

(18)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH,

J A I P U R.

O.A. No. 60/94

Date of decision: 2nd Oct. 1993

K.N. BHARGAVA

: Applicant.

VERSUS

UNION OF INDIA & CRS : Respondents.

Mr. P.N. Mathur : Counsel for the applicant.

Mr. U.D. Sharma : Counsel for the respondents.

CORAM:

Hon'ble Mr. Justice D.L. Mehta, Vice-Chairman

Hon'ble Mr. O.P. Sharma, Administrative Member

PER HON'BLE MR. JUSTICE D.L. MEHTA, VICE-CHAIRMAN:

Rehman Ali
By Order dated 8.12.93, Annexure A-1, passed by the Central Government in exercise of the powers alleged to have been conferred by sub-rule (3) of Rule 16 of the All India Services (Death-cum-Retirement Benefits) Rules, 1959 after due consultation with the Government of Rajasthan. Shri K.N. Bhargava, who is a member of the Indian Administrative Service borne on the Rajasthan Cadre and who has already attained the age of 50 years, was directed to be retired from service with immediate effect. A cheque for a sum equivalent to the aggregate amount of his pay and allowances for a period of three months calculated at the rate at which he was drawing them immediately before the date of this order was also made available to him. The applicant has come with a case that he is having an unblemished record and there is no adverse entry against him. It was also submitted by him that just before four months of his retirement, he was promoted vide Annexure A-2, dated 12.7.93 in the above super-time scale of Rs. 7300-7600 on merit. He has produced Annexure A-4, a letter issued by Shri Govind Jee Misra, IAS, Chief Electoral Officer to show that the C.E.O. appreciated his performance. He has also enclosed with the petition Annexure A-5, a letter dated 19.6.91 addressed by the

Chief Secretary to him. The Chief Secretary has appreciated his performance and observed that his performance was excellent and he has congratulated Mr. Bhargava, the applicant, for the same. He has also produced, during the course of arguments, appreciation certificate issued by the State Government appreciating the original work in literature and awarded Rs. 5000/- in appreciation of the service rendered.

2. On behalf of the State of Rajasthan, it was submitted that the case of the applicant was reviewed in an objective manner first on 8.10.90 and thereafter, again reviewed on 1.10.91 and the Central Government was of the opinion that the physical and mental condition of the applicant warranted that he should not be retained in service as he has ceased to be efficient enough for such retention and hence a decision was taken by the Central Government to retire him prematurely which is not arbitrary as alleged. However, in the reply, nothing has been said specifically about the views of the State Govt.

3. On behalf of the respondents, Union of India, in para 4, it was submitted that he has been repeatedly receiving adverse remarks in his Annual Confidential Reports about his mental illness and some of these remarks were also communicated to the applicant. It was also submitted that when the Government was reviewing the records of the applicant under Rule 16(3) of the I.A.S.(DCRS), Rules in consultation with the State Government, a Special Medical Board was constituted to examine him. The Board was of the view that the applicant is 'well maintained on treatment which he should continue under psychiatric supervision'. Annexure R/1 is the report of the Medical Board which reads as under:-

"At present, Mental State Examination and Psychodiagnostic Tests do not reveal any gross psychiatric abnormality which indicates that he is well maintained on treatment which he should continue under psychiatric supervision."

4. During the course of arguments, Mr. U.D. Sharma produced the statement of ACRs to show that the applicant is suffering from a mental disease. We consider it proper to reproduce the remarks given in the last 5 to 6 years:-

"1987-88 - Physically sound. Mentally he has suffered from depression, but has improved very significantly. He is graded as an average officer because of his temporary mental illness; otherwise, performance-wise his output was good. If he over-comes his mental set back, he would make a good modern minded officer. He is an intelligent officer who works hard, however, the occasional fits of depression he suffers from unfortunately, do not permit him to attain his full potential. A sad case. Categorisation average.

1988-89 - He has the makings and the potential but is impeded by slight mental depression. Since the 1st year, his mental health has improved very significantly. If he maintains this trend he should be able to normalise soon.

