

CENTRAL ADMINISTRATIVE TRIBUNAL

LUCKNOW BENCH

LUCKNOW

ORIGINAL APPLICATION No. 643/92.

V.P. Kapur

Applicant

versus

Union of India through
Secretary, Ministry of Home
Affairs, New Delhi
and another

Respondents.

Shri S.C. Budhwar, Advocate
Shri A.K. Chaturvedi,
Advocate,

for Applicant
for Respondents.

Shri Anoop Kumar, Advocate,
CORAM

for respondents.

HON. MR. JUSTICE V.S. MALIMATH, CHAIRMAN.

HON. MR. JUSTICE R.K. VARMA, V.C.
HON. MR. H. H. SETH, J.

HON. MR. V.K. SETH, ADMN. MEMBER

(By Hon. Mr. Justice V.S. Malimath, Chairman

This case has come before the Full Bench on a reference made by the Bench consisting of Justice U.C.Srivastava, V.C. and Shri V.K. Seth, Administratibe Member, on the ground that it raises several important questions of law. To appreciate the contentions raised inthis case it would be useful to narrate the necessary facts.

2. The petitioner, Shri V.P. Kapur was born in Chiniot village in District Jhung which is part of Pakistan. he alongwith his family, migrated to India in India in the context of partition in 1947. He completed his education in India. He was selected a for the Indian Police Service in the year 1961 and allotted to the U.P. Cadre At

the time of entering the service, he gave his date of birth as 1.8.1934 which ^{is} the date entered in his Matriculation Certificate.

2. The petitioner is governed by the All India Services Act, 1951(hereinafter referred to as 'the Act). Section 3 of the Act empowers the Central Government to make Rules for the regulation of Recruitment and Conditions of Service of persons appointed to All India Services, Sub-section 1(a) expressly confers the powers to make rules with retrospective effect subject to the condition that no retrospective effect shall be given to any rules so / to prejudicially affect the interest of any person to whom such rules may be applicable. It is in exercise of the powers conferred by sub section 1 of the Act that the Central Government has promulgated rules called the All India Services Death-cum-Retirement Benefits Rules, 1958 (hereinafter referred to as 'Rules'). By second amendment ^{of} Rules, of 1971, issued under those notification dated 4.12.71, rules were amended and the following rules 16 A and 16 B were inserted:

"16 A:Determination of the date of birth:

(1) For the purpose of the determination of the date of superannuation of a member of the service, such date shall be calculated with reference to the date of his birth as accepted, or determined, by the Central Government under this rule.

(2) In relation to a person appointed,

after the commencement of All India Service

✓ (Death-cum-Retirement Benefits) amendment

Rules, 1971, to:

(a) the Indian Administrative Service under clause(a) or clause(aa) of sub-rule (1) of rule 4 of the Indian Administrative Service(Recruitment)Rules, 1954; or

(b) the Indian Police Service under clause(a) of clause (aa) of sub-rule (1) of rule 4 of the Indian Police Service (Recruitment) Rules, 1954; or

(c) the Indian Forest Service under clause(a) or clause(aa) of sub-rule (2) of rule 4 of the Indian Forest Service (Recruitment)Rules, 1966.

the date of birth as declared by such person in the application for recruitment to the service shall, in the absence of any cogent evidence to the contrary, be accepted by the Central Govt. as the date of birth of such person.

(3) The date of birth, in relation to a person to whom sub-rule (2) does not apply and who is appointed to the Service after the commencement of the All India Services (Death-cum-Retirement Benefits) Amendment Rules, 1971, shall be determined in the following manner, namely:

(a) every such member shall, within one month of the date on which he joins the Service, make a declaration as to the date of his birth:

(b) on receipt of declaration made under clause(a), the Central Government shall, after making such inquiry as it may deem fit with regard to the declaration and after considering such evidence, if any as may be adduced in support of the said declaration, make an order within four months from the date on which such member had joined the service, determining, the date of birth of such member.

(4) (a) Every member of the Service holding office immediately before the commencement of the All India Services (Death-cum-Retirement Benefits) amendment Rules, 1971, shall within three months from such commencement make a declaration as to the date of his birth.

(b) On receipt of a declaration made under clause (a) the Central Government shall, after making such inquiry as it may deem fit with regard to the declaration and after considering such evidence, if any, as may be adduced in support of the said declaration, make an order, within four months from the date of such declaration, determining date of birth of such member.

(5) In the case of a member of the Service referred to in sub-rule (3), or sub-rule (4), as the case may be, who fails to make a declaration in respect of the date of his birth as required by such sub-rule, the Central Government shall after taking into account such evidence, as may be available to it, and after giving such member a reasonable opportunity of being heard make an order determining the date of birth of such member.

