 129 of the petition) that the horoscope was made "while your petitioner was but a few years old." There is apparent force in the contention of the petitioner that in the ordinary course of human affairs it is difficult to expect that a horoscope, - which is larger than a mere birth-chart and the preparation of which involves time and labour, would be made contemporaneously with the birth of a child.

In this connection, it has been urged by the petitioner that, even apart from this, there was none to explain to the President the mass of papers on the record upon which the President was to come to a decision, because even the consultation with the Chief Justice did not take place at any formal sitting between him and the President. In such circumstances, there is force in the petitioner's contention that, in the absence of a hearing offered to the petitioner, there was not only no adequate presentation of the petitioner's case resting on family documents in the Bengali language, but, more than that, the President had no alternative other than to assent to what had been recommended by the Home Minister and the Prime Minister, namely, to act as advised by the Chief Justice.

(b) The interpretation of article 217 (3) in *Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*,

192. The contention of the petitioner is that the interpretation given to article 217 (3) by the Supreme Court in *Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, itself involves a personal hearing. Before we go to the observations relied upon by the petitioner, I would like to point out that the learned Advocate-General has, on the other hand, relied upon the observations in paragraph 29 of the same report in support of his contention that the Supreme Court intended nothing more than that the petitioner should be allowed to adduce evidence in support of his case before a contrary decision could be arrived at by the President (para. 27 of the Counter-Affidavit). But that the Supreme Court did not expressly mention that personal hearing must be offered by the President is not conclusive upon the question if that obligation follows from the requirements of natural justice, which the Supreme Court has said, more than once (vide paras. 21, 29, *ibid*), must be

complied with in the proceeding under article 217 (3). The omission to specifically mention "personal hearing" may be due to the obvious fact that the Supreme Court did not intend to lay down exhaustively all the ingredients of natural justice merely because it was not possible to anticipate all the situations that might arise in the various proceedings under article 217 (3) as might crop up in the future. We have, therefore, to inquire whether, in the circumstances of the case, natural justice required that personal hearing should have been offered to the petitioner.

193. It is true that one of the reasons why the court did not accept the prior order of "approval" by the President as a decision under article 217 (3), which had been inserted with retrospective effect, was that at that time the decision was arrived at on the sole basis of the Matriculation age of the petitioner as disclosed in the Bihar & Orissa Gazette, without any evidence adduced by the petitioner to support his case. It is also true that on that occasion (para. 29), the petitioner refused to produce any evidence of his own on the ground that the Home Ministry, - the Executive department of the Government, - was not competent to determine the question about his age; but this contention and the petitioner's consequent refusal to adduce evidence in the circumstances were upheld by the court and that is why the court directed that there should be a fresh decision by the President after calling for evidence on behalf of the petitioner. So said the court-

Bearing in mind the fact that the appellant was justified in contending that his age could not be determined by the Executive in proceedings initiated by it, the impugned order passed by the President must be held to suffer from the serious infirmity that the evidence of the appellant was not available to the President when he reached his decision..... considerations of natural justice and fair-play require that before this question is determined by the President, the appellant should be given a chance to adduce his evidence" (para. 29).

But, seeing that the court definitely laid down (in para. 29, *ibid*) that "the concept of fair play and natural justice ought to govern the enquiry contemplated by article 217 (3)", it is difficult to agree with the learned Advocate-General that the court intended to lay down that the demands of natural justice would be satisfied if only the petitioner was allowed to lay his own evidence. It is settled beyond any doubt that where both parties adduce evidence, each party has the right to demolish the evidence adduced by the other party (apart from laying substantive evidence on his own behalf), say, by cross-examination where the adversary's evidence is testimonial [vide (83) *Osgood v. Nelson*, (1872) 5 HL 636(646; 650); (171) *Khem Chand Vs. The Union of India (UOI)and Others*, Paragraphs 18-19; (157) *Union of India (UOI) Vs. T.R. Varma*, ; (172) *State of Mysore Vs. S.S. Makapur*, except where the person aggrieved does not seek an opportunity to cross-examine, or his right, having regard to the nature of the proceedings, is confined to the minimal right of making a representation [(50) *Ceylon University v. Fernando*, (1960) 1 All ER 631(641-2) PC] - which is not the

case here, according to Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, itself.

