

ALLAHABAD HIGH COURT

Ram Autar Pandey

Vs.

State of U.P

Civil Misc. Writ No.2652 of 1961

(V.G. Oak, A.P. Srivastava and S.N. Dwivedi, JJ.)

21.12.1961

JUDGMENT

V.G. Oak, J.

1. By this petition under Article 226 of the Constitution, validity of a Government notification lowering the age of superannuation has been challenged. Ram Autar Pandey is the petitioner. The State of Uttar Pradesh and the District Judge, Mainpuri are the two opposite Parties.
2. The petitioner was born on the 4th of May 1906. He joined service in 1929 in Mainpuri judgship. He is at present occupying the post of Record Keeper in the said judgship. Under Rule 56 of the U.P. Fundamental Rules, it was laid down that the date of compulsory retirement of a Government servant is the date on which he attains the age of 55 years. By a Government notification issued on 27-11-1957 (hereafter referred to as 1957 notification) the figure '58' was substituted for the figure '55' in Fundamental Rule 56. According to this notification, the petitioner could remain in service till the completion of 58 years. It was expected that he would not retire from service till May 1964.
3. On 25-5-1961, the Governor of Uttar Pradesh issued two notifications. By the first notification dated 25-5-1961 (hereafter referred to as the principal notification), it was laid down that the figure '55' shall be substituted for the figure '58' in Fundamental Rule 56. It was further laid down in the said notification that, a Government servant shall be deemed to have been retained in service beyond the date of compulsory retirement till the date of the notification.
4. By the second notification dated 25-5-1961 (hereafter referred to as the subsidiary notification), it was provided that Government servants falling in certain classes would be able to continue in service up to the 31st December 1961. The petitioner's case falls under one of the classes mentioned in the subsidiary notification. The combined result of the two notifications is

that the petitioner will have to retire from service on 31-12-1961.

5. The petitioner's contention is that, he is entitled to remain in service till May 1964, when he would complete 58 years. According to him, the two notifications, dated 25-5-1961 are invalid. He has, therefore, prayed for the issue of a writ of mandamus restraining the opposite parties from enforcing the two notifications against the petitioner.

6. The petitioner filed an affidavit. The Joint Secretary to U.P. Government in the Judicial Department has filed a counter-affidavit on behalf of opposite party No.1, the petitioner filed a rejoinder affidavit.

7. When the writ petition was admitted by a learned Single Judge of this Court, he referred the case to a Division Bench. It appears that the petition has been referred to a Full Bench, as questions of general importance are involved in the case.

8. In paragraph 9 of the rejoinder affidavit, it is stated that the real reason for reducing the age of retirement from 58 years to 55 years is not to increase the efficiency of public services, but; political reasons. No such allegation was made in the original affidavit filed by the petitioner. As many as thirteen grounds have been enumerated in the writ petition. But none of the thirteen grounds levies a charge of mala fides against opposite party No.1. I, therefore, decline to consider the charge made in the rejoinder affidavit that the principal notification was issued by the State Government for political reasons.

9. The writ petition is directed against the two Government notifications, dated 25-5-1961. The two notifications may be reproduced here. The first notification runs thus:

"Whereas by Government of Uttar Pradesh, Finance Department Notification No. G-I-1733/X-534(19)-57, dated November 27, 1957, Rule 56 of the Fundamental Rules contained in Financial Handbook, Volume II, Parts II to IV was amended with effect from June 17, 1957 (hereinafter called the said date) by substituting the figure "58" for the figure "55" wherever the same occurred;

And whereas the Governor of Uttar Pradesh has, with a view to increasing efficiency in public administration and for sub serving the common good, decided that the age at which Government servants to whom the said Rule 56 applies including servants who had not been compulsorily retired on or before the said date and have not attained the age of 58 years on the date of this Notification and servants who have been recruited or appointed on or after the date first referred to that is June 17, 1957 and to be recruited or appointed hereafter, shall, subject as hereafter provided be compulsorily retired, be the date on which the servant attains the age of 55 years. Now, therefore, in exercise of the power conferred by the proviso to Article 309 of the Constitution and all other powers in that behalf, and in supersession of Finance Department

Notification No.G-I.1733/X-534(19)-57 dated November 27, 1957, the Governor of Uttar Pradesh is pleased to amend the said rule as under:

(a) For the figure "58" wherever it occurs the figure "55" shall be substituted.

(b) The following shall be added as proviso at the end of clause (a) of the said Rule:

"Provided that a Government servant who had not retired on or before June 17, 1957 but has subsequently attained the age of 55 years and has on May 25, 1961 not attained the age of 58 years, shall for the period he has continued to serve after attaining the age of 55 years be deemed to have been retained in service beyond the date of compulsory retirement i.e. the age of 55 years, within the meaning of the Rule aforesaid."

The second notification, dated 25-5-1961 runs thus:

"The Governor has carefully considered the question regarding the retention beyond the age of compulsory retirement under and in accordance with Fundamental Rule 56, Financial Handbook, Vol.II Parts II to IV, as amended by Finance Department Notification No. G-I-1233/X-534(19)-1957, dated May 25, 1961 of the Government servants mentioned in column 1 of the Schedule hereof, and has keeping in view the interest of public service and the demands of administration decided and in exercise of all the powers in that behalf is hereby pleased to grant, sanction and order that the said Government servants shall on public grounds be retained in services up to the date mentioned opposite them in column II of the Schedule hereto. This order, whenever so necessary, shall be read and construed to have been passed in the case of each Government servant hereby affected.

The Governor further directs that any Government servant who has, on or before the date of this order, already been directed in pursuance of order of sanction made or given under Fundamental Rule 56 to be retained in service beyond the age of compulsory retirement, shall be so retained, notwithstanding anything in this Schedule hereto.

SCHEDULE

Column I	Column II
1. Government servants who have on May 25, 1961 crossed the age of 57 years.	Upto the date on which he attains the age of 58 years or upto December 31, 1961 whichever is earlier.
Government servants who have on May 25, 1961	
2. crossed the age of 55 years but have not crossed the age of 57 years.	Upto December 31, 1961.
Government servants who will cross the age of	
"3. 55 years between May 25, 1961 and December 30, 1961.	Upto December 31, 1961."

10. It will be convenient to give an outline of the statutory provisions which existed from time to time for regulating conditions of service of Government servants in India, with special reference to Government servants in Uttar Pradesh. Under Section 96-B of Government of India Act, 1915, the Secretary of State-in-Council could make rules for regulating conditions of service. Sub-section (2) of Section 241 of Government of India Act, 1935, empowered Governors of Provinces to make rules for conditions of service in the case of persons serving in connection with the affairs of provinces. In or about the year 1942, the Governor of United Provinces (now Uttar Pradesh) framed certain rules, which have been described as Fundamental Rules. Clause (a) of Fundamental Rule 56 ran thus:

"Except as otherwise provided in clause (b) the date of compulsory retirement of a government servant is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of the Government on public grounds which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances."

11. Article 309 of the Constitution of India empowers the Governor of a State to make rules regulating the conditions of service of persons appointed in the State.

12. It will be noticed that, according to Fundamental Rule 56 as originally framed, the age of superannuation of Government servants in this State was 55 years. By the 1957 notification, the age of superannuation was raised to 58 years. By the principal notification dated 25-5-1961, the age of superannuation was again reduced to 55 years. The petitioner relies upon the 1957 notification. Opposite party No.1 relies upon the two notifications, dated 25-5-1961.

13. It was urged by Mr. P.C. Chaturvedi appearing for the petitioner that, the principal notification is invalid, because it purports to have retrospective effect. There is some force in this contention. The principal notification was issued on 25-5-1961. Clause (b) of the principal notification implies that, the petitioner virtually retired from service on the 3rd of May 1961, but he was given extension of service from the 4th of May 1961 till the 24th of May 1961. It is doubtful whether the Governor could make on 25-5-1961 a rule providing that, the petitioner should be deemed to have retired from service on 3-5-1961.

