(1979) 09 CAL CK 0010

Calcutta High Court

Case No: None

T.K. Das, I.P.S.	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision: Sept. 19, 1979

Acts Referred:

- Constitution of India, 1950 - Article 133, 226, 311

Citation: (1980) 2 LLJ 105

Hon'ble Judges: Ram Krishna Sharma, J; Murari Mohan Dutt, J

Bench: Division Bench

Advocate: Saktinath Mukherjee, Bikash Ranjan Neogi and Asit Kumar Banerjee, for the Appellant;Arun Prokash Chatterjee for State and Mrs. Archana Sengupta for Union of India, for the Respondent

Final Decision: Allowed

Judgement

1. In this appeal, the appellant has challenged the propriety of the judgment of a learned single Judge discharging the Rule obtained by the appellant on his application under Article 226 of the Constitution.

2. The appellant is a member of the Indian Police Service. At the relevant time, he was the Deputy Inspector General of Police, Training. West Bengal at the Police Training College, Barrackpore. He was served with an order dated April 16, 1975 of the President of India passed by him in exercise of his power under rule 16(3) of the All India Services (Death-cum-Retirement Benefits) Rules, 1958 retiring the appellant, who had attained the age of 50 years, in the public interest, on the expiry of three months from the date of service of the order. The appellant, being aggrieved by the said order of compulsory retirement, moved a writ petition before this Court and obtained a Rule Nisi.

3. The appellant was promoted to officiate in the selection grade of Indian Police Service with effect from January 1, 1968. He was promoted to the rank of D.I.G. of

Police and was posted at Jalpaiguri Range on August 19, 1969. In 1971 he was posted as D.I.G., Armed Police, Barrackpore. While he was in that post, he was served with a chargesheet by the then Chief Secretary, State of West Bengal, consisting of three charges. The said three charges are as follows:

Article of Charge-I

That the said Shri T. K. Das while functioning as D.I.G., Jalpaiguri Range on 23.10.69 used his official influence for getting two first class lower births against two Police Duty cards for the down Darjeeling Mail from New Jalpaiguri Rly. Station to Khejuriaghat Railway station and allowed those births reserved against Police Duty cards for his family members who were holding second class tickets and this was unbecoming of class I Police Officer of All India Service.

Article of Charge-II

That the said Officer on the aforesaid date and while functioning in the aforesaid office, used Government vehicle bearing No. WBE-8360 from Jalpaiguri to New Jalpaiguri Railway Station and back for private purpose, viz., carrying his family members to the Railway Station from his bunglow without paying charges and this too was unbecoming of a senior Police Officer like Shri T. K. Das.

Article of Charge-III

That the aforesaid Shri T. K. Das while functioning in the aforesaid office on 23rd October, 1969, arranged to depute sergeant Shri Haripada ghosh to travel by the Darjeeling Mail from New Jalpaiguri Railway Station to Khejuriaghat Rly. Station to guard and look after his family who were traveling by the same train and thereby employed a public servant for his personal work which was unbecoming of a senior Police Officer like him.

4. On July 28, 1972, the appellant submitted his explanation to the said charges and on May 10, 1973 after the closure of the enquiry, he submitted a written defence. On June 7, 1973, the Enquiry Officer submitted his report holding the appellant guilty of all the charges and the State Government generally agreed with the findings of the Enquiry Officer except as regards charge No. 1 on which it was held by the State Government that the subordinate to the appellant wanted to please him. The appellant was not, however, forwarded with the copy of the report of the Enquiry Officer or the findings of the State Government on the said report. Indeed the appellant did not know about the said report of the findings. When the appellant''s case was being considered in December 1973, the Review Committee recommended the compulsory retirement of the appellant from service. In view of the said, recommendation, the State Government did not think it fit to proceed any further with the departmental proceeding against the appellant, although as stated already, the charges against the appellant involving questions of integrity were found to have been established.

