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Calcutta High Court

Case No: Civil Rule No. 7687 (W) of 1971

Amiya Kumar Mitra — APPELLANT

Vs

State of West Bengal — RESPONDENT

Date of Decision: Feb. 19, 1976

Acts Referred:

- Constitution of India, 1950 - Article 162, 294(c), 300, 309, 311

Citation: 80 CWN 554

Hon'ble Judges: M.N. Ray, J

Bench: Single Bench

Advocate: Jyotindra Kumar Ghose and Dilip Kumar Paul, for the Appellant; Suprakash Banerjee, for the Respondent

Judgement

M.N. Roy, J.

In this Rule the petitioner has challenged orders dated 29th September, 1973 (Annexure K), 26th July, 1974 (Annexure S) and 21st August, 1974 (Annexure T). By the said ultimate order in Annexure T, he has been informed that his prayer for releasing him from the order of suspension in connection with an order issued in connection with the second offence, for which he has been charged, cannot be acceded to. The petitioner joined the West Bengal National Volunteer Force on 24th March, 1955 as a Platoon Commander (Tailor) and he has alleged that on such appointment, he was performing his duties to the entire satisfaction of the authorities concerned and there was or has been no adverse remark against him. The petitioner has further alleged that as such Platoon Commander (Tailor), his terms of service and conditions of employment are governed by the West Bengal National Volunteer Force Act, 1949 (hereinafter referred to as the said Act) and the Rules framed thereunder viz., West Bengal National Volunteer Force Rules, 1949 (hereinafter referred to as the said Rules). It has further been alleged that because of such appointment, the petitioner belonged to the subordinate and other ranks within the meaning of section 6 of the said Act, the provisions whereof are quoted here in below: --

Section -- 6 : There shall be the following classes of officers and subordinate other ranks in the Force, namely : --

Officers.

(1) Provincial Commandant,

(2) Deputy Provincial Commandant,

(3) District or Unit Commandant,

(4) Company Commander.

Subordinate other ranks.

(1) Platoon Commander,

(2) Section Commander.

He has further alleged that as such Platoon Commander (Tailor), he was allotted duties of a Tailor with the same scale of pay of Platoon Commanders, who are allotted other duties. The petitioner has further alleged that as such Platoon Commander, (Tailor) his duties were to repair and maintenance of suit, uniform and other materials of the Unit, as ordered by the Administrative Officer or the Commandant and his daily work was required to be recorded in a register and furthermore he would be responsible for the maintenance and security of the sewing machines and other stores. The aforesaid duties, the petitioner has alleged, have been allotted to him by an order dated 1st August, 1973 being Annexure "A" to the petition. The said order mentions that the petitioner will work under the direct control of Administrative Officer (Q) and where there is no such office, under A.C.C. (Q) and from a reference to the said order, the duties, responsibilities and obligations of the petitioner, particulars whereof have been mentioned hereinbefore are amply testified.

2. On or about 13th September. 1972, the State Commandant, West Bengal National Volunteer Force, Respondent No. 3, issued a charge sheet against the petitioner on the allegations inter alia that on 22nd July 1972 he did not attend to the repairing (stitching) of some pillows and matress of the Unit, M. I. room and some other urgent work required to be done by him by the Unit Medical Officer. It has also been alleged that on 22nd July, 1972, the petitioner misbehaved with the said Medical Officer. The said charge sheet is Annexure A(1) to the petition and it appears from the statement of facts incorporated therein that there were allegations against the petitioner to the effect that he refused to cut "bandage than" into required pieces and furthermore when the Medical Officer requested him to repair (stitch) some pillows and matress as mentioned hereinbefore, he refused to do the said work and replied that he was not meant for those works, as he was not a "Dhunkar". By the said chargesheet, the petitioner was directed to show cause

within 7 days from the date of receipt of the same as to why disciplinary action should not be taken against him. It appears that on 5th October, 1972, the petitioner addressed a letter to the said Respondent No. 3 for copies of some documents, particulars whereof are mentioned in paragraph 6 of the petition and also in Annexure "B" to the same and the petitioner has also admitted that out of the 4 documents as mentioned in the said list of documents, 3 documents were supplied to him and document No. 3, which is a representation dated 22nd July, 1972 by the petitioner, was not supplied. It has further been mentioned that he was also informed that the allocation of duties, in terms of the Government Order in respect of a Tailor, was that, a Tailor would have to perform all "tailoring" works of the establishment, to which he is placed.

3. After the receipt of the documents as mentioned hereinbefore, on 6th December, 1972, the petitioner replied to the said chargesheet contending inter alia amongst others that the work of repairing pillows and matress, which he was asked to perform by the Commandant, Training Centre, Kalyani, was not a part of his duty as a Tailor. He has further stated that be had no knowledge about the repairing work of such materials, which incidentally are required to be performed by a "Dhunkar". So far the allegations for non-compliance with the order for cutting bandage, the petitioner replied that such duty was required to be performed by the Nursing staff and not by a Tailor like him. Apart from this, the petitioner also denied the allegations of mis-behaviour by him with the superior officers.

