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Brigadiar Bhupinder Singh Vs. Union of India and ors.

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Court : Delhi

Decided On : Dec-18-1974

Reported in : ILR1975Delhi546

Judge : S.N. Shankar and; H.L. Anand, JJ.

Acts : Constitution of India - Article 226; General Clauses Act, 1897 - Sections 13

Appeal No. : Civil Writ Appeal No. 500 of 1972

Appellant : Brigadiar Bhupinder Singh

Respondent : Union of India and ors.

Advocate for Pet/Ap. : H.L. Sibbal,; Kapil Sibal,; Daljit Singh,;

Judgement :

H.L. Anand, J.

(1) By this petition under Article 226 of the Constitution of India, the petitioner, a Brigadier in the Indian Army, challenges an order of his compulsory retirement.

(2) The petitioner was commissioned in the Indian Army on April 18, 1943. In 1947, he was appointed in the Research & Development and Inspection Organisation of the Ministry of defense. It appears H that during 1967 69 certain allegations of abuse of official position by the petitioner were made subject matter

of investigation by the then Special Police Establishment but as a result of the report of such investigation and the further enquiry by the military authorities all the cases were dropped by the middle of the year 1970. It further appears that during the pendency of the investigation, the question as to the petitioner's promotion to the rank of Brigadier was kept pending and after the cases were dropped, the petitioner was promoted to the rank of Brigadier on October 12, 1970 and was appointed Director of Inspection (General Stores) on December 26, 1970. The procedure with regard to the retention, promotion and retirement of officers in the said Organisation was prescribed in a Presidential order and Annexure R-1 to the return to the rule filed by the Union sets out the aforesaid procedure, as amended up todate. Para 5(a) of Annexure R-1 deals with retirement of officers and provides that the age of 'compulsory retirement' would be 55 years provided that the continuance of an officer in service beyond the age of 52 years would be 'subject to a review to determine his suitability' for such continuance. It was further provided that 'the review will be carried out by the Research & Development and Inspection Selection Board well in advance of attaining the age of 52 years' and an officer not considered suitable for continuance in service as a result of the review 'will be retired on attaining the age of 52 years.' It further provides that in exceptional cases. Government may, on their discretion, grant 'extension' of service up to the age of 57 years where that was considered necessary in 'public interest.' The 'petitioner was due to attain the age of 52 years on February 24, 1972. In its meeting held on October 8, 1971, the said Board laid down the criteria to be followed in connection with the review for determining the suitability of officers for continuance beyond the age of 52 years and it was decided that in dealing with these cases, 'the service record as also other relevant considerations e.g. integrity and health would have to be taken note of.' It was further decided that the Board would make their recommendation in each case 'on the basis of the overall assessment in respect of all relevant aspects.' The meeting then proceeded to consider the cases of a number of officers who were due to attain the age of 52 shortly and in the case of the petitioner it was observed that his case had to be examined 'with reference to papers regarding Spe cases'. The matter was again taken up in the Board's meeting on December 9, 1971 and it was felt that the case of the petitioner and another officer 'would need careful consideration

having regard to certain vigilance cases which had earlier come up.' It was further felt that the Government decision regarding the age of retiremetit had been taken only very recently and in the ordinary course, these officers would have the opportunity to avail of six months' leave preparatory to retirement and considering this and also the state of hostilities then facing the country, it was decided that the petitioner and the other officer 'might for present, be allowed to continue for a period of six months beyond the date of their attaining the age of 52 years' and that a 'decision in regard to their continuance up to 55 years may be expected to be taken within this period.' Pursuant to this decision, the Director General of Inspection informed the petitioner vide his letter of December 20, 1971 (Annexure P-l) thus :

'YOURcase has been reviewed by the Research & Development and Inspection Selection Board who have approved your continuance in service for a period of six months beyond the date of your attaming the age of 52 years. A decision in 'regard to your continuance in service beyond the extended period of six months will be taken by the Board in due course.'

In its meeting held on January 15, 1972, the Board considered the case of the petitioner and another officer and 'it was decided that it would not be in the public interest to continue these two officers beyond the extension period of six months already decided upon.' A formal communication pursuant to this decision was, however, issued on May 8, 1972 (Annexure P-4) by which the petitioner was informed that he 'will retire from Army service w.e.f. August 24, 1972, on the expiry of the period for which his retention inservice beyond 52 years of age has been approved.' The petitioner made statutory complaint under Section 27 of the Army Act to the Hon'ble defense Minister (Annexure P-ll) against the order which proved abortive and the petitioner was retired in terms of the aforesaid communication.

(3) The petitioner challenged the aforesaid order of retirement on the ground that the petitioner having been found suitable for continuance in service beyond the age of 52 years even though for six months was entitled to continue in service up to the age of 55 years and that: the retirement of the petitioner after continuing him in service beyond the age of 52 years was contrary -to the procedure laid down by

the President in that behalf; that the review by the Board in December, 1971 could, not justify the compulsory retirement of the petitioner without any further review by the Board; that the decision in respect of suitability had relation to the integrity, efficiency and' medical fitness of the petitioner, which were clearly vouchsafed by the promotion of the petitioner to the rank of Brigadier, his subsequent appointment as Director of Inspection (General Stores), his annual confidential report regarding his performance prior to and after his taking over as Director of Inspection and extension for six months beyond February 24, 1972; that the decision to retire the petitioner was made on collateral and irrelevant consideration; and that it was vitiated on account of the prejudice against the petitioner 'on the part of respondents No. 2 & 3', who constituted majority of the Board. It was further alleged that the retirement of the petitioner was calculated to deprive the petitioner of the benefit of higher pension as a Brigadier as the requisite service for this fell short of a month and 20 days. It was further alleged that the petitioner had been singled out for compulsory retirement while services of other officers were retainer particularly Brig. M. Jayaraman and Commodore Paradkar, against whom also there were allegations of misconduct which were similarly dropped after enquiry, but who were allowed to continue in service beyond 52 years. It was further alleged that the impugned order would deprive the petitioner of the benefit of Rule 22 of Leave Rules which entitled the petitioner to six months leave preparatory to retirement.

