

**(1969) 03 GAU CK 0004**

**In the Gauhati High Court**

**Case No :** Civil Rules No's. 308, 316 and 323 of 1968

Premadhar Baruah and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

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**Date of Decision :** 28-03-1969

**Acts Referred:**

Assam Liberalised Pension Rules — Rule 1(2)  
Constitution of India, 1950 — Article 13(3), 14, 226, 309, 310  
Railway Establishment Rules — Rule 148(3)

**Citation :** (1969) 03 GAU CK 0004

**Hon'ble Judges :** S.K. Dutta, C.J.; M.C. Pathak, J.; K.G. Sen, J

**Bench :** Full Bench

**Advocate :** J.C. Medhi, K. Lahiri, K.N. Saikia, G. Baruah, M. Sulaiman and N. Chakarvarty, for the Appellant; B.C. Baruah, General, G.K. Talukdar, Sr. Govt. Advocate and A.M. Mazumdar, Jr. Govt. Advocate, for the Respondent

**Final Decision :** Dismissed

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## Judgement

S.K. Dutta, C.J.—Civil Rule No. 308 of arises out of an application made by Petitioner under Article 226 of the Constitution of India praying for an appropriate writ quashing the order made the Examiner of Local Accounts, Gauhati ordering the compulsory retirement of the Petitioner with effect from the 1st October, 1968. The Petitioner's case is that he was appointed on 18-8-41 as a Typist and was confirmed in the -post of Assistant Auditor on" 6-5-46. Thereafter he held the post of Auditor, Local Accounts, Assam, in which he was confirmed on 1-4-50. He was born on the 1st January 1913 and would have retired on the 1st of January 1968 on completion of 55 years of age. But the Government of Assam issued an order in the form of a memorandum dated the 21st March 1963 raising the age of superannuation from 55 to 58 years subject to two conditions viz. (1) physical fitness and (2) efficiency, to be certified respectively by prescribed authorities. The Petitioner was found physically fit and certified to be efficient. He was retained in service after the age of 55 years. But he received the impugned notice from the Examiner of Local Accounts, Gauhati

on the 7th May, 1968 terminating his service with effect from the 1st October. 1968. The notice was purported to have been issued under paragraph 4 of the Memorandum dated the 21st March. 1963. This memorandum is as follows:

GOVERNMENT OF ASSAM APPOINTMENT (A) DEPARTMENT APPOINTMENT BRANCH. No. AAP. 217/62/15 dated 21-3-1963. OFFICE MEMORANDUM

Sub : Raising of age of compulsory retirement of State Government employees.

Government have been considering for sometime past the question of raising the age of compulsory retirement of Government servants from 55 years to 58 years, Sometime back, orders were issued that pending a final decision on the subject, Government servants who are due to retire on or after 16th February, 1963 should be continued in service until further orders. It has now been decided that the age of compulsory retirement of State Government servants should be 58 years.

2. This decision will apply to all Government servants who retired or will retire on or after the 1st December, 1962. Government servants who were on leave preparatory to retirement on 1st December, 1962 will be entitled to this benefit. Government servants who were on refused leave from a date prior to 1st December, 1962 will not be entitled to the benefit of the increased age of compulsory retirement. This will also not apply in case of Government servants who having reached the age of superannuation on a date prior to 1st December, 1962, have been allowed extension of service. Persons who have been allowed to continue in service vide Government Memo. No. AAP 217/62A dt. 18th February, 1963 will be entitled to this benefit.

3. No Government servant will be entitled to the benefit of the increased age of compulsory retirement unless he has been permitted to continue in service after the age of 55 years after the appointing authority is satisfied that he is efficient and physically fit for further Government service. The procedure to be followed by the appointing authorities before they permit a Government servant to continue in service is outlined in the Annexure. This procedure should be followed even in case of those who were continued in service in pursuance of Government orders communicated, vide Memo No. AAP. 217/62A dated 18th February, 1963.

4. Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on 3 months" notice without assigning any reason. This will be in addition to the provisions already contained in Rule 1(2) of the Assam Liberalised Pension Rules to retire an officer who has completed 30 years" qualifying service or 25 years" qualifying service as the case may be. The Government servant also may after attaining the age of 55 years voluntarily retire after giving 3 months" notice to the appointing authority.

5. The age of compulsory retirement of Grade IV staff who are at present entitled to serve up to the age of 60 years including new entrants will continue to be 60

years.

6. As regards regularisation of the period of absence of those who retired on or after the 1st December, 1962 till the date of assuming duties, a separate communication will follow.

7. These provisions will have effect from 1st of December, 1962.

8. Necessary amendments to the relevant rules will be issued, in due course.

Sd. A. N. Kidwai, Chief Secretary to the Govt. of Assam.

2. In the annexure the procedure for finding out the physical fitness and the efficiency of the Government servant is laid down.

3. The first question that arises is whether the above memorandum has any force of law. If the memorandum merely creates a contractual right between the parties, and not a legal right, obviously no mandamus can be issued for enforcement of any right of the Petitioner. In the case of Bansi Ram Das v. Secy. to Govt. of Assam, Education (General) Dept. Civil Rule No. 319 of 1966 : AIR 1969 Gau 46 a Division Bench of this Court held that the memorandum having statutory sanction behind it, had the force of law That Bench considered the decision of the Supreme Court in the case of I.N. Saksena Vs. State of Madhya Pradesh, In that case the Government of Madhya Pradesh issued a memorandum (hereinafter called the M. P. memorandum) similar to the one which is under consideration in the instant case. By this memorandum the age of superannuation was raised from 55 to 58 years. Paragraphs 5, 6 and 7 of the memorandum were as follows:

5. Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' notice without assigning any reason. . . the power will normally be exercised to weed out unsuitable employees after they have attained the age of 55 years. A Government servant may also after attaining the age of 55 years voluntarily retire after giving three months' notice to the appointing authority.

