

(1994) 10 BOM CK 0039

In the Bombay High Court

Case No : Writ Petition No. 1354 of 1994

R.K. Banswal

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 11-10-1994

Acts Referred:

Constitution of India, 1950 — Article 141, 142, 153, 154, 233

Citation : (1995) 3 BomCR 353 : (1995) 1 MhLj 297

Hon'ble Judges : J.K. Chandrashekhara Das, J;A.A. Halbe, J

Bench : Division Bench

Advocate : R.K. Bansal, for the Appellant; State of Maharashtra and anr., for the Respondent

Judgement

A.A. Halbe, J.—The petitioner - District and Sessions Judge, Osmanabad - has preferred the writ petition for issue of writ of certiorari for quashing the order issued by Respondent No. 2 - The Chief Justice of the High Court of Bombay - dated 30th March, 1994 denying the benefit of increase of retirement age to 60 years in terms of the Review Petition No. 249 of 1992 in Writ Petition No. 1022 of 1989 in the case of a All India Judge's Association v. Union of India & Ors. reported in 1993 2 CLR 770.

2. The main grievances which has been made in this writ petition is that this order of denial of benefit of extended age of superannuation should have been issued by the appointing authority namely the Governor of the State of Maharashtra in this case and further that the said order, according to petitioner, is grossly erroneous, illegal and has been passed by way of compulsorily retirement of the petitioner and is thus mala fide and in not keeping with the above decision rendered by the Supreme Court. It is also contended that the said order being an order of compulsory retirement, should have been preceded by three month's notice or salary of three month's in lieu of the notice and the said requirement has not been complied with and on that count also, the impugned order is illegal and deserved to be quashed.

3. This has been broadly contested by the Respondent No. 2 and according to Respondent No. 2, there is virtually a mandate on the High Court to consider the cases of persons like the petitioner, who completed his age of 58 years on 30th April, 1994. The authority is vested in the High Court to take necessary steps for evaluating the performance of the petitioner who wanted the benefit of extended superannuation. The High Court considered the confidential reports, to character roll, quality of judgments and other relevant matters with the help of the committee of Judges headed by the Chief Justice and the unanimous decision of the said Committee was that the petitioner did not possess sufficient potential for continued useful service so as to deserve benefit of extended superannuation. The said order now cannot be challenged because the petitioner, who attained his superannuation on completion of 58 years of age, could not look to the post of District Judge for his continued service. His claim for extended superannuation has been hedged by several conditions indicated above and he could claim only if the High Court accorded him the said benefit but on denial of the same, the petitioner could not look to that post and could not, therefore, question the order denying the benefit to him.

4. The petitioner was born on 10th April 1936. He joined the judicial service on 14-10-1968 and in due course of time, he came to be appointed as the District Judge from August 1987. He has been continuously officiating as the District and Sessions Judge and expected his continuance in term of the extended superannuation right upto completion of his age of 60 years. Surprisingly on 30th March, 1994, he received the communication vide Exh. "L" that his services had been terminated by the end of April 1994 and that the petitioner should hand over the charge to the next senior most Additional District Judge, working at Osmanabad. The said order has been gazetted under No. A. 1201/94 on 12th April, 1994. The copies thereof have been forwarded to the Chief Secretary to the Government, the Law Secretary to the Government, the Additional Registrars of the High Courts at various Benches, the Accountant General-I and Accountant General-II. The copy was endorsed to the petitioner.

5. The petitioner is aggrieved by this order and his claim is that the said order of compulsory retirement came as a bolt from the blue when as a matter of fact his performance has been consistently appreciated by Respondent No. 2 - High Court. The petitioner has annexed Exhs. A-1 to A-5 showing that his disposals right upto September 1993 were noteworthy. The term "noteworthy" indicates that the petitioner's disposals were 1 1/2 times the disposal of the cases prescribed for the District Judge. The petitioner was also granted increment by the letter dated 12th October 1993. He was also given an increment previously and he was asked the option for the post of Judicial Member in the Income Tax Appellate Tribunal on a higher scale. The petitioner conveyed his consent and all these testimonials issued in favour of the petitioner would rather clearly show that the performance of the petitioner was quite excellent and there was, therefore, no reason for his sudden discontinuance and in that background, the impugned order is illegal, erroneous and should be quashed.