4. By a communication dated 31st January, 1973 (Annexure E), the said Respondent No. 3 informed the petitioner that in exercise of the powers conferred by sub-rule 4 of Rule 10 of the West Bengal Services (Classification, Control and Appeal) Rules, 1971 (hereinafter referred to as the said 1971 Rules), he appointed the Administrative Officer, West Bengal National Volunteer Force Training Centre, Halishahar, Respondent No. 5 as the Officer, to enquire nito the charges as framed. By the said memo the petitioner was directed to submit a written statement of his defence to the said Enquiry Officer within 7 days from the date of receipt of the same and also to intimate whether he wanted to be heard in person.

5. From the records and proceeding it appear that on 29th March, 1973 the said Enquiry Officer submitted his report holding that the charges against the petitioner for wilful negligence of duties or disobedience of lawful order of a superior officer, were perhaps not satisfactorily proved. But it was found that the petitioner"s conduct was improper and un-becoming of a Government Servant and as such he made recommendations that the petitioner should be suitably punished. The said Enquiry officer has of course found that the allegations about making caustic remaks by the petitioner have not been duly proved.

6. On the basis of the findings as mentioned hereinbefore, by an order dated 4th January, 1973 the State Commandant, Respondent No. 3, found the petitioner to be guilty of the charges and directed that his next increment of pay for a period of one year, without affecting his future career should be stopped. The effect of the said order is of course a

pecuniary loss to the petitioner to the tune of Rs. 90/-. The above facts relate to the issue of a first chargesheet and the proceeding arising therefrom and although the petitioner has not challeged such proceedings in this Rule, yet those facts have been recorded in extenso because in this proceeding, which relate to a second proceeding, practically on the self same facts and allegations, reference to those facts may be necessary. It may however be mentioned that against the said order of 14th June, 1973, the petitioner has preferred an appeal against the punishment to the Additional Inspector General of Police, West Bengal, Respondent No. 2 and in fact the said order has in effect been set aside by an order dated 11th February, 1974.

7. Thereafter, on 3rd August, 1973, the said Respondent No. 3 again informed the petitioner that inspite of the matter being brought to his notice, he has refused to attend the work of repairing of the M. I. Room matress in terms of an order dated 18th July 1973 which again was duly communicated to him by the Assistant Company Commandant on 21st July 1973 and thereafter again on 23rd July 1973 by the Administrative Officer (Q). Apart from those other allegations were made against the petitioner and he was (sic) reacted to take up the necessary repair works immediately, failing which, he was informed, that disciplinary action would be taken against him for derelection of duty and insubordination. Then on 7th August 1973, the petitioner made a representation to the said Respondent No. 3 and made certain queries about an order dated 1st August 1973, which laid down the duties of a tailor. He made such a representation as he felt some difficulty in understanding the implication of the words "other works" as mentioned in the said letters. The said letter of 7th August 1973 was however duly replied to by the said Respondent. No. 3 on 8th August 1973

8. Thereafter, on the basis of a report dated 28th September 1973 made by the Respondent No. 3 to the Commandant, Respondent No. 4, for dereliction of duty, the said Respondent No. 4 passed an order dated 18th December 1973 (Annexure K), whereby the petitioner was again placed under suspension with immediate effect.

9. The petitioner has alleged that since the said order in Annexure "K" has been issued during the pendency of his appeal against the first proceeding, which again was also on the self same offence or charge as the said second proceeding, so the said second proceeding was not only void and improper but the same was not bonafide. However, the petitioner has alleged that in view of the above, he first sent a reminder on 16th November 1973 for early disposal of the appeal and thereafter, on 6th February 1974, he has made a representation to the Additional Inspector General of Police, Respondent No. 2, praying for the withdrawal of the said subsequent second proceeding and the order of suspension as he alleged that since no orders or directions dated 21st July 1973 and 23rd July 1973 were received by him, so there could be no basis for the allegations of dereliction of duty and furthermore as he made it clear that the works alleged to have been allotted to him, not being the works of a tailor, there could not be any basis of the allegations made against him. He also intimated about the pedency of the appeal as mentioned hereinbefore and submitted that the circumstances leading to the same being

the same as in the said purported second proceeding, no proceeding against him could or should continue.

10. There is also no dispute that on appeal in the said first proceeding. particulars whereof have been mentioned hereinbefore, the Additional Inspector General of Police, Respondent No. 2 set aside the orders impeached therein and directed that the said Respondent No. 4 would proceed denovo in the matter from the stage of personal hearing and he would draw up a provisional finding after considering the record and hearing the petitioner and that apart, the said Respondent No. 4 would also give a hearing to the petitioner before passing the final order and directed him to appear before the said Respondent on 14th February 1974, which date was ultimately shifted to 21st February 1974. It further appears that after such hearing, the said Respondent again found the petitioner guilty of the charges and directed him to show cause on or by 9th May 1974 as to why his next increment will not be stopped for a period of one year, by his order in annexure "P" dated 23rd April 1974.