6. These orders will have effect from the 1st March 1963.

7. Necessary amendments to the State Civil Service Regulations will be issued in due course.

4. In consequence of this memorandum, one Sri I. K. Saksena who was a District and Sessions Judge in the service of the State of Madhya Pradesh and who would have otherwise retired in August, 1963 on attaining 55 years of age continued service. On the 11th September, 1961 the Government sent an order deciding to retire him on the 31st December, 1963 On November 29, 1963, F. R. 56 was amended raising the age of superannuation from 55 to 58 years. In that rule the condition laid down in Paragraph 5 of the M. P. memorandum was not incorporated. Sri Saksena by a writ petition before the High Court challenged the

order dated the 11th September, 196(sic) retiring him from service. His contention was two-fold viz. (1) that the rule which was framed, did not reserve (sic) power to the Government to retire (sic) employee on three months" notice; (sic) that his compulsory retirement cast (sic) stigma on him and therefore Article 311(2) of the Constitution was attract Under the said Article a Government servant could not be removed from service without being given a reasonal(sic) opportunity to be heard.

5. The High Court held that the (sic) retiring the Appellant cast no stigma (sic) him. It further held that the memorendum itself was a rule under Article (sic) of the Constitution and the appell(sic) therefore could not get the benefit of (sic) amended rule. The Supreme Court that as the order for compulsory retirement did not contain words which cast Stigma, Article 311 as not attracted. It further held that the memorandum was not a rule but a mere executive instruction.

6. Then It was urged that IX the memorandum did not amount to a rule under Article 309 of the Constitution, the Appellant would have to retire in August 1963 and therefore, could not take advantage of the rule published in December, 11963"fixing the retirement age at 58 years. This argument was repelled by the Supreme Court. It was pointed out that under the second part of the first paragraph of F. R. 56, the superannuation age could be extended by the Government by an individual as well as a general order. We may at this stage state the relevant portion of F. R. 56.

F.R. 56. - (a) The date of compulsory retirement of a Government servant is the date on which he attains the age of 55 years. He may be retained in service, after this age with the sanction of the State Government on public grounds which must be recorded in writing, and proposals for the retention of a Government servant in service after this age should not be made except in very special circumstances....

7. The Supreme Court held that the memorandum was a general order under E. R. 56 and therefore it has as much force as that rule. It was observed as follows:

It is true that the extension contemplated by this rule was generally for individuals and an individual order is passed in such a case. But we see nothing illegal if the Government came to the conclusion generally that services of all Government servants should be retained all the age of 58 in public interest. In such a case a general order would be though and no individual orders need be passed. We are of opinion that the memorandum of February 28, 1903 is merely in the nature of such a general order of extension of service by Government under F. R. 56 as it existed on that date. It seems that the Government bought it proper in the public interest (sic) retain all Government servants up to (sic) age of 58 under F. R. 56 and these executive instructions must be taken to provide such retention till a proper rule, (sic) envisaged in the memorandum came to be made. As we have indicated already we see nothing in F. R. 56 as it (sic) which would in any way bar the Government from passing such a general order

retaining the services of all Government servants up to the age of 58, though one would ordinarily expect an individual order in each individual case (sic)er that rule.

The Division Bench of this Court, (sic) in Bansi Ram Das's case, Civil Rule No. 319 of 1960 : AIR 1969 Gau 46(mentioned above) that the general order being issued under F. R. 56, it had statutory sanction and as such the force of law. If the memorandum issued by the Madhya Pradesh Government did not have the force of law, Sri Saksena could not remain in service beyond 55 years of age which was the superannuation age fixed by F. R. 56 as it stood at the time. In Assam also, under F. R. 56 the superannuation age continued to be 55. How could it be raised to 58 by a mere executive order, if such an- order had no force? The Petitioner could not continue in service after he attained the age of 55 in view of F. R. 56, had the memorandum no legal force.

9. In this connection we may also refer to the case of The State of Madhya Pradesh Vs. G.C. Mandawar, The facts of that case are briefly as follows. The Central Government on the recommendation of the Pay Commission, adopted a scheme for grant of dearness allowance to its employees. The M. P. Government on the recommendation of its Pay Committee, adopted a resolution granting dearness allowance to its employees on a scale which, though practically identical with that granted by the Central Government in respect of salaries above Rs. 400/- per month, was less than it, as regards salaries of Rs. 400/- per month or Jess. One G. C. Mandawar challenged the resolution of the Madhya Pradesh Government by a writ petition before the High Court on the ground that it was discriminatory and thus violative of Article 14 of the Constitution. This contention was accepted by the High Court which issued a mandamus on the Government asking it to reconsider the resolution. It may be mentioned here that F. R. 44 laid down that the local Government might grant such allowance to any Government servant under its control and might make rules prescribing their amounts and the conditions under which they might be drawn. The resolution of the M. P. Government was under this F. R. The Supreme Court in an appeal filed by the State of M. P. against the aforesaid order of the High Court, rejected the contention of the Respondent that under F. R. 44, the Government had a duty to grant dearness allowance. Thereafter it went on to say as follows:

Mr. Nambiar, the learned Counsel for the Respondent, did not dispute the correctness of this position. But he argued that when once the Government passed a Resolution fixing a scale of allowance under Rule 44, that would be law as defined in Article 13 (3) (a) of the Constitution, and if that law infringed Article 14, it could be declared void. That is a contention which is clearly open to him, and the question therefore that falls to be decided is whether the Resolution dated 26-9-1948 is bad as infringing Article 14.

10. The Supreme Court found that the resolution was not discriminatory. Another contention was that the resolution and the Central Government scheme if read together were discriminatory. The Supreme Court held that the sources of

authority of the two "Statutes" being different, Article 14 had no application.... Thus the Supreme Court treated a resolution and a scheme adopted under a Fundamental Rule to be Laws.

11. In Article 13 (3) (a) of the Constitution, law has been defined so as to include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. An executive instruction which is an order issued in exercise of statutory power has no doubt the "force of law" and as such, it will be law within the above definition.