(6) Notwithstanding anything contained in this rule, no date of birth other than the date of birth declared by a member of the Service, shall be accepted or determined, in relation to such member except after giving such member a reasonable opportunity of showing cause against the proposed action.

(7) Every date of birth accepted, or determined, under this rule shall be subject to rule 16 B be final.

16.B MEMORIALS: The provisions of rule 25 of the All India Services (Discipline and Appeal) Rules, 1969, shall so far as may be, apply to memorials against an order of the Central Government under rule 16-A subject to the modification that for the words "with

in a period of three years from the date of passing of such orders" occuring in such rule(1) of the said rule 25 the words "within a period of three months from the date of order" shall be substituted."

Rule 16-A provides for determination of the date of birth . This rule provides that the date of birth accepted by the Central Government under this rule shall be taken into account for determining the date of superannuation. Sub rules 2 to 7 prescribe the procedure for determination of date of birth. Rule 16-A is complete code so far as determination of the date of birth of the members of the All India Service, is concerned. Sub Rule 2 of Rule 16 A deals with persons appointed after the amendment of the rules, 1971(hereinafter referred to as 'Rules, 1971). Sub rule 3 deals with the persons appointed to the service after commencement of the Rules, 1971 to whom sub rule 2 does not apply. Sub Rule 4 (a) deals with members of Service holding office immediately before the commencement of the Rules, 1971 and such /^aperson is required to make a declaration as to the date of birth within three months from the date of commencement of the Rules, 1971.Clause (b) of sub Rule 4 enjoins the Central Government on receipt of the declaration under clause (a) to make an enquiry in regard to the declaration and after considering the evidence as may be adduced to make an order within four months from the date of declaration, determining the date of birth of such member. Sub Rule 5 requires the Central Government to make an order determining the date of birth of such member after taking into account such evidence as may be available to it and

after giving a reasonable opportunity to the member of being heard. Sub rule 4 incorporates the principle of natural justice that no adverse declaration regarding date of birth shall be made without giving person concerned opportunity of showing cause in the matter. Sub rule 7 gives finality to the declaration made to the date of birth accepted or to determine under Rule 16 A subject to rule 16 B. All India Service(Discipline and Appeal)Rules, 1969 contains Rule 25 which provides that a member of the service shall be entitled to submit memorial to the President against any order of the Central Government by which he is aggrieved. The period of limitation for presenting such memorials is prescribed as three years from the date of passing such order. Rule 16 B of the Rules amends Rule 25 in so far as it pertains to the memorials against the orders passed under the rules by reducing the period of limitation from 3 years to three months. Hence the orders regarding determination of date of birth under the rules made by the Central Government determining the date of birth under the rules can be challenged by means of memorial presented within three months from the date of the order.

3. Rule 16 A which was inserted by the 1971 Rules, was substituted by new rule 16 A by the All India Services(Death-cum-Retirement Benefits) Fourth Amendment Rules, 1978 (hereinafter referred to as 'Rules, 1978') issued under the notification dated 7th July, 1978. By the said Amendment rule 16 B was deleted. The newly substituted Rule 16 A reads as follows:

"16-A. Acceptance of date of birth: (10) For the purpose of determination of the date of superannuation of a member of the service, such date shall be calculated with reference to the date of his birth ~~xxxxxxxxxxxxxx~~ as accepted by the Central Government under this rule.

(2) In relation of a person appointed, after the commencement of the All India Service[▲] (Death-cum-Retirement Benefits) Amendment Rules, 1971.

(a) the Indian Administrative Service under clause(a) or clause (aa) of sub-rule(1) of rule 4 of the Indian Police Service (Recruitment Rules, 1954); or

(c) the Indian Forest Service under clause(a) or clause(aa) of sub-rule(2) of rule 4 of the Indian Forest Service (Recruitment) Rules, 1966;

the date of birth as declared by such person in application for recruitment to the service shall be accepted by the Central Government as the date of birth of such person.

(3) In relation to a person to whom sub-rule (2) does not apply, the date of birth as recorded in the service book or other similar official document maintained by the concerned government shall be accepted by the Central Government as the date of birth of such person.

(4) The date of birth as accepted by the Central Government shall not be subject to any alteration except where it is established that a bonafide clerical mistake has been committed in accepting the date of birth under sub rule(2) or (3).