11. From such order, the petitioner again made a representation to the Additional Inspector General of Police, Respondent No. 2 contending interalia amongst others that the impugned order dated 18th December 1973 was not a bonafide one and furthermore the same was issued with a preconceived intention to victimise him and thereafter on 29th May 1974 he gave an explanation to the said show cause notice denying the charges. Thereafter, the State Commandant, Respondent No 3, by his order in Annexure "S" dated 26th July 1974 directed the stoppage of the increment of the petitioner for one year. Such stoppage of increment was further directed not to affect the future service and career of the petitioner.

12. Mr. Ghose appearing for the petitioner has contended the impugned order to be violative of the provisions of the said Act and the said Rules. He relied on Rule 15 of the said Rules, which is in the following terms : --

Rule -- 15 : Discipline -- (1) A volunteer while undergoing training or when called out for duty u/s 10 or while on duty, shall, for breach of discipline, be subject to such penalties as are provided in section 13.

The following authorities may in exercise of the powers conferred by sub-section (4) of section 13, award summary punishments to the extent specified below in respect of persons under their command :

(a) State Commandant may award to --

(i) District or Unit Commandant

(1) Severe reprimand or reprimand;

(2) Forfeiture of seniority not exceeding one month;

(ii) Company or Platoon Commander

(3) Forfeiture of seniority not exceeding three months;

(4) Severe reprimand or reprimand.

(b) District or Unit Commandant may award to

(iii) A Company Commander

(5) Severe reprimand or reprimand;

(iv) A Platoon Commander

(6) Forfeiture of seniority not exceeding fifteen days;

(7) Severe reprimand or reprimand;

(v) A Section Commander

(8) Reduction to a lower grade;

(9) Forfeiture of seniority not exceeding one month;

(10) Severe reprimand or reprimand;

(vi) A volunteer

(11) Dismissal from service;

(12) Confinement to lines not exceeding ten days;

(13) Extra guards and pickets;

(14) Stoppages of pay and allowances;

(15) Severe reprimand or reprimand.

(c) A Company Commander, if specially empowered by the State Commandant, may award to

(vii) A Section Commander

(16) Severe reprimand or reprimand;

(viii) A volunteer

(a) Confinement to lines not exceeding three days;

(b) Severe reprimand or reprimand.

(2) Charges shall be framed in writing and a copy shall be given to the person charged with when the authority competent to award punishments finds on preliminary investigation that the charge is of a nature which, if proved, will call for award of punishment involving financial loss to the person charged with. In enquiring into such charges he shall follow the following procedure : --

(a) When an officer is charged with an offence, a Board of Officers shall be convened as prescribed in the regulations. The Board shall have the power to try and award punishment.

(b) When a subordinate other rank is charged with an offence, the Unit Commander shall convene a Court consisting of himself as President and two members not below the rank of Plattoon Commanders. Such Court shall be competent to award punishment.

(c) When a person is awarded punishment involving financial loss, he shall have the right of an appeal to the next higher authority pronouncing the award of punishment as prescribed in the regulations.

and specially to sub-rule (2) (b) thereunder and contended that the petitioner admittedly belonged to subordinate and other ranks in terms of the provisions of section 6 of the said Act, so under the said Rules and more particularly under the provisions of the same as mentioned hereinbefore, the Unit Commander was required to convene a Court consisting of himself as the President and two other members not below the rank of Platoon Commanders, as such Court was only competent to inflict the punishment. Mr. Ghose submitted that the said Rules having been framed under the provisions of section 16 of the said Act, is a statutory Rule and has the force of law. Mr. Ghose also submitted that the petitioner being a Platoon Commander, State Government and none else, can impose any punishment other than those mentioned in the said sub-rule (ii) of Rule 15(a). Apart from such submissions, Mr. Ghose has further submitted that non-compliance with the provisions of the said Rule has vitiated the entire proceeding. Apart from these Mr. Ghose also submitted that the impugned order to be malafide because the petitioner was asked to perform some work, which is the basis of the charge, and which he was not required to do in terms of his terms of employment or conditions of service and/or such work which was contrary to the Standing Order dated 1st August 1973 in Annexure "A". The petitioner further wanted to justify his allegations of malafide from the conduct of the respondents, particularly when they have issued the subsequent charge sheet and initiated the proceeding on the self same offence during the pendency of an appeal against the first proceeding. It was also submitted that the impugned order of suspension was not an order pending departmental proceeding but in fact the same was a substantive punishment, for which the petitioner was entitled to an opportunity to make due representation, Mr. Ghose also submitted that since the said cider entailed civil consequences, the petitioner was also entitled to the necessary and corresponding