12. Dr. Medhi, the learned Counsel for the Petitioner, makes three submissions.

(1) Under paragraph 4 of the memorandum, three months" notice could be given before the employee reached the age of 55 years and not after.

(2) The compulsory retirement permitted by the above paragraph contravenes the provisions of Article 311 (2) of the Constitution.

(3) The aforesaid compulsory retirement is violative of Article 14 of the Constitution.

13. In paragraph 4 of the memorandum, it is said that "the appointing authority may require a Government servant to retire after he attains the age of 55 on three months" notice without assigning any reason". According to Dr. Medhi, this provision does not mean that the Government servant can be asked to retire on three months" notice "at any time" after he attains the age of 55 years. He contends that there can be no justification for importing the words "at any time" into the provision. The argument is that if the Government did not want to retain any employee after the age of 55, or if any employee did not want to remain in service after that age, the Government or the employee, as the case might be, should have given three months" notice before the employee reached the age of 55. I am not prepared to give such a meaning to this provision. The word "after" does not mean "on". It means "later". It may also be noted that the M. P. memorandum contained a provision under which an employee could be retired "after he attained the age of 55 on three months" notice". Shri Saksena was due to retire in August. 1963 when he attained the age of 55. But by virtue of the M. P. memorandum, he remained in service and the three months" notice was given to him only on the 11th September 1963. It was nobody's case either before the High Court or before the Supreme Court, that the notice on Sri Saksena was bad because it was served on him in September although he attained the age of 55 in August 1963.

14. As regards the next argument of Dr. Medhi, reference may be made to the case of Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., In this case the validity of Rule 148(3) contained in the Indian Railway Establishment Code was considered. This Rule empowered the appropriate authority to terminate the services of "other non-pensionable" railway servants after giving them notice for a specified period. The Supreme

Court held that this rule was void as it was hit by Article 311 (2) and Article 14 of the Constitution. It observed that compulsory retirement did not offend Article 311 (2). But compulsory retirement had two ingredients viz. the retirement must be before the age of superannuation and it must be after service for a specified period. But the above Rule 148 (3) allowed termination of service without reference to any specified period of service and as such it could not be treated as simple compulsory retirement. It was hit by Article 311 (2). The Supreme Court also pointed out in *I.N. Saksena Vs. State of Madhya Pradesh*, that if any stigma was attached to compulsory retirement, such retirement would amount to removal within the meaning of Article 311 (2).

15. In the instant case, paragraph 4 of the memorandum empowers termination of service only after an employee attains the age of 55 and before he is 58. Thus it provides for compulsory retirement which is not hit by Article 311 (2). In short, the Supreme Court held the above-mentioned Rule 148 (3) to be invalid as it provided for termination of service without reference to any specified period of service. Such a rule is undoubtedly hit by Article 311 (2) of the Constitution. But in the present case paragraph 4 provides for termination of service of an employee after he completes 55 years of his age. So, I hold that paragraph 4 of the memorandum does not offend Article 311 (2).

16. Rule 148 (3) of the Indian Railways Establishment Code was attacked also on the ground that it was hit by Article 14 of the Constitution. Two points were raised. Firstly that the Rule gave no guidance to the authority who would take action on it. Secondly, it was urged that the Rule discriminated between Railway servants and other public servants. *Gandragadkar, J.* (as he then was) said that as the second attack must be sustained. It was not necessary to express any opinion on the first one. *Das Gupta, J.* however, went into the first contention. He referred to the case of *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, and quoted the following passage from the judgment of the Supreme Court in the said case viz.:

A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification.

17. Then his Lordship went on to say:

Applying the principle laid down in the above case to the present Rule, I find on scrutiny of the Rule that it does not lay down any principle or policy for guiding the exercise of discretion by the authority who will terminate the service in the

matter of selection or classification; Arbitrary and uncontrolled power is left in the authority to select at its will any person against whom action will be taken. The Rule, thus enables the authority concerned to discriminate between two railway servants to both of whom EL 148 (3) equally applied by taking action in one case and not taking it in the other. In the absence of any guiding principle in the exercise of the discretion by the authority the Rule has therefore to be struck down as contravening the requirements of Article 14 of the Constitution.

18. There is no doubt that paragraph 4 of the memorandum gives a naked power to the appointing authority to sack any employee by giving him a three months notice and without assigning any reason. It may be noted that in the M. P. memorandum also it was provided that the appointing authority might require a Government servant to retire after he attained 55 years on three months' notice without assigning any reason but this power would normally be exercised to weed out insuitable employees after they attained the age of 55 years. But this provision was dropped and I think very correctly, when the Rule was made within a few months. In Assam, although it was said the memorandum that necessary amendment to the relevant rules would be issued in due course, this was never done although more than five years rolled by. The purpose of termination of service on three months' notice is not indicated in the memorandum. In Assam, therefore, a person who was found to be physically fit and efficient could be asked to retire on a three months' notice without any rhyme and reason. In short, under paragraph 4 of the memorandum, a person who was found physically fit and efficient could be allowed to continue in service till he was 58 years of age, whereas another person who satisfied the above conditions could be asked to retire on a three months' notice which could be served even on the very next day of his attaining 55 years of age. Thus two individuals similarly circumstanced, could be treated differently under paragraph 4 of the memorandum.

19. The learned Advocate-General submits that the employee has also been given the power to retire on a three months' notice and hence the power given to the Government is not arbitrary. The following observation of the Supreme Court in Motiram's case AIR 1964 SC 600, gives an answer to this contention:

It is true that the termination of service authorised by Rule 148 (3) or Rule 149 (3) contemplates the right to terminate on either side. For all practical purposes, the right conferred on the servant to terminate his services after giving due notice to the employer does not mean much in the present position of unemployment in this country; but apart from it, the fact that a servant has been given a corresponding right cannot detract from the position that the right which is conferred on the railway authorities by the impugned Rules is inconsistent with Article 311 (2), and so, it has to be struck down in spite of the fact that a similar right is given to the servant concerned.