5. It also transpires from the affidavit-in-opposition filed on behalf of the State of West Bengal that the Review Committee considered the fact that the charges against the appellant involving his integrity were established in the disciplinary proceeding started against him. The Review Committee also took into their consideration the adverse remarks contained in his confidential character roll. The appellant was not aware of the adverse remarks made against him, for the same were not communicated to him, nor was he called upon to submit his representation to those remarks. In spite of that fact, the Review Committee recommended the compulsory retirement of the appellant with the observation that the appellant''s record of service was found to be consistently poor, and, as such, he was unfit for continuance in service beyond 50 years. The recommendation of the Review Committee for the compulsory retirement of the appellant was accepted by the State Government and thereafter the State Government sent the recommendation to the Central Government.

6. The Special Secretary to the Government of West Bengal by his memo dated April 10, 1974 forwarded to the appellant the copies of the adverse remarks recorded in the confidential character roll of the appellant for the years 1968-69, 1969-70, 1970-71, 1971-72 and 1972-73. The appellant duly submitted his representations to the said adverse remarks as forwarded to him. One of the defence of the appellant was that the adverse remarks for the year 1968-69 could not be relied upon against him as in spite of the same, the appellant was promoted to the post of D.I.G. of Police on August 19, 1969. It transpires that the adverse remarks were communicated to the appellant at the instance of the Central Government after it received the recommendation of the State Government for the compulsory retirement of the appellant. Again, on December 12, 1974, the appellant was forwarded by the Secretary of the Government of West Bengal with the copy of the adverse remarks for the year 1973-74. This was also done at the instance of the Central Government. The representations of the appellant to the said adverse remarks were rejected by the State Government except that so far as the adverse remarks for the year 1969-70 were concerned, a major portion thereof was expunged and the rest was not interfered with. The appellants submitted his representation to the adverse remarks for the year 1973-74 on March 17, 1975, that is, within the period of three months prescribed for submission of such representation. Before the explanation of the appellant reached the State Government, the Central Government had asked for the explanation of the appellant for the adverse remarks for the year 1973-74. The State Government intimated the Central Government that the explanation of the appellant was not then received. It appeared from the records that were produced before the learned Judge that the Central Government did not wait for the explanation of the appellant. It was observed by the Central Government that since that remarks for the year 1973-74 were sufficiently damaging and did not mitigate the cumulative adverse effect of the adverse remarks earned by the appellant for the preceding years, the

proposal for his premature retirement could be proceeded with without waiting for his representation and the State Government''s decision thereon in respect of those remarks. Thereafter, the Central Government passed the order of compulsory retirement of the appellant on April 16, 1975 and the appellant was informed of the same by the Memo dated April 30, 1975 of the Secretary to the Government of West Bengal. The appellant, being dissatisfied with the said order of compulsory retirement, challenged the same before this Court by filing a writ petition and obtained the Rule Nisi.

7. At the hearing of the Rule, it was contended on behalf of the appellant that as the disciplinary proceeding was started against the appellant for the purpose of punishing him, the order of compulsory retirement was made byway of punishment. Secondly, it was contended that as the adverse remarks were not communicated to the appellant and he was not given any opportunity to make representation against those remarks before the Review Committee made their recommendation and the State Government''s decision accepting the same and as both the said Committee and the State Government relied on those adverse remarks and the findings in the disciplinary proceeding, the order of retirement was illegal and mala fide. The learned Judge overruled all the contentions of the appellant and discharged the Rule. While discharging the Rule, the learned Judge, however, observed that the charges were not of such a nature in respect of which a grave view could be taken in the present standard. Further, it was observed that I view of the fact that the appellant was not given a copy of the report of the enquiry held against him, and that the adverse remarks were not communicated to him as enjoined by the rules and the appellant had no opportunity to correct his deficiencies, it would be just and proper that the Central Government should consider the appellant''s representation properly in the background f the facts and circumstances of the case.

8. Before we proceed to consider the respective contentions of the parties it may be recorded that Mr. Arun Prokash Chatterjee learned Senior Standing Counsel appearing for the State of West Bengal, has stated before us that State Government will have no objection if the Central Government reinstates the appellant. Indeed no argument has been advanced on behalf of the State of West Bengal in opposing the appeal. It seems to us from the above facts that now the State Government does not support the order of compulsory retirement of the appellant.