(4) In the course of an affidavit of Shri G. L. Sheth, Secretary to the Government of India, Ministry of defense, who is cited as respondent No. 4 in the petition, which was filed by the Union by way of return to the Rule the allegation that the order of compulsory retiremerit of the petitioner was liable to be quashed was denied. It was, however, admitted that the retirement of the petitioner was to be regulated by the terms of the memorandum of March 18, 1967, a copy of which was annexed to the affidavit as Ex. R-1 and the criteria laid down by the Board in its meeting of October 8,1971. It was further stated that the case of the petitioner was reviewed Along with others by the Board in its meeting held on October 8, 1971 but the decision with regard to the petitioner was deferred as it called for examination of certain further papers pertaining to the record of service and that in its meeting held on December 9, 1971, the Board bona fide came to the conclusion that the

cases of the petitioner and another required careful consideration having regard to certain vigilance cases that had come up earlier and that the petitioner and another might for the present be allowed to continue for a period of six months beyond the date of their attaining the age of 52 years by virtue of the fact that Government decision regarding the age of retirement had been taken only recently, i.e. on September 22, 1971 and in ordinary course, the petitioner would have had the opportunity to avail of six months leave preparatory to retirement as also the state of hostility then facing the country and that decision in regard to his continuance up to the age of superannuation was expected to be taken in the meanwhile and that the decision was communicated to the petitioner. It is further stated that the case of the petitioner was then examined in the meeting held on January 15, 1972 when the Board considered that the petitioner was not suitable for continuance in service and that it would not be in public interest to continue the petitioner beyond the said period of six months. It was further stated that the recommendation of the Board was approved by the Minister of defense Production and the decision was conveyed to the petitioner verbally by respondent No. 2 on February 7, 1972, but the making of the formal order was delayed because the petitioner had submitted two representations, (Annexure P-2 and P-3) and that the formal orders were issued and communicated to the petitioner on May 8, 1972 vide Annexure P-4. The affidavit proceeds to justify the impugned order on the ground that the language of clause 5(a) of the Memorandum provides for determining suitability for continuance beyond the age of 52 years and that the continuance may, thereforee, be for any period beyond the age of 52 years and need not necessarily be for the entire period of three years. It is further stated that the question of suitability of the petitioner was in any case deferred till the meeting of the Board held on January 15, 1972. It was further claimed that the decision in the meeting of January 15, 1972 was taken by the Board of which respondent No. 2 was only a member and that the decision was taken by the Board bona fide after considering all relevant material. The allegation that respondent No. 2 was highly prejudiced against the petitioner or was not taking dispassionate view of the matter was denied. The various grounds raised by the petitioner in support of his claim in the petition were dealt with Serialtim and were controverter. The allegation of mala fide or prejudice were denied and it was contended that the petitioner was involved

in three S.P.E. cases and that after the investigation by the S.P.E. in respect of the first case the army authorities came to the conclusion that the part played by the petitioner in the transactions in question did not appear to be blameworthy calling for any disciplinary or administrative action and the charges against the officer were dismissed. As regards the second case, the army authorities came to the conclusion that the allegations were more of presumptive nature than of any factual substance, and that the transactions were of three years old and they could not be made subject matter of any disciplinary action against the petitioner under the Army Act. With regard to the third case. the Ministry of defense, came to the conclusion that the case against the petitioner could not be substantiated and, thereforee, decided to drop it. The allegation of mala fide and prejudice were denied. It was further stated that the case of Brig. M. Jayaraman and Commodore B. P. Paradkar were considered by the Board on their merits.

(5) In separate affidavits, respondents No. 2 & 3 generally denied the allegation of mala fide made in the petition while adopting the affidavit filed by Shri G. L. Sheth. Respondent No. 2 further stated that in its meeting held on January 15, 1972, the Board of which he was a member, considered the matter in detail and as 'the petitioner was not considered suitable for continuance in service, as a result of the review, it was decided that it would not be in public interest to continue the petitioner in service beyond the extension period of six months.' The respondent further stated that the recommendation of the Board was approved by the Minister of defense Production. The respondent denied the allegation that he had told the petitioner that he will have to retire on February 24, 1972. Respondent No. 3 stated that there was no prejudice in his mind against the petitioner. An affidavit of Brig. S. P. Datta, Director of Administration was also filed in which he denied the allegation of the petitioner that while delivering to him the order of May 8, 1972, the deponent warned the petitioner that in case the petitioner did not take full leave immediately, the second respondent might adopt other means to remove him from the duties of Director of Inspection.

(6) In his affidavit by way of rejoinder the petitioner by and large reiterated the allegations made by him in the petition.

(7) The first contention urged by Shri Sibal on behalf of the petitioner was that the petitioner having been found to be suitable for continuance in service beyond 52 years, even though for a period of six months, could not be retired from service until he attained the age of superannuation and that in any event having been allowed to continue in service beyond attaining the age of 52 years on the basis of a review carried out under the Rules, the requirement of the Rule with regard to the review had been exhausted and no further review was permissible. Learned counsel argued that the procedure prescribed by the memorandum envisages one review to determine if the officer should be retired on attaining the age of 52 years, to be carried out before an officer attained that age, but well in advance to enable the officer to avail of six months leave preparatory to retirement under Rule 22 of the Leave Rules if he was to be retired on attaining the age of 52 years and that once an officer was found suitable for continuance beyond 52 years, he could not be retired from service until he attained the age of superannuation i.e. 55 years. It was further urged that the procedure did not permit of any further review after an officer had attained the age of 52 years or to permit of any periodic extensions during the period of three years beyond the age of 52 years. It was, thereforee, urged that the petitioner having been found to be suitable for continuance in service beyond the age of 52 years in the meeting of the. Board held on December 9, 1971, even though for a period of six months beyond the said age, was entitled to remain in service until he attamed the age of 55 years and it was not permissible for the Union to undertake any further review as was done in the meeting of the Board on January 15, 1972 or to retire him before he attained the age of 55 years.

(8) On the other hand, Shri F. S. Nariman, the learned Addl. Solicitor-General of India, who appeared for the Union, contended that the power of the Board to undertake a review with a view to determine the suitability of an officer turn continuance in service beyond 52 years would, impliedly as also by virtue of the provisions of Section 13 of the General Clauses Act, include the power to undertake more than one review or to review the suitability of an officer from time to time and that such a review was not barred merely because the officer had for some reason continued in service beyond attaining the age of 52 years. It was further contended that in any event, the contention on behalf of the petitioner that

he had been allowed to continue for a period of six months beyond the age of 52 years on a review of his suitability for continuance in service was misconceived because the petitioner was granted extension of six months beyond attaining the age of 52 years not because he was found suitable for such continuance but because the question as to his suitability required further consideration and it was felt, that, pending consideration of the question of his suitability, he should be allowed to remain in service for a period of six months because of the extra ordinary situation created on account of Indo-Pak hostilities and to enable the officer to avail of leave preparatory to retirement of which he would have been deprived if the decision with regard to his compulsory retirement had been finally taken in December, 1971, since the officer was due to attain the age of 52 years in February, 1972.

(9) The first question that, thereforee, requires consideration is, whether the procedure embodied in the memorandum envisaged or permitted more than one review and is a question that must, in my view, be answered in the negative.