6. The other grievance which is essentially of legal nature is that when the petitioner has been appointed by the authority other than the High Court, the High Court cannot terminate his services under the garb of compulsory retirement and for all these reasons, it is claimed that the order of denial of benefit of extended superannuation should be struck down.

7. The Respondent No. 1 - the State - did not file any return and we may briefly indicate that the learned A. G. P. appearing for Respondent No. 1 was instructed to say that the Respondent No. 1 would follow the procedure in terms of the final orders passed in this writ petition. The State agrees to follow the dicta which may be laid down by this Court in regard to the compulsory retirement. We, therefore, feel that the State has not taken any hostile stand in the matter of order of compulsory retirement by the High Court and, therefore, the contesting defendant is only the High Court.

8. The Respondent No. 2 - High Court - filed return and in the affidavit filed by way of return, the deponent - Additional Registrar - has averred that the factual aspect canvassed by the petitioner need not be disputed but in terms of Article 235 of the Constitution, the High Court is having exclusive and full control over subordinated judicial officers. By way of technical defence, it is contended that the necessary party is not the Chief Justice but the entire High Court. However, we may say that this contention has not been pressed by the learned counsel for Respondent No. 2. The Additional Registrar further contended that this order has been passed by the Committee headed by the Chief Justice and the grievance of petitioner that the Chief Justice did not head the Evaluation Committee is wholly false. This has been done in terms of the Review Petition No. 249 of 1992 reported in 1993 2 CLR 770 in the case of All India Judge's Association v. Union of India, (supra). The Respondent No. 2 has relied on relevant observations of the Supreme Court in the above judgment (to which we shall come later) and has contended that the benefit was to be accorded by the High Court if the Evaluation Committee of the High Court found that the petitioner had necessary potential for continued useful service after his age of 58 years. If the same is denied, as has been done in this case, there is no question of the petitioner claiming that benefit. It will be because of extended superannuation which presupposes superannuation at the age of 58 years and the said order does not carry any stigma and does not amount to punishment, dismissal or removal. It is strictly based on the directions of the Supreme Court and hence the question of the appointing authority issuing the said order does not at all arise. As per the ratio in the above case, the Court has only to follow the procedure prescribed for compulsory retirement. The question of enforcing rules does not at all arise. All that the High Court has to do is to follow the procedure prescribed for compulsory retirement and that would mean to consider the public interest and continued utility of petitioner. The nomenclatures "retirement" and "compulsory retirement" cannot be construed in strict sense as envisaged in the provisions of Rule 10(4) of the Maharashtra Civil Services (Pension) Rules, 1982.

9. Lastly it is contended that as per the directions in the above judgment, the petitioner is seeking as to whether the Additional Registrar, acting on behalf of the Chief Justice, is competent authority to retire the petitioner compulsorily and this, therefore, is the question of interpretation which must be referred to the Supreme Court in terms of the observations in the last paragraph, which are reproduced herebelow :

"Any clarification that may be required in respect of any matter arising out of this decision will be sought only from this Court and from no other Court. Further the proceedings, if any, for implementation of the directions given in this judgment shall be filed only on this Court and not other Court shall entertain them".

For all the above submissions, the Respondent No. 2 has craved for dismissal of the petition.

10. We may, in the first instance, examine the question of competency of the Respondent No. 2 to deny the benefit of extended superannuation when as a matter of fact, this amounts to compulsory retirement for which the prescribed authority is the appointing authority in term of Article 310 of the Constitution of India. As per that the Article, the appointee cannot be removed or dismissed by an authority subordinated to that by which he was appointed. The said Article further contemplates the rules of natural justice to be followed by the said authority. It is also not in dispute that under Article 310 of the Constitution, the tenure of office of a public servant is wholly during the pleasure of Governor of the State.