14. But it is not necessary to pursue the point. Under clause (b) of the principal notification, the petitioner's service from 4-5-1961 to 24-5-1961 was recognised. The subsidiary notification makes provision for continuation of the petitioner's service up to 31-12-1961. The combined result of the two notifications is that, the petitioner will be able to remain in service till 31-12-1961 without any break. Since the petitioner will be able to remain in service till 31-12-1961, the question whether he could be compulsorily retired on 3-5-1961 has no practical importance.

15. The proviso to Article 309 of the Constitution of India empowers the Governor of Uttar Pradesh to make rules regulating conditions of service of Government servants in this State.

16. By Article 367 of the Constitution, the General Clauses Act, 1897 has been made applicable for the interpretation of the Constitution. Section 21, General Clauses Act, 1897 runs thus:

"Where, by any Central Act or regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add, to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

17. Under Article 309 of the Constitution read with section 21, General Clauses Act, the Governor of Uttar Pradesh is competent to alter rules regulating conditions of service from time to time. In November 1957, the Governor issued a notification under Article 309 of the Constitution raising the age of superannuation from 55 years to 58 years. In May 1961, the Government issued the principal notification reducing the age of superannuation from 58 years to 55 years. The Governor was competent to issue these notifications in 1957 and 1961 under Article 309 of the Constitution.

18. Mr. Chaturvedi contended that, if the Governor proposed to lower the age of superannuation, he had to obtain the consent of Government servants concerned. For this contention, Mr. Chaturvedi relied upon the expression "exercisable in the like manner and subject to the like sanction and conditions (if any)" appearing in Section 21 of the General Clauses Act. The expression relied upon by Mr. Chaturvedi merely means that, alterations of rules have to be carried out under the same conditions, under which original rules can be framed. Now, for framing new rules under Article 309 of the Constitution, the Governor is not required to obtain consent of Government servants. There is, therefore, no good reason why such consent should be obtained by the Governor at the time of altering the rules. Mr. Chaturvedi pointed out that, when a rule likely to adversely affect Government servants is framed by an authority, it is the usual practice to give an option to the Government servants concerned. But under Article 309 of the Constitution, there is no obligation on the Governor to give an option to a Government servant, when the Governor proceeds to amend a rule. In the present case, it was open to the Governor to reduce the age of superannuation without giving any option to the Government servants likely to be affected by the alteration in Fundamental Rule 56.

19. Mr. Chaturvedi's main contention was that, the petitioner's compulsory retirement in 1961 is invalid, because it involves contravention of Article 311 of the Constitution. Mr. Chaturvedi contended that the petitioner is entitled to remain in service till the completion of 58 years. He is being retired in 1961 without giving him a reasonable opportunity of showing cause against premature retirement. It is, therefore contended that, clause (2) of Article 311 of the Constitution is being contravened.

20. Mr. Chaturvedi strongly relied upon the case of *Parshotam Lal Dhingra v. Union of India*¹, In

that case, their Lordships of the Supreme Court observed on page 48 thus:

"When a servant has a right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant or his reduction to a lower post is by itself and prima facie a punishment, for it operates as forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto."

21. It may, however, be pointed out that, in same case, it was observed on p.49 that, termination of service by compulsory retirement in terms of a specific rule regulating the conditions of service is not tantamount to infliction of a punishment, and does not attract Article 311(2) of the Constitution.

22. In *Shyam Lal v. State of U.P.*² it was explained that, removal generally implies that the officer is regarded in some manner blameworthy or deficient that is to say that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge

¹ AIR 1958 SC 36

² AIR 1954 SC 369

his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore involve the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer. There is no such element of charge or imputation in the case of compulsory retirement. Dismissal or removal is a punishment. This is imposed on an officer as a penalty. It involves loss of benefit already earned. But an officer who is compulsorily retired does not lose any part of the benefit that he has earned. On compulsory retirement, he will be entitled to the pension etc. that he has actually earned. There is no diminution of the accrued benefit. Compulsory retirement, therefore, does not amount to dismissal or removal and therefore does not attract the provision of Article 311 of the Constitution.

23. In *Dalip Singh v. State of Punjab*³, it was held that, retirement under a service rule which provided for compulsory retirement at any stage whatsoever irrespective of the length of service put in, cannot necessarily be regarded as dismissal or removal within the meaning of Article 311.

24. The broad principle laid down by these decisions is this. Compulsory retirement from service would be in the nature of removal from service, if termination of service is ordered by way of penalty. There are two tests for deciding whether termination of service was by way of penalty or not. The two tests are:

(1) Whether there was a charge or imputation against the officer? and

(2) Whether there is loss of benefit already accrued?

25. In the principal notification, there is a recital that, action was being taken with a view to increase efficiency in public administration and for subserving the common good. There was no charge or imputation against the petitioner. In fact, the petitioner was not named in the notification. In paragraph 7 of the counter-affidavit, it is stated that, the Governor's order does not affect the petitioner so far as his leave, pension and contributory provident fund are concerned. It means that the petitioner is not likely to lose benefits, which have already accrued to him. So neither of the two tests for deciding whether termination of service amounts to punishment or not applies to the petitioner's case.

26. Mr. Chaturvedi contended that there is a third test for deciding whether the termination of service was in the nature of punishment. He described the third test as that of per se punishment. It was recognized in P.L. Dhingra's case, AIR 1958 Supreme Court 36, that, a substantive appointment to a permanent post in public service normally confers on the servant so appointed, a substantive right to the post. When a Government servant has right to a post, termination of the service is by itself prima facie a punishment. The petitioner is in permanent service. According to the 1957 notification, he would have remained in service till May 1964. On 24-5-1961, the petitioner could properly urge that he was entitled to remain in service till May 1964. The position was altered as a result of the principal notification, dated 25-5-1961. By the principal notification, the age of

³ AIR 1960 SC 1305

superannuation was reduced from 58 years to 55 years. The petitioner completed 55 years on the 4th May 1961. In view of the principal notification, the petitioner could not urge on 25-5-1961 that he was entitled to remain in service till May 1964. If the petitioner had no right to the post on 25-5-1961, he could not rely upon the rule laid down in P.L. Dhingra's case, AIR 1958 Supreme Court 36.

27. Mr. Chaturvedi recognised that, if the principal notification is valid, the petitioner has not got much of a case. Mr. Chaturvedi, therefore, contended that, the principal notification is unconstitutional. He contended that, under the principal notification, the petitioner was being retired from service without giving him a reasonable opportunity of showing cause against the retirement. It was contended that, the principal notification offends against Article 311 (2) of the Constitution.

28. It is true that Article 309 is subject to the provisions of the Constitution. In other words, Article 309 is subject to Article 311. But that principle merely means that, the Governor cannot frame under Article 309 a rule contravening Article 311. The Governor is not competent to frame a rule laying down that a Government servant may be dismissed or removed from service without giving him a reasonable opportunity of showing cause against the proposed action. If such a rule is framed under Article 309, the rule would be ultra vires. But in the instant case, the

Governor has not framed any such rule. In terms, the principal notification does not mention dismissal or removal from service. The main provision of the principal notification was to reduce the age of superannuation from 58 years to 55 years. The provision was nothing more than alteration of one condition of service. Suppose, there is a service rule to the effect that, a Government servant is entitled to get privilege leave for one month for one year's active service. The rule may be amended so as to provide for privilege leave for 15 days only for one year's active service. Such an amendment in the rule would no doubt adversely affect Government servants. But it cannot be reasonably contended that, an alteration of this nature would be by way of punishment of Government servants. The impugned alteration in Fundamental Rule 56 is of the same character. The alteration seriously affects a large number of Government servants. But the amendment in the rule is not by way of punishment. No doubt the petitioner will have to retire from service in 1961, as a consequence of the principal notification. But the notification by itself is not by way of punishment. In terms, the principal notification was not in the nature of dismissal or removal of Government servants. The amendment of Fundamental R.56 was not by way of punishment. So the principal notification is not hit by Article 311 of the Constitution. The principal notification is valid.