1989-90 - Suffers from depression sometimes; otherwise his health is good. But for his occasional bouts of depression, he is a very good officer.

1990-91 - During the first quarter of the year he did not keep good health.

1991-92 - State of Health - Robust.

1.4.92 to
31.10.92 - State of Health - Satisfactory.

23.12.92 to
31. 3.93 - State of Health - Good."

Remarks of 1987-88 show that he has suffered from depression but he has improved very significantly. Because of his temporary mental illness, he is graded as an 'average' officer, otherwise, performance-wise, his output was good. There is also a reference in the year 1988-89 that he has the making and the potential but is impeded by slight mental depression. Again there is a remark that his mental health has improved very significantly and

if this trend is continued, he should be able to normalise soon. In 1989-90, there is a remark that he suffers from depression sometimes; otherwise, his health is good. But for his occasional bouts of depression, he is a very good officer. During the first quarter of the year 1990-91, he did not keep good health. From 1991-92 onwards, there is no adverse remarks about his health. In the year 1991-92, the remarks against the health column is 'Robust'. From 1.4.92 to 31.10.92, the remark is 'satisfactory' and from 23.12.92 to 31.3.93, the remark is 'Good'. Thus, in the last three years, there is no adverse remarks about his health. Respondents have produced the statement and from this statement produced also, there is no other adverse remarks in his service record except that of mental depression, as referred to above. The applicant has been considered as a good officer; intelligent officer suffering from mental depression and his performance and output has been appreciated also.

5. Mr. R.N. Mathur submitted the application, MA 443/94 and prayed that APAR dossiers of the applicant which were considered by Respondent no. 1 before taking decision to retire the applicant from the service be produced. (2) The file on which the decision to retire the applicant has been taken. (3) The details of the medical examination conducted by the Medical Board, report of which has been submitted by the Respondent no. 1 and which has been marked as Annexure R/1. The main controversy is about the file no. 2 as the respondents, Union of India, have claimed the privilege U/Ss 123 and 124 of the Indian Evidence Act. The respondents have submitted in relation to File No. 25013/8/91-AIS(II) that these documents contain free and frank expression of opinion at various decision making levels, disclosure of which would materially affect proper functioning of the Government

and cause injury to the public interest and candour of expression. It was also submitted that this file contains communication with the State Government. All these documents are communications in official confidence and any disclosure of these documents would cause injury to the determination and execution of public policy and materially affect public interest. Regarding file no. 36(19)-EO/92(SM), it was submitted that the entire file contains free and frank expression of opinions and deliberations of the various levels of decisionmaking in the Government, disclosure of which would be injurious to public interest and candour of expression of opinion. Same has been said about file no. 22011/3/94-AIS(II). In the correspondence side also, the same privilege has been claimed. After considering the objections of the respondents, directions were given that the relevant papers may be produced for the perusal of the Tribunal. However, the relevant record has not been made available to him and there is a direction not to produce the same. As far as the State Government is concerned, yesterday, at the time of hearing, Mr. Malu was present as the counsel for the State but today he is not present. The Assistant Secretary, DOP, State of Rajasthan submits that no record can be produced without the permission of the Chief Secretary. Thus, inspite of the directions given, the record has not been produced. As far as the ACRs are concerned, the statement given by Mr. Sharma is sufficient. However, we are not in a position to see the proceedings, the views of the State Government, the mode of consultation and other allied matters. After the dictation of the Judgment and before the pronouncement, the State Government moved a Misc. Application which was rejected and on the direction of the Tribunal, the State Government produced the record showing that the State Govt. and the Committee so constituted was of the view that

Mr. Bhargava was performing his duties well and no case of compulsory retirement has been made out. It was also submitted by the State Government that efficiency has not been impaired and Mr. Bhargava was working efficiently.

