

(1991) 08 DEL CK 0045

In the Delhi High Court

Case No : Civil Writ Petition No. 3997 of 1990

R.K. Anand

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 14-08-1991

Acts Referred:

Army Act, 1950 — Section 191, 191
Army Rules, 1954 — Rule 16A

Citation : (1991) 21 DRJ 185

Hon'ble Judges : Dalveer Bhandari, J;D.P Wadhwa, J

Bench : Division Bench

Advocate : Vibhu Bhakra, A.K. Dutt, V.V. Vaze, S.K. Tiwari and A.P. Aggarwal,
for the Appellant;

Judgement

D.P. Wadhwa, J.

(1) The petitioner, a Lt. General in the Army, has filed this petition under Article 226 of the Constitution. He seeks quashing of the order dated 3 March, 1990 of the respondents retiring him from Army service on 31 December, 1990 on his attaining compulsory retirement age of 57 years on 19 December, 1990 This order retiring the petitioner was issued in terms of letter dated 9 September, 1986 of the second respondent being the Chief of Army Staff. The petitioner seeks quashing of this letter of 9 September, 1986 and says rather he should have been given the benefit of letter dated 9 March, 1985 of the first respondent fixing the retirement age of Lt. General at 58 years. The bearing of the writ petition which was filed on 17 December, 1990 was expedited as in case the petitioner succeeded he could get the benefit of retirement age of 58 and retire on 31 December, 1992.

(2) Section 191 of the Army Act, 1950 (for brevity "the Act") empowers the Central Government, among other things, to make rules for the removal, retirement, release or discharge from the service of persons subject to the Act. The petitioner belongs to Infantry in the regular Army and is governed by the

provisions of the Act, rules and regulations made there under. u/s 192, Central Government can also make regulations for all or any of the Act other than those specified in Section 191. Section 193 prescribes that all rules and regulations made under the Act shall be published in the Official Gazette and, on such publication, shall have effect as if enacted in the Act. Section 193A which was inserted in the Act w.e.f. 15 March 1984, prescribes that rules and regulations are to be laid before the Parliament. This section is as under :-

"193A. Rules and regulations to be laid before Parliament-Every rule and every regulation made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session, or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation."

(3) Rule 16-A prescribes the compulsory retirement age of officers of Army. This rule was inserted by Army (Amendment) Rules, 1979, and came into force w.e.f. 4 June 1979. the date of publication in the Official Gazette. Under this rule the minimum age of retirement of a Lt. General is 56 years and maximum is 58 years. Then tenure is also prescribed which is as under:-

"ONE of 4 years in the appointment of General Officer Commanding in Chief Command or Vice Chief of the Army Staff (over all) and in the substantive rank in the case of officer

(4) There are notes to this rule which, it would appear, also form part of the rule. Note (2) says that cases for retention in service beyond the minimum age of retirement or the minimum period of qualifying service required to earn full pension shall be assessed by the appropriate Selection Board sufficiently in advance of the attainment of that age or completion of that period. Retention in service shall be subject to the conditions mentioned therein. Since there is no dispute on this it is unnecessary to set out the conditions.

(5) We do not think it necessary to go into the position relating to retiring officers as existed before the statutory Rule 16-A was introduced in the rules. On 9 March, 1985 a letter was issued by the Central Government to the Chief of Army Staff prescribing rules regarding age of retirement and tenure of appointments for army officers from various corps. Age of retirement for Lt. General from Armoured Corps, Infantry, Artillery, Engineering and Signal was fixed at 58 years. Para 4 of this letter stated that the orders mentioned in the letter would come into force from the date of issue of the letter and that "Army Rule 16-A will be revised in due course". It is not disputed that Army Rule 16-A

has not so far been revised in terms of this letter. There is a serious controversy if this letter in itself be considered as a statutory rule or it is in the nature of an administrative or executive instruction within the framework of Rule i6-A as it exists. It is, however, not disputed that this letter had been acted upon. Then came the letter dated 9 September, 1986. This letter introduced the concept of two streams in the rank of Major General and above One stream being called "Command and Staff" stream and the second as "Staff Only" stream It prescribed retirement age for the Lt. General falling in "Command and Staff" stream at 58 and that of "Staff Only" stream at 57 years. The petitioner being a Lt. General falling in "Staff Only" stream was, thus, made to retire on attaining the age of 57 years on 19 December, 1990, the retirement date being 31 December 1990 Para 13 of this letter required that officers of the General Cadre who were selected for the "Staff Only" Stream would be inducted into the stream subject to their, rendering a willingness certificate in terms thereof and the petitioner did give a willingness certificate as under :-

"WILLINGNESSCERTIFICATE It is certified that the position explained in Army Hq letter No. 04476 MS9B dated 9 Sep. 86 has been clearly understood by me and it is confirmed that the same is acceptable to me. Signature sd/- Name (R.K. Anand) Place : New Delhi Rank : Major General Date ; 24 Dec. 86 Appointment : Dag, ARMY/HQ"

(6) This letter dated 9 September, 1986 though emanating from the office of the Military Secretary's Branch of the Army Headquarters was in fact issued under the authority of the Central Government. Then came yet another letter of 1 June 1987 issued by the Military Secretary which it is stated was a clarificatory letter to certain doubts that arose in the implementation of the letter dated 9 September, 1986 The authority and validity of this letter have been seriously challenged by the petitioner. He has alleged discrimination as well.