Sub Rule 1 provides that the date of birth as accepted by the Central Government under the rule shall be taken into account for the purpose of determining the date of superannuation. Sub rule 2

governs persons appointed after commencement of Rules, 1971. Sub rule 3 governs the persons to whom sub rule does not apply. The date of birth of such person as recorded in the service book or other similar official documents maintained by the Central Government shall be accepted by the Central Government as the date of birth of such person. Rule 4 provides that the date of birth as accepted by the Central Government can be altered only when it is established that a bonafide clerical mistake has been committed in accepting the date of birth.

4. The petitioner's case is that he applied in the year 1972 for correction of his date of birth. In his application he stated that his correct date of birth is 15.9.1936 and that his date of birth was entered as 1.8.1934 when he joined school, the person concerned being illiterate. That application was considered and allowed sometime in the year 1974. Thus, the Central government accepted and declared 15.9.1936 as correct date of birth of the petitioner. The said decision became final and conclusive, it not having been challenged by presenting a memorial under rule 25 of the All India Service (Discipline & Appeal) Rules, 1969 read with rule 16 B of the Rules. Nearly 10 years thereafter, the petitioner made an application on 25.6.1984, wherein he sought correction of his date of birth for the second time claiming that his correct date of birth is 21.12.1937. This application of the petitioner was rejected by the Central Government by its order dated 7th June, 1985 (Annexure 19). It is stated in

the order that the representation of the petitioner has been carefully considered under rules and that it is not found possible to accept his request.

5. Immediately after rejection of his representation dated 25.6.84, on 7.6.85, he submitted another representation to the Government of India seeking the same relief, namely to correct his date of birth as 21.12.1937. Similarly representation was made on 11.8.86 as well. Both these representations of 13.6.86 and 11.8.86 were rejected by the Government of India by the order dated 11.4.1991(Annexure -3). In the order it is stated that it is not possible to accept the request of the petitioner as the same is not covered under the relevant rules.

6. The petitioner, thereafter, presented a memorial to the President of India on 16.5.1991 against the order dated 11.4.1991 rejecting his representations. That memorial was rejected by order dated 18.11.1992(Annexure -1) on the ground that earlier order or declaration that the correct date of birth of the petitioner is 15.9.1936, does not suffer from any bonafide clerical mistake, as required by rule 16 A(4) inserted by the Rules, 1978. It is in this background that the petitioner has approached this Tribunal seeking the following relief: "That the date of birth of the applicant in his service records be ordered to be corrected as 21.12.1937 as against 15.9.1936 at present entered."

7. The principal contention of Shri S.C. Budhwar, the learned counsel for the petitioner is that the orders rejecting the representations and

memorial suffer from errors apparent on the face of record. It was contended that the claim of the petitioner could not have been rejected on the ground that no bonafide clerical mistake was committed in accepting 15.9.1936 as the correct date of birth. It was submitted that the petitioner is a person who migrated from Pakistan to India at the time of partition when he was a child and he was not aware of his correct date of birth, but he believed that 15.9.1936 was the correct date of birth and made a representation in the year 1972 which was accepted. Later on, in the year 1975, he came to know from the Purohit in Hardwar who maintain the geneology of the family that his correct date of birth could not be 15.9.1936. He, therefore, made a request to the Government to ask the Indian Embassy in Pakistan to secure material regarding date of birth, such as the birth extract and to forward to him. This request was made sometime in the year 1980. According to him, he was able to secure from Indian Embassy, vide letter dated 18.10.1993, certificate of birth recorded by the Municipal authorities in Pakistan. It is thereafter that he made a representation on 25.6.1984 on the strength of the new material he was able to secure, for correction of his date of birth as 21.12.1937. At this stage it may be mentioned that the copy of birth certificate speaks only of a male child born on 21.12.1937 to Shri Ram Rang, who, according to the petitioner is, his father. No information is furnished in the relevant column regarding other children of Shri Ram Rang. It was submitted that

the petitioner, in such circumstances, could not be denied justice on the ground that no bonafide clerical mistake has been committed in accepting 15.9.1936 as the correct date of birth. It is also urged that the petitioner has a valuable civil right to remain in service until he attains the age of superannuation and that valuable right of his cannot be denied to him by invoking the limitations contained in rule 16 A (4) inserted by the Rules, 1978. It is also urged that rule 16 A(4) ~~had~~ ^{as} had effect of depriving the petitioner of his valuable right. It deserves to be declared as void, offending Articles 14, 16 and 21 of the Constitution of India.