6. Mr. R.N. Mathur, the learned counsel for the applicant, submitted that the applicant was promoted in the above super-time scale pay of Rs. 7300-7600 vide order dated 12.7.93 (Annexure A-2). He has invited our attention to the Indian Administrative Services Pay Rules, 1954 and submitted that the promotion in this above super-time scale is on the basis of Merit-cum-Seniority. He submits that once a promotion has been given in July, 93, then the entire record including the Medical Certificate, Annexure R/1, is washed away. The Government had the relevant record at the time of the passing of the promotion order and the record which was available at the time of the passing of the promotion order cannot be looked into. In support of his submissions, he has referred large number of cases including the case of Sh. Baikuntha Nath Das & Anr. Vs. Chief District Medical Officer, Paripada & Anr., reported in 1992(2) A.R 2(SC). In para 32(iv), the Hon'ble Supreme Court has laid down as under:-

"The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter-of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/ character rolls, both favourable and adverse. If a Government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority."

Mr. Mathur submits that the promotion was given to him in July, 93 and there was no adverse remarks about his health even from the year 1991-92 upto the date of his compulsory retirement in his ACRs. There is no other adverse entry about inefficiency etc. during this period.

He further submits that the medical certificate, Annexure R/1, issued by the Medical Board was also available with the respondents. Thus, he submits that he was promoted to a higher post notwithstanding the report of the Medical Board and the earlier remarks. He submits that the medical certificate of the Medical Board as well as the earlier remarks lose their sting as his promotion is based upon merits and not upon seniority. Mr. UD Sharma, the learned counsel for the respondents, Union of India, submits that under the rules, for the purpose of promotion, consultation with the Central Govt. is not necessary.

May it be so, but he is in the Rajasthan Cadre and the State Government is watching his performance and has promoted him, naturally, the natural consequences will be that higher promotion, notwithstanding, the earlier remarks and the report of the Medical Board lose their sting, more so, as his promotion is based upon merits and not upon seniority. It will not be out of place here to mention that on behalf of the State Government, nothing has been submitted on this point during the course of arguments.

7. The second part of this very paragraph has also been discussed by Mr. Mathur. He submits that more importance is to be given to the record and performance during the later years. He submits that during the later years, i.e. 1991, there is no adverse remarks about his health and particularly about the mental condition. On the contrary, in 1991-92, the remark is that the applicant is having 'robust health' and in 1992-93, his health was found to be satisfactory and good and thereafter, there is no entry. Thus, the latter remarks about his health also go in his favour and it goes to show that he is performing his duties faithfully and sincerely and his work was found satisfactory and no adverse remarks were

given. He connects these remarks with the remarks of 1987-88, 88-89, 89-90 and 90-91. In all these remarks of the previous years, there is a reference that the applicant has suffered mental depression but has improved very significantly. It was also mentioned that his performance was good. Thus, he submits that in the instant case, the case of Baikuntha Nath Das Vs. Chief District Medical Officer applies with full force and the action has to be considered as arbitrary and capricious. He has also referred the case of Posts and Telegraphs Board & Ors Vs. C.S.N. Murthy, reported in 1992(2) SLR 352 and submitted that the principles laid down in para 32 in the case of Baikuntha Nath Das have also been followed and approved in this case.

2. Mr. Mathur has cited before us the case of S. Ramachandra Raju Vs. State of Orissa, reported in JT 1994(5) SC 459. Their Lordships were of the view that "the law is now well-settled that though the order of compulsory retirement is not a punishment and the government employee is entitled to draw all retiral benefits including pension, the Government must exercise its power only in the public interest to effectuate the efficiency of the service." Their Lordships, in para 10 of the judgment, were of the view that "keeping these principles in mind and on considering the facts extracted hereinbefore we find that the exercise of power of the government falls in the category of arbitrary exercise or power or failure to take the total record of service into consideration objectively but has taken only the solitary adverse report for the year 1987-88 as a foundation to compulsorily retire the appellant from service." Their Lordships have used the word "objectively" in this case instead of subjective consideration. The solitary adverse entry has been considered - is not sufficient for

compulsory retirement. In the instant case, now, it is clear that the State Government and the Committee constituted was of the view that Mr. Bhargava/should not be retired as he was performing his duties efficiently. It is true that Union of India can disagree with the State Government but the disagreement must be based on foundation and should not be arbitrary. There is nothing on record to show that the State Government has taken a view which was incorrect and the Union of India was right. In fact, the service record of the latter years shows that Mr. Bhargava was performing his duties very effectively and so-called sickness has not impaired the performance. In such circumstances, we are of the view that the action taken by the Central Government in over-riding the views of the State Government was arbitrary and based on no foundation.