20. Dr. Medhi points out that although all the Government servants were served with three months' notices terminating their service, exceptions were made in a

couple of cases. But in the present case the legal provision i.e. paragraph 4 having given unfettered power to the appointing authority is hit by Article 14. Here we are not concerned with the discriminatory administration of a law which is otherwise valid. Here the law itself is invalid. It may be further noted that the unfettered power is given not to the Government but to the "appointing authority" which is not the Government in all cases. The appointing authority in many cases, including the case before us is a subordinate authority. I therefore hold that Paragraph 4 of the memorandum is violative of Article 14 of the Constitution.

21. Lastly, the learned Advocate-General submits that under Article 310 of the Constitution, all Civil Posts are held at the pleasure of the Governor and that this pleasure is only subject to Article 311. The contention is that the pleasure can be exercised so as to abridge a Fundamental Right of an employee. This contention appears to be somewhat startling after the decision of the Supreme Court in *I.C. Golak Nath and Others Vs. State of Punjab and Another*, This contention was rejected by the Division Bench of this Court in *Bansi Ram Das's case* Civil Rule No. 319 of 1966 : (AIR 1969 Gau 46) . The doctrine of pleasure is derived from the English Constitutional law and based on the prerogative maxim ""The King can do no wrong". The British Parliament being supreme can abolish or amend a prerogative. But we have a written Constitution and our legislatures are not sovereign. The pleasure of the President or a Governor under Article 310 of the Constitution cannot be curtailed by any law made by Parliament or the legislature of a State, as the case may be. But that does not mean that the pleasure can be exercised so as to take away or curtail a Fundamental Right. The Fundamental Rights incorporated in our Constitution are inviolate. The Supreme Court has pointed out in *I.C. Golak Nath and Others Vs. State of Punjab and Another*, that they cannot be taken away by any other method than by another Constituent Assembly. On the other hand. Article 310 itself can be amended by the ordinary process of amending the Constitution laid down in Article 368. As pointed out by *Hidayatullah, J.* (as he then was) in his lordship's judgment in *I.C. Golak Nath and Others Vs. State of Punjab and Another*, (vide paragraph 141) absolute, arbitrary power in defiance of Fundamental Rights exists nowhere under our Constitution, not even in the largest majority. A Fundamental Right is sacrosanct and it is a sacrilege to violate it. The Supreme Court in *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, held Article 14 to be a command issued by the Constitution to the State as a matter of public policy. It was not even open to a citizen to waive it. It is obvious that the President or a Governor cannot exercise his pleasure under Article 310 so as to abridge or curtail a Fundamental Right.

22. Dr. Medhi has raised a minor point which I may dispose of now. The impugned notice, terminating the service of the Petitioner was given by the Examiner of Local Accounts. The Petitioner was an Auditor. Local Accounts. It is contended that under the Assam Local Funds Audit & Accounts Act 1930 the Government is the appointing authority of an auditor and as such the notice

should have been given by the Government. There is no force in this argument. Under the Assam Subordinate Audit Service Rules 1963, the Examiner of Local Accounts has become the appointing authority. Under Article 313 of the Constitution a law applicable to any public service remains in force until other provision is made. Hence the above provision in the Act of 1930 remained in force till provision was made by a rule as aforesaid.

23. As I have held that paragraph 4 of , the memorandum is violative of Article 14 of the Constitution, the petition is allowed. The impugned notice issued under the said paragraph is quashed. The Petitioner shall be deemed to have continued in the service of the Government in spite of the said notice and shall be reinstated to his post forthwith,

24. Civil Rules Nos. 316 and 323 of 1968 are placed before us for hearing along with Civil Rule 308 of 1968 as they raise common questions of law.

25. In Civil Rule No. 316 of 1968 the Petitioner held the post of Head Assistant in the Office of the District Registrar, Kamrup, Gauhati He was born on 1-1-13 and would have retired on the 1st January, 1968 on completion of 55 years of age. But in the meantime the memorandum extending the age up to 58 years was issued. The Petitioner was found to be physically fit and efficient by the competent authorities and so he was allowed to continue in service after attaining the age of 55 years. But his service was terminated by a notice dated the 1st July, 1968 under paragraph 4 of the memorandum. This case is covered by the judgment in Civil Rule No, 308 of 1968 and hence the petition is allowed. The Petitioner shall be deemed to have continued in service of the Government and shall be reinstated to his post forthwith.

26. In Civil Rule No. 323 of 1968. the Petitioner was holding the post of a Mohurer in the office of the Executive Engineer, P. W. D., Jorhat. His date of birth as shown in the official record is 15th May, 1911. He was due to retire on the 15th May, 1966. But he continued in service under the memorandum as he was found physically fit and efficient. His service was terminated by a notice dated 28-5-68 issued under Paragraph 4 of the memorandum. This case is covered by the judgment in Civil Rule No. 308 of 1968 and hence the petition is allowed. The Petitioner shall be deemed to have continued in service of the Government and shall be reinstated to his post with.

27. Parties will bear their own cost in Civil Rules Nos. 316 of 1968 and of 1968. Cost is allowed in Civil Rule No. 308 of 1968, Hearing fee is fixed (sic) Rs. 200/-.

K.C. Sen J.

28. I agree with Lord the Chief Justice.

M.C. Pathak, J.

29. I had the privilege of seeing the judgment of My Lord the Chief Justice just now delivered. I am unable to agree with his finding that para 4 of the

Government Memorandum dated 21-3-63 is violative of Article 14 of the Constitution of India and consequently I respectfully differ from the conclusion that the three petitions should be allowed. For the reasons stated below, I hold, that para 4 of the Government memorandum dated 21-3-63 does not offend Article 14 of the Constitution and therefore I would dismiss all the three petitions and discharge the Rules.

30. By these three writ petitions the Petitioners have challenged the Government orders by which they have been compulsorily retired with effect from 30-9-68.