194. Apart from cross-examining the prosecution witnesses, the person affected may demolish the evidence adduced against him by "explaining" or "making comments" on that evidence. I have referred to a number of authorities which say that in certain circumstances the person affected may be entitled to this additional right, having regard to the circumstances of the case. It is to this additional right that the Supreme Court refers by the words "contention" and "version" in paragraph 21 of Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, on which the Petitioner relies. The relevant passage is:

It is also implicit in this provision that before the President reaches his decision on the question, he ought to give the Judge concerned a reasonable opportunity to give his version in support of the age stated by him at the time of his appointment and produce his evidence in that behalf. How this should be done, is, of course, for the President to decide; but the requirement of natural justice that the Judge must have a reasonable opportunity to put before the President his contention, his version and his evidence, is implicit in the provision itself.

It is obvious that the Court was treating the right to place the Petitioner's "contention" and "version" separately from and in addition to his right to produce his own evidence. These words echo the words "stating their case and their view", necessitating a personal hearing, which was considered to be of "the essence of justice" in (19) Spackman v. Plumstead Board of Works (1885) 10 App. Cas. 229 (240) H.L., as pointed out earlier.

(c) An alternative to. impeachment.

193. If I am right in my view that the requirement of personal hearing being an essential ingredient of natural justice depends upon the gravity of the question to be decided, it cannot be overlooked that, as pointed out by me earlier, the procedure introduced by Art. 217 (3) was, in substance, a substitute for the procedure for impeachment, at which the person impeached gets an opportunity to be heard personally, as at a trial in Court, according to the foreign precedents from where our Constitution has adopted the system of impeachment.

(d) The assurance of the Government that oral hearing would be offered.

194. The refusal of the opportunity to meet the Petitioner appears to have been unnecessary, having regard to the status of the petitioner, and to the fact the Home Ministry had on several occasions made statements (pp. 102,114 of the Petition- 20/c; 42/c of the File), which might have induced him to believe that he would have an opportunity of explaining his case orally to the President, for which he had been insisting from the very beginning (vide pp.5/c; 9/c; 71/c of the File; pp. 128, 132 of the Petition). More remarkable is the fact that the draft of the first letter just referred to was issued with the approval of the Chief Justice

of India and the President's Secretarial (vide noting in the File, pp. 5-6n).

195. At one stage on the File it was supposed that the petitioner had waived his claim for personal hearing by using the words "grant me an audience, if at all necessary," in the telegram at p 69"c. But these words must be read along with-

(i) the preceding statement in the telegram that Dr. Iyengar's report supported the petitioner's case (if the President accepted this contention of the petitioner, communicated by the telegram to the President no further personal hearing would, evidently, be needed by the petitioner);

(ii) the contents of the letter at p. 71/c, which was contemporaneous with the telegram.

It is clear that the petitioner never abandoned his claim to be personally heard by the President before he gave his decision.

It is conspicuous that though in his letter of 21.12.64. the Home Ministry made it clear that no oral evidence of witnesses would be received (p. 20/c of the File), at no stage was the petitioner told that he would not have an opportunity to make oral arguments. - not even in the final letter of 13.8.65 (p. 66/c).

In fact, as I have shown in another context, though the learned Chief Justice of India advised that it was for the President himself to decide whether he wanted to hear the petitioner in person, the President's decision on this point was never obtained. To all this, the comment of the learned Advocate-General is that since there was no legal obligation, under article 217 (3), the fact that there was an unnecessary suggestion to this effect at a prior stage of the proceeding was immaterial. The position, however, becomes otherwise if, according to the rules of natural justice, such hearing became necessary, in the circumstances of this case.

The unreasonableness of the refusal has to be considered along with the fact that there was no allegation that the petitioner was seeking to influence the President. Even if there was any such apprehension, the interview could be arranged to take place in the presence of the Chief Justice of India, who was to be "consulted" by the President by the terms of the Constitution.