11. Under Article 309 of the Constitution, it is the appropriate Legislature which has to regulate the recruitment and other conditions of services of persons appointed to public services and posts in connection with the affairs of the Union or of any State. In absence of Legislation, the Governor of the State has to frame rules regulating the recruitment and conditions of service of persons so appointed until a provision is made by or under an Act by the appropriate Legislature.

12. In this case, it is not in dispute that except the above Pension Rules, there are no other rules governing the cases of compulsory retirement. The said Rules are made in exercise of the powers conferred by the provisions of the Article 309 of the Constitution. Now as per Rule 10(4), it is stated that the appointing authority has the absolute right to retire, if it is of the opinion that it is in the public interest so to do, by giving notice of not less than three months to the gazetted Government servant, who had entered the Government service under any Government in India before attaining the age of 35 years and after his attaining the age of 50 years and in any other case, after he has attained the age of 55 years. In lieu of notice, three month's pay and allowances have to be paid.

13. In this case, it could be appropriately said that the petitioner completed the age of 55 years and thus called for the opinion of the appointing authority about his continuance in the public interest. The appropriate authority has been defined

in the "Explanation" and it means, the authority which has power to make substantive appointment to the post or service from which Government servant retires or wants to retire. Three month's notice is contemplated in the remaining sub-clauses. We may indicate here that the Respondent No. 2 does not dispute that the Governor is the appointing authority so far as the petitioner is concerned. However, according to the High Court, these questions have been in subordinated by the Supreme Court in the above judgment. The State has also not framed rules as per the directions of the Supreme Court and since the High Court has been called upon to carry out the work of evaluation, the High Court issuing the order of denial of benefit is fully within its competence.

14. We may here examine briefly the relevant observations of the Supreme Court in the above Review Petition. In Para 7, sub-para appearing on page No. 2509, it is observed :-

"There is, however, one aspect we should emphasise here. To what extent the direction contained in the main judgment under review shall stand modified. The benefit of the increase of the retirement age to 60 years shall not be available automatically to all judicial officers irrespective of their past record of service and evidence of their continued utility to the judicial system. The benefit will be available to those who, in the opinion of the respective High Courts, have a potential for continued useful service. It is not intended as a windfall for the indolent, the infirm and those of doubtful integrity, reputation and utility. The potential for continued utility shall be assessed and evaluated by appropriate Committees of Judges of the respective High Courts constituted and headed by the Chief Justices of the High Courts and the evaluation shall be made on the basis of the judicial officer's past record of service, character rolls, quality of judgments and other relevant matters".

15. The Supreme Court further observed that the enhancement of the superannuation age to 60 years coupled with the provision for compulsory retirement at the age of 58 years, does introduce a change in the service condition of the existing personnel. However, the incumbents desirous of extended superannuation are subject to the liability of retiring compulsorily at the age of 58 years according to the procedure for compulsory retirement, laid down in the Service Rules. In para 10 of the said judgment in sub-para (b), the observations are :-

"The direction with regard to the enhancement of the superannuation age is modified as follows :

"While the superannuation age of every subordinate judicial officer shall stand extended upto 60 years, the respective High Courts should, as stated above, assess and evaluate the record of the judicial officer for his continued utility well within time before he attains the age of 58 years by following the procedure for the compulsory retirement under the Service Rule applicable to him and give him the benefit of the extended superannuation age from 58 to 60 years only if he is

found fit and eligible to continue in service. In case he is not found fit and eligible, he should be compulsory retired on his attaining the age of 58 years".

The assessment in question should be done before the attainment of the age of 58 years even in cases where the earlier superannuation age was less than 58 years.

The assessment directed here is for evaluating the eligibility to continue in service beyond 58 years of age and is in addition to an independent of the assessment for compulsory retirement that may have to be undertaken under the relevant service rules at the earlier stage/s".