29. In passing, I may point out that, the petitioner joined service in 1929. It appears that at that time the age of superannuation was 55 years. In 1957, the age of superannuation was raised to 58 years. In 1961, the age of superannuation was again reduced to 55 years. It will thus be seen that, today the age of superannuation is the same in 1929, when the petitioner joined service. This is not a case where a Government servant's right existing at the time of his joining service is being taken away.

30. Now, I proceed to consider validity of the subsidiary notification. Under the principal notification, the petitioner had to retire on 25-5-1961. By virtue of the subsidiary notification, the petitioner will be able to remain in service till 31-12-1961. Considering that the subsidiary notification is in favor of the petitioner, it is difficult to see how he can challenge it.

31. Mr. Chaturvedi contended that the subsidiary notification violates Articles 14 and 16 of the Constitution. Article 14 provides for equality before law. Mr. Chaturvedi pointed out that, under the subsidiary notification, there is a provision for different dates of retirement for different government servants. The subsidiary notification deals with Government servants, who have recently retired, or who are likely to retire in the near future. Such persons have been divided into three groups. The first group covers Government servants, who had completed 57 years by 25-5-1961. Such Government servants may remain in service "up to the date on which they attain the age of 58 years or up to December 31, 1961, whichever is earlier." It means that if a Government servant was likely to complete 58 years during 1961 before 31-12-1961, he would retire on completing 58 years, and would not remain in service till 31-12-1961. Under 1957 notification, the age of superannuation was 58 years. If a Government servant is kept in service till he completes 58 years, he can have no grievance. There is no reason why he should continue in

service after completing 58 years. Although discrimination is prohibited under Article 14, reasonable classification is permissible. The classification made by the subsidiary notification in dealing with Government servants falling in the first group appears reasonable. Government servants falling in the second group and the third group will continue in service till 31-12-1961. The petitioner's case falls under the second group mentioned in the subsidiary notification. He will, therefore, remain in service till 31-12-1961. No one falling in any of the three groups will be able to continue in service beyond 31-12-1961. The subsidiary notification does not involve any discrimination against the petitioner.

32. Clause (1) of Article 16 of the Constitution states:

"There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."

33. The petitioner joined service in 1929. He had an opportunity to serve the State for more than 32 years. There is no infringement of Article 16 of the Constitution. The subsidiary notification is also valid.

34. Lastly, it was contended by Mr. Chaturvedi that, in view of the successive extensions granted by the principal notification and the subsidiary notification, the petitioner is entitled to remain in service till he completes 60 years. For this contention, reliance was placed upon the latter part of clause (a) of R.56 of Fundamental Rules. The relevant provision is:

"He may be retained in service after the date of compulsory retirement with the sanction of the Government on public grounds, which must be recorded in writing but he must not be retained after the age of 60 years except in very special circumstances."

This provision enables the Government to retain a Government servant after the completion of 55 years. The Government servant cannot claim extension of service as a matter of right. Retention in service beyond 55 years is in the discretion of Government. The petitioner cannot claim extension in Government service up to 60 years, simply because he got extensions of service by a few months after completing 55 years.

35. Thus all the contentions advanced on behalf of the petitioner fail. I would, therefore, dismiss the writ petition with costs to opposite party No.1.

Srivastava, J.

36. I agree that the petition must fail. In view however, of their importance I would like to indicate my approach to some of the problems involved.

37. The petitioner was born on the 4th May 1906 and entered Government service as a clerk in the Judgeship of Mainpuri on the 1st May, 1929. At the time when he entered service the age of superannuation as provided in rule 56 of the fundamental rules to be found in Part I of the Second Volume of the Financial Handbook issued by the authority of the Government of the United Provinces was 55. The fundamental rules of which R.56 was one were first framed under Section 96-B of the Government of India Act of 1919 and came into force with effect from January 1, 1922. After the repeal of the Government of India Act, 1919 by the Government of India Act, 1935 the rules including R.56 continued in force by virtue of Section 276 of the Act of 1935 and were to be deemed to have been made under the appropriate provisions of that Act. The rules thus continued in force till immediately before the enforcement of the Constitution and continued to remain in force by virtue of Article 372 of the Constitution even after its enforcement.

Clause (a) of R. 56 which is the only relevant clause for our present purposes reads like this:

"Except as otherwise provided in the other clauses of this rule the date of compulsory retirement of a government servant is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of the local Government on public grounds which must be recorded in writing but he must not be retained after the age of 60 years except in any special circumstances."

Under that clause as it stood on the date on which the petitioner entered Government service he was to retire compulsorily on the date on which he attained the age of 55 years but could be retained in service with the sanction of the local Government on public grounds until he attained the age of sixty. Beyond that age he could be retained only in very special circumstances.

38. In 1957 by a Finance Department Notification No.G-I-1733/X-534(19)-57 dated the 27th November, 1957 R.56 was amended with effect from the 17th June, 1957 by substituting the figure 58 for the figure 55 wherever the same occurred in the rule. On account of this amendment the age of superannuation applicable to the petitioner became 58 instead of 55 and having been born on the 4th May 1906 the petitioner was due to retire under the amended rule on the 4th May, 1964.

39. By Notification No.G-I-1233/X-534(19)-1957 dated the 25th May, 1961 published in the Government Gazette Extraordinary of the same date R.56 was amended for a second time. Purporting to act in the exercise of his powers under the proviso to Article 309 of the Constitution and all other powers in that behalf the Governor amended the rule by again substituting the figure 55 for the figure 58 wherever it occurred. The purpose of the amendment was stated as

"Increasing efficiency in public administration and for subserving the common good".

The Governor also directed the addition of a proviso at the end of clause (a) of R.56 which reads:

"Provided that Government servant who had not retired on or before June 17, 1957 but has subsequently attained the age of 55 years and has on May 25, 1961 not attained the age of 58 years, shall, for the period he has continued to serve after attaining the age of 55 years be deemed to have been retained in service beyond the date of compulsory retirement i.e. the age of 55 years within the meaning of the Rule aforesaid."

40. On the same date the Governor issued another order published in the same issue of the Gazette bearing No.G-1-1234/X-534(19)-1957. This order was issued in exercise of the power of retention of government servants conferred by R.56 itself and directed that:

"Any Government servant who has, on or before the date of this order, already been directed in pursuance of order of sanction made or given under Fundamental Rule 56 to be retained in service beyond the age of compulsory retirement, shall be so retained, notwithstanding anything in this Schedule hereto.

SCHEDULE

Column I	Column II
1. Government servants who have on May 25,1961 crossed the age of 57 years.	Upto the date on which he attains the age of 58 years or upto December 31 1961 whichever is earlier.
Government servants who have on May 25,1961	
2. crossed the age of 55 years but have not crossed the age of 57 years.	Upto December 31,1961.
Government servants who will cross the age of 55	
3. years between May 25,1961 and December 30,1961.	Upto December 31.1961.

The effect of this order was that the petitioner though he was deemed to have retired on attaining the age of 55 under the amended rule but had been retained in service till the 25th May 1961 under the newly added proviso to clause (a) of R.56 was to be further retained in service till the 31st December, 1961 as he fell in the second category of the first column of the Schedule appended to the order. The petitioner is, therefore, now due to retire on the 31st December, 1961.

41. By the present petition the petitioner challenges the validity of the two notifications issued on the 25th May, 1961 on various grounds and contends that they are invalid and ineffective. He, therefore, prays for a writ of mandamus or such other writ or order as the Court deems fit restraining the State of Uttar Pradesh and the District and Sessions Judge, Mainpuri, the two respondents impleaded in the petition, from enforcing the orders contained in the notifications and retiring the petitioner before he attains the age of 58 years.

42. The petition is opposed on behalf of the respondents and it is urged that the impugned notifications are perfectly valid and intra vires and that the petition is on that account not maintainable.