9. Even if we take into consideration the medical report, Exhibit R/1, which was also of a prior date, i.e. of a period prior to the promotion period even then it does not specifically say that there is any abnormality which may adversely affect the working. On the contrary, the report reveals that the tests do not reveal any psychiatric abnormality which indicates that he is well maintained on treatment which he should continue under psychiatric supervision.

10. The second question which needs consideration is about earlier reports in the ACRs which have been referred in the earlier part of the judgment. There is no complaint against the applicant except on the health ground. The judgment of Baikuntha Nath Das (Supra) has been considered in the various subsequent judgments and the view taken has been approved in para 32(iv), the words "before taking a decision in the matter-of course attaching more importance to record of and performance during the later years". Thus,

there is a mandate that the record of the earlier years can be considered. However, more importance to record of and performance during the later years should be given more weightage. Thus, it is a case of health ground, and from 1.4.91 to 31.3.93, nothing adverse has been found in the health of the applicant by the Reviewing or the Reporting Authorities and there is no mention of the disease also in the later years. This shows that the applicant has succeeded in getting the treatment and in fact, the view taken by the Medical Board that "indicates that he is well maintained on treatment which he should continue". Thus, there is a positive report, Annexure R/1, that he is well maintained and the deficiency, if any, of the past has come to an end or come to the stage of near end on account of well maintained treatment and there is observation that there was any periodical depression during the last 2 to 3 years. Compulsory retirement is a matter in which one has to find out that whether it is a case in which the officer can be considered as a dead wood. Once there is a positive finding in favour of the officer and there is an appreciation of his work in the last three years by the Chief Secretary and the Chief Electoral Officer alongwith the Government's award of appreciation certificate on 15th August, 1994 goes to show that there was no immediate cause for the compulsory retirement of the applicant.

11. We would like to discuss the reply given by the State of Rajasthan. On page 3 of the reply, the State of Rajasthan has come with a case - "It is submitted that the case of the applicant was reviewed in an objective manner first on 8.10.90 and thereafter reviewed on 1.10.91 and the Central Government was of the opinion that the physical and mental condition of the applicant warranted that he should not be retained in service as he has ceased to be

efficient enough for such retention and hence a decision was taken by the Central Government to retire him prematurely." The State Government, in its reply, has not mentioned that the State Govt. was also of the same view and agreed with the view of the Central Government. Non-supply of the relevant record is vital in the instant case and adverse inference can be drawn.

12. Apart from that one important factor is that the case of the applicant was reviewed on 9.10.90 and 1.10.91 and it took more than two years to decide that the retention of the applicant in service is not warranted.

Thus, within a period of two years after the meeting of the Review Committee, the case of the applicant has not been considered, and this fact also goes to show that the certificate of the Medical Board issued vide Annexure R/1 has not been placed before the Committee and the Review Committee had no opportunity to see the certificate. This is a point which remains unanswered on behalf of the respondents that how it took more than two years to decide the case of the applicant and why the applicant was promoted after getting the certificate, Annexure R/1 and why this certificate, Annexure R/1 was not made available to the Review Committee. The submissions made by the Union of India that the documents sought by the applicant contain free and frank expression of opinion at various levels, disclosure of which would materially affect proper functioning of the Government also goes to show that there was a possibility of divergence of opinion. This possibility cannot be ruled out though there is nothing before the Tribunal to arrive at such finding. It is only a question of drawing an inference on account of the non-production of the relevant records inspite of the direction so given. Production of record by state government after dictating judgement shows that state government disagreed with central government