16. The learned counsel appearing for the petitioner has contended that these observance in the Review Petition have to be read in juxta position with the main judgment reported in 1991 2 CLR 927, in the case of All India Judge's Association v. Union of India, and as per that judgment, it is directed that the retirement age of judicial officers be raised to 60 years and appropriate steps be taken by 31st December 1992. This judgment was delivered on 13-11-1991 whereas the judgment of the Review Petition was delivered on 24-8-1993. He has also drawn our attention to some of the observations in the Review Petition judgment and has contended that the age of retirement has been raised to 60 years and there is no question of extension or extended superannuation. The benefit must accrue to all the incumbents of the posts and it will be fallacious to say that the incumbents ordinarily would retire at the age of 58 years and unless he qualifies for extension on the basis of the report of evaluation Committee of the High Court, then alone his services could be extended upto 60 years.

17. He has tried to suggest that the direction is read in reverse direction when as a matter of fact, the direction is that 60 years is the normal age of retirement and 58 years is only in case of compulsory retirement and for that purpose, Rule 10(4) should be given effect to. In absence of the order issued by the Governor, the petitioner could not have been terminated. The learned counsel for the Respondent No. 2 has drawn our attention to the limitations which the High Court has to observe while implementing the directions issued by Supreme Court. In 1986 2 CLR 166 in the case of G. K. Dudani v. S. D. Sharma & Ors. the Supreme Court observed that the Division Bench of the High Court cannot sit in appeal over the judgment of the Supreme Court delivered under Article 141 of the Constitution. The High Court should take the words in the judgment in the sense in which they are used and apply to the facts before it. In that case, the Gujarat High Court tried to put difference interpretation on the words "promotes regularly appointed" in the matter of promotions to the post of Deputy Collector. The Supreme Court laid down the above observations and it can be therefore, said that the High Court should not put its own interpretation but should take the words in the sense in which they are used in the judgment of the Supreme Court.

18. In Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, in the case of Ballabhadas Lakhani v. Municipal Committee, Malkapur,

the Supreme Court laid down that the High Court cannot question the judgment of the Supreme Court under the pretext that the relevant provisions of the Statute were not brought to the notice of the Court. The Court observed :

"The decision was binding on the High Court and the High Court could not ignore it because the High Court thought that the relevant provisions were not brought to the notice of the Court."

That was the case in respect of Bale and Boja tax imposed by the Municipality under C. P. and Berar Municipalities Act. This observation would mean that the judgment of the Supreme Court cannot be scrutinised or questioned on the ground that the relevant provisions were not brought to the notice of that Court. It will have to be presumed that the Supreme Court has considered all the provisions relevant for the decision and delivered the judgment after consideration of all the relevant provisions.

19. In the case of Union Carbide Corporation, etc., etc. Vs. Union of India, etc. etc., , the Supreme Court while dwelling on the scope of Article 142 of the Constitution of India, observed that the scope of the power of the Supreme Court is far extensive and that the prohibitions or limitations on the power under Article 142 contained in substantive statutory law cannot constitute limitation on the powers of the Supreme Court unless those prohibitions are based on fundamental principles of public policy. The Supreme Court would take into account such prohibitions while assessing the "complete justice" of a cause or matter. Otherwise the prohibitions and limitations contained in ordinary laws cannot ipso facto act as prohibitions or limitations on the constitutional powers. The Court in Paragraph No. 83 of the judgment observed that the issues involved in Bhopal Gas Tragedy were the matters of serious public importance. The proposition that a provision in any ordinary law irrespective of importance of the public policy on which it is founded, operates to limit the powers of the Apex Court under Article 142(1) is unsound and erroneous.

"The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws would ipso facto act as prohibitions or limitation on the constitutional powers under Article 142. Such prohibition or limitations in the Statute might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the Court on which conferment of powers - limited in some appropriate way - is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policies".

"It will again be wholly incorrect to say that the powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override the constitutional provisions. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the Apex Court will take note of the express prohibition in any substantive statutory provision

based on some fundamental principles of public policy and regulate the exercise of its powers and discretion accordingly. The proposition does not relate to the powers of the Court under Article 142 but only to what is or is not "complete justice" of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise."