(7) To understand the concept of "two streams policy" introduced in the Army it will be necessary to understand the meaning of the terms "General Cadre", "Arms" and "Services" as applied to the officers in the Army. Army officers of the rank of Brigadier and above belonging to Armoured Corps, Infantry and Mechanised Infantry form the basic constituent of General Cadre. Officers from Arms which term applies to Artillery, Engineers, and Signals are also inducted in the General Cadre in the rank of Brigadier. A General Cadre, thus, consists of officers of the rank of Brigadier and above belonging to Armoured Corps, Infantry, Mechanised Infantry and those officers of other Arms who have been inducted into the General Cadre. The induction of officers of other Arms is done on the basis of recommendation of a Selection Board which examines their suitability for induction into the General Cadre and on their such induction to General Cadre these officers from other Arms progress in their career as General Cadre officers and relinquish any further claim for the purpose of promotion and appointment within their parent corps. The officers from Artillery, Engineers, and Signals who do not get inducted into the General Cadre and the officers from the

Army Service Corps, Ordnance Corps and the Corps of Electrical and Mechanical Engineers constitute the Non- General Cadre. Letter dated 9 September, 1986 envisaged that officers in the General Cadre on promotion to Major General and Lt. General will be bifurcated in the "Command and Staff" and "Staff Only" Streams as under t-

"(A) Command and Staff Streams: Very high calibre officers based on their merit will be promoted to this Stream. They will hold command appointments in the higher rank and thereafter be given exposure to Staff and ER.E appointments as necessary. They will be eligible for further promotion as per in the existing criteria. (b) Staff Only Stream : Officers promoted to this stream will hold only staff appointments, in the higher rank and will proceed on superannuation thereafter. These officers will not be eligible for further promotion."

(8) The letter described the purpose for introducing two streams concept and the objects sought to be achieved. Though this two streams concept applied generally to the officers of General Cadre it was mentioned that Non-General Cadre officers would also be considered for the "Staff Only" Stream in the rank of Lt. General. Para 11 of this letter prescribed that General Cadre officers of the "Command and Staff" Stream will serve up to the maximum age prescribed for the rank and officers including Non- General Cadre officers of the "Staff Only" stream will be superannuated one year earlier than the officers of the "Command and Staff" Stream in the corresponding rank.

(9) In the additional affidavit filed by Col. T.C. Rawal, Director Ms (Legal), Military Secretary Branch, Army Headquarters, on behalf of the respondents, it is stated that there are in all 53 posts of Lt. Generals in the Indian Army, and (hat Artillery. Signals, Asc, Aoc and Eme have two posts of Lt. Generals specified to their Corps, and the Corps of Engineers has three specified posts of Lt. Generals but that can be held only by them. All other posts can be held by Lt. Generals of the General Cadre belonging to "Command and Staff" Stream and "Staff Only" Stream and Lt. Generals of Non-General Cadre belong to "Staff Only" Stream. Therefore, officers of the Non-General Cadre unless selected for "Staff Only" Stream can be promoted to 2 or 3 posts mentioned above specified for their Corps, and since the number of posts of Lt. Generals available within their own Corps are very few, officers of Non-General Cadre have limited prospects of advancement in the rank of Lt. General as compared to the officers of the General Cadre. In order to better the promotion prospects of the Non- General Cadre officers, the two stream concept propounded by letter dated 9 September. 1986 provides that the deserving officers of his cadre can be promoted to the rank of Lt. General in "Staff Only" Stream. Thus, the two stream concept opens another avenue of promotion for officers of the "Non-General Cadre. However, officers of Non-General Cadre irrespective of their selection for "Staff Only" Stream are also entitled to be considered for promotion within their own Corps. This has been so clarified by letter dated 1 June, 1987. Reference in this case may be made to a letter dated 4 April, 1988 of the Army Headquarters. This

deals with introduction of officers of Artillery ,Engineers and Signals into General Cadre. It prescribes the eligibility, methodology adopted for introduction and recommendation required for introduction into General Cadre. Para 7 of this letter prescribes that officers of the supporting arms once absorbed into the general cadre do not have any lien in the appointment specified to their original arm and as such cannot be promoted to these appointments. Now since vacancies of Lt. General in Staff are more, Non-General Cadre officers normally get considered for promotion in "Staff Only" Stream earlier than consideration for promotion within their own Corps. It is stated that if such an officer gets promotion to " Staff Only" Stream, his age of retirement advances by one year (i.e. 57 from Major General for which maximum age 56) and later if such officer also gets cleared for promotion within his own Corps, he retires at the stipulated age of 58 years. The following is the table which shows ages of retirement of Lt. General belonging to different cadre as per these letters :-