9. It has been stated already that the disciplinary proceeding was started against the appellant on the charges as mentioned hereinabove. The appellant was found guilty by the Enquiry Officer of all the charges. He was, however, not forwarded with the report of the Enquiry Officer. He did not know what had happened in the disciplinary proceeding. It transpires that the disciplinary proceeding was not further proceeded with as a Review Committee was set up and they recommended for the appellant''s premature retirement. In paragraph 19 of the affidavit-in-opposition filed on behalf of the respondents nos. 1 to 3 and sworn by the Secretary to the Government of

West Bengal, Home Department, it has been stated that the Review Committee found the records of the appellant to be consistently poor. The Committee also noted that the charges against the appellant involving his integrity in the aforesaid disciplinary proceeding were found to be established on enquiry. The Committee considered him to be unfit for continuance in service beyond 50 years of age and recommended his retirement under rule 16(3) of the All India Services (Death-cum-Retirement Benefits) Rules, 1958. Thus it appears from the above statement made in paragraph 19 of the affidavit-in-opposition and it is not disputed that the Review Committee took into their consideration that the appellant was found guilty of the charges leveled against him as also they considered the adverse remarks made in the confidential character roll of the appellant. At this stage, it may be stated that the case of the appellant is that of the persons who constituted the Review Committee, namely, the Chief Secretary to the Government of West Bengal, the Home Secretary and Mr. Ranjit Gupta, the then Inspector General of Police, West Bengal, Mr. Ranjit Gupta was inimically disposed towards the appellant. But as the learned Judge has said, apart from Mr. Gupta there were two other persons in the Review Committee and so there was no question of the recommendation having been made by the Review Committee mala fide against the appellant. Be that as it may, the contention that has been made by Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the appellant, is that there was no material before the Review Committee justifying the recommendation of the premature retirement of the appellant. There can be no doubt that if there be no material before the Review Committee no recommendation for the retirement of the appellant can be justified. It is submitted on behalf of the appellant that the Review committee had no authority to place reliance on the un-communicated adverse remarks against the appellant or on the findings made against the appellant in the disciplinary proceedings. Rule 8(1) of the All India Services (Confidential Rolls) Rules, 1970 provides as follows:

8. Communication of adverse remarks - (1) Where a confidential report on a member of the Service contains an adverse remark or a critical remark, it shall be communicated to him in writing, together with a substance of the entire confidential report, by the Government, or such authority as may be specified by the Government ordinarily within three months of the receipts of the confidential report and a certificate to this effect shall be recorded in the confidential report.

Rule 9 lays down as follows:

9. Representation against adverse remarks - A member of the Service may represent to the Government against the remark communicated to him under rule 8 within three months of the date of its receipt by him.

Provided that the Government may entertain a representation within one year of the expiry of the said period if it is satisfied that the member of the service had sufficient cause for not submitting the representation in time.

Under rule 10, the Government shall consider the representation and pass orders as far as possible within three months of the date of submission of the representation - (a) rejecting the representation, or (b) toning down the remark or (c) expunging the remark. Under sub-rule (2) of rule 10, the order so passed on the representation shall be final and the member of the Service concerned shall be informed suitably.

10.Adverse remarks are made by superior officers against their subordinates without their knowledge. Rule 10 authorises the Government to expunge the adverse remark, if necessary, after considering the representation to the same made by the member of the service concerned. This shows that the adverse remarks may be without any foundation or may be based on wrong information or wrong assessment by the officer making the remarks. Rule 8(1) clearly provides for the communication of the adverse remarks to the Government officer concerned so as to give him an opportunity to make representation against the same. The rule only recognizes and gives effect to the principles of natural justice. A man should not be condemned on allegations made against him without giving him an opportunity to explain the same. Moreover, the object of communication of the adverse remarks is to give the officer concerned an opportunity to rectify his deficiencies and improve his conduct. In the instant case, the adverse remarks were not communicated to the appellant and the Review Committee placed reliance on those adverse remarks at a time when the appellant was completely in the dark about the same. In (1) Gurdial Singh v. the State of Punjab and others, 1979 (1) S.L.R. 804, it has been observed by the Supreme Court that the principle is well-settled that in accordance with the rules of natural justice, as adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Further, it has been observed that such an opportunity is not an empty formality, its object partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. In our view, the above principle which has been laid down by the Supreme Court where the officer concerned was denied his promotion on the basis of un-communicated adverse remarks, also applies to all cases where any order that may be passed or any action that may be taken on the basis of such adverse remarks will prejudice the person concerned. After the Review Committee made the recommendation for the premature retirement of the appellant and the State Government accepted the recommendation, in other words, after the adverse remarks were acted upon, it was useless to communicate the same to the appellant for the purpose of his representation. In our view, therefore, the Review Committee or the State Government had no authority to act upon the un-communicated adverse remarks for the purpose of the compulsory retirement of the appellant. These adverse remarks did not, therefore, constitute any material against the appellant.