43. Alterations in the age of superannuation like those ordered in 1957 and again in 1961 are received by the employees concerned with mixed feelings. When the age of superannuation was increased to 58 those employees who on account of that increase became entitled to put in a further period of service felt jubilant. Those employees on the other hand who were expecting a rise or promotion on the impending retirement of their seniors felt disappointed. The change having been made every one accepted it and began to plan accordingly. When, therefore, the position was changed again and the age of superannuation was reduced to 55 the employees who had expected to continue in service till the age of 58 and had made commitments accordingly naturally began to feel that they had not been treated fairly and unnecessary hardships had been created for them. Other employees whose promotion has been expedited on account of the change, however, naturally welcomed it. The employees like the petitioner affected adversely by the change will certainly have to suffer some hardship and inconvenience on account of it. They cannot, however, avoid the change or challenge it on that account. The present petition can succeed only if it can be shown that the amendment effected on the 25th May 1961 is invalid or beyond the competence of the Governor who has directed it.

44. The validity or vires of the two impugned notifications is challenged mainly on two grounds. It is urged in the first place that the amendment is fundamental. R.56 has been made with retrospective effect and that is beyond the competence of the Governor. The second ground urged is that the amendment virtually amounts to an order of removal of the petitioner from his post with effect from the 31st December, 1961 and as it has been passed in contravention of Article 311 of the Constitution it is invalid.

45. In connection with the first contention it is not disputed that provisions relating to superannuation are covered by the expression 'conditions of service' of Government employees and that the Governor has power under the Constitution to make rules regarding the conditions of service of the employees serving under the State Government. The contention, however is that the age of superannuation having been extended to 58 in the year 1957 the petitioner got a right (learned counsel for the petitioner called it a vested right) to remain in service till the age of 58 and by the amendment now made that right of the petitioner has been affected because the age of superannuation has been reduced to 55 and the petitioner is to be deemed to have retired on the date on which he attained that age. The amendment has thus been given retrospective effect. The Governor, it is urged, had no power to do that. The argument is that he could make a rule and make the age of superannuation 55 only for persons who were employed after that rule had been made. He could not make the change applicable to persons already in employment. It is stressed that under the former rule the petitioner had served even after he had attained the age of 55 from

the 4th May, 1961 to the 25th May, 1961. That period could not be converted by a deeming clause in the rule from a period put in the ordinary course of service to a period put in as a matter of grace, i.e., retention in service after superannuation.

46. Under the Government of India Act, 1919 power to make rules applicable to members of service was vested under Section 96-B of the Act in the Secretary of State for India in Council and R.56 was originally framed by the Secretary of State under that provision. The Act of 1919 was, however, repealed by the Government of India Act, 1935. Under Section 276 of the Act the rules which were in force immediately before the commencement of part 3 of that Act continued in force notwithstanding the repeal and were deemed to be rules made under the appropriate provisions of the 1935 Act. Under Section 241 of the latter Act rules regulating the conditions of service of persons serving in connection with the affairs of a province were to be made by the Governor. One of the limitations on the rule-making power, however, was that a right of appeal was conferred in case an order altered any rule by which the conditions of service were regulated to the disadvantage of the person concerned. The Government of India Act, 1935 was replaced by the Constitution in 1950. The rules framed under the 1935 Act, however, continued to be in force under Article 372 till they were replaced. Article 309 of the Constitution empowered the appropriate Legislature to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or the State. It thus took the place of Section 241 of the Government of India Act, 1935. Under the proviso to that Article, till the appropriate Legislature had passed the necessary legislation the power to make rules regulating the recruitment and the conditions of service of persons appointed to services and posts in connection with the affairs of a State was conferred on the Governor of the State or such person as he may direct. It was in the exercise of the power conferred by this proviso that the Governor first made the amendment in R.56 in 1957 and then made the amendment now in question.

47. It will be noticed that there was nothing in the Constitution Acts of 1919 and 1935 indicating that the rule-making power conferred by those Acts could be exercised only prospectively and not retrospectively. The restriction is conspicuous by its absence in Article 309 of the Constitution also. In the Act of 1935 if a rule was altered to the disadvantage of an employee he had a right of appeal. Even this restriction was removed when Article 309 replaced Section 241 of the 1935 Act. The rule-making power conferred by Article 309 on the Governor or his nominee is, therefore, not confined to prospective rule making and appears to be wide enough to include the making of rules with retrospective effect. In fact, if rules regulating conditions of service can be made only with prospective effect and cannot be made applicable to persons already in Government employment administration may sometimes become impossible. A comparison of the language used in the main part of Article 309 with that used in the proviso will show that the power given to the Legislature for regulating the recruitment and conditions of service of persons is identical with the power given to the Governor or such person as he may direct in regulating the recruitment or conditions of service employed in services and posts in

connection with the affairs of the State. The only difference is that the Legislature can make the regulation for all times and the Governor can do so only till the Act of the Legislature under the main part of the Article as passed. The Legislature, it is well settled, can legislate prospectively as well as retrospectively vide *J.K. Jute Mills Co., Ltd. v. State of Uttar Pradesh*⁴, The powers of the Governor under the proviso to Article 309 being identical with that of the legislation under the main Article there is no valid reason why the Governor should not be able to make rules with similar effect.

48. Instances are not wanting of rules having been framed and amendments in rules having been made which were applicable to persons already in service. In *P. Balakotaiah v. Union of India*⁵, the petitioner had started service in 1939 in the Bengal Nagpur Railway. In 1946 he had opted to become the employee of the Railway Administration of India. In 1949 acting in the exercise of the powers conferred by sections 241 (2), 247 and 266 (3) of the Government of India Act, 1935 the Governor General had promulgated certain rules called the Railway Services (Safeguarding of National Security) Rules, 1949 which came into force on the 14th May, 1949. The rules were made applicable to employees already in the service of the Railway also and it was under one of these rules that the petitioner's services were terminated. The promulgation was upheld by the Supreme Court, without any objection being taken on the ground that the subsequently framed rule could not apply to persons already in service. In *Anil Nath De v. Collector of Central Excise, Calcutta*⁶, also a rule which had been amended after the applicant had entered service was applied to him and his services were terminated in accordance with that rule. It was contended that the rule introduced subsequent to the appointment of the petitioner in service could not be applied to him. Dealing with that contention it was remarked:

"I am unable to agree with the contention. The service in this case means that the Government servant accepts as part of his conditions of service these Rules as they from time to time are made and modified. In fact, Rule 2 of the Revised Leave Rules says expressly that these Rules shall apply with retrospective effect. A part of the obligations of a Government servant, as I understand under these Rules, is that he takes the risk of the amendments made in these Rules from time to time. So long as these Rule or their amendments do not violate any provisions of the Constitution or of any relevant Statute, mutability of these Rules forms part of the contract and the conditions of service are to be deemed as engrafted therein as and when they or their amendments are made, unless expressly or by necessary implication, they say otherwise."

49. The rule in that case was expressly given retrospective effect but was not held invalid valid on that account. The amendment of R.56 in the present case has retrospective effect by necessary implication and on parity of reasoning cannot be held to be invalid simply because of that feature.

50. Relying on Article 367 of the Constitution, learned counsel for the petitioner urged that

Article 309 should be interpreted keeping in view section 21 of the General Clauses Act. That section, according to him, clearly provided that the Governor's power to amend Rule 56 could be exercised only in the manner and subject to the sanctions and conditions under which he could make the rule itself. Learned counsel urged that if the Governor

⁴ AIR 1961 SC 1534 ⁶ AIR 1958 Cal 407

⁵ AIR 1958 SC 232

could not make a rule with retrospective effect he could not amend a rule with similar effect. The simple answer to his contention is that there is nothing in the proviso to Article 309 to justify the contention that the Governor has no power to make a rule with retrospective effect. It is true that the powers of the Governor to amend a rule are subject to some conditions and limitations as his power to frame a rule but if, as it appears in the present case, there is no restriction to his making a rule with retrospective effect there can be no restriction on his power to amend a rule with that effect.