1. General Cadre-"Command and Staff " Stream. -58
2. General Cadre- "Staff Only Stream. -57
3. Non-General Cadre-"Within own Corps". -58
4. Non-General Cadre- "Staff Only" Stream. -57

(10) It is then stated that just as a Non-General Cadre officer gets chances of promotion within his own Corps so also a General Cadre "Staff Only" Stream officer gets two more chances for promotion to "Command Staff" Stream and thereafter serves up to 58 years of age if selected. Also a General Cadre officers normally gets promotion two years earlier than his batch-mate in the Non General Cadre and, Therefore, normally serves two years more in the rank of Lt. General. Lastly, it is stated that an officer of Non-General Cadre is entitled for promotion to the rank of Lt. General. within his own Corps and also outside his own Corps in the "Staff Only" Stream. Once promoted within his own Corps, the officer has got the right to be reverted to his parent cadre and hold one of the specified appointments within his own Corps. In such an eventuality, he is posted to a staff appointment outside his own Corps. After having been cleared for promotion within his own Corps he should in the normal course take up the appointment within his own Corps and continue up to the age of 51 years. But, as such a transfer leads to short tenures, he is generally made to continue on the same (same?) staff appointment in order to maintain continuity, provide reasonable tenure and make use of his expertise in the interest of the organisation. It is stated that any such a situation it is ensured that one posted is kept vacant within his own Corps.

(11) Various contentions of the petitioner may be noted:-

(1)Letter dated 9 May, 1985 is in fact a revised rule framed by the Central Government u/s 191 of the Act. It is not very material if the rule was not notified in the Official Gazette or not laid before the Parliament, the provisions of Sections 193 and 193A being directory in nature;

(2)Letter dated 9 September, 1986 is a mere departmental letter and could not override the statutory rule as framed by letter dated 9 May, 1985. Also letter

dated 9 September, 1986 was kept in abeyance in pursuance to a letter dated 19 June, 1987 written by the Military Secretary's Branch to the Adjutant-General's Branch in the Army Headquarters;

(3) Letter dated 9 September, 1986 in so far as it fixes two different ages for the officers holding the same rank is discriminatory and violative of Article 14 of the Constitution. Subsequent events have shown that the concept of two streams has failed to achieve the object and has resulted in lot of heart burning among the officers in the higher rank.

(4) Classification of offices into "Command and Staff" and "Staff Only" is without any reasonable basis and there is no nexus to the objects sought to be achieved by each classification. Even the posts to be manned by the "Staff Only" Stream have not been specified by any order or regulation

(5) Letter dated 9 May, 1985 is still being implemented in spite of subsequent letters of 9 September, 1986 and 1 June, 1987.

(6) Rule 16-A has been given ago by and it is not being implemented since the letter dated 9 May, 1986. Rule 16-A has, thus, broken down and need not be looked into. It will be most unjust, unfair and discriminatory to follow this Rule 16-A now when it has not been followed after letter dated 9 May, 1985.

(7) Assuming that letters dated 9 May, 1985 and 9 September, 1986 are merely administrative orders within the scope of Rule 16-A, the differential ages fixed by letter dated 9 September, 1986 cannot be valid in as much as this letter has been kept in abeyance in pursuance to letter dated 19 June, 1987 and is in teeth of the regulations for Army which clearly prescribe the retirement age of Lt. General at 58.

(8) defense Services Regulations which are statutory in nature prescribe uniform age of retirement of Lt. General at 58 as the revised edition of these Regulations would show. In this connection reference was made to 1987 Edition of the Regulations which are up to the date 5 December, 1986. It is said in view of this letter date 9 September, 1986 is of no value.

(12) Respondents refute all these contentions and in support they rely on two Bench decisions, one of this Court in C.W.P. 812/91 Major General D.N. Khurana v. Union of India and another, decided on 30 April, 1991, and the other of the Madhya Pradesh High Court in Misc. Petition No. 142 of 1990 Major General P.S. Verma v. Union of India and others, decided on 4 May, 1990. Before Delhi High Court the question was whether Major General Khurana was entitled to be promoted as Lt. General on or before a particular date. Major General Khurana was an officer of the Army of 1954 batch. After he had become Brigadier he was considered for promotion to the rank of Major General in the year 1983 and again in 1984 and third time in 1985. This time he was promoted to the rank of Major General and as per Army regulations was assigned 1986 batch. By letter dated 9 September, 1986 the concept of two streams of officers came into being.