11. Next, it will be considered whether the Review Committee was justified in relying on the findings of the Equity Officer made by him in the disciplinary proceeding against the appellant. As stated before, the Enquiry Officer found the appellant guilty of all the charges. The appellant was not, however, informed of the findings of the Enquiry Officer. If any punishment had been imposed upon the appellant on the basis of the findings in the disciplinary proceedings, the appellant could have challenged the same in an appeal. Indeed the findings of the Enquiry Officer were placed before the Review Committee and the Committee relied upon the same and recommended the compulsory retirement of the appellant. This was also another instance of which the appellant was kept in the dark and he was deprived of any opportunity to get rid of the findings in accordance with law. In our opinion, this was also a clear violation of the principles of natural justice. A disciplinary proceeding is started for the purpose of imposing a punishment on the Government officer if he is ultimately found guilty of the charges leveled against him. On the other hand, the Review Committee considers the case of a Government officer whether he should be compulsorily retired in the public interest. The two proceedings are completely different. In our opinion, the findings made against a Government officer in a statutory disciplinary proceedings cannot be utilized for a collateral purpose, far less when such officer has not been informed of the findings. When a disciplinary proceedings is started against a Government officer and if he is found guilty of the charges leveled against him, he should be punished. If, however, the charges are not proved, no steps for his removal from service can be taken against him. In the instant case, after the findings were made, the State Government did not proceed against the appellant as the Review Committee had considered the findings and recommended the premature retirement of the appellant. The appellant, if he was informed of the findings and if any punishment was imposed on him on the basis of such findings, he could have got an opportunity to have the punishment and findings set aside by preferring an appeal. In case of his success in the appeal, no Review Committee could place any reliance on such findings. But before the appellant got any such opportunity the Review Committee considered the findings made against the appellant in the disciplinary proceedings and recommended his compulsory retirement and the State Government also accepted the same. This, in our opinion, was highly unjustified and was in violation of the rules of natural justice.

12. From the above discussion, it follows that the adverse remarks against the appellant and the findings made against him in the disciplinary proceeding on which the Review Committee had placed reliance did not constitute any material for the purpose of considering the premature retirement of the appellant. The recommendation of the Review Committee and consequently the decision of the State Government accepting such recommendation, therefore, had no basis or foundation.

13. It is the contention of the appellant that the order of compulsory retirement as made by the Central Government is really an order of punishment. In this connection, on behalf of the appellant, reliance has been placed on certain decision which will be stated presently. In (2) Madan Gopal Vs. State of Punjab, , it has been held by the Supreme Court that where the employment of a temporary Government servant, even though liable to be terminated by notice of one month without assigning any reason, is not so terminated, but instead the superior officer chooses to hold an enquiry into his alleged misconduct, the termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career. In (3) P.C. Wadhwa Vs. Union of India (UOI) and Another, , the appellant, a member of the India Police Service and holding the substantive rank of Assistant Superintendent of Police in the State of Punjab, was promoted to officiate as Superintendent of Police, which was a post carrying a higher salary in the senior time-scale, and posted as Additional Superintendent of Police. After he had earned one increment in that post, he was served with a charge sheet and before the enquiry, which had been ordered, had started, he was reverted to his substantive rank of Assistant Superintendent of Police, the grounds suggested for reversion being unsatisfactory conduct. No details of the unsatisfactory conduct were specified and the appellant was not asked for any explanation. At the time when the appellant was reverted, officers junior to him in the I.P.S. Cadre of the State were officiating in the senior scale. The order entailed loss of pay as well as loss of seniority and postponement of the future chances of promotion. It was held by the Supreme Court that the order of reversion made against the appellant was in effect a ''reduction in rank'' within the meaning of Article 311(2) of the Constitution, and inasmuch as he was given no opportunity of showing cause against the said order of reversion, there was violation of Article 311.