(10) Para 5(a) of the memorandum is in the following terms :

'5(A): Age of compulsory retirement. (i) The age of compulsory retirement will be 55 years provided that continuance of an officer in service beyond the age of 52 years will be subject to a review to determine his suitability for continuance beyond that age. The review will be carried out by the Research & Development and Inspection Selection Board well in advance of attaining the age of 52 years. Officers not considered suitable for continuance in service as a result of the review will be retired on attaining the age of 52 years; (ii) In exceptional cases, Government may at their discretion grant extension of service up to the age of 57 years, where this is considered necessary in public interest.'

(11) The Memorandum provides that the age of superannuation, which it wrongly describes as 'the age of compulsory retirement' will be 55 years. It further provides that the continuation of an officer in service beyond the age of 52 years would be subject to 'a review' which is intended to determine the officer's suitability for continuance 'beyond that age.' It further provides that 'the review' will be carried out 'in advance of attaining the age of 52 years.' The procedure then envisages

that an officer who is not considered suitable for such continuance 'as a result of the review will be retired on attaining the age of 52 years', (underlining supplied). The only purpose of the review, thereforee, appears to be to determine whether or not an officer, who is due to attain the age of 52 years, should retire on attaining that age or be allowed to continue in service until the age of superannuation. It is precisely for this reason that such a review has to be before he attains the age of 52 years. The review must, thereforee, be related to the age of 52 years and such a review has to be carried out before he attains this age firstly because the officer as well as the Government must know ahead of his attaining that age if he is to continue in .service and secondly, because if he is to be retired at the age of 52 years, he may be entitled to avail of the leave preparatory to retirement and such a leave is provided for in Rule 22 of the Leave Rules and the period is six months. On the plain language of the memorandum it is not possible to accept the contention that the procedure postulates periodic reviews a little before or beyond the age of 52 years or for periodic extension of service from time to time during the period of three years between the age of compulsory retirement and the age of superannuation. Such a conclusion is not justified by the language of the memorandum and would not be possible without doing serious voilence to its phraseology which is not permissible by any known principles of interpretation. If the intention of the framers of the memorandum was not for a review to determine the continuance in service beyond a particular stage, the provision would have been for extension of service beyond the said age either for a fixed period or otherwise to be granted from time to time. In that eventuality the Rule would have either provided that an officer may be compulsory retired at any time 'after' he attains the age of compulsory retirement, or would have merely reserved the right to Government to compulsory retire an officer at any time 'after' he had completed service for specified years. That is how the relevant rules, with which the Supreme Court was concerned in the case of Shyamlal v. State of Uttar Pradesh and another, : (1954)IILLJ139SC was worded. To somewhat similar effect is the .- provision of F.R. 56(j), which reserves the right to Government to compulsory retire a Government servant 'after' he has attained the age of fifty-five years, if it is of opinion that it is in the public interest to do so. The argument that the expression 'review' would include its corresponding plural is not tenable because such a

conclusion would be contrary to the context in which the term 'review' has been used in the memorandum. The memorandum lays down the age of retirement of an officer and leaves no manner of doubt that the age of superannuation will be 55 years unless the officer is found unsuitable for continuance in service beyond the age of 52 years on a review to be carried on before he attains that age. in which case, he will retire on attaining the age of 52 years. A comparison of the two clauses of para 5 (a) of the memorandum brings out the distinction. Clause (i) of para 5 (a) contemplates a review to determine suitable for 'continuance beyond that age' while clause (ii) of para 5 (a) which refers to continuance beyond the age of 55 years provides for 'extension of service up to the age of 57 years.' It is, thereforee, not possible to read into the first clause of para 5(a) a provision for mere extension of service and this is so because the normal age of retirement in the memorandum is 55 years and not 52 years. The age of retirement is reduced to 52 years only in cases where an officer is not found suitable for continuance as a result of the review. I am, thereforee, of the view that para 5 (a) (i) of the memorandum envisages only one review to be carried out before an officer attains the age of 52 years to determine if the officer is suitable for continuance in service beyond the said age and an officer who is found unsuitable will be retired on attaining the age of 52 years.

(12) The next question that requires consideration is whether it could be said that the decision of the Board in its meeting held on December 9, 1971 that the petitioner should be allowed to continue in service for a period of six months beyond the age of 52 years was a result of a review as to his suitability and precluded the Board from undertaking a further review in its meeting held on January 15, 1972.

(13) On this aspect of the matter, the contention on behalf of the petitioner was that the Board in its meeting held on December 9, 1971 to which date the decision with regard to the suitability of the petitioner was deferred from an earlier meeting of the Board, the Board decided or would be deemed to have decided that the petitioner was. fit to be continued in service beyond attaining the age of 52 years, even though for a period of six months and that the question with regard to the petitioner's suitability to continue beyond the age of 52 years stood finally

determined so as to disentitle the Board to consider afresh in its meeting held on January 15, 1972 the question as to the petitioner's continuance beyond the period of the expiry of the said period of six months. In support of this contention, reliance was placed on behalf of the petitioner on the clear language and the tenor of the communication from the Director General of Inspection to the petitioner, Annexure P-1, purporting to inform the petitioner that his case had been 'reviewed' by the Board who had 'approved your continuance in service for a period of six months beyond the date of your attaining the age of 52 years.' On the other hand, it was contended on behalf of the Union that the decision to permit the petitioner to continue in service for a period of six months beyond attaining the age of 52 years was not result of a determination of his suitability for such continuance but was an interim decision to allow the petitioner to continue for a period of six months beyond attaining the said age pending the final review by the Board so as to determine the petitioner's suitability for continuance beyond the age of 52 years and that the interim decision became necessary because when the matter was considered by the Board on December 9, 1971, it was felt that the question as to the petitioner's suitability required further consideration which could not be concluded before he attained the age of 52 years which the petitioner was due to attain on February 24, 1972 and that pending the consideration of that question, and of the review, he should be allowed to continue in service for a period of six months beyond the age of 52 years firstly, in view of the emergency conditions created by the Indo-Pak conflict and secondly, because a final decision as to the retirement at that age would deprive the petitioner of the right to avail of six months leave preparatory to retirement under Rule 22 of the Leave Rules. Support for this contention was sought on behalf of the Union from the Minutes of the meeting of the Board held on December 9, 1971, copies of which were filed by the Union pursuant to an application made on behalf of the petitioner.