Major General Khurana came up for consideration for promotion as a Lt. General in the year 1989 and though he was selected by the Selection Board, the Government did not agree to the recommendation and again in 1990 he was considered. Meeting of the Special Selection Board for the purpose was held on 16 July, 1990, and in pursuance thereto on 26 October, 1990 a panel of officers approved for promotion to the acting rank of Lt. General was released. Ten officers including Major General Khurana were selected. Nine of them were, however, got into "Command and Staff" Stream and Major General Khurana was approved for promotion in the "Staff Only" Stream. As a Major General he would have superannuated on 31 May, 1991, as it would appear there were not sufficient number of vacancies in the "Staff Only" Stream to which he could have been promoted. Since Major General Khurana had no chances of promotion he filed the writ petition. He had two contentions to make. One, there was challenge to the policy of the Government making promotions to either on the "Command and Staff" Stream or on the "Staff Only" Stream, and the second, that he was entitled to be promoted earlier than the officers belonging to 1957 batch. This was so as the nine officers who were promoted to "Command and Staff" Stream were of 1957 batch and were placed above him in the panel. In the present writ we are not concerned with the second contention. On the first contention, the Bench held as under :-

"IN our opinion it is a policy decision taken by the Government and it is not open to a court to interfere in the game specially when on the face of it, it does not appear to be arbitrary. It is well known that in the General Cadre, there are two types of posts as Lt General; some are those which are regarded as "Staff" posts and the other are "Command" posts where the two have to be common persons who are selected for "Command" and "Staff" streams and promotion can be possible to either of the two types of posts. The persons like the petitioner who have been selected for promotion in the "Staff Only" Stream can, obviously, be promoted only against a Staff post. We find no patent illegality or infirmity in making promotions on this basis."

(13) In Major General P.S. Verma's case he had challenged his superannuation at the age of 55 years and had contended that he should be superannuated at 56 years only. At the relevant time he was holding the post of Major General and was General Officer Commanding Madhya Pradesh, Bihar and Orissa area. The High Court of Madhya Pradesh considered the policy of the Central Government for promotion into two streams which was challenged but upheld the policy of the Government. The court also negated the contention of Major General Verma that the letter dated 9 May, 1985 was a rule and under this Major General Verma could have retired only on his attaining the age of 56 years. The court referred to the provisions of Sections 191 and 193 of the Act and came to the conclusion that letter dated 9 May, 1985 did not amend Rule 16-A which fixes the age of superannuation of Major General between 54 and 56 years. The court observed that Rule 16-A could be amended only in the manner provided u/s 193 by publication in the Official Gazette. The court also negated the argument that

the two streams concept suffered from the vice of discrimination.

(14) During the course of arguments we were also told that a writ petition challenging the letter dated 9 September, 1986 Constituting two streams was challenged by Major General Prakash Singh in the Guwahati High Court. Copies of certain interim orders made in that writ petition had been filed by the petitioner with his rejoinder. But these are of no help to us in deciding this writ petition

(15) Principal controversy revolves around if letter dated 9 May, 1985 is a rule u/s 191 of the Act which would, thus, amend Rule 16-A of the Rules. While the petitioner says it is so, the respondents contend to the contrary. As noted above. Section 193 requires that rules made under the Act shall be published in the Official Gazette and on such publication shall have effect as if enacted in the Act. Then u/s 193A these rules are to be laid before the Parliament. Section 193A was inserted by the Delegated Legislation Provisions (Amendment) Act, 1983. Various other enactments as mentioned in that Act were similarly amended. This was done to implement the recommendations of the committee on subordinate legislation regarding publishing and laying of rules and other delegated legislation. It would, thus, appear that in the absence of Section 193A, Section 103 might be bad on account of excessive delegation. Now Section 193A saves that Mr. Bakhru for the petitioner submitted that there was difference between the rules made and the rules issued. He said there could be a time gap between the making of the rules u/s 181 and their publication u/s 133 in the Official Gazette. He said rule so made would nevertheless be valid and publication in the Official Gazette was a mere directory requirement. This was also his submission with reference to Section 193A. He sought support from the fact that before Rule 16-A was published in the Official Gazette on 4 June, 1979 when that rule in fact had been acted upon as from the date of issue of letter dated 15 December, 1976, which was ultimately the basis for incorporation of Rule 16 A. This may be so that the respondents started acting on letter dated 15 December, 1976 as rule as such but that letter is not in the form of a rule which ultimately became Rule 16-A. Sro 188 dated 4 June, 1979 by which . Rule 16-A was inserted in the Rules clearly states that that will come into force on the date of the publication in the Official Gazette. Mr. Vaze for the respondents ,however, said that the coming into force of the rule would be its publication in the Official which would be event for coming into force of the rule. Mr. Bakhru drew distinction between the language as used in Section 193 and that in some other enactments like the Essential Commodities Act, 1955, and the Industries (Development and Regulation) Act, 1951. He said the language in these enactments clearly showed that the rule or order could only be enforced by notification in the Official Gazette which was not so in the present case. We may refer to relevant provisions of the Essential Commodities Act on this aspect, as we will be finding an answer to requirement of Section 193A of the Act in view of the decision of the Supreme Court *Atlas Cycle Industries Limited and Milton Cycle Industries Limited Vs. State of Haryana and Others*, an order made u/s 3 shall in the case of an order of a general nature