13. This is also an additional ground which goes

in favour of the applicant. On behalf of the applicant, the order of compulsory retirement has been challenged on the ground that the respondents have come with a case in their reply that on account of mental and physical depression, the applicant has been retired compulsorily and orders have been issued under sub-rule(3) of rule 16 of the Rules of 1958. The learned counsel for the applicant submitted that Rule 13 provides that where the Government has reason to believe that a Member of the Service is suffering from a physical or mental disability which in its opinion interferes with the efficient discharge of his duties, it may direct him to undergo medical examination with a view to retire him from service on invalid gratuity or pension, as the case may be.

Rule 13 is reproduced as under:-

"13. Invalid gratuity or pension:-(1) Where the Government has reason to believe that a member of the Service is suffering from:

(a) a contagious disease, or
(b) a physical or mental disability which in its opinion interferes with the efficient discharge of his duties, it may direct him to undergo medical examination with a view to retire him from service on invalid gratuity or pension, as the case may be.

A member of the Service also may, if he feels, that he is not in a fit state of health to discharge his duties, apply to the Government for retirement on invalid gratuity or pension, as the case may be.

....."

Thus, the case of the applicant is that there is a special Rule 13 which enables the Government to retire a member of the Service who is suffering from mental disability which in its opinion interferes with the efficient discharge of his duties. The case of the applicant is that the Rule 13 can be invoked at the most but sub-rule(3) of rule 16 cannot be invoked as the Central Government as well as the State Government have come with a view that the applicant was suffering from mental depression. Rule 14 imposes a condition that a member of the Service who is discharged from the Service on ground other than those

specified in rule 13 shall have no claim in/invalid gratuity even or pension. Rule 15 is reproduced as under:-

"15. Retirement from service of a member of the Service in certain cases and grant of leave:-

(1) A member of the Service who has been declared by a Medical Board to be permanently incapacitated for further service shall, if he is on duty, be invalidated from service from the date of relief which shall be arranged without delay on receipt of the report of the Medical Board or, if he is granted leave under sub-rule(2), on the expiry of such leave.

Provided that if he is on leave at the time of receipt of the report of the Medical Board, he shall be invalidated from service on the expiry of that leave or extension of leave, if any, granted to him under sub-rule (2).

....."

It enables the Government to retire a member of the Service who has been declared by a Medical Board to be permanently incapacitated for further service. The contention of the learned counsel for the applicant is that there is no finding of the Medical Board against the applicant as specifically mentioned in Annexure R/1 that there is any mental or physical disability and which is likely to interfere with the efficient discharge of his duties. The contention of the learned counsel for the respondents is that sub-rule(3) of Rule 16 does not apply. Under this rule, a member of the Service is required to retire by the Central Government in consultation with the State Govt. in public interest from service on the date on which such member completes thirty years of qualifying service or on attains fifty years of age or/any date thereafter to be specified in the notice. Mr. Mathur submits that when there is a special provision relating to Rules 13 and 15, even then the provision of sub-rule (3) of rule 16 cannot be invoked. His case is that in case of sickness or incapacity, rule 13 or rule 15 can be applied but sub-rule (3) of rule 16 cannot be applied. Mr. Sharma, appearing on behalf of the respondents, Union of India, cited before us the case of Madras High Court, reported in

1987(5) S.L.R 28 - G.V. Narayanan Vs. U.O.I. & Ors. In this case, Mr. Narayanan who was the Deputy Inspector General of Police, seemed to have fallen ill and was off duty between 14.10.73 and 18.11.73 and again he fell ill on 5.5.74 and 10.6.74. His disease was diagnosed as Idiopathic Polyneuropathy of the Guillain Barre type. Three certificates were issued by the Doctor who was a Neurosurgeon. In the first certificate, the doctor was of the view that he requires a further period of leave for three months from 1.9.74 to 30.11.74 for medical treatment and physiotherapy for full recovery. In the second certificate issued on 19.11.74, Doctor opined that his present recovery is sufficient to enable him to attend to his office work for which he is fit. The third certificate was also issued by the same Doctor on 4.12.74 that he is recovering from illness and is now fit to resume duties. The petitioner wanted posting, but that was not accepted by the second respondent, State of Madras. The second respondent deemed fit to refer the matter to the Superintendent, Government General Hospital, Madras with a request to constitute a Medical Board to examine the petitioner and send the Report of the Medical Board immediately. The Medical Board reported -