51. The argument that a Government employee can claim a vested right under any rule relating to his conditions of service and that on that account it is not permissible for the rule-making authority to amend the rule so as to affect that right does not appear to be acceptable at all. It may be pointed out in this connection that certain audit instructions have been issued regarding Rule 56 which are printed just below the rule in the Financial Handbook, Volume II, Part I. Instruction No.1-B reads:

"The purpose of Fundamental Rule 56 is not to confer upon Government servants any right to be retained in service up to a particular age, but to prescribe the age beyond which they may not be retained in service."

This shows the intention with which the rule was framed. What to say of a vested right, not even a right was intended to be conferred by Rule 56. The petitioner could not, therefore, say that because at one stage 58 was the age of superannuation according to the rule a right was conferred upon him under which he could insist that he should be retained in service till that age and that the rule-making authority had lost its right to change the rule and to reduce the age of superannuation to a lower figure.

52. The power to amend a rule and to change it, whether to the detriment or to the advantage of the employees concerned, appears to be inherent in the rule-making power of the authority concerned. The circumstances in which the power can be exercised cannot be catalogued exhaustively. It all depends on what the exigencies demand. No one can say that because a particular rule exists in a particular form on a particular date it should remain in that form for all times to come and should not be changed even if as a matter of policy the change is necessary.

53. It was also argued that in any case the deeming clause in the first notification issued on the

25th May, 1961, by which the petitioner was to be deemed to have retired with effect from the 4th May, 1961, is bad. If the two notifications are read together, as in my opinion they ought to be read, the practical effect is that the petitioner is to continue in service for all material purposes till the 31st December, 1961. We have to look to the substance and not to the mere form. If that is done no particular significance can be attached to the deeming clause to which objection is being taken.

54. The objection that the Governor could not change the age of superannuation because he had no power to do so or that the change is invalid because it has been made with retrospective effect is, therefore, clearly untenable.

55. The second ground on which the validity of the notification in question is impugned is that the rule-making power of the Governor conferred by Article 309 is subject to the limitation contained in Article 311 (2) of the Constitution. Under clause (2) of Article 311 no person in civil employ of the State can be removed, dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken against him. Under Rule 56 of the Fundamental Rules as it stood after its amendment in 1957 the petitioner was entitled to continue in service till he attained the age of 58. The effect of the change now made in the rule by the Governor, it is contended, is that the petitioner is going to be removed from service before attaining that age. He is really being removed without any fault of his and without being given a reasonable opportunity of showing cause against the order of his removal. This removal, it is argued, per se amounts to punishment. Under the cloak of changing the rule it is urged the Governor has virtually by the notification in question directed the removal of the petitioner from service. The rule is, therefore, hit by clause (2) of Article 311 and the rule making power being subject to that Article the rule is invalid. Reliance is placed in support of this contention on certain observations made by the Supreme Court in *State of Bombay v. Saubhagchand M. Doshi*⁷, and *AIR 1958 Supreme Court 232 (supra)*.

56. It is not disputed on behalf of the respondents than the rule making power conferred by Article 309 is subject to the provisions of Article 311 of the Constitution. It is, however, contended that the petitioner is not being "removed" within the meaning of the terms as used in Article 311 of the Constitution. It is denied that the amendment of fundamental Rule 56 to which objection is being taken is a cloak for an unauthorised removal of the petitioner from service. It is argued that the petitioner is really begging the question when he contends that he is entitled to continue in service in spite of the amendment of the rule of superannuation because the amendment amounts to his removal and is, therefore, void as it contravenes Article 311.

57. It is thus common ground that the rule-making power conferred on the Governor by Article 309 is subject to the provisions of Article 311 and no rule can, therefore, be framed by the Legislature or the Governor which has the effect of whittling down the right of security of tenure conferred on a civil employee by Article 311. The two questions which arise for consideration in

this connection are

- (1) Whether the amendment of fundamental Rule 58 changing the age of superannuation from 58 to 55 is in any way inconsistent with the provisions of Article 311; and
- (2) Whether the order directing the petitioner's retirement with effect from the 31st December, 1961, amounts to an order of removal within the meaning of the term as used in clause (2) of Article 311.

58. It is conceded that the order does not amount to dismissal or reduction in rank.

59. The two safeguards which Article 311 provides for persons holding a civil post under the Union or a State are

- (i) No employee shall be dismissed or removed by an authority subordinate to that by which he was appointed; and

⁷ AIR 1957 SC 892, AIR 1958 SC 36

- (ii) Such an employee shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

In Parshotam Lal Dhingra's case, AIR 1958 Supreme Court 36 (supra), after tracing the history of the service rules S.R. Das, C.J., pointed out that the terms 'dismissed', 'removed' or 'reduced in rank' used in clause (2) of Article 311 of the Constitution had been taken from the service rules and were intended to have the same meaning which they had in those rules.

The learned Judge says:-

"In other words the substance of the protection provided by Rule 55 of the 1930 Classification Rules which required a special procedure to be followed before the three major punishments of dismissal, removal or reduction in rank out of the several punishments enumerated in Rule 49 was bodily lifted, as it were, out of the Rules and embodied in the statute itself so as to give a statutory protection to the Government servants. These statutory protections have now become constitutional protections as a result of the reproduction of the provisions of section 240 in Articles 310 and 311 of our Constitution.

It follows from the above discussion that both at the date of the commencement of the 1935 Act and of our Constitution the words "dismissed", "removed" and "reduced in rank", as used in the service rules, were well understood as signifying or denoting the three major punishments which could be inflicted on Government servants. The protection given by the rules to the Government servants against dismissal, removal or reduction in rank, which could not be enforced by action, was incorporated in sub-sections (1) and (2) of Section 240 to give them a statutory protection by

indicating a procedure which had to be followed before the punishments of dismissal, removal or reduction in rank could be imposed on them and which could be enforced in law. These protections have now been incorporated in Article 311 of our Constitution."

60. The Chief Justice also recognises in Dhingra's case, AIR 1958 Supreme Court 36 (Supra):

"The cases cited before us also indicate that the preponderance of view is that only a dismissal or removal or reduction in rank by way of penalty attracts the operation of Article 311 (2), but that a termination of service brought about otherwise than by way of punishment, e.g., by the exercise of the right under the terms of employment or under the relevant rules regulating the conditions of service which form part of the terms of employment does not."

61. The protection granted by clause (2) of Article 311 was, therefore, granted only against dismissal, removal or reduction in rank by way of punishment or penalty. Every termination of service though it must necessarily result in some disadvantage, inconvenience or loss of future prospects cannot necessarily be said to be by way of punishment or penalty and is, therefore, not removal or dismissal within the meaning of Article 311 (2).

62. The change in the age of superannuation by amending fundamental Rule 56 does not appear to affect the right guaranteed by Article 311 of the Constitution at all. The first safeguard provided by that Article that no one shall be dismissed or removed by an authority lower than the one which appointed him remains entirely unaffected by the amendment. So far as the second safeguard is concerned, no question of affecting it in respect of reduction in rank can arise. As the terms 'removal' and 'dismissal' used in Article 311 were intended to mean removal or dismissal by way of penalty or punishment and did not cover all cases of termination of services the change in fundamental Rule 56 does not affect that safeguard also because it does not mitigate or take away from the civil servant concerned his right to have a reasonable opportunity of showing cause against the proposed punishment of removal or dismissal (by way of punishment).

63. Learned counsel for the petitioner, however, urged that in AIR 1957 Supreme Court 892 (supra), it had been stated in paragraph 11:

"But where there is no rule fixing the age of compulsory retirement, or if there is one and the servant is retired before the age prescribed therein, than that can be regarded only as dismissal or removal within Article 311 (2)".

The idea, it is pointed out, was amplified in Dhingra's case, AIR 1958 Supreme Court 36 (supra), where while laying down the tests which were to be used for deciding whether an employee's services had been terminated by way of punishment or not Das, C.J., observed:

"It has already been said that where a person is appointed substantively to a permanent post in Government service, he normally acquires a right to hold the post until under the rules, he attains the age of superannuation or is compulsorily retired and in the absence of a contract, express or implied, or a service rule, he cannot be turned out of his post unless the post itself is abolished or unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the service rules read with Article 311 (2). Termination of service of such a servant so appointed must per se be a punishment, for it operates as a forfeiture of the servant's rights and brings about a premature end of his employment.