8. In order to appreciate the above contentions it is necessary to understand the purpose and scope of rules bearing on accepting or declaration and correction of date of birth. It is a matter of common knowledge that disputes regarding date of birth are often raised long after one has entered the service and in many cases on the verge of retirement. The service prospects of the serving personnel depend among others on the vacancies becoming available on persons retiring on attaining the age of superannuation. There would, therefore, be just expectation of the junior members of getting promotion on their seniors retiring on attaining the age of superannuation. The alteration of date of birth at a later stage, would necessarily affect the just expectations of several others. It is also necessary that the disputes regarding the date of birth are not kept lingering on for a long time.

It is of the essence of the matter that there is finality in regard to all these matters. It is not possible to agree with the contentions that the right to remain in service until attaining the age of superannuation, is civil right, and cannot, therefore, be curtailed or abridged by the statutory rules. The act in terms confers power **on the** rule making authority to make rules regarding recruitment **and** conditions of service. The **fixation of age** ^{of superannuation} is thus **a** condition of service.

The number of years of service one can render until he superannuates necessarily depends upon his date of birth. The provisions regulating the determination of date of birth and fixing the age of superannuation **are** the conditions of service in respect of which the rule making authority has **been** conferred the powers under the act to frame rules. The Supreme Court had occasion to examine in the case reported in 1992(2) SLR(SC.) page 742 between Government of Andhra Pradesh and another vs. M. Hyagreeva Sarma the Rules 4 and 5 of the Andhra Pradesh Public employment(Recording and Alteration of Date of Birth)Rules, 1984 framed by the Government under the proviso to Article 309 of the Constitution of India. The **relevant** provisions of sub rules are extracted below;

"4.No Government employee, in service before the commencement of these rules :

- (a) whose date of birth has been recorded in the service register in accordance with the rules applicable to him; or
- (b) whose entry relating to date of birth became final **and** binding under the rules in force prior to the commencement of these rules.

shall be entitled to claim alteration of his date of birth .

5. The case in which Government employees have already applied for alteration of their date of birth and which are pending on the date of commencement of these rules, shall be dealt with on the basis of recorded age in school and college records at the time of entry into service."

The validity of these rules was upheld and it was observed as follows:

"7.The object underlying Rule 4 is to avoid repeated applications by a Government employee for the correction of his date of birth and with that end in the view it provided that a Government servant whose date of birth may have been recorded in the service register in accordance with the rules applicable to him and if that entry had become final under the rules prior to the commencement of 1984 Rules, he will not be entitled for alteration of his date of birth.Rule 4 laid down a salutary principle to prohibit coping of the question of correction of date of birth which may have become final prior to the enforcement of 1984 Rules. Since the question of alteration of the respondent's date of birth had been made on the basis of the School Certificate and his application for alteration had already been rejected in 1968, he was not entitled to claim alteration of his date of birth after the enforcement of 1984 Rules. It was not open to the respondent to claim alteration of his date of birth, even on the basis of extracts of the entry contained in birth and deaths register maintained under the Births, Deaths and Marriages Registration Act, 1986 as the question of correction of his date of birth had already been finally decided in 1968.

8. As regards validity of Rule 5 is concerned, the view taken by the Tribunal is wholly misconceived .Rule 5 lays

down that where application of a Government employee for alteration of his date of birth was pending on the date of commencement of 1984 Rules the same will be dealt with on the basis of date of birth recorded in the School and College and records at the time of the entry of the employee into service. In substance Rule 5 lays down that the pending application of the employees for alteration of their date of birth shall be decided on the basis of the age as recorded in the school and college records. Thus if on the date of entry into service the date of birth of an employee was recorded in his service book on the basis of his age as recorded in the school and college certificate in that event the date so recorded shall be treated to be correct date of birth. However, if the date of birth recorded in the service book at the time of entry of an employee is not based on School or College records the Rule 5 does not operate as a part to consideration of other relevant materials in determining the date of birth of the employee. in the instant case as already noted the respondent's date of birth had been recorded in his service book on the basis of his S.S.L.C. Certificate, at the time of his entry into service therefore, that entry has become final and he was not entitled to reopen the correctness of that entry on the basis of extract of birth register. Moreover, since the respondent's application for alteration of his date of birth had already been decided prior to enforcement of Rule 5 he was not entitled to maintain application for any alteration of his date of birth. In either case respondent was not entitled to claim alteration of his date of birth, his application was rightly rejected although on different grounds."

As the Rule 16 A (4) has been promulgated with the object of bringing finality in regard to the matter pertaining to date of birth, the same can be regarded as illegal or invalid, merely because there is no scope for review of date of birth already accepted or declared by the Government of India. In the light of this authoritative pronouncement of the Supreme Court on the question, it is not possible to accede to the contention that the amended rule is liable to be struck down as offending Articles, 14, 16 and 21 of the Constitution.