or affecting a class of persons, be notified in the Official Gazette, and under Sub-section (6) of this section every order made under this section by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be, after it is made. In the *Atlas Cycle Industries* case the question before the Supreme Court was if the notification fixing the maximum selling price of the commodity was void for not having been laid before both Houses of Parliament. The court examined various provisions of the Essential Commodities Act and also certain decisions and texts on the construction of statutes and observed that there were two considerations for regarding a provision as directory and these were : (1) absence of any provision for the contingency of a particular provision not being complied with or followed and (2) serious general inconvenience and prejudice that would result to the general public if the act of the Government or an instrumentality is declared invalid for non-compliance with the particular provision. The court further observed that there were three kinds of laying which were generally used by the legislature and these were: (1) Laying without further procedure, (2) Laying subject to negative resolution, and (3) Laying subject to affirmative resolution. In the case before the Supreme Court it was held that the requirement as to laying contained in Sub-section (6) of Section 3 fell within the first category and was directory, not mandatory. Laying before the both Houses of Parliament in the present case would fall in the second category and question is whether it is a mandatory requirement or a mere directory one. As regards the third category where laying is subject to affirmative resolution there is no doubt that it is a mandatory requirement.

(16) We have no doubt in our mind that the manner of coming into the rules in the present case which have the effect of as being enacted in the Act itself is the publication in the Official Gazette. Here rules become part of the Act. This is a legislative power. That Parliament may not be accused of excessive delegation or abrogation of the legislative functions. Section 193A was inserted in the Act. We agree with the respondents that the event of coming into force of the rules is their publication in the Official Gazette. As noted above, when Rule 16-A was published in the Official Gazette, it was specifically mentioned that it will come into force on the date of the publication of the gazette notification. As to what respondents have been doing before Rule 16-A came into force, we are not called upon to decide in the present case.

(17) We are further of the opinion that all procedural requirements laid down for Sections 193 and 193A have to be followed and complied with, otherwise exercise of power will be null and void. Sections 193 and 193A do not talk of the consequences of non-compliance, but the language is quite explicit that unless procedure prescribed is followed, rule will not have the authority of law. The importance of these provisions cannot be overlooked when the rules have to form part of the substantive law by subordinate legislation. We do not find any alternative to this though the courts at times do adopt a flexible attitude on the question of consequences of non-compliance of procedural requirement

depending upon the seriousness of the departure from the procedure prescribed, and again depending upon variety of factors. But here we have no choice, no alternative except to say that laying of the rules framed by the Central Government u/s 191 is a mandatory requirement u/s 193A even though laying subject to negative resolution. It cannot be said that Parliament has enacted Section 193A as a mere surplusage when it was specifically Inserted by an Act of Parliament.

(18) Letter dated 9 May, 1985 is not, Therefore, a rule within the meaning of Section 191 as it has not been published in the Official Gazette nor laid before each Houses of Parliament. It does not amend Rule 16-A. Then, what it is ? Rule 16-A prescribes the minimum and maximum ages of retirement of a Lt. General, the minimum being 56 and maximum 57. This letter has fixed the retirement age of a Lt. General at maximum of 58. It is within the rule and has been issued by competent authority being the Central Government. The letter is, Therefore, an administrative instruction and is valid. Rule 16A itself does not lay down the criteria for fixing ages of retirement of Lt. Generals between minimum and the maximum. This can certainly be done by administrative instructions. Letter dated 9 September, 1986 has also been issued under the same very authority of the Central Government. What it does is to carve out a further exception in the letter of 9 May, 1985 in the case of Lt Generals of General Cadre (to which Cadre the petitioner belongs) putting them into two streams of "Command and Staff" and "Staff Only" and fixing different ages of retirement for the first category at 58 and the second at 57. Again this letter is also well within the limits fixed by Rule 16-A.

