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CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD  
Circuit Bench at Lucknow

Registration O.A. No.21 of 1988 (L)

Dr. Padmakar Dwivedi ..... Applicant

Versus

Union of India & Others ..... Respondents.

Hon. Justice Kamleshwar Nath, V.C.

Hon. D.S. Misra, A.M.

(By Hon. Justice K. Nath, V.C.)

This application under Section 19 of the Administrative Tribunals Act, 1985 is for issue of a direction to quash an order of compulsory retirement of the applicant passed on 15.4.88 and contained in Annexure-1 to the application. Consequential relief to treat the applicant to be in continuous employment with all benefits has also been sought.

2. The applicant who had entered into service before he had attained the age of 35 years, was an Assistant Divisional Medical Officer from 1973 and was working as a Divisional Medical Officer, a class I post by promotion since January, 1984. He had attained the age of 50 years on 18.9.82 and was more than 55 years and six months of age when the order of his compulsory retirement Annexure-I was passed on 15.4.88 under Rule 2046(h) of the Railway Establishment Code Volume II (for short the Rules). He was also directed to be paid three months Pay & Allowances in lieu of the notice of retirement.

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3. The case of the applicant is that Rule 2046(h) authorises compulsory retirement in public interest for which guidelines were issued by Railway Board's letter No.E(P&A)I-77/RT-53 dated 15.11.79 but those guidelines have not been followed.

4. Before we enter upon the questions raised on the basis of guidelines it would be appropriate to set out the status of administrative/executive instructions qua statutory rules. In Gurdial Singh Fijji Vs. State of Punjab and Others (1979)2 S.C.C. 368 (para 12), it <sup>was</sup> ~~is~~ held that the Govt. in exercise of its executive authority cannot supersede a statutory rule or regulation, but it can certainly effectuate the purpose of the rule or regulation by supplementing it through instructions. In the case of District Registrar Palghat and Others Vs. M.B. Koyakutty and Others (1979)2 S.C.C. 150 (paras 22,26 and 30) it has been held that administrative/executive instructions can be made only to fill up gaps and to supplement the statutory rules framed under Article 309; they cannot supersede or super-impose on the statutory rules. It is clear, therefore, that instructions are effective only to the extent they carry out the purpose of a rule; they can neither supersede, extend or superimpose upon the rules. If ~~all~~ <sup>a</sup> instructions seem to infringe upon the statutory provisions, they may be made use of only to such extent as can keep <sup>them</sup> ~~it~~ within the statutory powers on the analogy of the principle of 'reading down' the statute (vide(1980) 2 S.C.C.478 (para 112) All Saints High School Vs. Govt. of Andhra Pradesh), <sup>it</sup> ~~It~~ is in this light that Rule 2046(h) and the instructions contained in Annexure- must be construed. Rule 2046 (h) runs as

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follows :

" 2046(h): Notwithstanding anything contained in this rule, the appointing authority shall, if it is of the opinion that it is in the public interest to do so, have the absolute right to retire any railway servant giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice -

(i) if he is in Class I or Class II service or post and had entered Government service before attaining the age of thirty-five years, after he has attained the age of fifty years.

(ii) in any other case after he has attained the age of fiftyfive years. "

5. The learned counsel for the applicant refers to instruction No.I which mentions that an employee in Class I service who has entered the Govt. service before attaining the age of 35 years, may be retired after he has attained the age of 50 years. The contention is that since the applicant was in Class I service and had entered service before attaining the age of 35 years, he could have been retired after he attained the age of 50 years but that was not done. Another part of the instruction mentions that a railway servant belonging to Class I who had entered service after attaining the age of 35 years can be retired after he has attained the age of 55 years. The learned counsel's contention is that since the applicant has attained the age of 55 years at the time of the passing of the impugned order he could not be retired because the power, according to the instructions, applies to persons who had entered service after attaining the age of 35 years whereas the

applicant had entered into service before he had attained the age of 35 years. This contention is plainly in conflict with the specific provision of Rule 2046(h) taken as a whole. The power under clause (i) of Rule 2046(h) to retire a person who entered service before attaining the age of 35 years and holds a Class I post after he has attained the age of 50 years is plainly a continuing power. A person who has attained the age of 55 years within the meaning of Clause (ii) of Rule 2046(h) is also a person who is at a stage after the age of 50 years; hence the power to retire such a person after he has attained the age of 55 years is a statutory power which cannot be whittled down by the instructions contained in Annexure-7. Moreover the instructions do not say that a person belonging to Class I who had entered the service before attaining the age of 35 years cannot be retired after the age of 55 years if he has not already been retired between the age of 50 and 55 years. The contention of the learned counsel therefore on this point fails.