(14) It appears to me that this contention of the petitioner must also fail. It is the common case of the parties and is even otherwise borne out by extract from the Minutes of the various meetings of the Board that the first meeting of the Board dealing with the matter was held on October 8,1971. In this meeting the Board discussed the question as to the criteria to be followed in connection with the review for determining the suitability for continuance beyond the age of 52 years

and expressed the view that 'in dealing with these cases, the service record as also other relevant considerations e.g. integrity and health etc. would have to be taken note of.' It was further observed that 'the Board would make their recommendation in each case on the basis of the overall assessment in respect of relevant aspects.' The Board then reviewed the cases of a number of officers including the petitioner and the decision with regard to the petitioner was : 'case to be examined with reference to papers regarding S.P.E. cases and to be put up for Board's decision.' The decision with regard to the suitability of the petitioner was accordingly deferred to a later date. It may be mentioned here and, it is the common case of the parties, that the Government's decision with regard to the retirement of the permanently seconded service officers like the petitioner was taken only on September 22, 1971 and if the Board had been able to take a decision with regard to the petitioner in its meeting held on October 8, 1971, the petitioner would not have been able to avail of six months' leave preparatory to retirement because he was due to attain the age of 52 years on February 24, 1972. Be that as it may, when the matter came up again on December 9, 1971, it was felt that the case of the petitioner and another officer would need careful consideration and in the peculiar circumstances, the petitioner might for the present be allowed to continue for a period of six months pending final decision with regard to his. suitability. It would be appropriate to quote in extenso the relevant portion of the Minutes of the said meeting which is in the following terms :

'DGIthen brought up the cases of A/Col. P. B. Kapur (IC-4457 Acc and A/Brig. Bhupinder Singh (IC-1505) Acc who are due to attain the age of 52 years on 10-1-1972 and 24-2-1972 respectively, in regard to their continuance beyond this age. The Board felt that the cases of these officers for continuance up to the age of 55 years would need careful consideration having regard to certain vigilance cases which had earlier come up. Dgi and CCR&D; pointed out, however that the Government decision regarding the age of retirement of the permanently seconded officers was taken only very recently. In the ordinary course, these officers would have had the opportunity to avail of six months leave preparatory to retirement. Considering this and also the present state of hostilities facing the country, it was decided that these two officers might for present, be allowed to continue for a period of six months beyond the date of their attaining the age of 52

years. A decision in regard to their continuance up to 55 years may be expected to be taken within this period.'

It is obvious from the aforesaid extract that the decision to allow the petitioner to continue in service for a period of six months was neither the result of a final review of his case nor of a decision with regard to his suitability but Was an interim decision pending the conclusion of the review which had been initiated in the meeting of October 8, 1971 and culminated in the last meeting of January 15, 1972 and he was allowed six months period because of the emergency conditions and the desirability of allowing him six months leave preparatory to retirement, a benefit to which he would be deprived of it the decision deferred earlier was taken either on December 9, 1971 or even on October 8, 1971. Another reason for deferring the decision on December 9, 1971 was that on account of the S.P.E. cases, the matter required further consideration which could not perhaps be bestowed in that meeting. It may also be relevant to set out the relevant extract of the meeting of January 15, 1972. This is how decision Was recorded :

'THEmatter was then considered in some detail and it was decided that it would not be in the public interest to continue these two officers beyond the extension period of six months already decided upon. It was also decided that these officers should be informed that whatever leave is due and admissible to them should be taken by them during this period, if they wish to avail of it. The Board also decided to postpone consideration of the case of Commodore B. P. Paradkar for the next meeting.'

(15) It, however, appears that while the decision of December 9, 1971 was in the nature of an interim decision, pending further consideration of the question of suitability and because of the two compulsions referred to in the Minutes, the communication that was addressed to the petitioner, Annexure P-1, was rather unreserved and unconditional and gave the impression as if the decision to continue the petitioner in service beyond the age of 52 years for a period of six months was based on his suitability to continue in service during the said period of six months: This is how the relevant portion of that communication reads :

'YOURcase has been reviewed by the Research & Development and Inspection Selection Board who have approved your continuance in service for a period of six months beyond the date of your attaining the age of 52 years. A decision in regard to your continuance in service beyond the extended period of six months will be taken by the Board in due course.'

(16) This letter obviously does not correctly reflect the decision of the Board taken in its meeting of December 9, 1971 for it does not set out either expressly or by necessary implication the reason for the continuance beyond the period of six months, the compulsions behind such an unusual decision but unfortunately gives an erroneous impression which has given the petitioner a basis for the contention that this was the result of a review with regard to his suitability for continuance in service beyond the age of 52 years. Such a contention is, however, not borne out by the Minutes of the meeting of the Board of December 9, 1971 which were intended to be carried out by this communication. It is, thereforee, necessary to read the aforesaid communication in the light of the decision in the meeting of December 9, 1971 on which it admittedly was based and examined in that context, it does not bear out the contention of the petitioner that the decision to permit him to continue in service beyond the age of 52 years for a period of six months was a result of final review as to his suitability or of a determination of his suitability for continuance beyond the age of 52 years. The process of review which was initiated in the meeting of the Board held on October 8, 1971 was concluded in the meeting of the Board held on January 15, 1972, the consideration of the question having been deferred not only on October 8, 1971 but also on December 9, 1971 with the difference that in the meeting held on December 9, 1971 it was felt that the question as to the petitioner's continuancne needed careful consideration because of the vigilance cases set up earlier against him and the process could not be concluded before the petitioner attained the age. of 52 years. It was further felt that in view of this as also the emergency conditions brought out by the Indo-Pak conflict and the desirability of giving an opportunity to the petitioner to avail of six months leave preparatory to retirement the petitioner may be allowed to continue beyond the said age for a period of six months pending decision with regard to the question of suitability, which may be arrived at in the meanwhile. The decision as to the petitioner's suitability for continuance in service beyond the age

of 52 years was, thereforee, deferred to a later date when the Board felt, according to the Minutes, 'that the decision in regard to their continuance up to the age of 52 years may be expected to be taken within this period.' That the petitioner was allowed to continue in service for six months beyond the said age as an interim measure pending the determination of the question becomes obvious on a reference to the Minutes because, according to the Minutes, 'it was decided that these two officers might for the present be allowed to continue for a period of six months beyond their attaining the age of 52 years.' It was, thereforee, neither a decision that the petitioner was suitable for continuance beyond the age of 52 years nor a final decision in the process of review which had been initiated in the meeting of October 8, 1971. The further contention raised before us on behalf of the petitioner that once the petitioner was allowed to remain in service beyond the age of 52 years, he could not be retired before the age of superannuation, i.e. 55 years and that no review was possible once that crucial stage had been crossed is equally unsustainable. While it is true that the procedure prescribed by para 5 (a) envisages only one review to be undertaken well in advance of the officer's attaining the age of 52 years so as to enable him to avail of six months leave preparatory to retirement and that there is no warrant for the view that there may be periodic review even after an officer had attained the age of 52 years or, what may be described as, periodic extensions of service during three years between 52 and 55 and I have already held so, it is not possible to hold further that if a review had been initiated before an officer attained the age of 52 years but. it could not be concluded before he attained such an age or an extra ordinary situation arose in which such a review had to spill over to the post 52 years' period either because of need of further examination of the material or because of emergency conditions or because the conclusion of such a review earlier would prejudice an officer in the matter of his right to the leave preparatory to retirement, the three eventualities which led to the prolongation of the process of review in the present case, such a review must be struck down as being contrary to the procedure laid down by the memorandum. Clause (i) of para 5 (a) of the memorandum is rather unhappily worded. It first provides the age of superannuation although describes as the age of 'compulsory retirement'. It next provides that the continuance in service beyond the age of 52 years, however,