14. (4) Samsher Singh Vs. State of Punjab and Another, is a decision of seven Judges of the Supreme Court. In that case, the appellant was a probationer and his services were terminated after a disciplinary proceeding was started against him on the charge of misconduct. It has been observed that no abstract proposition can be laid down that where the services of a probationer are terminated it can never amount to a punishment. Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing the probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperament or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases, the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation.

If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2), he can claim protection. It has been further observed that the fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment. If the facts and circumstances of the case indicate that the substance or the order is that the termination is by way of punishment, then a probationer is entitled to the protection of Article 311. The substance of the order and not the form would be decisive.

15.From the above decisions, it follows that if the termination of service of a temporary government servant or a probationer is preceded by disciplinary proceedings on charges of misconduct, the order of termination may be regarded as one by way of punishment. A distinction has however, been sought to be made by the learned Judge between the case of termination of service or reversion and the case of compulsory retirement. The learned Judge has placed reliance on two decisions of the Supreme Court (5) The State of U.P. Vs. Sri Shyam Lal Sharma, and (6) Tara Singh and Others Vs. State of Rajasthan and Others, . In Shyamlal''s case (supra), it has been observed by the Supreme Court that where there are no words in the order of compulsory retirement, which throw any stigma, there should not be any inquiry into Government files to discover whether any remark amounting to stigma could be found in the files. The reason is that it is the order of compulsory retirement, which alone is for examination. If the order itself does not contain any imputation or charge against the officer, that fact that "considerations of misconduct or misbehaviour weighed with the Government in coming to its conclusion to retire him compulsorily does not amount to any imputation or charge against the officer". Where the authorities can make an order of compulsory retirement for any reason and no reason is mentioned in the order it cannot be predicated that the order of compulsory retirement has an inherent stigma in the order. Unless it is established from the order of compulsory retirement itself that a charge or imputation against an officer is made the condition of exercise of that power or that by the order the officer is losing benefits already earned, the order of retirement cannot be said to be one for dismissal or removal in the nature of penalty or punishment. In Tara Singh''s case (supra), it has been observed by the Supreme Court that the right to be in public employment is a right to hold it according to rules. The right to hold is defensible according to rules. The rules speak of compulsory retirement. There is guidance in the rules as to when such compulsory retirement is made. When persons completed 25 years of service and the efficiency of such persons is impaired and yet, it is desirable not to bring any charge of inefficiency or in-competency, the Government passes orders of such compulsory retirement. The Government servant in such a case does not lose the benefits which he has already earned. These orders of compulsory retirement are made in public interest. This is the safety valve of making such orders so that no arbitrariness or bad faith creeps in. In that case, the Supreme Court upheld the

compulsory retirement as the order did not contain any stigma.

16. The learned Judge has summarized the principles that follow from the above two decisions and also some other decisions of the Supreme Court, referred to by him, as follows:

(1) The order of compulsory retirement must be in public interest.

(2) It is open for the court to examine whether there were relevant and material evidence to form the opinion that the retirement was necessary for public interest.

(3) Sufficiency of the material or the correctness of the opinion formed, however, is not justiciable in a court of law.

(4) The order must further, be not a mala fide one.

The learned Judge took the view that whether a compulsory retirement is byway of punishment or not should only be considered on the face of the order. If the order does not contain any stigma it would not, in the opinion of the learned Judge, tantamount to an order or punishment even in spite of the fact that such order of compulsory retirement was preceded by a statutory departmental proceeding against the Government servant concerned. The principles of law that have been summarized by the learned Judge on the basis of the decisions of the Supreme Court are sound and well settled. On an examination of the Supreme Court decisions, it does not appear to us that in any case, the Supreme Court had occasion to consider whether an order of compulsory retirement could be regarded as having been made by way of punishment when such an order was preceded by a statutory departmental proceeding against the Government servant concerned on charges of misconduct. But the Supreme Court had to consider whether the order of termination of the services of a temporary Government servant or a probationer or the revision of a Government servant from an officiating position to his substantive rank was really by way of punishment or not when before such termination or reversion was made, disciplinary proceedings were held against the Government servant on charges of misconduct. In such cases, as already pointed out, the Supreme Court held that it could amount to an order of punishment, although the order did not contain any stigma against the Government servant concerned. There can be no doubt that there is a distinction between a temporary Government servant or a probationer and a permanent Government servant. The question, however, is whether such a distinction remains when the permanent Government servant attains a particular age when he may be retired compulsorily. In our opinion, after a Government servant attains a particular age when he may be considered for the purpose of compulsory retirement, he is placed in the same position as that of a temporary Government servant. The authorities may consider the permanent Government servant as having outlived his utility and may direct his premature retirement after he attains a particular age. Such an order of compulsory retirement is made in the public interest. The Government servant will be bound by