(19) The respondents in their return has spelled out in detail the reasons for adopting the two streams policy and the objects sought to be achieved. In fact (be letter dated 9 September, 1986 also gives reasons for taking this course. First three paras of this letter giving introduction and concept of adopting two streams may be noted as there under :-

"INTRODUCTION(1) The up gradations in senior ranks in the Cadre Reviews have been sanctioned only in the Staff and Ere appointments. This has caused serious imbalances in the existing ratio between the Command, Staff and Ere appointments. Whereas, earlier senior officers could be given a proper command tenure before their turn came up for the next promotion, it is not now feasible in all cases after the upgradations are fully implemented. (2) Ours is a Command oriented Army and successful performance in a command must continue to be mandatory for promotion to higher ranks It is not desirable to truncate command tenures, if we have to maintain our fighting efficiency. It is to this end. that it has been decided to adopt the "Two Stream Concept" for officers of the rank of Brig and above. The details of the concept: are given in the succeeding paras. Concept (3) The concept envisages that officers on promotion to Maj Gen and Lt Gen will be bifurcated into the "Command and Staff" and the "Staff Only" streams as per details given below :- (a) "Command and Staff" Stream. Very

high calibre officers based on their merit will be promoted to this Stream. They will; hold command appointments in the higher rank and thereafter be given exposure to Staff and Ere appointments as necessary. They will be eligible for further promotion as per the existing criteria. (b) "Staff Only" Stream. Officers promoted to this Stream will hold only staff appointments, in the higher rank and will proceed on superannuation thereafter. These officers will not: be eligible for further promotion. Advantages (4) The "Two Stream Concept" will result in the following advantages :- (a) Viable command tenures for Divisional and Corps Commanders and a consequent improvement in the quality of command performance and fighting efficiency of the Army. (b) Only very high calibre officers will get command appointments. (c) Improved Staff work at higher levels "Staff Only" Stream officers will tend to gain expertise in handling complex staff functions. (d) High calibre officers from other Arms/Services will be available to the "Staff Only" Stream to contribute to their expertise."

(20) It is not for this Court to sit over judgment on the policy of adopting two streams as set out in the letter and give its own opinion as to the validity of the scheme So long the policy is constitutionally valid and legal it is not for the Court to scrap the same or suggest any other policy. Court cannot interfere in such policy matters. Mr. Bakhru says the two stream concept has failed to achieve its purpose. Assume that to be so, it would be for the Central Government and the Chief of Army Staff to suggest and apply corrective measures. The court can step in only if the petitioner says he has been differently treated as per the policy. That is not BO. He is attacking the policy itself Indeed the fact that policy is not working properly is no ground to hold it is not legal. Post events are relevant only for the authority to see if the policy needs any amendments or withdrawal altogether. Another argument was raised that the letter dated 9 September, 1986 has been kept in abeyance and in this connection refer- once has been made to a letter dated 19 June, 1987 from the Military Secretary's Branch to the Adjutant General's Branch of the Army. This letter is as under :-

"MINUTES OF PSOs" Conference Held On 26 May, (1) Reference para 14 of the minutes of PSOs" Conference held on 26 May 87. (2) A case has been taken up with the Government for doing away with the differential ages of retirement in respect of officers promoted in "Command and Staff" and "Staff" Only Streams. (3) It is, Therefore, requested that the issue of Govt. letter stipulating different ages of retirement in respect of officers promoted in "Command and Staff" and "Staff Only" Streams, may be held in abeyance."

(21) This letter raked up a great deal of controversy before us. If it referred to letter dated 9 September, 1986, para 3 would have been worded differently. The letter dated 9 September, 1986 had already been issued and was being implemented. There was, Therefore, no question of the issue of this letter being held in abeyance. We, Therefore, examined the relevant file of the department. The file starts with the noting that the Government had approved in principle of career management of Army Officers of the rank of Brigadier and above and

further to fix the ages of superannuation of officers selected in the "Staff Only" stream in the ranks of Lt.General, Major General and Brigadiers one year less than those for the corresponding ranks in the "Command and Staff" stream. It was, Therefore, noted that the letter dated 9 May, 1985 had undergone changes and an amendment to this letter was sought to be issued and the tiles was put up for according necessary approval to the Ministry of defense. The Army Headquarters described this as corrigendum to (he letter of 9 May, 1985. This was resumed by the Ministry of defense with an objection that it should appropriately be called as "addendum" and not "corrigendum". Certain other points were raised by the Ministry of defense and the file was returned to the Adjutant General's Branch for putting up a revised draft addendum or when a substantive letter on the subject-matter in consultation with the Military Secretary's Branch. Draft addendum was then prepared and in substance was founded to be in order after being examined by the Finance Division It was again sent to the Ministry of defense, but before it could issue it was noted that a request had been received from the Army Headquarters in June 1987 itself that a case had been taken-up for doing away with differential ages of retirement in respect of officers promoted in the two streams and, Therefore, the issue of the addendum was suggested to be kept in abeyance. This is per the note dated 8 September, 1989 of the Under Secretary (AG). The last note in the Ministry of defense shows that the matter was discussed with the defense Secretary who opined that no action needed to be taken for the present as the two stream concept was being reviewed. The file was then returned to the Army Headquarters who again suggested issue of the addendum particularly in view of two. court cases of Major General Chopra and Major General Prakash Singh. Under Secretary in the Ministry of defense, however, noted that the writ petitions filed by the two Generals were being defended separately and there was no linkage between the earlier issue of Government instructions with that of the present one. He, however, wanted the view of the Adjutant-General before processing the case further. There is no further action in the file on the issue of the addendum and the last substantive note on the file is of the Military Secretary's Branch that the revised proposal recommending doing away with the two stream concept as applicable in the rank of Lt. General and Major General and Major General in its entirety was forwarded to Ministry of defense in May 1990 and thereafter discussions were held between the Additional Secretary and the Military Secretary and that the decision of the Ministry of defense was still awaited on the recommendations of the Army Headquarters. This note is dated 9 July. 1990. It was nevertheless suggested that early decision be taken regarding issue of the addendum and the orders fixing the ages of retirement as per letter of 9 May, 1985 and the addendum be issued in the form to S.R.O. The file ends up up with a note of the Joint Secretary in the Ministry of defense with a remark "pl. discuss". We have also seen the draft addendum which earlier bad met the approval of the concerned authorities It introduces in the letter of 9 May, 1985 the retirement ages of the officers of the General Cadre in the "Command and Staff" stream and "Staff Only" Stream and also of the Non-General Cadre