20. The learned counsel for Respondent No. 2 while dwelling on these observations, has contended that the powers under Article 142 go far reaching and that the Supreme Court would not be bound down by the prohibitions or limitations of a particular statute in case the complete justice has to be done in the matter. Such prohibitions or limitations shall be deemed to have been considered by Supreme Court and they cannot come in the way of Supreme Court for doing complete justice. The Supreme Court cannot be forestalled by such prohibitions and limitations unless they are fundamental to policies of the Government. Extending this analogy in this case, it is contended that the Supreme Court in Review Petition has not been oblivious of the limitations and prohibitions of the service law namely the Pension Rules. Still the Supreme Court has issued directions both to the Government and the High Court and those authorities are bound to implement those directions irrespective of whether they are prohibited or permitted under the Service Rules.

21. It is in this context that the judgment of the Supreme Court should be read and that the directions issued therein are the mandates which the Supreme Court has issued and that the concerned authorities are under obligation to observe and implement them. It, therefore, becomes imperative for us to traverse through the facets of the judiciary which has been considered by the Supreme Court. The Supreme Court considered that under Articles 233 and 234, the appointment of the District Judges are made by the Governor. The power to regulate their conditions of service belongs to the executive subject to legislative control. It is entirely in the purview of State Legislature to determine the conditions of service. It was argued that under Article 309 of the Constitution of India, the matters concerning appointment, promotion, terms and conditions of service of the subordinate judiciary are to be decided by the State Government subject to laws which may be made by the Legislature. The judgment, it was argued that would impugn upon the powers namely the constitutional functions ordinarily to be performed by the executive or the Legislature. This argument has been rejected by the Supreme Court in the first judgment reported in 1991 2 CLR 927 (supra) and the Supreme Court observed that the Review Petition deserved to be dismissed as the arguments were considered in the main judgment. (See para No. 4, page 2501).

22. On the other hand, the Supreme Court on detailed analysis on their facets, directed that the relevant States should include the direction that the Advocates seeking selection to the posts in judiciary should have practiced the profession of advocacy for at least three years. Such a uniform qualification should be incorporated because the experiment of some of the States by recruiting the law

graduates without practice did not bring in desired results. The Supreme Court also directed the State Governments to include the representative of the High Court in the selection process and this opinion should be given weight and the same cannot be ignored except on exceptional grounds. We may reproduce those observations which are as below :

"We therefore, direct that all States shall take immediate steps to prescribe three years' practice as a lawyer as one of the essential qualifications for recruitment as judicial officer at the lowest rung."

"We direct that in all cases where the selection of judicial officers is to be made by the Public Service Commission, the representative of the High Court (preferably the Sitting Judge of the High Court) shall be one of the members of the selection committee and the opinion given by him with regard to the suitability of the candidates shall not be disregarded unless there are strong and cogent reasons for not accepting his opinion, which reason must be recorded in writing."

23. These directions are in the nature of mandates and non-observance thereof may cause serious consequences and possibly constitutional deadlock. In these two directions, it is manifest that an attempt has been made to see that the competent judicial officers are selected at the hands of the experts in the Court work. The Supreme Court observed that these directions are in fact the duties and obligations which the State should have implemented long before. The 14th report of the Law Commission given as early as in 1958 did contain all these requirements for raising the standard of judiciary and by judgment, the Supreme Court called upon the executive to implement those requirements. They are nothing less than mandates which the Supreme Court has been authorised to issue sequel to the failure on the part of the executive to implement them. In this regard, the Supreme Court has said that the State Governments did not look upon the judicial service as a service rendered by the judiciary which is one of the pillars of the Constitution. There should be, therefore, parity between the political executive (Ministers), the Legislatures and the Judges and not between the Judges and Administrative Executive which means Secretarial Staff. The judiciary is thus part on a higher pedestal in the realm of constitutional functions. It has been equated with the legislature and Council and Ministers and in that background, it will have to be stated that the mandate of the judiciary is a mandate which must invite obedience from other organs of the State.

24. We may observe that in the above directions, the Supreme Court has conferred the status of an appointing authority on the High Court and the same cannot be faulted for cogent reasons given. The appointment of Judges in subordinates judiciary or even in the cadre of District Judges, by implication, has come within the competence of the High Court. The learned counsel for the petitioner has fairly conceded that this is indeed the position. The appointment under present rules is only the ministerial act to be performed by "the appointing authority" and nothing beyond that.