31. The Petitioner in Civil Rule 308/ 68 was appointed on 18-8-41 in the post of a typist. He was then appointed an Assistant Auditor in which post he was confirmed on 6-5-46. Thereafter he was appointed an Auditor, Local Accounts, Assam, in which post he was confirmed on 1-4-50 and he was continuing in that post under the Government of Assam. He was born on 1-1-1913 and he completed 55 years of age on 1-1-68. In the meantime, the Government of Assam decided to raise the age of retirement of all Government servants from 55 years to 58 years and an Office Memorandum being No. AAP. 217/62/15 dated 21-3-63 was issued, which is Annexure "B" to the petition. In the said memorandum, the Government decision of raising the superannuation age was to be given effect to with retrospective effect from 1st December 1962. The Petitioner was found both physically fit and also sufficiently efficient as laid down in the annexure to the said memorandum and he was allowed to continue in service beyond the age of 55 years by order dated 21-12-67, a copy of which is annexed as Annexure "C" to the petition. On 7-5-68, of the Petitioner was served with a notice to by the Examiner of Local Accounts that the Petitioner would not be retained in service beyond 30-9-68; a copy of the said notice is annexure "D" to the petition. The Petitioner has challenged this notice dated 7-5-68.

32. Dr. J. C. Medhi, the learned Counsel appearing for the Petitioner, challenged the said notice dated 7-5-68 as bad (sic) law on the following grounds:

(i) That a notice under para 4 of the Government Memorandum dated 21-3-63 would not be issued after the Government servant had attained the age of 55 years and had been allowed to continue the post beyond 55 years;

(ii) That the impugned notice was not issued by the appointing authority!

(iii) That the provision of compulsory retirement with three months" notice provided in para 4 of the Government Memorandum dated 21-3-63 offended Article 311 (2) of the Constitution; and

(iv) That the provisions laid down in para 4 of the Government Memorandum dated 21-3-63 offended Article 14 of the Constitution of India.

33. The learned Counsel's submission that the notice contemplated under para 4 of the Government Memorandum dated 21-3-63 could be issued only before the Government servant attained the age of 55 years and not after he was allowed to continue in the post beyond 55 years does not appear to have any substance.

Under F. R. 56, Government servant has the right to continue in service till he attains the age of 55 years unless he is removed from service in accordance with law and procedure laid down in this respect. The question of requiring the Government servant to retire after he attained the age of 55 years on three months' notice would arise only when the Government servant was retained in service under F. R. 56 beyond the age of superannuation. In the circumstances, the notice contemplated under para 4 of the Government Memorandum of 1963 would be issued only after the Government servant attained the age of 55 years. If a Government servant wanted to get the benefit of the Government memorandum of 1963 he would have to satisfy the appointing authority regarding his efficiency and physical fitness as prescribed by the memorandum. If he did not want to continue in service beyond the age of 55 years, he would be entitled to retire on the attainment of the age of superannuation. I therefore hold that the submission of the learned Counsel that the notice contemplated under para 4 of the Government memorandum of 1963 could not be issued after the Government servant attained the age of superannuation has no substance and the impugned order of compulsory retirement is not bad on this ground.

34. The second submission of the learned Counsel is that the notice requiring the Petitioner to retire with effect from 30-9-68 was issued by the Examiner, Local Accounts, who was not the appointing authority of the Petitioner and as such it was bad in law. But under the Assam Subordinate Audit Service Rules, 1963, the Examiner of Local Account has been the appointing authority of the Petitioner and as such I hold that the notice has been issued by the competent authority and it is not bad in law.

35. The third submission of the learned Counsel is that the order of compulsory retirement made under para 4 of the Government memorandum dated 21-3-63 was violative of Article 311 (2) of the Constitution.

36. In the case of Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., the Supreme Court has laid down that if a Government servant holding substantively a permanent post is compulsorily retired under the relevant service rules, such compulsory retirement does not amount to removal under Article 311 (2). Similarly the retirement of a permanent Government servant on his attaining the age of superannuation does not amount to his removal within the meaning of Article 311 (2). In the instant case, the age of superannuation is 55 years under F. R. 56 and the Petitioner attained the age of superannuation on 1-1-63. Therefore his compulsory retirement with effect from 30-9-68 does not attract the provisions of Article 311 (2) of the Constitution of India. The Supreme Court has held that where an order directing compulsory retirement does not expressly contain the words prescribing stigma on Government servant, the order will not amount to removal and action under Article 311 is not necessary. In the order of compulsory retirement in the instant case, there are no express words from which any stigma can be inferred. In the circumstances, I hold that the notice dated 7-5-68 could not be said to be an

order of removal attracting Article 311 (2) of the Constitution.

37. Dr. Medhi, the learned Counsel appearing for the Petitioner, has submitted that the Government memorandum dated 21-3-63 raised the superannuation age of the Government servants from 55 years to 58 years and it created a right in the Government servants to continue in service up to the age of 58 years. Since the authority concerned by its order dated 7-5-68 compulsorily retired the Petitioner with effect from 30-9-68 before he attained the age of 58 years, the order is bad in law inasmuch as it amounted to removal from service without complying with the provisions of Article 311 (2). This leads us to consider the nature and character of the Government memorandum dated 21-3-1963. The Government memorandum dated 21-3-63 is not in the form of Rules. In para 8 of the memorandum it is stated that necessary amendments to the relevant rules would be issued in due course. The memorandum is a Government decision, copies of which were forwarded to all Administrative Departments, all Heads of Departments, all Deputy Commissioners and Sub-divisional Officers, Accountant General, Secretary, Assam Legislative Assembly and Secretary, A. P. S. C. for information. In para 1 of the memorandum, it is stated as follows:

It has now been decided that the age of compulsory retirement of the State Government servants should be 58 years.

The very form of these words shows that it conveyed the executive decision of the State Government to Heads of Departments. The memorandum was never published in the Gazette.