such an order. In that respect, therefore there is no distinction between a temporary Government servant and a permanent Government servant. In these circumstances, we fail to understand why the same test should not be applied as in the case of a temporary Government servant for the purpose of considering whether an order of compulsory retirement is really an order of punishment or not. If the order of termination of a temporary Government servant can be regarded as made by way of punishment, for before the order was made there was a disciplinary proceeding against him on charges of misconduct, we fail to understand why an order of compulsory retirement should not be so regarded in such circumstances. As stated already, the cases of compulsory retirement that cam up before the Supreme Court for its consideration did not involve the consideration of a question similar to that before us. Indeed, we have not been cited and decision of the Supreme Court where an order of compulsory retirement was made during the pendency of a statutory disciplinary proceeding. In our opinion, the same principle as laid down by the Supreme Court in Madan Gopal v. State of Punjab and others; P. C. Wadhwa v. The Union of India and another, and Samsher Singh v. State of Punjab and another, referred to above, will also apply to the instant case before us.

17. In this connection, we may refer to the decision of the Allahabad High Court in (7) State of U. P. and others v. Purshottam Swarup Johari, 1976 (2) Lab. I.C. 1087. It has been held that when the Government initiates disciplinary proceedings against a Government servant on the basis of charges of misconduct or inefficiency, it is obvious that the Government does so with the intention of punishing him. If in such proceedings an Enquiry Officer has been appointed, a chargesheet has been submitted explanation has been called for and considered and thereafter an order of compulsory retirement is passed, it can legitimately be inferred that the misconduct or inefficiency is the foundation or basis of the order and that the order has been passed by way of punishment. Further, it has been held that in these circumstances, the order of compulsory retirement will amount to an order of dismissal or removal from service and will attract the provision of Article 311(2) of the Constitution. In (8) Jamshed Newroji Sarkary v. The Zonal Manager, Food Corporation of India and another, 1978 (1) SLR 471, the Andhra Pradesh High Court has also expressed the view that tests applicable to temporary Government servants are also applicable in cases of compulsory retirement. The following observations have been made by the Allahabad High Court in (9) G. S. Sial v. The Union of India, 1977 (1) Lab. IC 378:

The principles applicable for judging the nature and character of an order of termination of temporary Government servant are applicable to judge the true character of the order of compulsory retirement. In both the cases considerations are almost the same. A temporary Government servant has no right to hold the post and his services are liable to be terminated in accordance with the rules. Similarly, an officer on the completion of the period of qualifying service or on attaining a particular age as fixed in the rules is liable to be compulsorily retired in pursuance of

the service rules and he has no right to hold the post thereafter. The form of the Order of compulsory retirement is not decisive or conclusive; it is open to the Court to determine the substance and true nature of the order.