6. The second point urged by the learned counsel for the applicant is a corollary to the first point. According to the instructions <sup>no. II</sup> ~~(iii)~~ the case of a railway servant covered by Rule 2046(h) should be reviewed six months before he attains the age of 50/55 years. Admittedly the case was not reviewed before the applicant had attained the age of 50 years but was reviewed before he attained the age of 55 years. Since no infirmity attaches to the impugned order merely on the ground of its having been passed after the applicant's attaining 55 years of age, the contention <sup>regarding</sup> ~~that~~ <sup>that</sup> the

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failure to review the case before the applicant attained the age of 50 years cannot stand.

7. The third point raised is that since the applicant was not compulsorily retired immediately after he attained the age of 50 years it has to be presumed that he was found fit to be retained in service beyond the age of 50 years and that although it may be open to the Govt. to consider the applicant's case after the age of 50 years; the material must be confined to that which came into being after he had attained the age of 50 years. Connected with this submission is Clause 3(c) of the instruction II contained in Annexure-7 which says that while the entire service record of an officer should be considered at the time of the review, no employee should ordinarily be retired on the grounds of ineffectiveness if his service during the preceding 5 years or where he has been promoted to a higher post during that 5 years period, his service in the higher post has been found satisfactory. Since admittedly the applicant was promoted to the post of Divisional Medical Officer in January, 1984, the contention of the applicant's learned counsel is that the only relevant material would be for the period from January, 1984 to April, 1984 when the impugned retirement order Annexure-I was passed. The applicant's case (vide para 6.5) is that at the time of his promotion in January, 1984 the applicant's entire service record had been evaluated and after he was found meritorious he had been given

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promotion. In para 6.13 it is stated that an effort was made to implicate the applicant in a false case through a raid of the applicant's residence by the C.B.I. on 27.8.87 but nothing incriminating was found. In para 6.19 and 6.23 it is stated that since his promotion in 1984 the applicant had been discharging his duties to the entire satisfaction of his superiors and he did not earn any adverse remark or entry in his Character Roll nor any such entry was communicated to him and that a perusal of the applicant's service record by the Tribunal would make the position manifest.

8. There is a denial of the applicant's contentions in these respects in the Counter Affidavit. In para 7 it is stated that the promotion was done on the basis of seniority-cum-suitability. In para 18 it was stated that the performance of the applicant was reflected in his Confidential Report and vigilance record which had been taken into consideration by the Reviewing Committee and orders were passed by the competent authority compulsorily retiring the applicant as it was considered appropriate in public interest. It was added that the applicant had been throughout an average officer and his ratings were not compatible to the confidential record, which was not without adverse entry and the instructions regarding review of service of a Railway Officer under Rule 2046. In para 21 it is stated that the applicant was communicated with the adverse entries in the Confidential Record for the year ending 31.3.1979, in which he was assessed as unreliable and irresponsible officer of poor calibre and below average. In para 22 it was stated that

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in the year 1987 the Divisional Railway Manager had endorsed an entry in the applicant's service record that he was certainly not fit for promotion or for handling an independent charge of a big hospital like Gonda where he indulged in local politics. The remark went on to say that the applicant was not fully committed to his work and did not apply himself sufficiently in sorting out administrative problems of his hospitals and that his professional knowledge was average.

9. It was further said (in para 22) that the Chief Medical Officer agreed with the above remarks of the Divisional Railway Manager and that the applicant had issued a back dated false certificate to a Gangman with a view to deprive him of the benefits of pay and leave as the Gangman had not paid illegal gratification demanded by the applicant. It was also pointed out that the applicant had manipulated to get one Gangman falsely declared as a patient of Tuberculosis by substituting X-Ray Plate and inflated E.S.R. with a view to harass and take revenge as the Gangman did not accede to the applicant's evil designs.