Again where a person is appointed to a temporary post for a fixed term of say five years his service cannot, in the absence of a contract or a service rule permitting its premature termination be terminated before the expiry of that period unless he has been guilty of some misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the rules read with Article 311(2). The premature termination of the service of a servant so appointed will prima facie be a dismissal or removal from service by way of punishment and so within the purview of Article 311(2)."

The same view was reiterated, it is pointed out, in AIR 1958 Supreme Court 232 (Supra) at p.238 where Venkatarama Aiyar, J. said:

"The question as to what would amount to punishment for purposes of Article 311 was also fully considered in Parshotam Lal Dhingra's case, AIR 1958 Supreme Court 36 (supra). It was therein held that if a person had a right to continue in office either under the service rules or under a special agreement, a premature termination of his services would be a punishment."

64. On the basis of these observations it is argued that under fundamental rule 56 as it stood amended in 1957 the petitioner had a right to continue in service till he attained the age of 58. He is now being asked to retire before attaining that age. This premature retirement per se amounts to punishment and attracts Article 311(2) of the Constitution. No opportunity to show cause having been given to him the order is invalid.

65. The fallacy in the argument appears to be twofold. In the first place the distinction between a rule and an order in pursuance of the rule to give effect to it is overlooked. In all the three cases in which the observations relied upon were made there was a rule under which the employee concerned was entitled to continue in his post for some time. By an independent separate order in AIR 1858 Supreme Court 36 (supra) he had been reduced in rank and in the other two cases the services of the employees concerned had been terminated under another rule. The orders were being questioned on the ground that they contravened Article 311 (2). In the present case the rule itself under which the petitioner could claim to be entitled to continue to the age of 58 has been

altered and under the rule as it stands he is not entitled to continue till that age. The rule on which he relies is no longer there as it has been amended and under the amended rule he was bound to retire at the age of 55. The observations relied upon would have been applicable if the authorities had asked the petitioner to retire at the age of 55 without amending fundamental rule 56 and reducing the age of superannuation to 55. If as has been shown the amendment cannot be challenged on the ground of its incompetence the rule applicable to the petitioner is the amended rule and not the unamended rule. Under the amended rule he cannot claim any right to continue in service till the age of 58.

66. Secondly, in final analysis the argument really amounts to begging the question. The amendment of the rule reducing the age of superannuation from 58 to 55 is said to be bad as it contravenes Article 311 (2). When asked how it contravenes that Article the answer given is,

'Because it reduces the age of superannuation and requires the petitioner to retire at 55 instead of 58.'

The same assumption (the correctness or otherwise of which is to be decided in the case) is the basis, of both the branches of the argument.

67. Since the Constitution came into effect a number of cases have been gone to the Supreme Court with reference to Article 311. The cases to which our attention was drawn are *Satish Chandra v. Union of India*⁸, AIR 1957 Supreme Court 892, AIR 1958 Supreme Court 36, AIR 1953 Supreme Court 232, *P. Balakotaiah v. Union of India*⁹, *State of Orissa v. Ram Narayan Das*¹⁰, *State of Uttar Pradesh v. Babu Ram Upadhyaya*¹¹, and *Jagannath Prasad Sharma v. State of Uttar Pradesh*¹², The one common feature shared by all these cases except one which related to reduction in

⁸ AIR 1953 SC 250, AIR 1954 SC 369 ¹⁰ AIR 1961 SC 177 ¹² AIR 1951 SC 1245

⁹ AIR 1960 SC 1305 ¹¹ AIR 1961 SC 751

rank is that in each of them a particular order terminating the services of a Government employee concerned was in question. None of these cases related to a change in the rule itself according to which the employee concerned had become liable to retire. This particular feature distinguishes the present case from all of them. Analysing the facts of those cases it is possible to classify them in several categories. The case of AIR 1953 Supreme Court 250 (Supra) forms a class by itself because it is a case where the civil servant concerned had been engaged on the basis of a special contract for a certain term. As he was being discharged in pursuance of the terms of the contract it was held that the discharge could not amount to a dismissal or removal within the meaning of Article 311. The cases of AIR 1954 Supreme Court 369 (supra), AIR 1957 Supreme Court 892 (supra), AIR 1958 Supreme Court 232 (supra), and AIR 1960 Supreme Court 1305 (supra), fall into one class because they share the common feature that there was a rule under which the employee concerned could continue to serve for some time more but there was another rule under which his services could be terminated earlier. It was in pursuance of the latter rule that the services of the persons concerned in those cases had been terminated. The

termination was upheld and Article 311 was held inapplicable because the termination having been made under an existing rule was not held to be by way of punishment so as to amount to dismissal or removal.

68. The case of AIR 1958 Supreme Court 36 (supra), stands on a separate footing because that case did not relate to dismissal or removal at all. It was a case of reduction in rank. In that case, however, all the implications of Articles 309, 310 and 311 were considered and certain general observations relating to the rights conferred by Article 311 were also made.

69. Out of the remaining three cases the case of AIR 1961 Supreme Court 177 (supra), related to a probationer who had been discharged in the manner provided by Rule 55-B of the Civil Services (Classification, Control, and Appeals) Rules. It was held that he was not entitled as of right to continue in service and Article 311 (2) of the Constitution, therefore, did not apply. In AIR 1961 Supreme Court 1245 (supra), the officer concerned was a police officer and an enquiry against him under the U.P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 was made. The Tribunal had recommended a particular punishment which under Rule 10 of the Rules was binding on the Governor. It was held that as that rule was in conflict with Articles 310 and 311 of the Constitution it was partially invalid. The Governor had, however, in that case served a notice requiring the employee concerned to show cause why he should not be dismissed and had ordered his dismissal after considering the explanation. The order was, therefore, upheld. In AIR 1961 Supreme Court 751 (supra), there was no question of the application of Article 311 at all. The trial in that case had been held under section 7 of the Police Act and the dismissal of the police officer concerned had been ordered under that Act. Articles 309 and 310 of the Constitution came up for consideration only because it was urged that the Police Act and the Regulations framed thereunder were in conflict with those Article's and void to that extent.

70. It thus appears to be settled beyond controversy that the word 'removal' used in Article 311 (2) has been used not in the general sense of termination of service but in the special sense of termination by way of penalty or punishment. The usual tests to be applied for finding out whether the termination is by way of punishment are, (1) where it has been ordered in pursuance of some imputation or charge and (2) whether it has resulted in the deprivation of rights which have already accrued, e.g., right of pension or provident fund. These tests are, however, not exhaustive and a third test which it may sometimes become necessary to apply is whether under the contract or rules of his employment the employee in question was entitled to remain in service and had been deprived of that right in the absence of a term in the contract or a rule in the rules permitting such deprivation. In such a case without showing that the termination involved an imputation or charge or deprivation of rights already accrued the person concerned can say that the premature termination of his service amounted to punishment. It is necessary in such cases, however, that there should be a rule or term in the contract under which the employee is entitled to continue in service and there should be no rule or term under which his services can be terminated at an earlier date.

71. The petitioner's case does not fulfil any of the three tests abovementioned. He is not being asked to retire because there is charge or imputation of misconduct, inefficiency or negligence against him. It is pointed out that in the preamble of the second notification issued on the 25th May, it is said that it was being issued with a view to increasing the efficiency in public administration. The argument is that from that it can be inferred that the persons who were being required to retire were inefficient. The premise, however, does not support the conclusion. Only because improvement in efficiency is necessary it does not follow that the existing staff is inefficient. It is also conceded that the petitioner is not being deprived of any rights which have already accrued to him. As the rule of superannuation itself has been amended it is not possible for him to say that he is entitled to continue in service beyond the age of 55. He has not succeeded in showing that the rule altering the age of superannuation is incompetent. The contention that the rule is in conflict with Article 311 is, therefore, not correct.