would be subject to review to determine an officer's suitability for continuance beyond that age. It further provides that the review would be carried out well in advance of attaining the age of 52 years and concludes with the provision that an officer not considered suitable for such continuance will be retired on attaining the age of 52 years. The defect of phraseology becomes obvious when one poses the question as to what would happen if no review is carried out before an officer attained the age , 52 years and. the officer is allowed to cross that stage. Would it mean that the officer having crossed the age of 52 years, he will be entitled to remain in service until he attains the age of superannuation i.e. 55 years. If the criterion for continuance beyond 52 years is the absence of determination that he is unsuitable for continuance then certainly he does, if on the contrary, the criterion is that there should be a definite determination that he is suitable for such continuance he is not because in that case, there is no definite determination one way or the other. While the first part of clause (i) talks of a review, 'to determine his suitability for continuance', the last four lines of the clause refer to the liability to retirement on attaining the age of 52 years of the officer 'not considered suitable for continuance.' The first part, thereforee, introduces, as it were, a positive test. The last portion of the clause introduces, as it were, a negative test. When one keeps in view that the age of superannuation is 55 years and the liability to retire earlier on attaining the age of 52 is when the officer is not considered suitable for continuance in service beyond that age, it follows that if no review is initiated before an officer attains the age of 52 years and the officer is allowed to remain in service beyond that stage without any reservation, he could not be retired after he had crossed that stage until the age of superannuation in terms of the aforesaid memorandum. It would, however, not make any difference to the case of the petitioner even if one lboked at the two portions of the clause in any of the two ways to which it is susceptible because in the present case, the petitioner was not allowed to continue beyond, the stage when he attained the age of 52 years, unreservedly. It was done subject to a process of review that had been initiated and subject, thereforee, to the terms of the decision which led to the unusual procedure of allowing the officer to cross the stage of 52 years in special circumstances but as an interim measure subject to final decision to be taken before the expiry of the said period of six months. The continuance in service of

the petitioner beyond the age of 52 years for a period of six months, however, did not harden into any entitlement to be continued in service up to the age of superannuation for it was a case in which the petitioner was allowed to continue for a limited period subject to the decision in the review which was still in the process. I am unable to see any warrant for the view that in such a situation the conclusion of the review by the Board in its meeting of January 15, 1972 was contrary to the procedure laid down in the memorandum or amounted to a subsequent or a second review. It is also not possible to accept the petitioner's contention that the decision to allow the petitioner to continue in service turn a period of six months beyond the age of 52 years was based on his suitability for such continuance for I am unable to see any decision in any of the meetings as to the petitioner's suitability in terms of the criteria laid down by the Board. The decision to continue the petitioner as an interim measure was dehors any question as to his suitability and was intended to be an interim measure and subject to the final decision on the question of suitability which had to be deferred because of the extraordinary circumstances referred to in the Minutes of the meeting of the Board of December 9, 1971. This contention of the petitioner, must, thereforee, be rejected.

(17) It was next contended on behalf of the petitioner that the decision to retire the petitioner was based on irrelevant and extraneous material and was, thereforee, void. On this question, learned couasel for the petitioner raised two contentions : (i) the memorandam envisaged that the decision in regard to the question of continuance beyond the age of 52 years or retirement on attaining the said age would be based on the outcome of a review to determine an officer's suitability for continuance beyond that age' to the exclusion of all other considerations but the decision of the Board in its meeting of January 15, 1972 with regard to the continuance of the petitioner beyond the period of six months already allowed to him was not based on the petitioner's 'suitability' but because 'it would not be in the public interest' to continue the petitioner in service and (ii) in arriving at the aforesaid conclusion, the Board considered the circumstances that 'certain vigilance cases' had come up earlier against the petitioner which would be deemed to have been washed away by the promotion of the petitioner to the rank of Brigadier and to his still subsequent appointment as Director of Inspection

(General Stares) after these cases had been finally dropped and the aforesaid circumstance, thereforee, could not be taken into account.

(18) In support of the first of the above contentions learned counsel for the petitioner urged that the order of compulsory retirement like other executive orders required to be made on the satisfaction of an authority with regard to a certain state of affairs or in the belief that a state of facts existed, were subject to limited judicial review, in that, the aggrieved person would be entitled to convass that in deciding the question required of it the executive authority had applied the criterion other than the one required of it by the statute. It was further urged that the only criterion that could be applied by the Government was if the petitioner was suitable for continuance beyond the age of 52 years and this had to be decided with reference to the standard laid down by the Board itself in its meeting held on October 8, 1971 and that the only question that, thereforee, required determination was if, having regard to the service record of the petitioner, his integrity health and the over all assessment in respect of various aspects of his service, he was a suitable person to be continued in service beyond the age of 52 years. It was next urged that the larger consideration if the continuance of the petitioner in service beyond that age was or was not 'in the public interest' was wholly foreign to the enquiry, and that by applying the latter standard, the Government had failed to apply the criterion laid down by the memorandum thereby vitiating the decision and the impugned order that led to it.

(19) On the other hand it was contended on behalf of the Union that the continuance in service of an officer who was unsuitable for such continuance could not be in public interest and that the use of the expression 'public interest' in the Minutes should be construed in that light and it should, thereforee, be held that the continuance of the petitioner was not considered in public interest because on a review of the entire matter, the Board had come to the conclusion that he was not suitable for such continuance.

(20) It is true that 'public interest' is a much wider concept than 'suitability' of a particular individual and would certainly involve consideratio,ns which may be wholly extraneous and irrelevant for a limited determination as to the suitability of a

person to a position or post or service which would have relation to his physical fitness, his integrity and his entire record of service as in the present case but in considering if it is in public interest to continue a person in service or to put him in a particular position or post will involve much larger questions of public policy, morality etc. It is, however, equally true that if a person is unsuitable for being continued in service, it could not be said that his continuance would be in public interest. It is the requirement of public interest that a suitable person should be put in a particular position and an unsuitable person should not be entrusted with the duties which he is unable to carry out effectively or honestly and in that sense, public interest would certainly be adversely affected if an unsuitable person was allowed to continue in service. It is also significant that in the affidavit by way of return to the rule, Shri G. L. Sheth, Secretary to the Government of India stated in para 7 that 'the Board considered the matter in detail and as the petitioner was not considered suitable for continuance in service as a result of the review, it was decided that it would not be in public interest to continue the petitioner.' This assertion is not supported by the Minutes of the meeting of January 15,1972 because the Minutes do not refer to any review as to suitability or any conclusion as to unsuitability and merely says that it was not inpublic interest to continue the petitioner in service. It appears that while drawing up the .Minutes as indeed the order of retirement, there was some mix up of the phraseology of the two clauses of para 5(a) of the Memorandum because the term 'public interest' which is an expression that is used in clause (ii) with respect to extension beyond 55 years of age and the expression used in the first clause is only 'suitability'. It, thereforee appears that this distinction was realised by the Union when the affidavit was filed and an attempt was made to link public interest with the unsuitability of the petitioner. It is, however, not possible to strike down the order merely because in the Minutes, it was made out that it was not in public interest to continue the petitioner in service while the criteria and the procedure laid down by law required that decision must rest on his suitability because reference to the earlier Minutes and the history of the question as to the continuance of the petitioner in service bears out the fact that the entire question had throughout been considered in the context of his suitability and that also was more or less confined to the circumstance that there had been some vigilance cases against the petitioner. It