opportunities. He also submitted that the findings, which are the basis of the initiation of the subsequent proceedings or the determination made thereunder, are also perverse and are not consistent with the recorded evidence and the report. It may be mentioned that initially the enquiry was sought to be held under the provisions of the West Bengal Services (Classification, Control and Appeal) Rules, 1971 (hereinafter referred to as the said 1971 Rules) and the Respondents have contended that the proceedings in the instant case were initiated under the said 1971 Rules and not under the said Act or the said Rules. Apart from all the submissions as aforesaid Mr. Ghose also submitted that the initiation of the proceedings under the provisions of the said 1971 Rules was also improper, illegal, irregular and unauthorised in view of the provisions of the said Act and the said Rules, which were also validly enacted and framed and were effective at the relevant time and the more so, as by no stretch of imaginations, those provisions could be considered to be repealed or replaced by the said 1971 Rules.

13. Mr. Suprokash Banerjee, appearing for the Respondents contended that the steps taken against the petitioner were not at all governed by the provisions of the said Act and the said Rules, but really and in fact they were governed and guided by the provisions of the said 1971 Rules. He first relied on the preamble to the said Act, which is to the following effect :

Whereas it is expedient and necessary to provide for the constitution of a National Volunteer Force in West Bengal by enrolment therein of the citizens of the Dominion of India or subjects of an Acceding State of persons having permanent domicile in West Bengal who may offer themselves for such enrolment, for service during a period of emergency and for such other purposes as the Provincial Government may think fit.

then to the provisions of the same and contended that the said Act made provisions for the formation of a force in West Bengal known as National Volunteer Force, for having their services during a period emergency and for such other purposes as the State Government may think fit and in fact the provisions of the said Act and the said Rules were not regulatory in nature and furthermore the provisions as contained therein were not complete in all respects. He contended that the force in the instant case started functioning in 1949 and the Rules relating to award of punishment etc., were initially framed more or less on the basis of the procedure and practice followed in the Court Martial Enquiry. Thus in the said Rules and more particularly in Rule 15(2) of the same, there are provisions for summary procedure of enquiry in the case of certain offences. He further contended that from a reference to Rules 15(2) (a) and 15(2) (c) of the said Rules, it would appear that the manner in which such enquiry would be conducted and completed were not framed earlier but such manner was required to be prescribed in the Regulations which were not framed and in fact they have not been framed even to-day. In that view of the matter Mr. Banerjee contended that section 6 of the said Act and the provisions of the said Rules in respect of discipline under Rule 15 have no application and in fact such question does not arise at all in this case. He submitted further that in such circumstances, the procedure as laid down in the Bengal Subordinate Services

(Discipline and Appeal) Rules 1936, as amended from time to time, and generally applicable to all Subordinate Services and posts under the Government of West Bengal were followed in the organisation relating to the said Force since its inception, to ensure full justice to the member of the same in the light of the provisions of Article 311, the principles of natural justice and for affording due opportunities to them for setting up their defence effectively. He also submitted that the said Act and the said Rules being pre-Constitution provisions, the provisions of the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936 were made applicable to the National Volunteer Force Organisation in respect of disciplinary proceedings and appeal also and that too having regard to the provisions of Article 311. It was also submitted by Mr. Banerjee that since the said Rules of 1936 have been repealed by the said 1871 Rules, so in terms of Rule 2 of the same, which is to the following effect: --

Rules 2: Application -- (1) These rules shall apply to all Government servants except --

(i) persons paid at daily rates;

(ii) persons against whom action is taken or proposed to be taken under the West Bengal Civil Services (Safeguarding of National Security) Rules, 1949, reproduced in Appendix I in respect of matters covered by the provisions of those rules;

(iii) members of the All India services;

(iv) Inspector of Police and members of the Subordinate Police Force; and

(v) members of the West Bengal Higher Judicial Service and the West Bengal Civil Services (Judicial),

and they shall also apply to persons for whose appointment and other matters covered, by these rules, special provisions is made

(i) by or under any law for the time being in force, or

(ii) by an agreement made with them,

in respect of matters not covered by the provisions of such law or agreement.

(2) Notwithstanding anything contained in sub-rule (1), the Governor may, by order, exclude from the operation of all or any of the provisions of these rules any Government servant or class or classes of Government servants.