72. There remains the contention that the notification amending fundamental rule 56 is really a camouflage and is cloak to cover an order of the petitioner's removal. It is argued that it has been passed in that form only to avoid the rigours of Article 311 (2) of the Constitution. There are no materials before us to support this contention. The petitioner is not the only person who is affected by the change in the age of superannuation or who is being directed to retire in pursuance of that change. It is not suggested that against the petitioner or any of the other persons who are likely to be affected by this change in the rule the respondent No.1 has any particular reason to require them to retire. It is really as a master of policy that respondent has decided that the age of superannuation of all employees should be 55 and not 58. The change in the rule has been effected in order to carry out that policy. There can, in the circumstances, be no question of the termination of the services of the petitioner or any one else affected by the rule by way of punishment or penalty. Article 311 is, therefore, not attracted at all and the change in the rule cannot be questioned on the ground that that Article has not been complied with.

73. Two other points were mentioned by the learned counsel for the petitioner in his opening address but no serious attempt was made to substantiate them. One was that the change in the fundamental rule 56 had been made for political reasons and was on that account mala fide. This was not one of the grounds on which the petition was based and in the affidavit filed in support of the petition no averments were made in this respect. It was only in the rejoinder affidavit which was filed later that allegations were made in this connection. The respondents could not in the circumstances have any opportunity of refusing these allegations and the petitioner could not be permitted to rely upon them. The second point was that both notifications published on the 25th May 1961 were hit by Articles 14 and 16 of the Constitution. No attempt was made to show how any discrimination was involved in the amendment of rule 56. The amendment is general in nature and affects all employees under the State without exception. The classification involved in the second notification has a rational basis. The only purpose of the notification is to implement the policy which has led to the reduction of the age of superannuation from 58 to 55. The three

categories mentioned in the first column of the Schedule of the notification are based on age which could form a reasonable basis of distinction. It is also difficult to see in respect of either of the two notifications how it is affected by Article 16 of the Constitution which guarantees equality of opportunity of employment.

74. Learned Attorney-General who appeared on behalf of the State referred to Article 310 of the Constitution also and placed his alternative stand on that Article. He contended that even if the impugned rule was not found to be valid with reference to Article 309 of the Constitution under which it had been framed the notifications in question could be supported on the ground that under Article 310 the petitioner held his office during the pleasure of the Governor and the Governor could, therefore, require him to retire at any time he liked. For two reasons I do not feel called upon to consider this argument. In the first place, as has been shown the impugned rule is valid and could be framed under the proviso to Article 309 of the Constitution. It is, therefore, not necessary to consider the alternative basis suggested to support its validity. Secondly, it appears to me that in the present case the Governor has not purported to exercise his pleasure under Article 310 of the Constitution. There is no mention of the Article in the preamble to either of the two notifications. In the former, besides Article 309 reference has been made to "all other powers in that behalf" but the words "in that behalf" show clearly that the powers referred to were the powers under which rules could be framed. Article 310 of the Constitution does not confer on the Governor the power to frame any rules. The change in the rule cannot, therefore, be held to have been ordered in the exercise of the powers conferred by Article 310. The other notification too has not been issued in exercise of those powers. It has really been issued in the exercise of the powers reserved in Fundamental Rule 56 itself.

75. All the grounds on which the petitioner challenged the validity of the notifications in question are, therefore, unacceptable and the petition cannot succeed. It must, as a result, be dismissed.

Dwivedi, J.

76. I agree with Oak, J. that the impugned rule and notification are valid, and would shortly state and supplement my own reasons.

77. The notification, being incidental to the rule, would stand or fall with it. So I turn to the rule.

78. The impugned rule was enacted by the Governor 'in exercise of the powers conferred by proviso to Article 309 of the Constitution and all other powers in that behalf, on May 25, 1961; it has sundered, admittedly at a premature stage and with retro-operative effect, "the service-bond of all employees of the State who have crossed the age of 55 before that date. The retrospective nature of the rule would not however condemn it, as the Governor is competent to enact a retrospective rule under the proviso to Article 309. If, as is not debatable, the U.P. Legislature could regulate conditions of service of State employees by a retrospective measure, otherwise

legitimate, it is difficult to comprehend that the Constitution denies the Governor that means in the same field and for a similar end. Neither principle nor precedents would warrant the asserted denial of power to the Governor. At the outset it may be well to bear in mind that we are 'expounding' the Constitution and that considering its character, scheme and structure that construction of the proviso to Article 309 should be preferred which is most beneficial to the widest amplitude of power in the Governor. The proviso is expressed in broad strokes. The scheme and setting of it both suggest that the Governor is constituted a co-ordinate authority with the State Legislature, and is invested with as extensive powers as the Legislature itself for effective regulation of service conditions of State servants for public weal. According to Shorter Oxford English Dictionary (3rd Edn.) the word 'regulate' inter alia means to control, govern, or direct by rule or regulations; to adjust, in respect of time, quantity, etc., with reference to some standard or purpose.....'. It would therefore not be an unfair construction of Article 309 that it clothes the Governor with all necessary means to effect any readjustment of rights and duties of State employees as may appear to be necessary or expedient for the common weal. A welfare State depends enormously on an ever-expanding Public Service. Political administrators come and go periodically, but they do not change. They thus keep running the machinery of Government in constant good gear as also provide for wholesome continuity of basic policies and ideals. Their vital duties and architectonic responsibilities of course demand of them utmost vigilance and excellent efficiency, masculine, moral and mental. Efficient Public Service conduces to good government; good government augments the sum-total of human happiness. There is no denying that Public Service is a vital spot in the body politic. Ex necessitate the Governor must have been endowed by the Constitution makers with wide regulatory powers to ensure an efficient Public Service. The observations of Gwyer, C.J., may be apposite here:

"We hope that no responsible Legislature or Government would ever treat as of no account solemn pledges given by their predecessors; but the readjustment of rights and duties is an inevitable process, and one of the functions of the Legislature in a modern State is to effect that readjustment, where circumstances have made it necessary, with justice so all concerned". *Jagannath Baksh Singh v. United Provinces*¹³,

79. It may be that some conditions of service, by their very nature, may not admit of retrospective readjustment, but a term about the age of compulsory retirement would not apparently fall in that category in particular when, as here, a rule fixing a retrospective date for compulsory retirement does not touch any accrued rights or benefits of employees.

¹³ AIR 1943 FC 29 at p.35.

80. The argument that the Governor may authorise any subordinate officer to regulate conditions of service should not 'terrorise' the court to cut down the wide scope of the proviso. Delegation by the Governor of his rule-making power to a subordinate officer does not denude him of his organic power, and he remains responsible for the action of his subordinates taken in his name. (*Emperor v. Sibnath Banerji*¹⁴).

81. The nomenclature of the law-maker and the mode of law-making a service-rule is a 'law': vide Article 313 make no essential difference. The crucial question and it is one of construction is whether the people of India by their Constitution have authorised the Governor to adopt the means, pursued here for regulating conditions of service. If the answer is in the affirmative, as the foregoing discussion shows, then the Court is concerned no further (See *Attorney-General for Canada v. Cain*¹⁵, In that case, repelling the challenge to the constitutionality of Section 6 of the Alien Labour Act which authorised Government, inter alia, to expel an alien from the territory of Canada, Lord Atkinson said,

"The Imperial Government might delegate those powers to the Governor or the Government of one of the Colonies....If this delegation has taken place, the depository or depositories of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them."

82. This, I think, lends support to my approach. Precedents, though meagre, also tend to strengthen the construction suggested here. (*Kewal Mal Singh v. Hetram*¹⁶, *State of Saurashtra v. Bhola Nath Jatashankar*¹⁷, *Varadaraja Iyer v. State of Travencore-Cochin*¹⁸, *S.V.G. Iyengar v. State of Mysore*¹⁹, *Raj Kishore v. State of U.P.*²⁰, AIR 1958 Supreme Court 232.