was also a common case of the parties in this Court that the decision as to unsuitability was based primarily on the aforesaid vigilance cases and that being so, it is not possible to accept the contention that the impugned order is liable to be struck down because it purports to be based on a criterion which was not relevant for the determination of the question as to the petitioner's continuance in service. This contention of the petitioner must, thereforee, fail.

(21) The next question that requires consideration is as to whether the circumstance that certain vigilance cases had arisen against the petitioner and were eventually dropped, could be taken into account in determining the petitioner's suitability for continuance in service even though the petitioner's promotion to the rank of Brigadier was held over during the pendency of investigation into those cases and the petitioner was not only promoted to the rank of Brigadier when these cases were dropped but was also given an important posting as Director of Inspection (General Stores).

(22) The contention on behalf of the petitioner was that on the promotion of the petitioner to the rank of a Brigadier, which Was not only a senior but a very responsible position in the armed forces, and on his subsequent posting to an important post as Director of Inspection (General Stores), both of which rank and position required efficiency, effectiveness and integrity and involved both initiative and drive, the adverse effect, if any, of the initiation of investigation against him in certain charges which were eventually dropped, was completely washed away and that such circumstance could not, thereforee, be taken into account for determining the petitioner's suitability for continuance in service. In support of this contention, the petitioner strongly relied on the decision of the Supreme Court in the case of State of Punjab v. Dewan Chuni Lal. : [1970]3SCR694 . the decision of the Madras High Court in the case of P. Shankar Rao v. The Government of India and another, Writ Petition No. 2922 of 1969, decided on October 30, 19700 and a decision of the Single Judge of this Court in the case of Shri J. R. Jain v. Union of India and others, 1973 (2) S.L.R. 309.

(23) On the other hand, it was contended on behalf of the Union that the rule required that for determining the question as to the suitability of the petitioner, the

entire service record of the petitioner apart from the question of health, integrity and his overall assessment in service must be taken into account and that even though the petitioner was promoted after the cases had been dropped and had been even given the post of Director of Inspection, the fact that investigation into certain conduct of the petitioner in relation to the official duty had been initiated even though it proved abortive, nevertheless remained an integral part of his record of service and could not on any principle be said to have been washed away even though it was also part of the record that inspire of the initiation of these cases, he was promoted to an important position and given an important posting. It was contended that the considerations that may be relevant when an officer is allowed either to cross the efficiency bar or is promoted to a higher rank or is given a posting in a higher and more responsible position or is punished by way of dismissal or otherwise would not necessarily be relevant at the stage of the career of an officer when he reaches the age of compulsory retirement and a question has to be considered on a review of his entire service record if he should be compulsorily retired at that stage or be allowed to continue in service until the age of superannuation because subject to the pleasure of the President under Article 31

(24) This contention of the petitioner, ex facie, appears to be quite attractive and even plausible but cannot stand closer scrutiny.

(25) The rule of English law embodied in the 'pleasure doctrine' was not applied with full rigour in India either by Section 240 of the Government of India Act, 1935 or by Article 310(1) of the Constitution of India. This is so because Article 310 begins with a clause 'except as expressly provided by this Constitution' with the result that if there are any provisions in the Constitution which impinge on the 'pleasure doctrine', the provisions of Article 310 must be read subject to them. One of such provisions is Article 311 of the Constitution of India. Article 311 of the Constitution of India, thereforee, has to be read as a proviso to Article 310 so that the pleasure contemplated by Article 310(1) must be exercised subject to the limitations prescribed by Article 311. It is significant that Article 310 admits only of constitutional limitations and not others because the rule making power under Article 309 of the Constitution of India is subject to the provisions of the

Constitution which would include Article 310. These rules and the exercise of the power under them must, thereforee, be subject to Article 310. Article 309 is incapable of impairing or affecting the doctrine of pleasure specified in Article 310(1). It, thereforee, follows that Article 309 has to be read subject to Articles 310 and 311 and Article 310 has to be read subject to Article 311.

(26) It is significant that inspire of the aforesaid limitation on the doctrine of pleasure, it was held in series of cases by the Supreme Court that the compulsory retirement of a civil servant in accordance with the rules governing him would not amount to removal from service within the meaning of Article 311 of the Constitution of India. In the case of Shyam Lal (supra), the Supreme Court observed that removal was always synonymous with dismissal and in the case of removal as in the case of dismissal, some ground personal to the servant which was blameworthy was involved. There was also a stigma attached to the servant who was removed and it involved a loss of benefit already earned by him. Applying the aforesaid test, it was held that compulsory retirement did not amount to removal. In dealing with the argument about loss of benefit the Court observed that a distinction must be made between the loss of benefit already earned and the loss of prospect of earning something more and it proceeded to add that in the first case it was a present and certain loss and certainly a punishment but the loss of future prospect was too uncertain for the officer may die or be otherwise incapacitated from serving a day longer and could not, thereforee, be. regarded by law as a punishment. This line of reasoning has since been consistently followed by the Supreme Court and in the case of Moti Ram Deka & others v. General Manager North East Frontier Railway and another, : (1964)IILLJ467SC their Lordships of the Supreme Court while reviewing the case of Shyam Lal (supra) observed that this view has been taken in respect of compulsory retirement throughout and that this 'branch of the law must be held to be concluded by the series of decisions' of that Court.

(27) If the compulsory retirement of a civil servant, who holds a permanent post and would by virtue of that have the right to hold the post so as to constitute its deprivation a penalty per se within the meaning of Article 311 of the Constitution of India, as held by the Supreme Court in the case of Parshotam Lal Dhingra v.

Union of India, : (1958)ILLJ544SC would not be removal so as to attract Article 311 of the Constitution of India because the rules provide, for such compulsory retirement, there should be no difficulty in holding that a member of a defense service, to whom Article 311 does not apply and in whose case the 'Pleasure doctrine' would apply with all its rigour, would have no right to the post more so on attaining the age of compulsory retirement where the rules made a provision in that behalf.