9. The next question for examination is as to whether the rejection of the petitioner's representations and Memorial on the ground that no case of bonafide clerical mistake has been made out, is not warranted. Sub-clause 4 of Rule 16 A which has been invoked by the Central Government in this case in express terms provides that the date of birth as accepted by the Central Government, shall not be subject to any alteration except where it is established that bonafide clerical mistake has been committed in accepting the date of birth under sub -rule 2 or 3. It is clear from this provision that the only ground available for interfering with the date of birth already accepted by the Central Government is a bonafide clerical mistake committed in accepting the date of birth. In other words, the date of birth already accepted by the Central Government under sub rule 2 or 3, cannot be altered on any other grounds whatsoever. There is, therefore, no scope of reviewing the decision already taken on merits. The power of review, it is well

settled, has to be expressly conferred by law. No such power to review has been conferred under the rules empowering the Central Government to review an earlier decision taken accepting the date of birth. Discovery of new and importatnt material after the earlier decision or acceptance of date of birth made, is not a ground available under the rule for interfering with the date of birth already accepted. The entire procedure regarding determination of date of birth is regulated by the statutory provisions contained in Rule 16 A hence the limitations imposed by the said provisions for alteration or correction have become integral part of the scheme of rules regarding determination of date of birth. We have , therefore no hesitation in holding that the date of birth already accepted by the Central Government, under sub rule 2 or ;3 can be altered only when it is established that a bonafide clerical mistake was committed in accepting the date of birth and on no other ground.

10 A. It was argued that the rights conferred bythe amendment Rules, 1971 cannot be taken away; by the amendment Rules,1978. It was submitted that whereas under the 1971 amendment Rules alteration in the date of birth could be done without any limit, restriction have been imposed by the amendment Rules of 1978 permitting alterations of the accepted date of birth only on the ground of a bonafide clerical mistake. If we look at the scheme of the Rules , it becomes clear that so far as persons who entered service before the amendment rules 1971, came into force , they were given one time opportunity for corrections of their date of birth. A time limit was fixed within which such persons could seek correction and if they failed to do so, the Government itself was required to examine the materials and take a decision after giving an opportunity of showing cause to the persons concerned. Sub clause 7 of

Rules, 1978. The date accepted under sub rule 16 A (3) of the Rules, 1978 cannot be altered except where it is established that a bonafide clerical mistake has been committed in accepting the date of birth. It is not the case of the petitioner, nor was it so argued that any bonafide clerical mistake ^{was} committed by the Central Government, when it accepted the petitioner's own request and declared 15.9.1936 / ^{as} his date of birth, what the petitioner has claimed in his subsequent representations made in the year 1984 and in the further memorial in the year 1985 is that he has come in possession of fresh material to show that his correct date of birth is 21.12.1937, and that the said material should now be taken into consideration, and his date of birth be determined as 21.12.1937. In other words, what he claims in substance, is on review of earlier decision, not on the ground that bonafide clerical mistake was committed in arriving at ^{the} ^{bent} decision, on the ground that he has discovered fresh and new material which should be taken into consideration and the earlier decision reviewed, ~~xxxxxx already been taken~~. Rule 16 A (4) of the Rules, 1978 does not confer such power of review taking into consideration fresh materials and that the only limited scope for interference / ^{is} when it is established that a bonafide clerical mistake was committed in accepting the date of birth. We, therefore, have no hesitation in holding that the rejection of the petitioner's representations and the memorial on the ground that they cannot review a decision already taken in the light of the material furnished by the petitioner, is right and / not ^{does} call for any interference.

11. We shall, next examine the contention of the petitioner that the respondents have discriminated the petitioner in not entertaining the request of the petitioner to alter the correct date of birth invoking bar contained in Rule 16 A (4) of the Rules, 1978. In similar circumstances, they have interfered and altered the date of birth on evaluating materials produced before the Government even / no case of bona fide clerical mistake was made out. If the contention of the petitioner is accepted, it would mean that if the authorities have committed a mistake and altered the date of birth in contravention of Rule 16 A(4) of the Rules, 1978 that the rejection of the petitioner's claim invoking the rule 16 A would be discriminatory, and therefore, violative of Articles 14 and 16 of the Constitution. One of the cardinal principles to be borne in mind/that it is the duty of the courts and Tribunals to exercise their jurisdiction to maintain the rule of law in this country, The question for consideration, therefore, is as to whether our jurisdiction can be exercised or should be exercised to direct the respondents to act contrary to rule 16 A(4) merely on the ground that the Central Government has acted in contravention of that provision in another case. Several authorities have been cited by the learned counsel for the petitioner including ~~xxx~~ 1971(1) S.L.R. page 155 between Mir Ahmad vs. State of Jammu and Kashmir. That is a decision of learned Single Judge. That was a case in which the authorities had corrected the date of birth of some

discrimination. That was not a case of the action of the authorities being opposed to statutory provisions, as in the present case.