Officers as mentioned in the letter dated 9 September, 1986. It is, Therefore, quite clear that when the letter dated 19 June, 1987 talked of keeping the issue of letter in abeyance it was referring of the addendum in question and not to the letter of 9 September, 1986 which had already been issued and acted upon. We permitted the petitioner to go through file. The argument then raised was that the letter dated 9th September, 1986 was namely a policy letter and was not an order as such which could be acted upon and till the addendum was issued the retirement ages of officers falling under two stream concept could not be acted upon. We are unable to agree to this submission. Firstly, because letter dated 9 September, 1986 is not merely a policy letter but in terms specifies two stream concept and gives the retirement ages of the officers falling under two different streams; secondly, the letter had been acted upon and in fact petitioner himself under this letter gave big willingness certificate which has been reproduced in the earlier part of the judgment; and thirdly, the letter had been subject-matter of various court cases by the officers who were sought to be retired and it was never said that the letter was only a policy letter to come into operation at any subsequent stage. The letter has been issued under authority of the Central Government. To us it also appears issue or non-issue of addendum cannot make any difference. By the addendum the letter dated 9 May, 1985 was sought to be made a comprehensive one inasmuch as letter dated 9 September, 1986 had modified that letter when the concept of two streams was evolved. Both letters, Therefore, can stand together; with the letter dated 9 May, 1985 modified the extent mentioned by the letter dated 9 September 1986.

(22) Then it was contended by the petitioner that letter dated 1 June, 1987 was not issued by or under the authority of the Central Government and has no validity. The respondents admit this position but say that letter is merely clarificatory in nature and since certain doubts crept in implementation of the ages of retirement of officers falling in General and Non-General Cadres, this letter had been issued by way of clarification. If this letter has no validity as contended by the petitioner, then petitioner cannot take advantage under the same even if Lt. Generals in Non-General category are retiring at the age of 68 years as stipulated by this letter. This letter says that as per current rules officers of the "Staff Only" stream are to superannuate one year earlier than the officers of the "Command and Staff" Stream and that this rule was applicable both to the General Cadre and officers from Arms and Services, and, however, in the case of officers of other Arms and Services certain other clarifications were required which were being given in the letter. As we have seen above, petitioner is an officer of the General Cadre. This letter, Therefore, does not apply to him. We have seen above that in order to better the promotion prospects of Non-General Cadre officers the stream concept enunciated in the letter dated 9 September, 1986 provided that deserving officers of this Cadre could be promoted to the rank of Lt. General in the "Staff Only" stream. The respondents say that the two stream concept opened another avenue of promotion of the officers of the Non-General Cadre and these officers irrespective of their selection for the "Staff

Only" Stream were also entitled to be considered for promotion within their own Corps. This is what the letter dated 1 June, 1987 clarified. The two stream concept provided an opportunity to the meritorious officers of "the Non-General Cadre to get a promotion to the post of Lt. General "Staff Only" Stream outside their own Corps. Respondents have submitted that an officer of the Non-General Cadre is entitled for promotion to the rank of Lt. General within his own Corps as well and also outside his own Corps in the "Staff Only" Stream, and once promoted within his own Corps the officer who has earlier been promoted in "Staff Only" Stream has got the right to be reverted back to his parent cadre and hold one of the specified appointments within his own Corps. In the eventuality of his being selected in the "Staff Only" Stream the officer is posted to a staff appointment outside his own Corps. This is so as after having been cleared for promotion within his own Corps he should in the normal course take up the appointment in his own Corps and continue up to the age of 58 years as per letter of 9 May, 1985. But such a transfer leads to short tenures, he is generally made to continue on the same staff appointment in order to maintain continuity and provide reasonable tenure and make use of his expertise in organisational interest. It is stated that in such a situation it is ensured that one post of Lt. General is kept vacant within his own Corps