(3) If any doubt arises as to (a) whether these rules or any of them apply to a Government servant, or (b) whether any person to whom these rules apply belongs to a particular service, the matter shall be referred to Governor whose decision thereon shall be final.

the said 1971 Rules are applicable to all Government servants including the petitioner except the category of services as mentioned herein and furthermore the said 1971 Rules are also applicable to persons for whose appointment and other matters covered by the said 1971 Rules, special provision is made (i) by or under any law for the time being in force or (ii) or by an agreement made with them, in respect of matters not covered by the provisions of such law or agreement. Mr. Banerjee also contended that in view of the applicability of the said 1971 Rules and more particularly when the National Volunteer Force organisation, in terms of Notifications No. 4195/F/1R-18-(40)/71 dated 3rd July 1972, which is to the following effect : -- "In exercise of the power conferred by the proviso to article 309 of the Constitution of India, the Governor is pleased to make the following amendment in the West Bengal Services (Classification, Control and Appeal) Rules, 1971, as subsequently amended (hereinafter referred to as the said rules), namely : --

AMENDMENT

In Schedule I to the said rules, after entry 10 under the heading "In all other Establishments", add the following entries, namely : --

(1) Home (Defence) Department.

(2) Provincial Commandant.

(3) Provincial Commandant.

(4) and (5) All Additional Inspector General of Police.

Class III and Class IV Services in the West Bengal National Volunteer Force Organisation.

By order of the Governor,

Sd/- A. K. Mukherji,

Special Secretary to the Government of West Bengal.

and has been added to Schedule 1 of the said 1971 Rules, the said 1971 Rules has application in this case and no other Rules. As such he submitted further that the disciplinary proceeding against the petitioner is and would be covered by the said 1971 Rules. In support of his contentions that in the facts and circumstances of the case the said 1971 Rules as framed under Article 309 of the Constitution of India, would have preference and application. Mr. Banerjee first relied on the case of Dr. R. P. Chaturvedi & Ors. v. State of Rajasthan & Ors., 1968 L.I.C. 1605. In that case, appointments of certain gentlemen as Professors and Principals in Medical College, as different place in Rajasthan, were challenged as they did not possess the academic qualifications as

prescribed by the University ordinance. It was also alleged that they do not possess 10 years teaching experience as prescribed by the University, for their respective posts. It was of course admitted that they had acquired the qualifications as prescribed by the Collegiate Branch Rules for the posts of Professors on 22nd August, 1966 i.e. on the day when the said Rule was inserted in the Collegiate Branch Rules and in terms of the proviso whereof, 2 years service rendered, should be reckoned as equivalent to one year''s teaching experience gained in the service/post. On the pleadings in that case, a point arose for consideration, whether those gentlemen should be considered as not qualified to hold the respective posts and a writ of quo warranto should be issued against them. On a consideration of the relevant University Act and the Rules as framed under Article 309, it has been held that there are distinctly demarcated fields in which the University Act would operate and the Rules made by the Government, in exercise of his powers under the proviso to Article 309 and the provisions in the Ordinance in question regarding minimum qualifications, for teachers of various stages of University Education in the affiliated Colleges contained in the said Ordinance, only govern the relationship between the University and the affiliated Colleges. It has been further held in that case that it is well established that the rules made by the Governor, in exercise of his powers conferred upon him by proviso to Article 309 have statutory force. It has also been held that the Rules so made under Article 309, are subject to the provisions of the Act in that behalf made, by or under an Act of the appropriate Legislature under the Article. Thus in that case it has been held it was perfectly competent for the Governor to make rules regulating the recruitment to the posts and the conditions of service of persons appointed to the Rajasthan Medical Service "Collegiate Branch". It has also been held that the University of Rajasthan Act is a special law made by the State Legislature, in exercise of its powers to legislate under the head "Education" including the Universities, in Entry 11 of list II of the VIIth Schedule. The University Act, therefore, does not regulate the recruitment and the conditions of service of persons appointed to the public services and posts in connection with the affairs of the State of Rajasthan. It has also been held in that case that it is not obligatory under the proviso to Article 309 to make rules of recruitment, etc., before a service can be constituted or a post created or filled. The State Government has executive powers in relation to all matters with respect to which the Legislature of the State has power to make laws. Thus, it has also been held that the State Government will have executive powers in respect of Schedule VII, List II, Entry 41, State Public Services There is also nothing in terms of Article 309 which abridges the powers of the executive to act under Article 162 without a law. The said Article lays down that subject to the provision of the Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. However, as soon as the rules are made under the proviso to Article 309, the executive power of the State Government in relation to matters in respect of which the rules have been framed will come to an end.