25. While dwelling on the question of rise in the age of superannuation, the Supreme Court has observed that the office of the Judge is an office of an artist who has to involve himself in the creative art all throughout and that is how the rise in the retirement age was directed. The Supreme Court thus rejected all the arguments based on Article 309 and laid down that the directions have to be observed by other organs of the State. The learned counsel for the respondents has contended that this judgment is a mandate which the High Court as well as the Government has to implement and in the process of implementation, the High Court is vested with powers to scrutinise the case of an incumbent whether he deserved to be granted the extended superannuation.

26. The Andhra Pradesh High Court in the case of G. Nageswara Rao v. State, reported in 1994 LIC 870 observed :-

"The judicial officers in the services of the High Court or the District Court do not have the right to hold the post beyond 58 years. Their right to continue after 58 years is hedged in certain conditions".

Such continuance is solely in the discretion of the High Court, which would be inclined to grant in case the incumbent deserved continuation. The word used is "potential for continued useful service". If the High Court denies the benefit, it cannot be said that the right of these officers to continue upto 60 years is scuttled. It is the benefit which the High Court has to accord to the incumbent. Otherwise, the incumbent is liable to be retired. The Andhra Pradesh High Court, on extensive consideration of other cases decided by the Supreme Court, laid down the ratio :

"Therefore, the preponderance of judicial pronouncements clearly point out that unless there is right to the post, the action be challenged. We have no hesitation in holding that the petitioners do not have the right to hold the post beyond 58 years. Their right to continue upto 60 years is hedged in certain conditions. Unless those conditions are satisfied, they are not entitle to seek the benefit... the finding of the Review Committee that the petitioners do not possess the requisite potential for continued useful service beyond 58 years of age is a finding recorded for the purposes of giving benefit of extended superannuation or not and it does not amount to punishment."

27. The above observations, therefore, clearly spell out that the superannuation is 58 years and although the superannuation age generally is raised to 60 years the same cannot be claimed as of right. It is the benefit which the High Court alone could accord on the basis of the report of Review Committee. The discretion is subject to the guidelines in the judgment. It is not arbitrary. The report of the Evaluation Committee based on scrutiny of confidential records, judicial performances etc. is the foundation.

28. The next point for consideration for us is, therefore, whether the order of denying benefit of extended superannuation is an order of compulsory retirement, which can be passed in terms of Rule 10(4) of the above Pension

Rules. It has been consistently laid down by the Courts that the order of compulsory retirement does not amount to dismissal or removal from the service within the meaning of Article 311 of the Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI), . It is neither punishment nor visit with loss of retirement benefits. It does not case stigma. The officer will be entitled to pension that is actually earned and there is no diminution of the accrued benefits. The Supreme Court in its latest judgment in the case of S. Ramachandra Raju Vs. State of Orissa, , considered these aspects at length. The Court considered its previous judgments and laid down that the compulsory retirement does not carry any stigma. It cannot be termed as an order of dismissal or removal from service and would not, therefore, come within the scope of Article 311 which require the order of dismissal or removal to be passed by the appointing authority namely the Governor. In the matter of compulsory retirement what has to be considered is that the minimum service is performed by the Government servant. In this case, we find that under the Rules, the petitioner has completed his age of 55 years and his performance was, therefore, liable to be reviewed. The review contemplated in the above case is in addition to the reviews contemplated under other rules which in fact would mean previous reviews. The only caution that has to be taken is that the compulsory retirement should be in the public interest which would mean interest in relation to the public administration.

29. It is well settled that public interest in relation to public administration envisages the retention of honest and efficient employees in the service, dispensing with the services of those who are inefficient and dishonest. Public interest eminently testifies to get rid of those who have lost their utility and became useless and their continuance in service is considered improper. Public interest has been variedly defined and in the case of Brij Behari Lal Agarwal Vs. Hon"ble High Court of Madhya Pradesh and Others, , the Court observed :

"Various considerations may weigh with the appropriate authority while exercising the power conferred under the rule of compulsory retirement. In some cases, the Government may feel that a particular post maybe more usefully held in public interest by an officer more competent than the one who is holding. It maybe that the officer is holding the post is not inefficient but the appropriate authority may prefer to have a more efficient officer. It may further be that in certain key posts, public interest may require that a person of undoubted ability and integrity should be there. There is a good deal of dead wood which has to be chopped off in the public interest.... While a minimum service is guaranteed to the Government servant, the Government is given power to energise its machinery and make it more efficient by compulsory retiring those who in its opinion should not be there in the public interest."