"Thiru G.V. Narayanan, IPS, Offg. DIG has been on medical leave from 5.5.74 for treatment of chronic Guillain Barre Syndrome. As a result of this disease, his body muscles are reported to have wasted and his legs are not able to support the weight of his body. Thiru G.V.N. was due to return to duty on 1.12.1974. He requested the Government to give him a posting. He has also produced a M.C. from a Doctor. The Doctor has certified that Thiru G.V.N. has shown neurologically a very good improvement. He is of opinion that his present recovery is sufficient to enable him to attend to his office work for which he is fit. This certificate is enclosed.

Thiru G.V.N. is an Offg. DIG of Police. He has to tour extensively for performing annual inspection of various units in the District in the Range. He has to advise and if necessary supersede the S.Ps in times of grave disorder, taking over full control of the situation. He will have to pay particular attention to the training and discipline in the Police Force. It will be clear from the above position that the DIG of Police has a very large measure of strenuous executive work to do. This would

entail long tours, attendance at and inspection of parades, supervision of large scale bando-bust for visits of VIPs. Hence, as DIG of Police, Thiru G.V.N. does not merely have to do office work but he has also a large measure of executive work requiring physical activity. It has been reported to the Government that G.V.N. is able to walk with the aid of crutches. The Government, therefore consider that G.V.N. may be placed before a Medical Board for a definite recommendation about his fitness to perform not merely office work but also executive work. The Supdt. of Government General Hospital is requested to constitute a Medical Board to examine the officer and send the report of the Medical Board to Government immediately. He is also requested to intimate the officer the date and time on which he should appear before the Medical Board.

The Supdt., G.G.H., Madras is requested to return the certificate of medical fitness by the Medical Attendant of Thiru G.V.N. alongwith the report of the Medical Board."

14. The Medical Board seems to have examined the petitioner, Mr. Narayanan in this case thrice and recommended spells of long leave on all occasions. On 26.4.74, after careful examination of the case, the Medical Board certified that the officer is suffering from Idiopathic Polyneuropathy of the Guillain Barre Type and sincerely declared that according to the best of their judgment, a period of absence from duty of six months is essentially necessary for the recovery. The State Government, taking into consideration the duties reported that the DIG of Police will not have to sit in the office but he will have to go in the field to control the law and order situation. It was also reported that the officer will also be required to undertake long tours, attendance at and inspection of parades, supervision of large scale bando-bust for visits of VIPs. It was also admitted position that the officer was not able to walk without the aid of crutches. The respondents, the State of Madras, recommended his compulsory retirement. However, the Central Government advised to seek the retirement under sub-rule(2) of rule 16. However, the advice was not accepted and thereafter, the Central Government passed the order on 10.12.75 to retire the DIG. The Gazette Notification in this behalf was also published on 16.12.75.

15. In the light of the said facts, we will also have to consider sub-rule(3) of rule 16. Since this itself does not contain any guidelines, directions or criteria, the instructions issued by the Government furnish an essential and salutary procedure for the purpose of securing uniformity in application of the rule. These instructions really fill up the yawning gaps in the provisions, and are embedded in the conditions of service. Paragraph 5 of the guidelines, we find, is extracted in the judgment of G.V. Narayanan Vs. U.O.I. on page 32, para 3 which reads as under:-

"In a case in which an officer's integrity is not in doubt if his physical or mental condition is such as to make him inefficient for further service, it would be appropriate to consider him for premature retirement. However, in such cases, it may be desirable, once it has been decided with the approval of the Central Government to retire an officer prematurely, that the State Government first advise the officer to opt to retire under sub-rule(3) of rule 16 of the AIS(DCRB) Rules; formal action under sub-rule(2) being taken only in the event of the officer failing to avail himself of this advice."