14. The next case on which Mr. Banerjee planed reliance in support of his contentions as aforesaid or in justification for the same, is the case of N. Lakshmana Rao & Ors. v. State

of Karnataka & Ors., 1975 (2) S.L.R. 232. The petitioners in that case could be classified in (i) a group consisting of primary and secondary school teachers in Government Schools of the former State of Mysore, (ii) a group consisting of teachers in the Schools belonging to various local authorities situate in the area of the former State of Mysore and (iii) a group consisting of teachers of the Schools of the School Boards in the Bombay area and the Madras area of the new State. The first and second group of teachers were absorbed in Government services of the new State of Mysore, when the concerned schools were taken over by the Government and the third group of teachers were absorbed in Government services under the Mysore Compulsory Primary Education Act, 1969. It appears that consequent upon the reorganisation of the States, brought about by the States Reorganisation Act, 1956, the new State of Mysore came into existence on 1st November 1956 and the said reorganised new State consisted of the former State of Mysore, part of the former State of Bombay, part of the former State of Hyderabad, part of the State of Madras and the centrally administered territory of Coorg. Sections 114 and 115 of the said Act deal with allotment and transfer of State services of the merged part of the New State. The teachers of the former State of Mysore, who were allotted to the New Stale of Mysore with effect from 1st January, 1956, had 58 years as the age of retirement under the Mysore Service Regulations. In 1957 the said age of retirement was reduced by the State Government to 55 years. Such action being challenged, the Supreme Court in the case of State of Mysore v. Padmanabhacharya, (1956) 1 S.C.R. 994 held that such fixation of age was illegal as the State did not obtain the prior approval of the Central Government u/s 115(7) of the States Reorganisation Act, in regard to the said reduction of the age of compulsory retirement. Thereafter, by a notification of 14th April, 1966 the age of retirement of the primary and secondary school teachers in the new State was fixed at 58 years with effect from 5th April 1965 and the age of retirement of teachers, who were allotted from other integrated areas, was kept at 55 years. Then by a notification of 15th April 1966, a uniform treatment was given to all the said school teachers of the said New State by fixing the age of retirement at 58 years. Thereafter, by several notifications the age of retirement of the teachers of several Colleges of different categories and that of the members of the Higher Judicial Service, was fixed at 58 years. Then again, the Karnataka Civil Services (Twenty Second Amendment) Rules, 1973 provided for 55 years, as the age of retirement for all teachers in all the Departments except for Ex-Mysore Primary and Secondary School teachers. The age of retirement of the teachers of the erstwhile local authorities was 58 years and they were governed either by contract or by special laws and not by the said Karnataka Service Rules and after the incorporation of the said Rules, those teachers were asked to retire at 55 years. Such action was challenged in a writ proceeding Then came the Mysore Services (Amendment) Regulations 1974, on 21st January 1974, whereby the age of retirement of Ex-Mysore teachers was reduced from 58 to 55 years. Thereafter, came the Mysore Civil Services Regulations 1974, which was framed in exercise of powers conferred by proviso to Article 309 and with the previous approval of the Central Government in terms of section 115(7) of the State Reorganisation Act. Those Regulations provided that every Government servant governed by the provisions of the note below Article 294(c) of the

said Regulations would retire on attaining the age of 55 years and those who were continued in service after attaining the age of the 55 years on the date of the Regulations, would retire on attaining the age of 58 years on 1st March 1974, whichever is earlier. Thus the Second Amending Regulations of 1974 reduced the age of Ex-Mysore teachers to 55 years. On 24th February, 1974 the Karnataka State Civil Services (Age of Compulsory Retirement) Rules, 1974 was incorporated in exercise of powers under Article 309. The said Rules provided that notwithstanding anything to the contrary contained in any law, rule, notification, order or agreement, every Government servant referred to in sub-rule (4), whose age of compulsory retirement is 58 years, shall retire on attaining the age of 55 years. It was also provided in those Rules that those who continued in service after attaining the age of 55 years on the date of the promulgation of the Rules, would retire on the date on which they attained the age of 58 years on 1st April, 1974 whichever is earlier, those who will attain the age of 55 years after the commencement of the Rules, but on or before 1st April, 1974 would retire on 1st April 1974 and those who will attain 55 years after 1st April 1974 shall retire on attaining the age of 55 years. The three kind of teachers, whose cases were considered by the Supreme Court, were Government servants in terms of the definition of "Government servant" in the Rules.

15. The Ex-Mysore primary and secondary teachers contended in the case that they had their age of retirement at 58 years and they were protected under the proviso to section 115 of the States Reorganisation Act, those of Ex-Municipal High Schools taken over under orders of the agreements made by the Government, contended their age of retirement as 58 years i.e. the age of retirement which was applicable to the Municipal High School teachers and thus, they were protected under the agreements and the teachers of elementary schools which were under the management of local bodies and which were taken over by the State Government, contended that their age of retirement was 58 years before the Schools were taken over by the State Government under the provisions of the Karnataka Compulsory Primary Education (Amendment and Miscellaneous Provisions) Act, 1969 and their conditions would continue until other condition was made. At the sometime, the teachers of the Municipal and Taluk Development Board High Schools which were taken over by the State Government under written agreements made by the relevant local body contended that they became Government servants by the exercise of option from accepting the terms and conditions offered by the Government. They also contended that the option was incorporated in the agreement between the State Government and the relevant local body under whom they were employed and in short their contentions were that the conditions made applicable to them must not be to their disadvantage. The aforementioned contention were raised in view of a Government order dated 30th April, 1971 which provided that the employees of local bodies and Secondary Schools would be absorbed in Government Services only if they agreed in writing to the forms viz., option forms and more particularly the two types of option forms. As a result of the exercise of such option by the teachers, they became Government servants. It has been held by the Supreme Court that prescribing an age of