18. It is, however, contended on behalf of the Respondent Union of India that in the case of a compulsory retirement the Government servant concerned does not lose the benefits which have been earned by him and so the tests applicable to the temporary Government servants cannot be applied in considering whether an order of compulsory retirement has been made by way of punishment or not. Reliance in this regard has been placed on a decision of the Supreme Court in (10) Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI), , where it has been observed that on compulsory retirement the Government servant will be entitled to the pension etc. that he has actually earned. There is no diminution of the accrued benefit. It is true that in a wide sense the Government servant may consider himself punished, but there is a clear distinction between the loss of benefit already earned and the loss of prospect of earning something more. In our opinion, Shyamlal''s case (supra) is of no help to the respondent. When the services of a temporary Government servant are terminated, he does not lose the benefits already earned by him. In the case of probationer and also in the case of reversion of a person from the officiating post to the substantive rank, the position is the same. There can be no doubt that there is distinction between the dismissal and compulsory retirement of a Government servant, but we are not considering the case of dismissal of a Government servant. The question is where the tests laid down by the Supreme Court in the case of a temporary Government servant or a probationer or the reversion of a person holding an officiating position should also be applied to the case of compulsory retirement for the purpose of considering the true nature of the order, namely whether it is by way of punishment. In that view of the matter, the decision of the Supreme Court in (11) The State of Bombay Vs. Saubhagchand M. Doshi, relied on by the Union of India does not apply to the facts of the instant case. In that case, the Supreme Court had laid down that an order of retirement differs both from a dismissal and an order of removal, in that it is not a form of punishment prescribed by the rules, and involve no penal consequences, inasmuch as the person retired is entitled to pension proportionately to the period of service standing to his credit. There can be no doubt that there is such a distinction between an order of dismissal or removal and an order of compulsory retirement as laid down by the Supreme Court, but in our opinion, there is no distinction between the case of a termination from service or reversion from a higher post to the substantive rank and the order of compulsory retirement which is made after a Government servant attains a particular stage. If in the former cases, the termination of service or reversion may be considered to be an order of punishment if before such an order was made the Government servant concerned was proceeded with in a departmental proceeding on charges of misconduct, why the same principle should not be applied to the case of compulsory retirement in similar

circumstances. In the circumstances, we do not think that the contention made on behalf of the Respondent is of any substance.

19. It is strenuously urged by Mr. Rathindra Nath Das, learned Advocate appearing on behalf of the Union of India, that under rule 16 (3) of the All India Services (Death-cum-Retirement Benefits) Rules, 1958, the Central Government is alone entitled to retire prematurely the Government servant in consultation with the State Government. One of the modes of consultation as laid down in the administrative instructions which have been issued to supplement the said rule is that the Central Government will consider the recommendation of the Review Committee and the decision of the State Government thereon. If in making a review the State Government commits certain illegalities, it will not vitiate the decision of the Central Government. Further, it is contended that there is nothing to show that the Central Government has placed reliance on the findings made against the appellant in the departmental proceedings. This contention requires some consideration. Under rule 16(3) it is the absolute power of the Central Government to retire its servant compulsorily in the public interest, but before the Central Government does that it has to consult the State Government under which the Government servant concerned is placed. Administrative instructions that have been issued lay down that the service records of the Government servant will be considered by a Review Committee. It has been noticed that the Review Committee had taken into consideration the un-communicated adverse remarks against the appellant and also the findings made against him in the disciplinary proceeding. In our view, the Review Committee had no authority to rely on such adverse remarks or such finings and, accordingly, there were no materials before the Review Committee or the State Government justifying the recommendation of compulsory retirement of the appellant. When such a Review Committee set up under the Administrative instructions makes a recommendation and the State Government accepts the same the Central Government has to consider such recommendation tantamounting to consultation with the State Government. The Central Government, therefore, applies its mind to the recommendation which, is the instant case, has no foundation or is vitiated by illegalities. The records that were produced before the learned Judge showed that the Central Government had relied on the recommendation of the Review Committee. In paragraph 8 of the note that was put up before the Minister concerned states inter alia as follows:

Shri Das is unfit for retention in service and his premature retirement would be in the public interest, as recommended by the State Review Committee and decided by the State Government, Shri Das may, therefore, be served with three month''s notice for premature retirement under rule 16(3) of the All India Services (Death-cum-Retirement Benefits) Rules, 1958.

Thereafter, the impugned order of compulsory retirement was passed by the President of India. There is, therefore, no doubt that the Central Government also

placed reliance on the recommendation of the Review Committee. Not only that, the Central Government also independently placed reliance on the findings made against the appellant in the disciplinary proceedings. In our view, that is considerable force in the contention made on behalf of the appellant that although it cannot be said that the Central Government acted mala fide in the matter, it was a case of malice in law as laid down by the Supreme Court in (12) Smt. S. R. Vankataraman v. Union of India and others. 1979 (1) SLR 130. In that case, the Supreme Court has relied on the following observation of Viscount Haldane in (13) Shearer and another v. Shields, (1914) AC 808 at P. 813.