38. A similar memorandum was considered by the Supreme Court in the case of I.N. Saksena Vs. State of Madhya Pradesh, Relevant portions of the memorandum of the Madhya Pradesh Government are quoted in the said judgment and it is found that the Madhya Pradesh Government memorandum and the Assam Government memorandum contain similar terms with slight modification here and there. On a consideration of the Madhya Pradesh Government memorandum, the Supreme Court held that the memorandum in question was not a rule under Article 309 of the Constitution and that it was a mere executive instruction of the Government and it contained merely executive instructions. In view of the law laid down by the Supreme Court in this regard in the case of I.N. Saksena Vs. State of Madhya Pradesh, I am clearly of opinion that the Assam Government memorandum dated 21-3-63 was merely executive instructions by the Government to the Heads of all Administrative Departments etc. and It contained merely executive instructions and it is not a rule under Article 309 of the Constitution of India.

39. In the case of I.N. Saksena Vs. State of Madhya Pradesh, the Madhya Pradesh Government in pursuance of their office memorandum amended F. R. 56 raising the age of superannuation. But in the instant case, F. R. 56 has not been amended by the Government and it is clear from the Government memoranda dated 2-4-68 that the Assam Government dropped the idea of raising the

superannuation age by amending F. R. 56. Since F. R. 56 was not amended, the age of superannuation remained at 55 years and the Government servants including the Petitioner had no right to continue service till he attained the age of 55 years under any statutory rule.

40. In the decision of I.N. Saksena Vs. State of Madhya Pradesh, the Supreme Court further held that the executive instructions contained in the Madhya Pradesh Government memorandum amounted an order of Government retaining the services of all Government servants up to the age of 58 years subject to the contentions prescribed in the memorandum an appropriate rule as to the age superannuation was framed. As has been observed earlier, the Assam Government decided by a subsequent memorandum (sic) not to raise the age of superannuation (sic) amending F. R. 56. The Supreme Court also held in that case that under F. R. 56 (a) it was open to the Government to extend the date of retirement of Government servant if it so desired and there was nothing illegal when the Government came to the conclusion generally that the services of . all Government servants should, be retained till the age of 58 years on public grounds and in that view the Supreme Court held that the Government memorandum in the said case was in the nature of a general order of extension of services of Government servants under F. R. 56 as it existed on that date. On the same reasoning, it must be held that the Assam Government memorandum dated 21-3-63 was in the nature of a general order of extension of services of the Government servants by the Assam Government under F. R. 56 as it existed on 21-3-63. In other words, the Government servants including the petitioner were to retire on their attainment of 55 years of age, but by the memorandum of 1963 their services were retained. under the second part of F. R. 56 (a). Thus the petitioner's right to continue in service up to the age of 58 years must be held to be subject to the conditions prescribed in the memorandum which was issued under F. R. 56 (a), as has been laid down in I.N. Saksena Vs. State of Madhya Pradesh, The petitioner has been compulsorily retired with effect from 30-9-68 with three months' notice as provided in para 4 of the Government memorandum. Since the Assam Government memorandum dated 21-3-63 is held to be issued under F. R. 56 (a), which is a statutory rule, it necessarily follows that the memorandum has the force of law and it is "law" as defined under Article 13 (3) (a) of the Constitution. Thus the order of compulsory retirement of the petitioner after he attained the age of superannuation was under the Government memorandum of 1963 which has the force of law and as such the case did not attract Article 311 of the Constitution.

41. The fourth submission of the learned counsel is that para 4 of the Government memorandum of 1963 is hit by Art. 14 of the Constitution. His submission is that para 4 gives-naked and arbitrary power (sic) the, appointing authority to compel (sic)rily retire a Government servant at his (sic)eet will and therefore offends Art. 14 (sic)the Constitution and must be struck (sic)wn. For a decision of this point, it (sic) buld be convenient to consider the (sic) cuments relied on by the parties in (sic) instant case.

42. The Office Memorandum No. AAP. (sic)/62/15 dated 21-3-63 is Annexure "B" (sic) the petition and it has been quoted in (sic) judgment of My Lord the Chief Jus(sic) and I need not extract it. The order (sic)ed 21-12-67, by which the petitioner was allowed to continue In service beyond the age of 55 years, which is Annexure "C" to the petition, is as follows

In pursuance of the decision contained in Appointment (A) Department Office Memorandum No. AAP. 217/62/15 dated 21-3-63, the Governor of Assam is pleased to allow Shri Premadhar Barooah, Auditor under the Local Audit Department to continue in service beyond the age of 55 years, until further orders with" effect from 1-1-68.

This Government letter was from . the Under Secretary, Finance Department, Government of Assam, to the Examiner, Local Accounts, Assam, a copy of which, was sent to the petitioner.

43. The impugned notice dated 7-5-68 (Annexures "D" to the petition) is as follows:

Notice

No. VI/1/68-69-13 dated, Gauhati, the 7th May, 1968.

To

Shri Premadhar Barooah,

Designation - Auditor, Local Accounts.

Address - Gauhati.

In pursuance of office Memorandum NO. AAP. 217/62/15 dated 21-3-63 read with O. M. No. AAP. 126/67/54 dated 2-4-68 you are hereby requested to take notice that you shall not be retained in service beyond 30-9-68.

This may be treated as notice under, para 4 of O. M. No. AAP. 217/62/15 dt. 21-3-63.

Sd. J. Sarmah, Designation: Examiner of Local Accounts Gauhati

Address : Gauhati.

44. The relevant paragraphs of the Government Memorandum No. AAP, 126/67/54 dated 2-4-68 (Annexure "E" to the petition) are as follows:

Government of Assam

Appointment (A) Department : Appointment Branch.

No. AAP. 126/67/54

Dated, Shillong the 2nd April, 1968

OFFICE MEMORANDUM

Sub, : Retirement of State Government Employees at age of 55,

In view of the serious unemployment situation in the State, Government" have been considering for sometime past the question of discontinuing the present policy of extension of service of the State Government employees beyond 55 years as envisaged in the Government office Memorandum No. AAP. 217/62/15 dated 21-3-63 as amended from time to time. It has now been decided that the age of compulsory retirement of State Government servants should be 55 years as laid down in F. R. 56 (a), discontinuing the present benefit of raising the age of superannuation to 58 years of age as laid down in the aforesaid office Memorandum.