Such rule would operate as a constant reminder to the incumbents that they are likely to be weeded out if found to be slack, sluggish and inefficient and further who have doubtful reputation. Thus compulsory retirement operates as a

salutary safeguard in the armoury of the Government for maintenance of the services in trim and fitness. At a reasonable point of time, a stage is reached in the service when the Government reserved its own right for a second look at the officer - whether their retention in the employment would be useful in the public interest. Such rule is a warning poster for every Government servant to conduct himself properly, diligently and efficiently throughout his service career.

30. It would be thus seen that the High Court has been empowered to carry out those directions and in terms of the judgment to do so.

31. The learned counsel for the petitioner has contended that the right of appointment or termination cannot be delegated and that can be easily gathered from the judgment of the Supreme Court reported in the case of *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, . The Court observed that the powers to dismiss a public servant at pleasure is outside the scope of Article 154 which relates to executive powers of the State which maybe carried out through officers subordinate to Governor. However, we have indicated in the foregoing paragraphs that it is settled by catena of decisions that the powers of compulsory retirement does not amount to dismissal or removal from service and this is to be found in the judgment of the Supreme Court in the case of *S. Ram Chandra Raju v. State of Orissa*, (supra). It is neither punishment nor visit with loss of retiral benefits. It does not cast stigma and the officer would be entitled to pension that is accrued benefits. The Supreme Court relied on its own judgment reported in 1992 1 CLR 610 in the case of *Baikuntha Nath Das v. Chief District Medical Officer, Baripada*, wherein the Court further observed that uncommunicative remarks could also be relied upon by the Review Committee.

32. The sum and substance of the cases discussed above in relation to compulsory retirement is that compulsory retirement does not amount to either dismissal or removal. If that be so, the question of appointing authority exercising powers would not at all arise. The said power can be impliedly delegated. In *B.K. Sardari Lal Vs. Union of India (UOI) and Others*, in the case of *Bk. Sardari Lal v. Union of India*, it is laid down that the power to dismiss a public servant is outside the scope of Articles 153 and 154 of the Constitution of India and cannot be delegated by the President or the Governor to a subordinate officer and the same can be exercised by him only by the manner prescribed in Constitution. This would, therefore, impliedly mean that if there is no dismissal, the constitution limitations cannot come into operation. If there is no dismissal or removal as in the case of compulsory retirement, it cannot be argued that compulsory retirement must also be effected by the appointing authority. There is no constitutional violation and the same is to be found in the observations of the Supreme Court in the case of *Baldev Raj Chadha Vs. Union of India (UOI) and Others*, . In para No. 5 of that judgment, it is clearly observed :-

"The fallacy in the argument lies in the confusion between "dismissal" and "compulsory retirement". The two cannot be equated and the constitutional bar cannot be operative."

33. These observations were prompted because it was claimed that the incumbent, who was appointed by the Comptroller and Auditor General, was liable to be removed by him alone and not by the Accountant General, who was subordinate to the Comptroller and Auditor General. Compulsory retirement did not contemplate the dismissal or removal. It merely contemplated the cessation from the post. It was, therefore, said that there was no constitutional bar as envisaged under Article 311 of the Constitution of India. We have indicated here before that in Supreme Court directed the High Court to carry out all these directions so far as the District Judges, who were about to complete their age of 58 years. The High Court was directed to deny the benefit of extended superannuation to the District Judges who did not have potential for continued service. We are, therefore, of the view of the arguments that the appointing authority did not terminate or did not compulsorily retire the petitioner, should be taken as constitutional violation and in that background, the order deserved to be quashed cannot be considered. The action of the High Court is fully within the bounds of the directions issued by the Supreme Court. There was no violation of Article 311 of the Constitution of India and hence the question of the High Court issuing the orders of compulsory retirement was in fact denial of the benefit of extended superannuation and it cannot be questioned. It is manifestly clear that what the above case contemplates is denial of benefit of extended superannuation and not continuance of service. We are, therefore, unable to agree with the arguments of the learned counsel for the petitioner that the appointing authority did not issue the order of compulsory retirement.