Superannuation does not amount to an action under Article 311 and Article 309 confers legislative power to provide conditions of service. The Legislature can regulate conditions of service by law which can impair conditions or terms of service and the exercise of option does not mean that there was a contract whereby a limitation was put on prescribing an age of superannuation. Following the determination in the case of Roshan Lal Tandon v. Union of India, (1967) 1 S.C.R. 185, it has been held in this case also that the legal position of a Government servant is one of status than of contract, the duties are fixed by law and the terms of service are governed by statute or statutory rules which may be unilaterally attend by the Government without the consent of the employee. Following the determination in the case B.S. Vadera Vs. Union of India (UOI) and Others, , wherein it has been held that if an appropriate Legislature has passed an Act under Article 309 the Rules framed under the proviso to Article 309, would have effect subject to the Act, it has been held that in the absence of any Act of the appropriate Legislature, the Rules framed-by the President or such person as he may direct, shall have full effect. It has also been held that there is legislative power under Entry 41, List II to legislate for State Public Service Commission and there is no fetter on the legislative power to legislate with regard to service or with regard to any other matter mentioned in the Legislative list. Thus, on the facts of the case after referring to the decisions in Gurdev Singh Sidhu Vs. State of Punjab and Another, which has observed that there are two exceptions to the protection afforded by Article 311 and the case of Bishun Narain Misra v. State of Uttar Pradesh & Ors. (1965) 1 S.C.R. 193, wherein it has been held that there is no provision which takes away the power of the Government to increase or reduce the age of superannuation and when the Rule only deals with the age of superannuation and the Government servant had to retire because of the reduction in the age of superannuation, it cannot be said that the termination of the service amounts to removal within the meaning of Article 311, it has been held that the teachers in the instant case, who had exercised the option were subject to change: in the conditions of service under Rules framed under Article 309 and there is no Constitutional limitation to reduce the age of retirement. In the instant case it was argued that the terms of service of the teachers concerned were continued by the Mysore Compulsory Primary Education Act, 1969 and more particularly in view of section 14 of the same which states that the transfer of primary schools managed by Municipal Councils and Panchayats in the Madras and Bellary District before the appointed day and as such the age of retirement could not be altered by rules made by the Governor under Article 300. Such contentions were of course negatived and it has been held that just as it is open to the appropriate legislature to provide for rules to be framed for regulating recruitment and conditions of service under Article 309, it is equally open to the legislature to provide that in certain conditions the Governor acting under the proviso may make appropriate rules. Such power under the proviso is co-extensive with the power under the main part.

16. Apart from the aformentioned cases, Mr. Banerjee also made a reference to a Bench decision of this Court in the case of Purnananda Patra Vs. Collector of Central Excise and Another, , wherein it has been held that the Government servants in India are all subject

too the rules made by the appropriate authority, under the rule making powers given under the Constitution. There is no guarantee that any Government servant will continue to enjoy the benefits of a rule which was in existence when he joined service. On the other hand, he is subject to all rules which may be brought into existence lawfully at any time during his term of service. Government servants, being subject to such disability, cannot be heard to say that they will not be governed by the rules which apply to them from time to time, except the rules which were in existence at the time when they joined service.

17. Thereafter, Mr. Banerjee made a reference to the unreported judgment of P. R. Banerjee, J., dated 19th August 1975 made in the case of Kanti Ranjan Ghose v. State of West Bengal & Ors. (Civil Rule No. 163(W) of 1971). for the purpose of showing that even inspite of the said Act and the provisions in the said Rule, His Lordships has observed that the department concerned has right to make Rules under Article 309 for the purpose of enquiry into the charges. That Rule was of course made absolute by His Lordship as at the relevant time there was no such Rules under Article 309 and there was violation of the existing provisions of the said Rules viz., Rule 15(2) (b) inasmuch as the Enquiry Committee was constituted by one person only. Mr. Banerjee submitted that the determination in that case also prescribes that such framing of Rules under Article 309 was permissible and if and when such Rule is framed, the same would have precedence over the existing Rules viz., the said Rule and/or immediately on the framing of the Rules under Article 309, the said Rules would be replaced and would have no effect or application. Mr. Ghose also relied on the above mentioned judgment of P. K. Banerji J., apart from relying on another unreported judgment of Amiya Kumar Mookerji J., dated 14th June 1974, made in the case of Subal Kumar Saha v. Additional Inspector General of Police & Ors., (Civil Rule No. 7196(W) of 1968), in support of his contentions that in the instant case also there was admitted violation of Rule 15(2) (b) of the said Rules, inasmuch as a Court consisting of three members as mentioned therein was not formed and the more so when the petitioner, without any dispute, comes within the category of employees as mentioned in section 6 of the said Act. It may be mentioned that the said Civil Rule No. 7196(W) of 1968 was also made absolute by His Lordship as there was violation in the formation of the Court, in terms of the provisions of the said Rules.