10. The applicant has filed a rejoinder affidavit. He said that the promotion of 1984 was based on efficiency and merit alone, that after promotion all the previous entries stood wiped off and his record was always commendable and outstanding (vide Annexure-R3 and R4). He added that he crossed his E.B. in 1979, hence there

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no question of any adverse entry in that year and that for the year 1987 no adverse entry was communicated to him. On the contrary, he said, he was given an award of Rs. 500/- for commendable work that year. The entry regarding Gangman was for the year 1975-76, hence stale.

11. The learned counsel for the opposite parties has produced before us the applicant's C.R. Dossier as also the proceedings of the Reviewing Committee. The learned counsel urged that the contents of the Chart Annexure-R3 are contrary to the contents of applicant's C.R. Dossier and that in supplement of the instructions dated 15.11.79 contained in Annexure-A7, there have been further instructions of the Railway Board in letter No.E(P&A)I-77/AT/53 dated 1.11.85 and No.86/289-D/Secy/Admn dated 9.1.86 adopting an objective "point-system" read with Railway Boards Confidential D.O. No.87/289-B/Secy/Admn dated 15.5.87 on the basis of which the applicant's performance was assessed and he was found to be no longer suitable for retention in service in public interest.

12. We have heard the learned counsel for both parties at length and have gone through the entire report including the applicant's C.R. Dossier which has been placed before us by the learned counsel for the opposite parties.

13. Since the applicant was promoted in January 1984 we may examine the record of his work and conduct

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for the period from January, 1984 onwards.

14. For the year ending 31.3.84, the Reporting Officer assessed the applicant as an average worker; the Reviewing Officer as well as Accepting Officer assessed him as 'Good'.

15. For the year ending 31.3.85, the Reporting Officer assessed him as an average officer and remarked that ~~one~~ displeasure had been communicated to the applicant for not being available during emergency duty. The Divisional Railway Manager recorded that the applicant was not fit for promotion to the Junior Administrative Grade and had yet to develop administrative qualities. He assessed the applicant to be an average officer with which the Reviewing Officer agreed. There is no remark of the Accepting Officer because the ~~Accepting~~ Officer is noted ~~to~~ have retired.

16. For the year ending 31.3.1986, the Reporting Officer assessed the applicant to be an average officer. The Divisional Railway Manager remarked him as not yet fit for promotion. The Reviewing Officer agreed with these assessment and the Accepting Officer accepted the same.

17. For the year ending 31.3.87, the applicant was noticed as having been given a group award of Rs.500/- for cleanliness and team spirit. It may be mentioned that it is this remark on which the applicant relied in his Rejoinder Affidavit as commendable work for the year; it is noticeable that this award is not

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individual but is a group award for cleanliness and team spirit. Be that as it may, the Reporting Officer graded the applicant as an average officer, assessed him as fair in several ways and went on to say that the applicant had superiority complex, always involved himself in local politics, did not reply to the letters in a proper way and that several displeasures had been communicated to him for not replying to the letters in time. The Reporting Officer went on to mention that lot of complaints had been received against the applicant. However he observed that the applicant was fit for promotion in the Department.

18. The Reviewing Officer noticed the inconsistency and incongruity in the remarks recorded by the Reporting Officer inasmuch as the Reporting Officer considered the applicant to be fit for promotion although the overall assessment was only fair and the applicant had not fixed any objective and target for himself. The Reviewing Officer recorded that the applicant was certainly not fit for promotion or for holding an independent charge of a big hospital like Gonda; that he indulged in local politics, was not fully committed to his work and did not apply himself sufficiently in sorting out the administrative problems of his hospital. The Reviewing Officer mentioned the applicant's professional knowledge to be average.

19. The Accepting Officer agreed with the

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observations of the Reviewing Officer and observed that the applicant was unfit for promotion and was only an average <sup>that his</sup> ~~officer~~ performance in every field had been unsatisfactory; that he had been untrustworthy, intriguing, quarrelsome, defiant to higher authority and levelled charges against his colleagues through Union Officials. The Accepting Officer went on to add that the applicant was unworthy of his profession and had shown little interest in national programmes. The Accepting Officer lastly observed that the applicant had been advised and that the remarks need not be communicated to him.