Thus, in the case of G.V. Narayanan, the advice was given in the light of the guidelines issued by the Central Government. However, in the instant case, the offer was not made to the officer to opt to retire under sub-rule(2) of rule 16. In the cases of Sant RamSharma Vs. State of Rajasthan, reported in AIR 1967 SC 1910 and Union of India Vs. K.P. Joseph, reported in AIR 1973 SC 303 and in the case of State of Uttar Pradesh Vs. Chandra Mohan Nigam & Others, reported in AIR 1977 SC 2411, Hon'ble Supreme Court was considering the guidelines issued by the Government. Their Lordships were of the view that while purity in administration is to be desired, the security and morale of the services have also to be maintained. It is because of these considerations that the Government has issued appropriate and reasonable instructions to guide the authorities in passing orders for premature retirement. In these cases, their Lordships have taken the view that

ordinarily, the guidelines issued by the Government should be followed and in case of exceptional circumstances or if new circumstance justifies any different approach, then there can be a slight variation and which will have to be explained by the State.

16. Now the question which needs consideration is that why the guidelines issued in para 5, we find, as extracted in the judgments of G.V. Narayanan (supra) and Shankar Rao Vs. Government of India, (1971) 1 MLJ 302 were not followed. Even in para 8 of the Judgment of G.V.Narayanan, which is cited by the learned counsel for the respondents, the directions have been reproduced and it was ordinarily necessary for the Government first to advise the officer to opt to retire under sub-rule(2) of rule 16 and formal action under sub-rule(3) was to be taken thereafter if the advice is not accepted. Atleast, the Government is expected to follow its own guidelines. In the case of G.V. Narayanan(supra), this guideline was followed. In fact, the offer was made to the officer to opt for his retirement under sub-rule(2) of rule 16 and as he declined, the necessary order was issued under sub-rule(3) of rule 16. Thus, there is again a violation of the guidelines issued by the Government.

17. Rule 13, Rule 15 and sub-rule(3) of rule 16 are independent of each other and are reserved for the Central Government to apply the provisions, whenever necessary in the facts and circumstances of the case. Rule 13 and Rule 15 enable the Government to pass an order of compulsory retirement when the Government is of the view that the mental disability interferes with the efficient discharge of his duties of the officer has been permanently incapacitated on account of the disease. The words "efficient discharge of the duties" used in clause (b) of Rule 13(1) correlated with mental disability and in case

(35)

of mental disability, it is necessary that the Government should come to the conclusion after considering the report of the medical board so constituted that the mental disability is of a nature which interferes with the efficient discharge of the duties. In the instant case, neither the medical board nor the reports of the later years show that on account of mental sickness, there was any probability of interference with the efficient discharge of his duties in the later years. Again the word "disability" as used in clause (b) cannot be substituted for mental disorder of mild type. Rule 13 and Rule 15 are the special rules and when there is a case of mental disability, mental sickness or permanent incapacitation, then Rule 13 and Rule 15 should ordinarily be invoked. It is true that inefficiency is there but the inefficiency cannot be equated with the inefficiency on account of mental suffering. Thus, when the special rule is there, then the general rule cannot be applied and we are of the view that there is a departure from the procedure prescribed. Therefore, instead of applying sub-rule(3) of rule 16, the Government should have considered the case of the applicant under Rule 13 or Rule 15 and should have followed the same procedure.

18. Now the question that remains is that in the facts and circumstances of the case, even if we take into consideration that the procedure followed is irregular or illegal, what consequence will follow because of that illegality or irregularity. It is settled law that when there are undeniable facts on records, then any violation of any rule will not stand in the way. In the same way, if there are undeniable facts on record, then the case will have to be looked in the light of the said provision. In the instant case, the undeniable facts are as under:-

(i) that the applicant was promoted on 12.7.93 by way of adopting merit-cum-seniority selection procedure in the above super-time scale.