2. In order to give enough time to the appointing authorities and to the individual Government servant, affected by Government's decision on principle, to apply for leave due to them, which normally assumed as four months and to ensure that each person affected has the necessary three months" notice it is intended that the decision be made effective from the afternoon of 30th September, 1968.

3. This decision will apply to all Government servants who will retire on or after 30th September, 1968. Government servants who are already on extension beyond 55 years of age should be served with a 3 months" notice without assigning any reason as envisaged in Government O. M. No. AAP. 217/62/15 dated 21-3-63 to. retire on 30-9-68. The respective appointing authorities should immediately serve the notices on each individual Government servant separately to retire on 30-9-68....

x x xx x x A.N. Kidwai, Chief Secretary to the Govt. of Assam.

45. Since the Government memorandum dated 21-3-63 must be held to be a law, Dr. Medhi the learned Counsel for the Petitioner, has submitted that para 4 of the memorandum is hit by Article 14 of the Constitution inasmuch as it is germane with discrimination and it gives unguided and naked discretion to the authority concerned.

46. Accepting the position that the Government memorandum dated 21-3-63 has the force of law and it comes within the definition of "law" given under Article 13 (3) (a) of the Constitution, we have to consider whether para 4 of the memorandum is discriminatory or otherwise hit by Article 14 of the Constitution. F. R. 56 (a) confers a discretion on the Government to retain a Government servant after he attains the age of 55 years on public grounds to be recorded in writ-tag. The Government servant has no fundamental or legal right to continue in service beyond the age of superannuation but he may be retained beyond the age of superannuation on public grounds to be recorded in writing by the Government. This discretion has been vested in the Government and the policy, the principle and the procedure under which this discretion has to be exercised have been laid down in F. R 56 (a) itself, and therefore P. R. 56 (a) cannot be said in any way to offend Article 14 of the Constitution. Since the Government

has a discretion to retain a Government servant after he attains the age of superannuation on public grounds to be recorded in writing, it necessarily follows that" the Government has also the discretion not to retain and/or when retained, to put an end to such retention in service on public grounds to be recorded in writing. Para 4 of the memorandum empowers the authority to require a Government servant, who has been retained after he has attained the age of 55 years, to compulsorily retire." In my opinion, this reservation of power in the authority concerned is inherent in the second part of F. R. 56 (a). That being the legal position, the discretion conferred on the authority under para 4 of the memorandum has its source in F. R. 56 (a) itself and this discretion can be exercised only on public grounds to be recorded in writing. The policy and principle for exercise of this discretion vested in the authority under para 4 of the memorandum are found in F. R. 56 (a) Itself. In this connection, it would be apposite to refer to the following passages in the case of Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, "A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification; the Court will uphold the law as constitutional, as it did in Kathi Raning Rawat v. The State of Saurashtra.

A statute may not make a classification (sic) of the persons or things to whom its provisions are intended to apply (sic) and leave it to the discretion of the Government to select or classify the person or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion (sic) the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held this Court, e.g. in Kathi Raning Raw v. The State of Saurashtra that in such a case the executive action but not statute should be condemned as unconstitutional.

47. Since the Government memorandum of 1963 is held to be a general order (sic) under F. R. 56 (a), and the guidance (sic) principle for exercising the under para 4 of the Government memorandum are found in FR 56 (a) itself, (sic) submission of the learned Counsel that para 4 of the Government memorandum confers unguided and naked discretion has no substance. I therefore hold that para 4 of the Government memorandum of 1963 does not offend Article 14 of the Constitution.

48. The matter may be viewed from another angle. Under the Government memorandum of 1963 the Government servant was entitled to continue in service till the age of 58 years, subject to the conditions mentioned therein. By Government memorandum dated 2-4-68, the age of superannuation was retained as it is laid down in F. R. 56 and the benefits of retention of all

Government servants beyond the superannuation age granted under the Government memorandum dated 21-3-63 were withdrawn from all [Government servants concerned. The Government memorandum dated 2-4-68 deciding to retire all Government servants by 30-9-68 must be held to be under F. R. 56 (a) which confers the discretion on the Government to retain Government servants beyond the superannuation age on public grounds to be recorded in writing which necessarily includes the discretion to cancel or withdraw such retention in service on public grounds. This withdrawal of the benefits by the Government memorandum of 1968 is clearly on public grounds inasmuch as from the memorandum of 1968 it is found that the Government took decision in this respect in view of the serious unemployment situation in the State, or, in other words, to meet the serious unemployment situation in the State. The notice requiring the Petitioner to retire with effect from 30-9-68 was issued not only under para 4 of the memorandum of 1963 but it was also issued in pursuance to the Government memorandum of 1968 which lays down the public grounds under which the Petitioner was required to retire on 30-9-68. The Government memorandum of 1963 applied to all Government servants who were retained in service beyond the age (sic) 55 years in pursuance of the Government memorandum of 1963. In this view (sic) the matter also, the order of compulsory retirement in the instant case cannot be said to be in any way illegal.

49. F. R. 56 confers discretion in Government to retain a Government servant (sic) service beyond the age of 55 years (sic) though he has no legal right to continue under F.R. 56 beyond the age of superannuation. This discretion must necessarily include discretion not to so retain Government servant beyond the age of years and such discretion may be exercised at a time when the Government servant attains the age of 55 years or at time after he is so retained in service. This discretion, no doubt, will have to be exercised on public grounds to be recorded in writing. The Government memorandum dated 2-4-68 decided not to retain all Government servants who were retained in service beyond 55 years by the Government memorandum dated 21-3-63 in accordance with second part of F. R. 56 (a). Hence the Government memorandum dated 2-4-68 also must be held to be an order under F. R. 56 (a) itself which is a statutory rule and as such the said memorandum dt. 2-4-68 has the force of law and it is a "law" as defined under Article 13 (3) (a) of the Constitution. It is, therefore, found that both the Government Memoranda dated 21-3-63 and 2-4-68 are orders under the second part of F. R. 56 (a) and both have the force of law. By the memorandum dated 21-3-63, all Government servants were retained up to 58 years after they attained the age of superannuation and by the Government memorandum dated 2-4-68 such retention beyond 55 years up to 58 years was terminated with effect from 30-9-68.