18. Apart from the aforementioned contentions, Mr. Banerjee, appearing for the Respondents, relied on the case of State of Andhra Pradesh and Others Vs. Chitra Venkata Rao, for the limited scope and authority of High Court and its power of interference in case of a departmental enquiry as enunciated therein and submitted that the findings of fact as arrived at in the instant case, should not be interferred with and the more so when admittedly the present cases do not come within the exceptions or circumstances as mentioned in that case and all the more so when there is neither any evidence of perversity nor that of any violation of principles of natural justice in the instant case.

19. Mr. Ghose, in reply, referred to the provisions of Article 309 and Rule 2 of the said 1971 Rules and contended that since the said Act is an Act of the appropriate Legislature and regulates the recruitment and conditions and the said Rules are duly framed under the provisions of the said Act, so the provisions of the said 1971 Rules, which is framed under Article 309, has got no application at all, In that view of the matter, he submitted that the said Rule is he only Rule which has application and as such, following the determinations of P. K. Banerjee J., in Civil Rule No 163(W) of 1971 and Amiya Kumar Mookerji J. in Civil Rule No. 7196(W) of 1968, this Rule should also be made absolute as there has been clear violation of Rule 15(2)(b) of the said Rules.

20. The cases as decided by this Court, particulars whereof have been mentioned hereinbefore, were made at a point of time when the said 1971 Rules was not incorporated and in fact the incorporation of the said 1971 Rules, if the same is found to have application, would take this case out of the application of the determinations in those cases. But, if the said 1971 Rule has no application, then this Rule will also have to be made absolute, as there has been admitted violation of Rule 15(2) (b) and in fact, in the instant case and for such violation, the determinations in the case of State of Andhra Pradesh & Ors. v. Chitra Venkata Rao (supra), will have no application at all, because for not forming the Court properly, the entire proceeding may be termed as irregular and any determination by any authority other than such a Court may also be deemed to be perverse apart from being unauthorised. Now the real question for determination would be whether the said 1971 Rules has application in the facts of this case. It may be mentioned that P. K. Banerjee J., in his determination as reproduced hereinbefore, has practically determined that there is scope for such framing of Rules as in the said 1971 Rules and in the event of such a Rule being framed under Article 309, the said Rules will have no effect or application. On a consideration of the provisions of Article 309, that of the said 1971 Rules and the provisions of the said Act and the said Rules, I have got no hesitation in holding that this case would also come within the determination of the Supreme Court in the cases of Dr. R. P. Chaturvedi & Ors. v. State of Rajasthan & Ors. (supra) and N. Lakshmana Rao & Ors., v. State of Karnataka & Ors. (supra) and furthermore the Rules as framed under Article 309 viz., the said 1971 Rules, will have application and the more so when the Rules as duly framed by the Governor in exercise of his powers under Article 309, have statutory force and preference, of course with the limitation the such Rules should not override the parent Act made on that behalf by the appropriate Legislature. In the instant case, when admittedly there is no such violation, the said 1971 Rule as framed, may be regarded as valid and legal and the more so when the Governor had and has the necessary right and power to make such rules for regulating the recruitment to the posts and the conditions of service of persons employed under and for the Force in question. Since it is open to the appropriate Legislature to provide for Rules to be framed for regulating recruitment and conditions of service and as the said Act and the said Rules as framed are not complete in all respects, so also the Governor had in the instant case the right, power and authority to frame necessary Rules under Article 309, for having a complete Code for the guidance of the employees

concerned and for regulating their terms of service and conditions of employment. Furthermore, since the employees, as of the category of the petitioner, and all other servants under the Government, are all subject to the Rules made by the appropriate authority, under the Rule making powers given under the Constitution, so the action in framing the said 1971 Rules is also not unauthorised. The petitioner had or has no guarantee that he will continue to enjoy the benefits of a Rule which was in existence when he joined the service, rather his appointment was and is subject to all rules which may be brought into existence lawfully at any time during his terms of office and since such a Rule has now been brought in by the incorporation of the said 1971 Rules, he will be bound by that and the said 1971 Rules will bind him.

21. In view of the above, I hold that the said 1971 Rules, as framed by the Governor, in exercise of his powers under Article 309, has application in the instant case and as such the said 1971 Rules has replaced the said Rules. In view of the above and since I have in this jurisdiction, a very limited or restricted scope and power of inteference ordinarily, this application should fail. The Rule is thus discharged. There will however be no order for costs.