(ii) there is no adverse report or a report of any medical authority of the period subsequent to the date of promotion.

(iii) that in the later years of service and particularly, from 1991 to the date of his retirement, there is no adverse remarks about his health. On the contrary, the remarks are that the applicant is maintaining a robust health. His health is satisfactory and good.

(iv) that Annexure R/1, the certificate issued by the Medical Board prior to his promotion was available with the authorities even at the time of the promotion and after considering that certificate and the entries made, the respondents have promoted the applicant. The certificate, Annexure R/1, reads as under:-

"At present Mental State Examination and Psychodiagnostic Tests do not reveal any gross psychiatric abnormality which indicates that he is well maintained on treatment which he should continue under psychiatric supervision."

(v) that the State Government disagreed with the Central Government and reported that the performance of the officer is good. The officer was not on deputation and the Central Government had no opportunity to see his work.

Thus, at the relevant time, the state of health was also good and the Doctors have not opined that the state of health will affect adversely in the discharge of his duties.

19. During these periods, the Chief Secretary of the State, Shri V.B.L. Mathur issued a certificate of appreciation on 19.6.91 and congratulated him for his better performance and the similar certificate was also issued by the Chief Electoral Officer. Thus, we are of the view that ordinarily, Rule 13 and Rule 15 should have been applied and the Government have committed an error in applying sub-rule(3) of rule 16. However, in every case, wrong application of rule is not fatal. It may be in favour of either of the parties if on the admitted facts, the position is to be judged. As stated above, there is

Only

a violation of the rules, we are of the view that this is not fatal and it is the case in which applicant has not been prejudiced to a great extent that he had no opportunity to put up his case under Rule 13 or Rule 15. However, there is no adverse factual report or adverse ACR about the health in the later part of the year or at the relevant time, as such, the applicant can get the advantage of the admitted facts and it is not necessary to re-refer the matter for invoking other provisions of the law.

20. Mr. Mathur, the learned counsel for the applicant, also raised the preliminary objection that the respondents had no jurisdiction to have the second review. We are of the view that ordinarily, the second review may not be permissible but in special cases, the second review is advisable also and in the second review, ordinarily, the new developments are looked into and it is not fatal and the applicant cannot get any advantage merely because there is a second review. In the instant case, in fact, the case of the applicant was considered as stated by the State Government on 1.10.91 and the order has been passed on 8.12.93, i.e. after 2 years and 2 months. What has happened in the intervening period is not known on account of non-production of the record and we are of the view that the applicant can derive benefit out of it and he cannot make any grievance about the second review. There is one more important factor that after passing of the order, Annexure A/1 dated 8.12.93, it was necessary to notify the same by the State Government. Under GIMHA letter no. 20/10/64-AIS(II), dated 6.3.66, the Government has taken the view that the order in each case would need to be issued by the Central Government but the formal notification giving effect to the above order would be issued by the State Government. A specific query was made even during the course of arguments to the Assistant Secretary, who is the Officer Incharge of the case to show whether

any notification as referred to above, has been issued by the State Government and if so, when. The Officer Incharge submitted that no notification has been issued so far. Only the order of the Central Government has been served as directed by the Central Government to the Officer Incharge and the FPO has been prepared. We fail to understand why no notification has been issued particularly, when the directions are very clear. Thus, taking the total picture of the case into account, we are of the view that this is a case in which the order, Annexure A/1, dated 8.12.93 should be set aside and should be quashed and the applicant should be reinstated in the service with all consequential benefits. The respondents will be at liberty to take into the account the subsequent performance of the applicant and if they find that the applicant is not performing his duties effectively, may be on account of mental health or any other count, then the respondents will be at liberty to pass a fresh order, if necessary.

21. In the result, the O.A. succeeds and the order, Annexure A/1, dated 8.12.93 is set aside and quashed. The applicant should be reinstated in service with all consequential benefits. There shall be no order as to costs.

(O.P. SHARMA)
Administrative Member

(D.L. MEHTA)
Vice-Chairman