The next decision relied upon is in the case reported in A.I.R. 1984 S.C., between Sengara Singh and others vs. The State of Punjab and others. That was a case in which large number of members of Police force were dismissed, on the ground that they had participated in an agitation ^{to} which was opposed/rules governing the discipline in the police force and several prosecutions were also launched against them. But among them, 100 persons were reinstated and criminal cases against them were withdrawn. Those who did not receive similar treatment, approached the Supreme Court complaining discriminatory treatment. On the facts of that case the Supreme Court held that there was no real justification for meting out a different treatment to the petitioners in that case and hence a direction was issued to ~~reinstate~~ the petitioners ~~to~~ ~~xxxxxxxx~~ remove discrimination. That decision was rendered on the facts of that case. There was no question of any action having been taken in that case in contravention of the statutory provisions. Hence the petitioner cannot derive assistance from the said decision.

11. These decisions have been cited by the learned counsel for the petitioner in support of his contention that the respondents having granted relief to others similarly situate in contravention of Rule 16A(4) of the Rules, 1978, there is no justification to deny relief on the ground that the bar contained in rule 16 (4) is attracted.

persons taking into consideration fresh materials produced before them while declining consideration of the case of the petitioner for correction ~~and~~ of his date of birth on the basis of fresh ~~material~~ and new material furnished by him. The court came to the conclusion that there was no justification for not meting out - a similar treatment to the petitioner as well. That was not a case in which the alteration of date of birth was regulated by statutory provisions as in the present case. On the facts of that case the court held that executive action of the authorities was discriminatory in character. That decision would, therefore, not be of any assistance in this case.

The next decision cited is in the case reported in AIR 1981, S.C., 1831 between Vishnudas Hundumal etc. vs. The State of Madhya Pradesh and others. In that case the Supreme Court held on consideration of facts of the case that action on the part of Regional Transport Authority resulted in gross discrimination between Transport Operators in the same class, in that some have their permits in tact with right to ply their vehicles on the notified roads and some others whose permits are curtailed. In that case discrimination was removed by directing that the petitioners who are in the same class be accorded similar favourable treatment as has been given by inadvertance to others similarly situate. That was a case in which an inadvertant decision on the part of R.T.A. in favour of some had brought about

12. The learned counsel for the respondents, Shri A.K. Chaturvedi relied upon a decision of the Supreme Court reported in AIR 1987, SC, page 1550 between E.S. Reddy vs. The Chief Secretary, Govt. of Andhra Pradesh and another. That was a case in which some persons were kept under suspension and others not. Those who were kept under suspension made a complaint of discrimination. On the facts, the court came to the conclusion that there was no justification for not keeping other similarly situated under superannuation and that the action in keeping some of the officers under suspension was proper. In these circumstances, the discrimination brought about by the situation was removed by issuance of a direction that those who were not kept under suspension should also be kept under suspension like the petitioners.

13. What emerges from the decisions cited before us is that when the court is satisfied that the action of the State is discriminatory, the discrimination may be removed either by directing that similar treatment should be accorded to the petitioner, or that favourable treatment given to others should be vacated. It would depend upon the facts and circumstances of each case. In none of the decisions cited before us has direction been issued to the authorities to act in violation of statutory provisions on the ground that the authorities had acted in identical circumstances, in violation of those statutory rules

provisions. The function of the courts and the Tribunals being essentially to keep the authorities within the bounds of the law. We should lean in favour of issuing appropriate directions for removal of discrimination by ensuring removal of illegal action and not by directing the perpetuation of illegality. We cannot, therefore, allow ourselves to be persuaded to direct the respondents to effect the alteration of petitioner's date of birth in contravention of Rule 16-A(4) of the Rules, 1978, assuming for the sake of arguments that in other cases, action was taken by the Central Government in favour of others in altering the date of birth in contravention of the said statutory provisions.