A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the State of mind is concerned, he acts ignorantly, and in that sense innocently.

20. It is true that the recommending authority and the authority which ultimately passed the order of compulsory retirement are two different bodies, but that does not matter in the least. We are unable to accept the contention of Mr. Das that the Central Government in relying on the recommendation of the Review Committee is not bound by the effect of any illegality or any departure from the rules of natural justice committed by the Review Committee of the State Government. If there is no material justifying the recommendation of the Review Committee for the compulsory retirement of a Government servant, or as laid down by the Supreme Court in (14) Union of India (UOI) Vs. Col. J.N. Sinha and Another, , the appropriate authority has relied on collateral grounds, in our opinion, it will affect the order of compulsory retirement even though such an order is passed by another authority which, in this case, is the Central Government.

21.The Central Government, before it considered the recommendation of the Review Committee, directed the State Government to communicate the adverse remarks for the year 1968-69, 1969-70, 1970-71, 1971-72 and 1972-73 to the appellant and to consider the representation that might be submitted by him. The State Government communicated the adverse remarks and considered the representations of the appellant though after the recommendation of the Review Committee and acceptance of that recommendation by the State Government had been made. The representations of the appellant were all rejected. It has been already noticed that before the appellant had submitted his representation to the adverse remarks for the years 1973-74, the Central Government did not wait for such representation and consideration thereof by the State Government and it was observed that since the remarks were sufficiently damaging and do not mitigate the cumulative adverse effect of the adverse remarks earned by the appellant for the preceding years, the proposal for his premature retirement could be proceeded without waiting for his representation and the State Government''s decision

thereon. In our view, the Central Government was not justified in considering the adverse remarks for the year 1973-74, without giving the appellant an opportunity to make his representation to the same and the decision of the State Government thereon. The Central Government considered the remarks for the year 1973-74, as sufficiently damaging. The adverse remarks for the year 1973-74, are as follows:

Totally uncreative evening work but he is no fool and understands things. He knows his work too. His power of expression also is above average. His power of collecting general information is average. His attention to details is average. His industry is average. But I am not sure if he is very conscientious in work. His judgment cannot be relied upon. He has speed of disposal. His willingness to accept responsibility and take decisions has not been tested very hard. His relations with subordinates and colleagues are average. His public relations are reasonably good. For his bad record the State Government recommended compulsory retirement of this officer.

It has been urged on behalf of the appellant that the Central Government was not justified in observing that the said adverse remarks were sufficiently damaging. Be that as it may, we are of the view that the Central Government should have waited for the representation of the appellant and the consideration thereof by the State Government.

22. After considering the facts and circumstances of the case, we are of the view that the order of compulsory retirement was made by way of punishment of the appellant without giving him an opportunity as provided in Article 311(2) of the Constitution. In any event, the Review Committee and the State Government had acted illegally in relying on the un-communicated adverse remarks and the findings made against the appellant in the departmental proceeding. The Central Government having relied on the recommendation of the Review Committee and the decision of the State Government accepting the same, the order of compulsory retirement is illegal.

23. Before we part with this appeal, it may be stated that the learned Judge has taken much pains in quoting all the adverse remarks in his judgment. The adverse remarks are all-vague and are not made on the basis of any particular circumstance or instance. The only adverse remarks that contained some materials were made in the year 1969-70, but the major portion thereof was expunged. In other words, the materials in justification of the adverse remarks became non-existent after such expunction. We have already referred to the observation of the learned Judge recommending that it was just and proper that the Central Government should consider the appellant''s representation property in the background of the facts and circumstances of the case. Be that as it may, for the reasons aforesaid, we are of the view that the impugned order of compulsory retirement cannot be sustained. In these circumstances, the impugned order of compulsory retirement of the appellant is quashed. Let a Writ in the nature of Certiorari issue in that regard. The judgment of the learned Judge is set aside. The appeal is allowed, but in view of the facts and

circumstances of the case, there will be no order for costs.

Leave to appeal to the Supreme Court under Article 133(1) of the Constitution is prayed for by the learned Advocate appearing on behalf of the Respondent Union of India and refused.

Sharma, J.

24. I agree.