20. It will be noticed that except for the year of promotion when the work and conduct of the applicant was assessed as good, in all subsequent periods he was assessed either average or unsatisfactory, unfit for promotion to administrative post. The gradation of 'average' is forth in descending order of merit i.e. after 'outstanding', 'very good' and 'good'. Certain displeasures for unsatisfactory performance had been communicated to him in the years 1985 and 1987. This state of affairs regarding his performance in the post-promotion period gets over the restrictive provision contained in <sup>Instruction</sup> ~~Annexure~~ 3(c) of Annexure-47 that no employee should ordinarily be retired if his service during the preceding five years or during five years after promotion has been found satisfactory. This very instruction indicates that if the service during such period is found unsatisfactory, the entire service record of the employee should be considered at the time of review.

21. We may now examine how the review was done.

The proceedings of review consist of a statement showing

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details of ~~post~~ as well as present vigilance cases against the applicant and another statement showing performance/assessment as given in the Annual Confidential Reports for the preceding five years. The criteria of "point basis" which is set out in the letters dated 1.11.85, 9.1.86 and Confidential D.O. letter dated 18.5.87 referred to above were applied. He was found to have secured 13 points. According to the letter dated 9.1.86 officers having not more than 11 points were not to be retained in service, officers having 14 points or above were to be retained in service unless the last three Annual Confidential Reports had a total of 6 points and below, and the officers having over 11 and less than 14 points were placed in 'grey area' to be viewed for compulsory retirement from the point of view of assignments they held during the last five years.

22. The statement of vigilance cases indicated that a censure has been imposed on him on 20.1.81 in the matter of demand of illegal gratification, warning has been recorded on 7.9.76 for irregular issue of sick/fit certificates; censure had been imposed on 16.5.78 for making a malicious complaint against a Chief Medical Officer. These are all old cases and therefore do not carry as much weight as those of recent periods. Even so, the censures imposed on 16.5.78 and 20.1.81 are within ten years and cannot be ignored.

23. Among the recent cases vigilance proceeding in respect of acceptance of illegal gratification and

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effort to hush up past vigilance matters was closed down on 16.7.87, but the complaint of possessing disproportionate assets found during the C.B.I. raid on 27.8.87 continued to be under investigation. The making of the C.B.I. raid on the applicant is admitted; but the applicant's case is that the raid was false. Even so, that was a material which concerned the service conduct of the applicant at the time when the review of the applicant was taken by the Reviewing Committee.

24. The report of the Reviewing Committee dated 14/15.3.88 indicates that the Committee took notice of all the materials referred to above and found him to be falling in the 'grey area'. A decision was taken, on the above material, to retire the applicant prematurely in public interest.

25. On a very careful consideration of this material we do not find any infirmity attached to the conclusion of the Reviewing Committee and the competent authority. The material relevant for the purposes of Rule 2046 (h) of the Railway Establishment Code Vol.II and the applicable instructions set out in the earlier part of this judgement, were carefully applied. It is not a case of misconduct on which any disciplinary enquiry was called for; it is a clear case of unsuitability and inefficiency for which a bonafide decision could be taken to retire him from service in public interest. The power to retire in such situations is not at all disputed and has been well recognised ever since the famous decision in the case of Union of India Vs. Col. J.N. Sinha 1971 SC 40 and Union of India Vs. M.E. Reddy 1980 SC 563.

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26. Dealing with the performance of the applicant we may point out that the entries contained in the applicant's Chart R-III are not borne out from the record. Column 3 refers to Character Roll entries and indicates that the applicant had been assessed as Very Good for the year 1983-84 and Good for the years 1984-85, 1985-86 and 1986-87. This is belied by the record contained in the applicant's C.R. Dossier to which we have already referred.

27. Much emphasis is laid by the learned counsel for the applicant on non-communication of the entry by the Accepting Officer for the year ending 31.3.1987. Reference is made to paras 1606 to 1610 of the Railway Establishment Code Volume I. These paragraphs now are not published in the latest Railway Establishment Code but in Suranjan Chakraverti's ' Law of Railway Servants ' Second Edition 1987 at page 182 and 183. The relevant provision is para 1610. This paragraph mentions that when an unfavourable report is made on a gazetted railway servant he shall be shown Section I of his confidential report, and his initials obtained. The officer may make comments on the remarks which are to be disposed of by the next higher officer before he frames his conclusions and endorses his remarks on the report. Note 1 and 2 are material in this context :

Note 1: It is not intended that a copy of the report should be supplied to the gazetted railway servant or that he should make a copy for his use.