50. The question therefore arises whether a Government servant who acquires the right to continue in service till 58 years of age by virtue of the Government memorandum dated 21-3-63 maybe compulsorily retired in pursuance of the Government memorandum dated 2-4-68 before he attains the age of 58 years.

In other words, whether the benefit of the increased age of superannuation conferred by some rule or law may be curtailed or taken away by another rule or law. The same question arose in the case of *Bishun Narain Mishra Vs. State of Uttar Pradesh and Others*. The facts of that case were as follows: By a notification dated November 27, 1957 the Government of Uttar Pradesh raised the age of superannuation for members of its service from 55 to 58 years. On May 25, 1961 by a notification under Article 309, the Government again reduced the age to 55 years. By a proviso to the later notification it was laid down that those who owing to the earlier notification had continued in employment beyond the age of 55 years will be deemed to have been retained in service beyond the date of compulsory retirement. Another order was issued by the Government the same day directing that all those who were between the age of 55 years and 58 years and had been retained in service in the above manner would be retired on December 31, 1961. The Appellant in that case who attained the age of 55 years on December 11, 1960 and was continued in service when the age of retirement was raised to 58 years was one of those who were retired on December 31, 1961. Aggrieved, he filed a writ petition before the High Court which was dismissed and an appeal to the Division Bench also failed. Appeal was filed before the Supreme Court by special leave.

It was submitted on behalf of the Appellant in that case as follows:

- (1) The change in the rule of retirement made by the notification of May 25, 1961, was hit by Article 311 as it amounted to removal of public servants from service without complying with the requirements of Article 311 (2).
- (2) The rule in question being retrospective was bad as no notification could be made retrospectively; and
- (3) The rule was hit by Article 14 inasmuch as it resulted in inequality between public servants in the matter of retirement.

On the facts of that case and in answer to the questions raised on behalf of the Appellant in that case, the Supreme Court held as follows:

- (i) There is no provision which takes away the power of Government to increase or reduce the age of superannuation and therefore as the rule in question only dealt with the age of superannuation and the Appellant had to retire because of the reduction in the age of superannuation it cannot be said that the termination of his service which thus came about was removal within the meaning of Article 311.
- (ii) There was no retrospectivity in the rule. All that it provided was that from the date it came into force the age of retirement would be 55 years. The rule would operate only for the period after it came into force. Nor did the proviso make it retrospective. It only provided as to how the period of service beyond 55 years should be treated in view of the earlier rule of 1957 which was being changed by the rule of 1961. The second order issued on the same day clearly showed that

there was no retrospective operation of the rule for in actual fact no Government servant below 58 years was retired before the date of the new rule i.e. May 25, 1961. Thus the new rule reducing the age of retirement from 58 years to 55 years could not be held to be retrospective.

(iii) There was no force in the contention that the new rule was discriminatory inasmuch as different Government servants were retired on December 31, 1961 at different ages. The rule treated alike all those who were between the age of 55 and 58 years. Those who were retired on December 31, 1961 certainly retired at different" ages but that was so because their services were retained for different periods beyond the age of 55. Government was not obliged to retain the services of every public servant for the same length of time. The retention of" public servants after the period of retirement depended upon their efficiency and the exigencies of public service, and in the present case the difference in the period of retention had arisen on account of the exigencies of public service.

51. The order of retirement dated 7-5-68 in the instant case was issued in pursuance of the Government memorandum dated 21-3-63 and the Government memorandum dated 2-4-68.

52. Following the law laid down by the Supreme Court in that case, I hold that the order of compulsory retirement of the Petitioner with effect from 30-9-68 in pursuance of the Government memorandum dated 2-4-68 does not offend Article 311 (2) nor Article 14 of the Constitution of India.

53. Considering the law and facts in the case, I am dearly of opinion that para 4 of the Government memorandum does not offend Article 14 of the Constitution and the order of compulsory retirement dated 7-5-68 is valid in law. I therefore hold that the Petitioner in Civil Rule No. 308/68 is not entitled to any remedy and I would dismiss his petition.

54. The Petitioner in Civil Rule No. 316/68 was holding the post of an Office Assistant in the establishment of the District Registrar of Kamrup, Gauhati and he was duly confirmed on 1-11-67. He was born on 1-1-1913 and he completed 55 years of age on 1-1-68. The Petitioner was allowed to continue in service for further three years from the date of completion of 55 years in pursuance to the Government memorandum dated 21- 3-63. On 1-7-68 the Petitioner was served with a notice that he would not be retained in service beyond 30-9-68 in pursuance to Government memorandum dated 21-3-63 read with Government memorandum dated 2-4-68. The Petitioner has challenged this order in this writ petition. The points raised and argued in this case on behalf of the Petitioner are identical with those raised and argued in Civil Rule No. 308/68 and this case is covered by my decision in Civil Rule No. 308/68. I would, therefore, dismiss the petition in Civil Rule No. 316/68.

55. The Petitioner in Civil Rule No. 323/68 was holding the post of a Mohurir in Class III category in the public Works Department. His date of birth was 15-5-1911 and he would have retired on 15-5-1966. The Petitioner was found

medically fit and also efficient and he was retained in service beyond the age\*\* of 55 years up to the date when he would attain the age of 58 years by a specifically order. Thereafter, by letter dated 30-4-68 the Petitioner was intimated that he was to retire on 30-9-68. The Petitioner has challenged this order by this writ petition. The points raised and argued in this case on behalf of the Petitioner and identical with those raised and argued in Civil Rule No. 308/68 and this case is covered by my decision in Civil Rule No. 308/68. I would, therefore, dismiss the petition in Civil Rule No. 323/68.