The refusal of personal hearing has enabled the petitioner to contend-

(a) that it is the Home Ministry which has induced the President to come to the same conclusion as the Home Ministry had arrived at before and prevented the President from maintaining an open mind;

(b) that the petitioner did not adduce any further evidence of his own on the assumption that he would be granted an interview as promised earlier at which he would be able to convince the President that the expert's report really supported his version as to his age. [As to the effects of such an assurance, we may refer to the observations in *Haque v. Board of Revenue*. AIR 1956 Ori 103(105)].

Whether such apprehensions are real or not, it is not for this court to determine. The court has to interfere wherever it appears that justice has "not been seen to be done" [R. v. Sussex, J J., (1924) 1 KB 256(259), approved in (49) Franklin v. Minister of Town Planning, (1947) 2 All ER 289 (HL)]. Irrelevant considerations.

196. It was faintly suggested that since the petitioner did not accept the opportunity of adducing "rebuttal evidence" as offered by the letter at p. 66/c of the File, it must be presumed that he has no case on the merits and that it would be idle to give him a personal interview or to make a fresh hearing, excluding the Ministry from the picture. This contention cannot, however, be upheld, because when the jurisdiction of the court is invoked on the ground of denial of natural justice or on any other ground relating to the violation of the quasi-judicial obligation, the issue before the court is not whether the decision of the quasi-judicial authority is "right or wrong" but whether the requirements of natural justice or the like have been complied with [(50) University of Ceylon v. Fernando. (1960) 1 All ER 631(642)) PC].

A contention that since Spackman's guilt had already been found by a competent court, it would be useless to have the matter heard again by the Medical Council having been raised in Spademan's case, (1943 AC 627 (644) HL, was rejected by the House of Lords in the following words of Lord Wright-

If the principles of natural justice are violated in respect of any decision, is,, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no derision.

It follows that the person affected by a denial of natural justice is entitled to have such decision set aside without establishing, further, prejudice or actual injury [(174) Annumunthodo v. Oilfields Workers, (1961) 3 All ER 621 (625) PC], because the decision is a nullity, as pointed out in Spackman's case, in the passage just cited [see also (93) State of Orissa v. Binapani, (1967) SC CA 499/65; (175) State of U. P. v. Nooh, AIR 1958 SC 86(94)].

To put it otherwise, if a decision is a nullity, common law will ignore it, even though the same conclusion might be reached if it were determined again, in accordance with the law. The reason, in the words of Lord Morris in Ridge's case, (1963) 2 All ER 66(102), is-

.... here is something basic to our system; the importance of upholding it far transcends the significance of any particular case.

It is this sentiment which has been echoed by our Supreme Court, in relation to the common law jurisprudence as adopted in India, in the case of (93) State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, -

That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.

197. For the same reason, once it is held in the case before me that the impugned decision is not in conformity with the mandate of article 217 (3). as explained by the Supreme Court in (3) Jyoti Prokash Mitter Vs. Hon''ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another, the consideration that the petitioner's case has been already examined by the highest judicial authority in India, even though out of court, (Ann. X to the additional Affidavit - in - Opposition) and that the issue, as stated by him was a simple one, namely, whether the entries in the official records for the purposes of the Matriculation Examination and the Civil Service Examination, contrary to the Petitioner's version, had been sufficiently explained by the Petitioner, becomes patently immaterial. In short, the requirements of Art 217, read with the principles of natural justice, must be complied with even though the chances of the Petitioner's success on the merits may not be bright at all.

The question before me in the instant proceeding is not whether the Petitioner has declared or suppressed his real age or whether his conduct is worthy of approbation or denunciation but whether the impugned order is in conformity with the requirements of art. 217 (3), including the principles of natural justice which have been held to be implicit in the provision by the highest Court of this land.

198. Similarly, if it is held that the impugned order is not a "decision" under Art. 217 (3) of the Constitution, considerations of delay, administrative inconvenience or the like involved in making a fresh determination in accordance with law cannot stand in the way. The answer to any such plea was offered by Lord Atkin in *Spademan's case* (1943) A.C. 627(638)]

Convenience and Justice are often not on speaking terms.

More elaborately, Lord Morton explained this principle in (31) *Vine v. National Dock Labour Board*. (1956) 3 All E.R. 939 (945) H.L.-

..... if delegation was not permissible, the dismissal of the plaintiff was a nullity and this House must so hold, however unfortunate may be the result to the National Board in the discharge of its heavy and important duties.