Note 2: Section II of the report will be initiated and filled in by a gazetted railway servant of not lower than junior

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administrative rank. No portion of the remarks in this section will be communicated except under the personal orders of the General Manager.

28. Para 1611 then runs as follows :

" On receipt of the reports from the General Manager, the Heads of the Departments concerned will communicate to the gazetted railway servants concerned, the Section I adverse portions of the reports in substance together with any remarks in Section II which the General Manager may indicate. It is to be noted that adverse remarks are to be communicated only as finally accepted by the General Manager."

29. It will be clear from the provisions of the two Notes to para 1610 and ~~para~~ para 1611 that remarks recorded in Section II are not to be communicated except under the personal orders of the General Manager. The Confidential Reports which have been placed before us are in Section I and II upto the year ending 31.3.1987. Section I contains the report of the Reporting Officer as well as next higher administrative authority. This includes the Chief Medical Officer. Section II contains the reports of the Dy. Head of the Departments as well as Head of the Departments which is mentioned as the Chief Medical Officer and of the Accepting Officer as the General Manager. For the year ending 31.3.1987 the proforma of the reports underwent a change. Instead of Sections, it has parts. Parts I & II contain self assessment of the officers. Parts III & IV contain the remarks of the Reporting Authority. Part V contains

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contains the remarks of the Reviewing Authority which is an administrative officer namely the Divisional Railway Manager. Part VI contains the remarks of the Accepting Authority. The Accepting Authority is described as the Chief Medical Officer and not the General Manager. The comparative study of the two proforma would show that till the year ending 31.3.1986, no self assessment was to be made by the officer reported upon; that Parts III & IV of the revised proforma correspond to Section I of the earlier proforma while Parts V & VI of the revised proforma correspond to Section II of the earlier proforma. It may also be presumed that the Accepting Authority who happened to be the General Manager till 31.3.1986 came to be the Chief Medical Officer for the year ending 31.3.1987. It would be reasonable, in these circumstances, to hold that the provisions of paragraphs 1610 and 1611 providing for non communication of the contents of Section II report of the old proforma except under the personal orders of the General Manager apply to the Chief Medical Officer in respect of Part V & VI of the revised proforma. The Accepting Authority therefore was well within his powers to direct that the remarks for the period ending 31.3.87 need not communicated to the applicant. This is apart from the endorsement that the officer i.e. the applicant had been advised. The applicant, in these circumstances, gets no benefit from non communication of the remarks for the year ending 31.3.1987.

30. The learned counsel for the applicant has referred to certain decisions in his support. The case of J.D.Srivastava Vs. State of Madhya Pradesh and Others



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1984 SC 27, says that stale entries are not quite relevant. The compulsory retirement order in that case was passed on 28.8.1981, but certain adverse entries relating to the year 1959-60 or near about were <sup>h</sup>taken into account. This was held to be a perverse approach. The Supreme Court examined entries for the preceding ten years. In the present case the examination of the Annual Confidential entries has been confined to the immediately preceding five years. The vigilance cases examined by the Reviewing Committee relate to the years 1976, 1978 and 1981. The 1976 entry is stale but the other two entries relating to the years 1978 and 1981 are well within ten years preceding the passing of retirement order in April, 1981.

31. The case of Brij Behari Lal Agarwal Vs. Hon'ble High Court of Madhya Pradesh and Others 1981 SC 594, lays down that the Annual Confidential entries relating to <sup>h</sup>later years are of utmost importance and that <sup>h</sup>entries made prior to the consideration of question of compulsory retirement should <sup>be</sup> communicated. We have already pointed out that the entries of appropriate years have been considered in this case. In dealing with <sup>the</sup> question of communication of adverse entries, the Hon'ble Supreme Court did not have the occasion to examine paras 1610 and 1611 of the Railway Establishment Code which are applicable to the present case. The decision therefore is not of much help.