34. When we view the order of the High Court we feel that it is not an order of compulsory retirement but denial of extended superannuation. Indirectly there is confirmation of retirement of the petitioner attaining superannuation age of 58 years. The extended age is hedged in strict conditions and is thus impliedly denied to every incumbent unless these conditions are satisfied by him. The extension is not automatic and as of right but it has to be energised by the Evaluation Report. In this background, no role is left to the appointing authority. It is not disputed that previous to the Review Judgment, the High Court used to publish in Government Gazette the retirement of the judicial officer and this practice was fully within the knowledge of the Government.

35. The next argument which has been canvassed on behalf of the petitioner is that the termination notice is illegal and, therefore, needed to be quashed. Several cases have been cited. The consequences which emerge from consideration of various cases namely Brij Behari Lal Agarwal Vs. Hon'ble High Court of Madhya Pradesh and Others, ; in the case of Baikuntha Nath Das v. Chief District Medical Officer, reported in 1992 1 CLR 610 ; in the case of S. Ramachandra Raju Vs. State of Orissa, , are that the judicial review is permissible if the retirement is not in the public interest or that it is unreasonable, arbitrary. The retirement could be set aside if confidential reports are not taken into consideration or that the decision was not at all warranted

from entries in the confidential report. It is not disputed that the judicial review is permitted in the above circumstances but at the same time, the Court cannot sit in appeal over those remarks which are found to be not arbitrary.

36. In this case, we called upon Respondent No. 1 to tender before us the character roll, confidential reports and other relevant documents for our consideration. The concerned record was produced before us. We went through all the entries in detail and we found that the respondent has rightly denied the benefit of extended superannuation to petitioner. We may not observe anything more because we found that the entries were based on proper data. It has been repeatedly said by the Courts that reputation of the Judge is built up by the passage of time and if that reputation does not befit the judicial officer, such officer need not be continued although it may not be possible for the authority to tender exact evidence of the faults committed by the incumbent. We, therefore, feel that the exercise of the powers by the High Court in terms of the directions issued by the Supreme Court in the Review Petition have been properly observed and accordingly, the petition is devoid of substance.

37. Since the Respondent No. 1 has not filed any return and since respondent No. 1 did not question the order of the High Court, we feel that there is no challenge from the Respondent No. 1 to the actions taken by the High Court. It may however be desirable that in due course of time, Respondent No. 1 would draft the necessary rules in consultation with the High Court to implement the scheme envisaged in the above judgment. Till then, we feel that the High Court shall have to carry out the instructions and directions in regard to the officers, who are about to superannuate.

38. It is also argued that the order of retirement is not accompanied by three months' salary. The High Court has contended that the procedure contemplated for compulsory retirement has been followed in this case. The payment of salary is not a condition precedent and hence this lapse on that part cannot be termed as fatal. In the case of *G. Nageswara Rao v. The State*, the High Court of Andhra Pradesh considered this aspect and found that this was not fatal. It is not stated by petitioner as to how much salary he was paid along with notice. However, we feel that if the notice is required to be accompanied by three months' salary, the petitioner should be accorded that benefit. We find that the notice is of one month. Accordingly, we proceed to pass the following order.

39. Writ Petition is partly allowed. The Respondent No. 1 is directed to pay to the petitioner two months' salary and other allowances within eight (8) weeks deducting whatever he has been paid along with the notice dated 30th March 1994. The order of denial of the benefit is confirmed. Rule made absolute to the extent indicated. There shall be, however, no order as to costs.

40. At this stage, the learned counsel for the petitioner prays for leave to appeal. For the reasons indicated, leave rejected.

41. Appeal partly allowed.