199. Nor has ultra virus or denial of natural justice anything to do with the bona fides or otherwise of the authority in question. In (16) *Cooper v. Wilson*, (1937) 2 All ER 726 (745), Scott, L.J., said-

However well-intentioned the Watch Committee may have been personally in their desire to do their duty, which I do not doubt, the Committee constituted as a quasi-judicial court to hear the appeal failed to conform to those requirements. It follows from this conclusion that there was in law no decision by the Watch Committee.....

The same thing has been said by the Judicial Committee in (61) *Estate and Trust Agencies v. Singapore Improvement Trust*, (1937) 3 All ER 324 and in (176) *Kanda v. Government of Malaya*, ((1962) AC 322(338) PC.

200. Even the fact that the placing of the matter for the formal decision of the President took place at the suggestion of the petitioner, as recorded at page 970 of *Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, also cannot stand in the way of the petitioner's getting relief, if he has succeeded in establishing that the impugned order is no decision under article 217 (3) and is, accordingly, a nullity. As observed by the House of Lords in (25) *Ridge v. Baldwin*, (1963) 2 All ER 66 (81, 110, 116, 119), no amount of waiver or acquiescence, can, in such circumstances, resuscitate a nullity.

Conclusions.

201. I, therefore, conclude that the impugned order of the President (Ann. Y to the additional Counter-Affidavit), the purport of which was communicated to the petitioner by the letter of the Home Secretary, dated 13.10.65 (p. 133 of the petition), is not a "decision" of the President in terms of article 217 (3). because-

A. Whether the function is quasi-judicial or administrative - he acted as recommended by the Home Minister and the Prime Minister, who are extraneous to the function under article 217 (3);

B. The function being quasi-judicial,:

(i) the President was not given sufficient time and opportunity to exercise his independent judgment on the question before him;

(ii) the petitioner was not given a personal hearing before the President, as called for by the circumstances of the case.

C. The jurisdiction of this court to interfere on the above grounds is not barred by the finality clause under article 217 (3).

Order.

202. Sitting in the jurisdiction under article 226 of the Constitution, this court has the power to give relief in such modified form as may be required in the circumstances of a case, irrespective of the relief asked for. As I have suggested, at the outset, in the light of the order passed by the Supreme Court in *Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, the proper order in the instant case should be as follows :

Let the respondent be directed not to give effect to the order at Ann. Y to the Additional counter-affidavit, as communicated by the letter of the Home Secretary, dated October 13, 1965, which is at p. 133 of the petition. The respondent may, if so advised, place the matter before the President again, within two months from this date, inviting him to decide the age of the petitioner, in accordance with article 217 (3).

The Rule is made absolute on the above terms, and without any order as to costs.

203. After the above judgment is pronounced, the petitioner submits that in pursuance of the findings given in this judgment he should get relief by way of Writ of a Certiorari to quash the impugned order of the President and that there should not be any further direction to place the matter again before the President for a proper decision under article 217 (3) of the Constitution, firstly, because that has not been asked for by the respondent" in its counter-affidavit and, secondly, because the President has no jurisdiction under article 217 (3) to give a decision under article 217 (3) after a Judge ceases to be a sitting Judge.

Since I have already given reasons as to why I have made a modified order, nothing more need be said at this stage. As to the second point raised, a liberty to proceed afresh according to law is a usual concomitant in a proceeding for mandamus and it is not possible for the court, while giving such liberty to anticipate the nature or incidents of the exercise of that option. The respondent will do that at its own risk and subject to the right of the petitioner to pursue the fresh cause of action, if any, arising from such exercise. The petitioner's objections are thus disposed of. Mr. Salil Kumar Dutt, appearing on behalf of the respondent, makes a verbal prayer for a certificate under article 132(1) of the Constitution. I have no doubt that the case involves a substantial question of law as to the interpretation of article 217 (3) of the Constitution, as I have stated at the beginning of my judgment, and other connected articles.

Hence, the certificate asked for be granted under article 132(1) of the Constitution and as prayed for further, the operation of this order will remain stayed for a period of six weeks from this date.