(28) It is, thereforee, important to bear in mind while dealing with the question of compulsory retirement of a member of the defense service that he holds the post subject to the pleasure of the President and the doctrine of pleasure would apply to him with full force and render his tenure a precarious one. The question, thereforee, as to what material could be considered when the authorities are faced with the problem if such an officer should or should not be retained beyond the age of superannuation and the considerations that would be relevant in making that determination must, thereforee, be viewed in the context of the nature of his tenure. The officer in the present case obviously had no right to continue in service beyond the age of compulsory retirement unless on a review of his entire service records, 'he was found suitable for such continuance. The criteria laid down in the rules empowered the authorities to review his entire service record apart from the question of health, integrity and his overall assessment in service. A review means a reconsideration of the entire service record. If in the course of his service, there has been an adverse circumstance such as a police investigation into charges of abuse of official position, as in the present case, it would obviously form part of the service record, even though, the decision eventually may have been favorable to an officer whether on the merits or on insufficiency of material or any technical ground. If inspire of such an adverse circumstance, the officer was allowed promotion or posted to a most responsible position as in the case of the petitioner, that would also form part of the service record in the same way as the adverse circumstance did. When the petitioner was allowed promotion after the cases were dropped and was even posted to a more responsible position, the circumstance of initiation of investigation and the circumstances in which or the reasons for which the cases were dropped did not in any manner get obliterated from the record but for the limited purpose of the promotion and of the posting, the circumstance was

ignored but that was a stage where the petitioner had not reached the age of compulsory retirement and, within the terms of the rule, had the limited right 'to be continued in service, as indeed, a fundamental right under Article 16 of the Constitution of India for being considered for promotion. The mere promotion or posting is, however, distinguishable from a right being conferred on the officer to continue in service beyond the age of compulsory retirement until the age of superannuation. Different considerations would, thereforee, apply when the question of continuation beyond the age of compulsory retirement came up for consideration. The question of promotion has relation to the period when there was a limited right to hold the post, while the question of continuance beyond the age of compulsory retirement has relation to the period beyond which there was no such right. The two stages are clearly distinguishable. Besides, the continuance in service beyond the age of compolsory retirement not only meant a longer tenure for the officer but also the prospect of promotion to higher ranks, posting in more responsible and sensitive positions and for that reason also a distinction would be justified. It may be that if the order of compulsory retirement was subject to full judicial review, the Court may take the view that if the officer was fit enough to be promoted to the high rank of a Brigadier and entrusted higher responsibility of Director of Inspection (General Stores), he could be equally fit to be continued in service beyond the age of compulsory retirement and given still higher promotions and postings. Unfortunately for the petitioner, however, the order of compulsory retirement is not subject to full judicial review but is only partly justiciable and all that this Court is entitled to consider is whether in deciding the question of the petitioner's suitability for continuance in service beyond the age of compulsory retirement, the authorities competent to deal with the question have bonafide applied their mind to the material before them and have taken into account the material which was relevant and germane to the question. The aggrieved officer is, however, not entitled to convass before the Court nor is the Court entitled to go into the question if the material on which the decision is based would not justify the decision or a contrary view was possible on that material. The sufficiency of the material or the correctness or otherwise of the decision are not open to judicial review. It may be sufficient in this connection to refer to the cases of Machinder Shivaji v. The King, Air 1950 Federal Court 129,(8), Barium Chemicals Ltd. v.

Company Law Bobrd, : [1967]1SCR898 and Rohtas Industries Limited v. S. D. Aggarwal. A.I.R. 1969 SC 307.

(29) The case of Dewan Chuni Lal (supra) on which reliance was placed on behalf of the petitioner is clearly distinguishable. In that ease, their Lordships of the Supreme Court were concerned with the question as to the validity of the order of dismissal of the respondent a Sub-Inspector of police, who had been called upon to answer a charge framed in 1949 based on his confidential character roll showing his inefficiency and lack of probity while in service from 1941 to 1948. The contention before the Supreme Court on behalf of the officer was that the reports earlier than 1944 should not have been considered at all in dismissing the officer because he had been allowed to cross the efficiency bar in that year. The contention prevailed and it was observed that the reports earlier than 1944 'should not have been considered at all inasmuch as he was allowed to cross the efficiency bar in that year,' and that it was unthinkable 'that if the authorities took any serious view of the charge of dishonesty and inefficiency contained in the confidential reports of 1941 and 1942 they could have overlooked the same and recommended the case of the officer as one fit for crossing the efficiency bar in 1944.' It is difficult to read in the aforesaid observations any conclusion or principle that the earlier reports were irrelevant or could not have been considered merely because the officer was allowed to cross the efficiency bar subsequent to the reports. The Supreme Court was dealing with the question arising in a suit and laid down merely a rule of propriety. The observations must also be seen in the context in which they were made. The case before their Lordships of the Supreme Court was one of dismissal on a specific charge. There was no limitation, thereforee, on the extent of the justifiability of such an order or was there any requirement that while awarding the punishment of dismissal, the entire service record must be reviewed as in the present case. That was also a case of a permanent civil servant who had a right to hold the post until the age of superannuation unless he was removed in accordance with the provisions of Article 311 of the Constitution of India. The decision in favor of the officer turned on the conclusion that the officer had been denied a reasonable opportunity of showing cause and was not based on the infirmity on which reliance is being placed. These observations, thereforee, could not be of any assistance in the present case in which the Court is concerned

with the validity of an order of compulsory retirement of a member of defense service under the rules which enjoin that the question of suitability of an officer for continuance beyord the age of compulsory retirement must be decided on a review of his entire service record. The case of P. Shanker Rao (supra) was again a case of a civil servant and there was no requirement with regard to the review of his entire service record. The conclusion that the antecedents of the officer in that case could not be considered in determining whether he should be compulsorily retired of not was primarily based on the circumstance that the result of the enquiry before the Board of Enquiry, which was being relied upon, had been 'vacated.' by the Division Bench of that Court. Reinforcement was, however, sought for the conclusion from the fact that the petitioner had been promoted to the I.A.S. but only incidentally. This case is, thereforee, also of no assistance to the petitioner. In the case of J. R. Jain (supra), a learned Single Judge of this Court set aside the order of compulsory retirement of a civil servant, inter alia, on the ground that the adverse remarks conveyed to the officer as well as the punishment of withholding of two increments with cumulative effect imposed on him, on which the order was based 'stood wiped out and could not be taken into consideration' because the officer had been, subsequently allowed to cross the efficiency bar. In support of the conclusion the learned Judge relied on the observations of the Supreme Court in the case of Dewan Chuni Lal (supra) referred to above and of the decision of the Madras High Court in the case of P. Shanker Rao (supra). The learned Single Judge noticed the distinction in the case of Dewan Chuni Lal (supra) and in the case of P. Shanker Rao (supra) but observed that the observations of their Lordships of the Supreme Court in the case of Dewan Chuni Lal and of the Madras High Court left no manner of doubt that 'the earlier reports could not have been considered at all.' In the first instance, this case is distinguishable because there was no requirement or obligation to review the entire service record of the officer as in the present case. Secondly, the decision is clearly based on a misreading of the two decisions on which it purports to be based and I say so with respect. I have already pointed out above the context in which the observations of the Supreme Court were made and what appears to me to be their true import. This case is, thereforee, of no assistance to the petitioner. The case of Gopal Krishan Oberoi (supra) on which reliance was