83. It has been argued that the powers of the Governor should not be assimilated to those of the State Legislature with respect to regulation of conditions of service, as the latter, unlike the former, is sovereign. The argument seems to me to proceed from misapprehension of the status of the State Legislature in our country and of the source spring of its powers. The State Legislature, I venture to think, is not a Sovereign Legislature for it does not possess unlimited powers, and its acts are not uncontrollable. Its powers are conditioned, both affirmatively and negatively, by the Constitution; its acts may be set at naught by courts if they are found by them to be inconsistent with the Constitution. The true fountain of its powers is thus the Constitution. It derives power to enact a retrospective rule as ancillary to its power of law-making for the peace, order and good government of the State for the principle that grant of a specific power necessarily carries with it the grant of all power which are necessary for effective execution of the granted power. Under the Constitution a true characterisation of the State Legislature would, I think, be: It is limited as to choice of matters; but unlimited as to choice of means in most matters.

84. Expressions, such as 'plenary powers of legislation, as large as those of Parliament

¹⁴ AIR 1945 PC 156 at p.162 ¹⁶ AIR 1952 Raj 17 at p.19

¹⁸ AIR 1953 Tran Coc 140 at pp.142 and 143; AIR 1958 Cal 407 at p.410

¹⁵1906 AC 542 at p.546. ¹⁷ AIR 1952 Sau 49 at p.57 ¹⁹1961 Mys 37 at p.(41)

²⁰ AIR 1954 All 343 at p.347

itself' (The *Queen v. Burah*²¹), 'authority as plenary - as the Imperial Parliament in the plenitude of its power possessed' and 'Supreme' (*Hodge v. The Queen*²²), 'a

prime element is Canadian Sovereignty' (*British Coal Corporation v. The King*²³, in the decisions of the Judicial Committee of the Privy Council are perhaps reminiscent of Parliamentary Sovereignty, but they would not conclusively prove that the Judicial Committee, who were familiar with, and wedded to, the theory of Parliamentary Sovereignty as first evolved by Austin and later expounded by Dicey, had really supposed that the British Parliament became incarnate in Colonial Legislature. A careful reading of their decisions would suggest that those expressions were not intended to portray a verisimilitude, and as time went on, the Judicial Committee began to lay greater emphasis on constitutional reality.

85. It seems to me that decisions of the Judicial Committee really turned on a true construction, in each case, of the text of various constituent Acts. In *Burah's case* (1878) 3 AC 889 (*supra*) they said,

"The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted."

86. In *Riel v. The Queen*²⁴, Lord Halsbury, referring to the British North America Act, said,

"The words of the statute are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to."

87. In *British Coal Corporation's case*, 1935 AC 500 (*supra*), Viscount Sankey said,

"What is the extent of the legislative competence in the relevant regard conferred on the Canadian Parliament, - must be ascertained from the words of the Constituent Act."

88. On a survey of authorities it would appear that the State Legislature derives power to enact a retrospective rule from its power of law-making. So does the Governor; he also derives power to enact a retrospective rule from his power of law-making. Although the Federal Court had said,

"It seems to us misleading to assume that the Ordinance-making authority enjoys plenary powers of legislation and then seek to deduce therefrom the inference that it must have the power to enact a provision with retrospective operation. As regards "subject-matter" its powers may be co-extensive with those of the ordinary Legislature but,.....there are at least two limitations upon its powers." (*Emperor v. Sibnath Banerji*²⁵), no person would now question the right of the Governor to enact by an Ordinance a retrospective rule (See *Hirji*

²¹(1878) 3 AC 889 ²³1935 AC 500: (AIR 1935 PC 158) ²⁵ AIR 1943 FC 75 at p.81
²²(1883) 9 AC 117 ²⁴(1885) 10 AC 675

*Laxmidas v. Francis Fernandez*²⁶, *Jnan Prosanna Das Gupta v. Province of West Bengal*²⁷, *In re Velayudam*²⁸).

The true explanation for this power of his is, I think, to be found in his power of law-making, as Viscount, Simon said,

"There is not, of course, the slightest doubt that the Parliament of Westminster could validly enact that the choice of Courts should rest with an Executive Authority, and their Lordships are unable to discover any valid reason why the same discretion should not be conferred in India by the law-making authority, whether that authority is the Legislature or the Governor-General, as an exercise of the discretion conferred on the authority to make laws for the peace, order, and good government of India." (See *Emperor v. Benoari Lal Sharma*²⁹).

Earlier, at page 53, he has said,
".....Whether the Ordinance is *intra vires* or *ultra vires* does not depend upon considerations of jurisprudence or of policy. It depends simply on examining the language of the Govt. of India Act and of comparing the legislative authority conferred on the Governor General with the provisions of the Ordinance by which he is purporting to exercise that authority."

89. The Bihar Regulation IV of 1942, though made to operate retrospectively by the Governor of Bihar, was not challenged before the Supreme Court for that reason. *Chatturam Horiram Ltd. v. Commr. of Income-tax, B. and O*³⁰.,

90. Summing up, in exercise of his power under Article 213 read with Article 246 and Item 41 of List II of Schedule VII of the Constitution the Governor could make an Ordinance incorporating the impugned rule. He can also enact it as ancillary to his constitutional rule making power.

91. The impugned rule does not seek to determine the service of an employee in violation of the rule of opportunity of hearing embodied in Clause (2) of Article 311 of the Constitution. In its nature it is normative, not punitive. It does not cast a blot on the escutcheon of any service man; nor does it forfeit any of his accrued benefits. It has been strenuously pressed upon us that the rule fails to stand the 'per se punishment' test evolved by the Supreme Court in *Dhingra's case*, AIR 1958 Supreme Court 36.

There, at pp.47-48 S.R. Das, C.J. observed,

".....where a person is appointed substantially to a permanent post in Government service, he normally acquires a right to hold the post until under the rules, he attains the age of superannuation or is compulsorily retired and in the absence of a contract, express or implied, or a service rule, he cannot be turned out of his post unless the post itself is abolished or unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the service rules read with

Article 311 (2). Termination of service of such a servant so appointed must per se be a punishment, for it operates as a forfeiture of the servant's rights and brings about a premature end of his employment."

²⁶ AIR 1945 Bom 352

²⁸ AIR 1950 Mad 324

³⁰(1955) 2 SCR 290: AIR 1955 SC 619

²⁷ AIR 1949 Cal 1 (FB)

²⁹ AIR 1945 PC 48 at p.54

A little downwards, in the same context, his Lordship was persuaded to conjunct 'prima facie' with 'per se'. With great respect, the 'per se punishment' test does not seem to operate in the circumstances and facts of this case. The impugned rule does not punish any employee or group of employees; it fixes the age of compulsory retirement for all employees as a matter of policy and irrespective of their merits or demerits. It does not affect their earned benefits. It is a universal rule designed professedly to increase efficiency in public administration and to subserve the common good.

92. It seems to me that the 'per se punishment' test would not ordinarily circumscribe the choice of the Governor for framing for his guidance a general rule for compulsory retirement. All services, except the 'entrenched' posts, are held during pleasure of the Governor. No rule framed under Article 309 which is subject to the provisions of Article 310, may carve out a tenure of any other kind. Accordingly the old rule, fixing 58 years as the age of compulsory retirement and framed under Article 309, would not avail against the Governor, even though it may bind his subordinates (*R. Venkata Rao v. Secy. of State*³¹, AIR 1961 Supreme Court 751 at pp.758 761 762, AIR 1961 Supreme Court 1245 at p.1252. No employee could claim against the Governor a right to hold his post till 58 years, as he would be free to frame a general rule reducing the age of compulsory retirement as a matter of policy. It is theoretically true that, if I am right in what is stated here, a Government servant is left with a precarious tenure of service as against the Governor. But there seems to be no getting away from it, for even the protective armour of the "opportunity of showing cause against the action proposed to be taken" would, in view of Clause (c) of the proviso to Clause (2) of Article 311, wear thin against the Governor. 'But that is theory and has no relation to realities'. It is certain that in practice security of office would be largely determined by the equation between the Governor and an articulate democracy.

93. BY THE COURT: The petition is dismissed with costs to Opposite Party No.1.
Petition dismissed.

³¹ AIR 1937 PC 31