13. Bearing in mind the aforesaid principles, we shall now, examine the instances relied upon by the petitioner in support of charge of discrimination. In this case it has been pleaded by the petitioner in paragraph 16 in the following terms:

"That the applicant respectfully submits that by the rejection of his applications and Memorial above, he has been discriminated as in the case of officers like Shri P.K. Khandelwal (U.P. 53 cadre), Shri I.R. Kakkar (U.T-64 cadre) and D.K. Arya (M.P. 60 cadre), the change of date of birth was allowed and, whereas in the rarest of rare case of the applicant, whose birth certificate has been procured from a foreign country by the Government of India themselves with full knowledge that the applicant's only purpose to seek their help was to ascertain his correct date of birth, which is backed by affidavits sworn before a Judicial Magistrate over 8 years earlier than the date on which the Birth Certificate was

furnished by the Embassy of India and the authentic family genealogical records running back to as far back as 1810 AD and that there is now no basis for continuing the present incorrect date of birth in the official records, the repeated prayers of the applicant had been rejected without considering these unique, cogent and authentic circumstance/fact."

The facts pleaded in support of the plea of discrimination, in our opinion are not adequate. The allegations are vague and devoid of particulars. It is not stated how the case of Shri Khandelwal, Shri Kakkar and Shri Arya is similar to the case of the petitioner. No information in regard to the dates when they made their applications, the dates when the orders were made and the dates on which the alteration was effected / and copies of the orders have not been furnished that the petitioner would ^{not} have access to all the necessary information, is not by itself sufficient justification for him to, ^{accept} such bald assertions in regard to plea of discrimination.

14. In reply filed by the respondents, this case is met in paragraph 13 of the Reply and this is what the respondents have stated:

"That the contents of paragraph 4(xvi) of the Original Application are denied. It is stated that the applicant has not been discriminated in any manner. The applicant's Memorial/Representations were considered on merits and were rejected and the Applicant was not discriminated in any manner. The applicant cannot claim any parity with S/Shri Khandelwal, T.R. Kakkar as the Applicant's case has been considered under rule 16(a) 4 of the All India Services

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(Death-cum-Retirement Benefits)Rules, 1971, as amended on 7th July 1978. The applicant's request for his date of birth from 1st August, 1934 to 15th September, 1936 has already been acceded to under the All India Services(Death -cum-Retirement Benefits) Amendment Rules, 1971. The applicant cannot claim benefits keeping in view his one date of birth in the year 1952 i.e. while appearing in the Matriculation Examination 1952 and thereafter in the year 1953 in obtaining Government Service and now again at the age of attaining superannuation. The applicant cannot be permitted to claim another date of birth, otherwise the benefits while claiming the initial benefit has already been allowed once and now it is being claimed for the third time i.e. in regard to the time of retirement."

The respondents have, thus denied the charge of discrimination.

15. In the Rejoinder filed by the petitioner, ~~is~~ case of all that has been stated ~~that~~ ^{the} ~~the~~ correction of date of birth of those few persons is much weaker than that of the petitioner. No attempt has been made to furnish any further information. The petitioner has adverted to one more instance of discriminatory treatment in favour of Shri A.M. Watali. The petitioner, apart from furnishing some information from the civil list has not been able to furnish any particulars to establish the plea of discrimination. There was no justification for the petitioner to plead ~~the~~ ^{new} case for the first time in the Rejoinder. That there was enough time for the respondents to file further pleadings, is not an argument which deserves acceptance. We are, therefore, not inclined to examine the allegation ~~made~~ for the first time made in the Rejoinder in regard

to the case of Shri Watali.

16. During the course of arguments the learned counsel for the respondents Shri A.K. Chaturvedi also submitted that none of the records pertaining to Shri Watali are ~~traceable~~. This is an added reason for us not to examine belated plea of the petitioner made in the Rejoinder. As regards the cases of Shri Khandelwal, Shri Arya and Shri Kakkar ~~Kakkar~~ xxxxxxx, the learned counsel for the respondents placed, during the course of arguments, the relevant files as also the orders passed in their favour which we have perused. The order dated 18.8.86 regarding Khandelwal shows that on consideration of representation of Shri Khandelwal, his date of birth was determined by the Central Government as 5.5.29. He had invoked the provisions of Rule 16 A of the Rules 1971. Shri Khandelwal then preferred a memorial on 29.9.78 against the said order. That memorial was rejected on the ground that it is not maintainable in the light of Rules, 1978 which had come into force in the meanwhile. On a further representation, the matter was re-examined and the Central Government held that the memorial of the petitioner being against the order made under the Rule 16 A of the Rules, 1971, a memorial under those provisions was competent even after 1978 amendment Rules came into force. It is on that basis that his memorial was considered and his request for fixation of date of birth as 19.11.29 was acceded to. It is clear from these facts that the decision having been taken under rule 16 A of the 1971 Rules, he was entitled to invoke the provisions regarding the present memorial under those rules even though

in the meanwhile, 1978 amendment rules had come into force. It is, therefore, clear that the case of Khandelwal was not one which was governed by Rule 16-A(4) of 1978 Amendment Rules. Hence, the action taken in favour of Shri Khandelwal will not assist the case of the petitioner.