32. In the case of Swami Saran Saxena Vs. State of Uttar Pradesh, 1980 SC 269, the order of compulsory retirement was passed only a few months after the officer had been permitted to cross the second

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alia that adverse entries prior to promotion lose their significance, that although it may be desirable to make an overall assessment of the Govt. servant's record, but while doing that more value should be attached to Confidential Reports pertaining to the years immediately preceding such consideration, that old and stale entries should not be taken into consideration, that the entries of last ten years should be considered in forming the requisite opinion to retire the Govt. employee in public interest and that the <sup>entries</sup> which are not communicated should not be taken into consideration. This is also the law which has been laid down in the earlier decisions which have been mentioned above and in view of what has been said by us with reference to them, this decision also brings no benefit to the applicant.

35. The learned counsel for the applicant has also referred to two decisions of the Central Administrative Tribunal. In the case of Ahendu Bikas Sen Vs. Union of India & Others (1989)9 ATC 202 the ground of indifferent performance and doubtful integrity was found not borne out by the Character Report entries in the preceding five years while the crossing of the efficiency bar by the officer three or four years earlier was not taken into consideration. That is not the situation in the present case.

36. The decision as well as another decision in the case of S.P. Francis Nathan Vs. Govt. of Pondicherry (1988)6 ATC 729 are relied upon to show that once an employee had been permitted to cross 50 years of age and review <sup>was</sup> not done within six months before

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efficiency bar. The Court observed that although for the purposes of crossing the second efficiency bar the appellant was considered to have worked with distinct ability and integrity beyond question, yet he was found so unfit as to deserve compulsory retirement. The Court noticed that there was no evidence to show that suddenly there was such deterioration in the quality of appellant's work and integrity that he deserved to be compulsorily retired. In the present case, the promotion was given to the applicant in January, 1984 and deterioration in his performance was noticed during the succeeding four years. Moreover, as already pointed out, once the performance in the post held on promotion was found to be unsatisfactory, the earlier record of the applicant also became open to consideration in view of the clear instructions issued by the Department ~~as~~ as already discussed above. The decision therefore is of no help to the applicant.

33. In the case of Baldev Raj Chadha Vs. Union of India and Others (1980)4 SCC 321 no adverse entry was found to exist in the Character Roll of the appellant atleast for five years immediately before the order of compulsory retirement. That is not the position in the present case.

34. The last case decided by the Supreme Court and referred to by the learned counsel for the applicant is Brij Mohan Singh Chopra Vs. State of Punjab 1987 SC 948. The decision lays down inter

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alia that adverse entries prior to promotion lose their significance, that although it may be desirable to make an overall assessment of the Govt. servant's record, but while doing that more value should be attached to Confidential Reports pertaining to the years immediately preceding such consideration, that old and stale entries should not be taken into consideration, that the entries of last ten years should be considered in forming the requisite opinion to retire the Govt. employee in public interest and that the <sup>entries</sup> which are not communicated should not be taken into consideration. This is also the law which has been laid down in the earlier decisions which have been mentioned above and in view of what has been said by us with reference to them, this decision also brings no benefit to the applicant.

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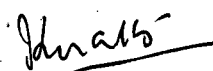
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attaining that age the order of compulsory retirement would be in violation of the guidelines contained in Ministry of Home Affairs' Memorandum No. 25013/14/77-Estt(A) dated 5.1.1978. We are not concerned with those instructions; the applicable instructions in the case of railway servants are a different set already discussed above. It may be mentioned that in the case of S.P. Francis Nathan Vs. Govt. of Pondicherry (supra) it has nevertheless <sup>been</sup> held in para 3 that according to the guidelines a review may be ordered at any time to adjudge the desirability of retaining a Govt. employee in service even if he had been cleared in the first review before attaining the age of 50 years. The decision therefore cannot be construed to say that if in a particular case review has not been made before attaining the age of 50 years it cannot be made after he attained the age of 55 years. Indeed any such construction would violate the establishment rule of interpretation, as already discussed, that administrative/executive instructions cannot super-impose or restrict the wide powers which are conferred by the Rule.

37. These are all the points raised in this case. After very careful consideration of all the matters, we hold that the case has no merit and is dismissed. Parties shall bear their own costs.



Member (A)



Vice Chairman

Dated the 24<sup>th</sup> April, 1989.

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