(23) It may also be noticed that just as Non-General Cadre officers get chances of promotion within their own Corps, so also a General-Cadre "Staff only" Stream officer gets two more chances of promotion to "Command and Staff" Stream and if selected would serve up to 58 years of age. Again it may be noticed, as pointed out by the respondents, a General-Cadre officer normally gets promotion two years earlier than his batch-mates in the Non-General Cadre and, Therefore, normally serves two years more in the rank of Lt. General. The petitioner has filed an order dated 27 December, 1990. of the Central Government rejecting his statutory complaint. From this it would appear that it was never the case of the petitioner that letter dated 9 September, 1986 was only a policy letter. He had complained about irregularities at the Army Headquarters in implementing the two stream policy. He also challenged his non-selection for the "Command and Staff" Stream. The Central Government also rejected the plea of the petitioner that the willingness certificate given by him was not valid. The instances which the petitioner gave in the writ petition regarding certain Lt. Generals going up to the age of 58 years, but they all belong to Non-General category and would fall within the scheme envisaged in letter dated 2 September, 1986 read with letter dated 1 June, 1987. No grievance can be made by the petitioner on that account who belongs to the General Cadre. Petitioner was considered for promotion to the rank of Lt. General by Special Selection Board held in October, 1986 and was found fit to "Staff Only" Stream for which the age of superannuation as per letter dated 9 September, 1986 is 57 years. He was promoted to the rank of Lt General in December 1987 and attained the age of superannuation on 19 December, 1990, and was, thus, retired on 31 December, 1990.

(24) Lastly, it may be noted that defense Services Regulations are not statutory

in nature though in the absence of any statutory rules or order under the Act, respondents would be bound by the same. 1987 Edition of the defense Services Regulations incorporated Army instructions up to 5 December, 1986. It instated that letter dated 9 September, 1986 could not get incorporated in this 1987 Edition mainly due to the fact that the compilation takes some time and the instructions which are issued immediately before the publication some times do not get included. The fact of the matter would, Therefore, be that the letter dated 9 September, 1986, would get precedence over defense Services Regulations incorporating any other different age of retirement of the officers.

(25) Because of the view we have taken in the matter, it is not necessary for us to consider other points raised and the authorities cited at the Bar. We are, Therefore, of the opinion that the letter dated 9 September, 1986 is valid and effect can be given to letter dated 9 May, 1985 as amended or modified by letter dated 9 September, 1986, These contain executive instructions and only supplement Rule 16-A and do not supplant the same. By issuing these instructions the Central Government is not in any way restricting the operation of the Rule 16-A. No constitutional right of the petitioner has been violated and we agree with views expressed by this Court and that by the Madhya Pradesh High Court in the cases noted above.

(26) This petition, Therefore, fails. Rule is discharged.

(27) In conclusion, however, after examining the whole record of the case and relevant files of the Army Headquarters, we have been dismayed and also filled with anguish over the way Central Government in the Ministry of Defense is functioning. Grave doubts have been expressed over the continuance of the two stream concept and it was decided in the Conference of Principal Staff Officers to do away with such a concept. The matter has been banging fire since June, 1987. There has been dissatisfaction at the highest rank of officers in the Army because of the different ages of retirement on the basis of two stream concept. General V.N. Sharma former Coas (Chief of Army Staff) recommended that system of streaming officers into "Command and Staff" and "Staff Only" Streams at the level of Lt. General and Major General be discontinued with immediate effect. The present Chief of Army Staff General S.P. Rodrigues also expressed the same view. A formal communication to do away with such two stream concept was sent to the Central Government by the Army Headquarters in May 1990. No decision of the Central Government has so far been communicated. Since we have not been shown the file of the Central Government we do not know at what stage the matter is being considered. The matter, however, brooks no delay. The Central Government must wake up from its deep slumber to which it has fallen into and sooner the better. Army officers of the rank of Major General and Lt. General and even others must retire from the Army with pride and satisfaction and not as persons filled with some: remorse or discontentment. It is unfortunate to see such high ranking Army officers as Major Generals and Lt. Generals in the corridors of the High courts The least we countrymen can express

our gratitude is to see that the Army personnel retire with honour. We are confident that Central Government will immediately apply its mind to the issue and take a decision forthwith. We were even considering of issuing a mandamus but our self imposed limits refrain us from doing so.

(28) Though we have discharged the Rule we feel it is a fit case where petitioner should be awarded costs of this litigation as it can be said that it is the Central Government which is to be blamed for its inaction. We order accordingly. Counsel fee Rs. 3,300.00.