17. As regards the case of Shri Arya is concerned, it is enough to state that relief was granted in his favour because of the direction issued by the M.P. High Court to accord him particular date of birth. As the alteration of date of birth was not by the Central Government but on account of directions of the High Court of Madhya Pradesh, the petitioner cannot rely upon it as a discriminatory action on the part of respondents.

17. The last instance is of Shri Kakkar. The order made in his favour shows that Shri kakkar made representation on 16.12.1975 that his date of birth should be altered from 19.4.38 to 8.12.1940. That representation of his was rejected as timebarred. Shri Kakkar thereafter, made another representation in November, 1990 producing the photostat copy of the birth certificate obtained by him and other material in support of his claim. The Central Government took the view that his case should be examined on the basis of Rule 16-A as it stood before its amendment in 1978. On consideration of the case, his representation was allowed and his date of birth was altered to 8.12.1940. The order makes it clear that they have invoked Rule 16 A of the Rules as it stood before its amendment in 1978. One thing that is quite clear from this provision is that the Central

Government has not consciously recorded a decision contrary to rule 16 A (4) of the Rules, 1978. In the opinion of the Central Government what governed that case of Kakkar was Rule 16-A as it stood before its amendment in 1978. We are not really concerned with the question as to whether the view taken by the Central Government in this behalf is right or wrong. What is of the essence of the matter is that they have examined the case of Shri Kakkar on the basis that he is governed by the Rules as were in force before their amendment in 1978. May be that they are persuaded to take that view because his first representation itself was made before 1978 amendment rules came into force. The application having been rejected, they have re-considered the matter, obviously on the ground wrongfully that they have rejected his claim as barred by time. Kakkar's case is not one of taking action by the Central Government under Rule 16-A (4) as amended in 1978. So far as the petitioner is concerned, his application which has been rejected, is that which was made in the year 1984, long after 1978 rules had come into force, while Shri Kakkar's application is concerned, his application was made in the year 1975 before the 1978 rules had come into force. It is the continuation of the proceedings under old rules that ultimately resulted in alteration of the date of birth in his favour, That was not a case governed by rule 16 A(4) of 1978 Rules. The therefore, decision in favour of Shri Kakkar cannot be expressed into service to prove discrimination. This

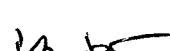
is so far as the factual position is concerned. We have already held that if a decision is taken in contravention of statutory provisions we would not be justified in directing the Central Government to act in violation of the same statutory provisions in favour of the petitioner. Even if we assume, that the order made in favour of Shri Kakkar can be regarded as one having been made in contravention of Rule 16 A(4) of the Rule 1978 Amendment Rules, it would not justify our directing relief being granted to the petitioner in contrvention of Rule 16 A (4) of the Rules, 1978.

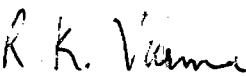
18. The learned counsel for the respondents, however, submitted that as the Central Government has power of relaxation under rule 3 of All India Services (Conditions of Service, Residuary Matters Rules(, 1963 it should be regarded as the order made in favour of Shri Kakkar not in violation of statutory provisions of Rules contained in Rule 16 A (4) of Rules, 1978, but having been made after exercising the power of relaxation. If the relaxation powers have been invoked in favour of Shri Kakkar it was urged that it would be discriminatory not to exercise similar power of relaxation in favour of petitioner as the facts are similar. Firstly, it is necessary to point out that it is nowhere pleaded by the petitioner that the power of relaxation was exercised in favour of Shri Kakkar. The order made in favour of Shri Kakkar does not say that they have invoked a power of relaxation. The respondents have stated that his case was governed by the rules which were in force before the Rules, 1978 and that they were therefore, entitled to allow the

request made in the representation. It is not possible to accept the contention that the order in favour of Shri Kakkar was made in exercise of the power of the Central Government of relaxation and similar action should be taken in favour of the petitioner after relaxing the bar contained in the statutory provisions. We do not express, as it is unnecessary, on the question as to whether the power of relaxation can be exercised to enlarge the scope of rule 16 A (4) which was inserted by the Rules, 1978.

21. On examination of all the relevant contentions, we find that the petitioner is not entitled to any relief. The entire case having been referred to the Full Bench, it is not necessary to answer all the points formulated in the order of reference.

21. For the reasons stated above, this application fails and is dismissed. no order as to costs.


ADMN. MEMBER


VICE CHAIRMAN


CHAIRMAN

Lucknow: Dated: 16th February, 1994.

Shakeel/