placed on behalf of the Union is not of much assistance either. In that case a member of the defense service was compulsorily retired after taking into account certain minor punishments, even though, after the minor punishments had been imposed, the officer had been promoted. According to the Government decision the fact of the imposition of a minor penalty on a Government servant should not by itself stand against the consideration of an officer for promotion. The contention of the petitioner that if such a punishment could not be a bar in the matter of promotion, it could not be taken into account in deciding the question of compulsory retirement was negatived by the Nagpur Bench of the Bombay High Court on the ground that the Government decision with regard to the impact of minor punishment was limited to promotion and could not be applied to compulsory retirement, it was also observed that an employee in the employment of government had a fundamental right of being considered For purposes of promotion. The decision, however, turned more on the language of the circular with regard to the impact of minor punishment on the right for being considered for promotion rather than on any principle.

(30) That leaves for consideration the allegations of mala fides and discrimination. None of these appear to me to have any substance and are apparently based on the misgivings of the petitioner. In the first instance, it is alleged that the petitioner was not considered. for promotion during the pendency of the investigation into the vigilance cases inspire of a Government circular to the contrary because of the second respondent's decision that the circular was not applicable to the army officer. In his affidavit, respondent No. 4 has explained that the instructions contained in the circular were not applicable to the service officers of the R & D and Inspection Organisation and were never applied to the service officers. If the respondent No. 2 took a certain view with regard to the applicability of these instructions to the officers of the Organisation, I do not see how this could constitute an act of mala fide particularly where the petitioner was eventually promoted after the eases had been dropped. The petitioner next cites the instance in which the order of the second respondent with regard to petitioner's seniority was reversed by Chief of the Army Staff in favor of the petitioner and it is alleged that -the reversal of this decision was not taken, by the second and the third respondents sportingly. In his affidavit, respondent No. 4 has explained that the

case of inter se seniority involved interpretation of complicated rules and regulations and the decision had been taken bona fide on an interpretation of the rules and when the decision was reversed, it was promptly implemented. Respondents No. 2 and 3 have generally denied the allegations that they were prejudiced against the petitioner. Neither of the said respondent had any personal stake in the matter of inter se seniority between the petitioner and certain other officers and I do not see how any mala fide could be attributed to the respondents on that account. Thirdly, it is contended that the decision to drop all cases against the petitioner was not relished by the second and the third respondent and they nursed a prejudice in their mind against the petitioner. This allegation has been denied by respondent No. 4 as well as generally by respondents No. 2 and 3. There is no substance in this allegation because after the cases were dropped the petitioner was promoted and some of the said respondents were concerned with the decision with regard to promotion. If respondents No. 2 and 3 were influenced by the fact that the investigation had been initiated in considering whether the petitioner should or should not continue in service beyond the age of compulsory retirement, no exception could be taken to it because the rule itself enjoins that the entire service record should be taken into account. That would not, thereforee, involve any question of mala fide. It has been clearly stated in the various affidavits that the decision was taken bona fide on the review of the service record of the petitioner. It is next alleged that when the order of May 8, 1972 was personally communicated to the petitioner by Brigadier Datta, the petitioner was told by him that he should immediately proceed on leave otherwise the second respondent will have to devise some other method to remove him from the duties of Director of Inspection (General Stores) and it is alleged that this threat was carried out because by two separate orders, Annexures P-9 and P-10, duties of the petitioner were changed and he was relieved of financial powers. Brigadier Datta in his affidavit has denied that he holdout any such threat. Shri Sheth in his affidavit has explained that the changes were made in the interest of government work. There does not appear anything unusual in the change of duties or of withdrawal of financial powers because of the imminence of the retirement of the petitioner and it is difficult to connect these with any prejudice and I have no reason to disbelieve the statement of Shri Sheth that the changes were made in

the interest of government work. The allegation that the retirement was calculated to deprive the petitioner to earn his pension as a Brigadier is equally unsustainable because the question of his compulsory retirement had to be decided at a particular stage of his career and the timing of it, thereforee, could not have been contrived. Shri Sheth has also explained in his affidavit that it is anaccepted convention in the army that even a days' extension is not granted to a service officer merely to enable him to earn a higher pension. The last allegation with regard to mala fide attributes a statement to respondent No. 2 when the petitioner met him on February 7, 1972, to the effect that even though Government had agreed to six months' extension, the petitioner would have to retire on February 24, 1972 as if there was no extension. This allegation appears to me to be ridiculous on the face of it because apart from the fact that it has been denied, there would be no occasion for respondent No. 2 to make such an assertion in the face of a written order by which six months extension in service was allowed to the petitioner. Lastly, it is alleged that in the matter of compulsory retirement, the petitioner was singled out and that the petitioner was retired even though Brigadier Jayaraman and Commodore Pradkar, against whom also there were vigilance cases which were dropped, were recommended for continuance. Shri Sheth has pointed out in his affidavit that the cases of each officer were considered by the Board on their respective merits and the decisions were made accordingly, and that apart from the petitioner, Col. Kapoor and Col. Tiwari were also recommended for retirement on attaining the age of compulsory retirement. It was further stated that the cases of Brigadier Jayaraman and Commodore Pradkar were considered on their respective merits. The allegation of the petitioner that the cases of the petitioner and of the said two officers could be put on the same level and that the case of the petitioner for continuance may even be stronger than theirs, was rather vague and indefinite. The petitioner did not give any detail either of the service records of these officers or of the nature of allegations against them which were investigated into or the reasons for which or the circumstances in which cases against them were dropped. The Board had to make its recommendations on the basis of the overall assessment of an officer's work and on a review of his entire service record. The assessment of work and service record of any two officers is rarely the same. If the decision in each case is based on bona fide consideration

of the relevant records and considerations which are germane for the decision of the matter, the question of discrimination can hardly arise. The material on the record does not justify the allegation of discrimination. In the course of his affidavit, Shri Sheth has stated that the cases of these officers were considered on the merits and decided accordingly and there is no reason to disbelieve this statement. The contentions of the petitioner with regard to mala fides and discrimination must, thereforee, be rejected.

(31) In the result, the petition fails and is hereby dismissed but, in the circumstances, without costs.

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