IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Soumen Sen
And
The Hon'ble Justice Saugata Bhattacharyya

W.P.C.T. 37 of 2020
With
C.A.N. 4388 of 2020

The Principal Commissioner of CGST and Anr.
Vs.
Arvind Mohan Sahay and Ors.

For the Petitioner	: Mr. K.K. Maiti, Adv. Mr. Tapan Bhanja, Adv.
For the respondents	: Mr. L. Gupta, Sr. Adv., Mr. Bharat Bhushan, Adv. Mr. C. Gupta, Adv.
Heard on	: 25.08.2020
Judgment Date	: 30th September, 2020.

Soumen Sen, J.:- This writ petition is directed against an order passed by the Central Administrative Tribunal CAT in connection with an application filed by one Arvind Mohan Sahay (for short "applicant") against the decision of the appellant writ petitioner in rejecting his representation for release of his retirement benefits including pension, gratuity and other accumulated dues with all consequential benefits arising out of the order of the compulsory retirement on 18th March, 2016 issued by the Ministry of Finance, Department of Revenue, Central Board of Excise and Customs (for short CBEC), Government of India, in view of pendency of a disciplinary proceeding and for quashing of the Charge Memo dated 13th April, 2018 issued during the pendency of the said proceeding.

The Tribunal on consideration of the materials on record and the relevant rules quashed the charge Memo dated 13th April, 2018 and directed the authorities to release pension and gratuity of the applicant in accordance with law, if no judicial proceeding or no other departmental proceeding is pending against him, with liberty to act in accordance with law for the purpose of initiating departmental proceeding.

This order is under challenge in this writ application.

Shorn of details, the applicant was initially appointed as Custom Appraiser in 1980 and at the time of his compulsory retirement he was working as Commissioner of Customs & Central Excise being appointed to the said post by an order No.181/2013 dated 30th July, 2013 on the recommendation of UPSC and with the approval of Appointment Committee of Cabinet (ACC). While working as Commissioner, CBI, ACB, Kolkata registered a Case R.C. No. 010 2014 A 0009 dated 03.04.2014 against Shri A.M. Sahay, Commissioner, Central Excise and Service Tax, Kolkata-II and 5 others U/S 120B of IPC and Section 7, 12 & 12(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988. It is alleged that the CBI investigations revealed that Shri A.M. Sahay while working as Commissioner, Central Excise and Service Tax, Kolkata-II entered into a criminal conspiracy with Shri M.S. Barman, Superintendent of Anti-Evasion of his Commissionerate, Shri R.K. Bhalotia and his son Shri Prateek Bhalotia of M/s. Riddhi Siddhi Udhyog Limited, during the year 2014 and demanded and accepted illegal gratification of Rs.50 lakh from them in consideration of sending a favourable report with respect to an ongoing enquiry against their Company M/s. Riddhi Sidhhi Udyog, Kolkata engaged in manufacturing of Phosphoric Iron (Medium phosphorous) Brake Blocks. Mr. Sahay alleged to have managed to remove from official records the inculpatory statement of Shri R.K. Bhalotia voluntarily tendered by him on 18.03.2014 before Shri M.S. Barman, Superintendent. Shri Sahay negotiated and agreed to receive Rs.50 lakhs in cash as illegal gratification and the said amount was got delivered to persons as instructed by him in Mumbai and out of this Rs.44.14 lakhs was recovered by the CBI.

Consequent upon his detention by the CBI in the aforesaid matter, Shri A.M. Sahay was placed under deemed suspension from the date of his detention i.e. 05.04.2014, which was continued for a further period of 180 days each, vide Orders dated 30.06.2014 and 30.12.2014 and for a period of 90 days each vide Orders dated 26.06.2015, 24.09.2015 and 23.12.2015.

Later invoking the provisions of clause (j) of Rule 56 of the Fundamental Rules, the Competent Authority compulsorily retired Shri A.M. Sahay, with immediate effect on his having attained the age of 50 years in the public interest by an Order No.26/2016 dated 18.03.2016.

The order dated 18.03.2016 whereby and whereunder the applicant was compulsorily retired under Clause (j) Rule 56 of Fundamental Rules is extracted herein below:-

F.No.C-50/09/2016-Ad.II
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
....

North Block, New Delhi
Dated, the 18th March, 2016

ORDER No. 26/2016

WHEREAS the President is of the opinion that it is in the public interest to do so:

NOW THERFORE in exercise of the powers conferred by clause (j) of Rule 56 of the Fundamental Rules, the President hereby retires Shri A.M. Sahay IRS(C&CE:1990), Commissioner of Customs and Central Excise (U/S): with immediate effect, he having already attained the age of 50 years. The President also directs that Shri A.M. Sahay shall be paid a sum equivalent to the amount of his pay plus allowances for a period of three months calculated at the same rate at which he was drawing them immediately before his retirement. **(emphasis supplied)**

(Jai Prakash Sharma
Under Secretary to the Government of India.)

To

Shri A.M. Sahay IRS(C&CE: 1990)
Commissioner (U/s),
Kolkata Central Excise-II,
Kolkata

The respondent initially filed an application under Section 19 of the Administrative Tribunals Act, 1985 before the Central Administrative Tribunal, New Delhi challenging the said order of compulsory retirement dated 18th March, 2016, which, however, was subsequently withdrawn.

Since the applicant did not receive post retiral benefits except provisional pension after the issuance of the order of compulsory retirement and the provisional pension sanctioned by the Additional Commissioner of Central Excise, Calcutta-I, under Rule 64 of the CCS (pension) Rule 1972 on 13th January, 2017 was determined without taking into account of the revision of salary under 7th Pay Commission effective from 1st January, 2016 and paid only after 11 months of retirement, the applicant made several representations between 29th November, 2016 and 7th March, 2017 demanding removal of such anomalies which, however, did not elicit any reply from the authorities.

Being aggrieved by such inaction and/or failure to release the retiral benefits to the applicant an original application being O.A. No.350/00450/2017 was filed by the applicant before the learned Tribunal. The said application was disposed of on 13th April, 2017 by directing the Revenue Secretary, Ministry of Finance Department of Revenue, Government of India to consider and dispose of the last representation dated 7th March, 2017 of the applicant by a well reasoned order as par the rules and intimate the decision within a period of 3 months from the date of receipt of the copy of the order.

Following the said direction the under Secretary to the Government of India, Ministry of Finance issued a Memo dated 17th April, 2017 by which the Chief Commissioner of Central Excise was requested to issue a status report of the case to enable the department to consider the same. Since the matter did not progress further and disbursement of the pensionary benefits did not happen, on 6th June, 2017, the applicant made a representation to the Commissioner of Excise specifically stating that the order of compulsory retirement under Rule 56(j) of the Fundament Rules issued by the Hon'ble President of India specifically ordered to determine his pay immediately before his retirement and not before his suspension. It was stated that the pay is required to be fixed, regularising the pension period as on the date of his retirement. The petitioner was only receiving subsistence allowance, which does not fall within the meaning of and/or definition of "pay" within the F.R.S.R. Rule.

Ultimately by a Memo being No.II(25)4-Pen/H. Q./C.Ex./Kol-I/16/14698B dated 15th June, 2017 issued by the Additional Commissioner (P&V), Central Excise, Kolkata-I Commissionerate, the representation made by the applicant dated 7th March, 2017 was rejected.

The authorities rejected the representation based on a vigilance report dated 15th March, 2017 (bearing an official stamp of 30th March, 2017). The order of rejection admits that there was delay in disbursing the post retirement benefits but attributed such delay due to non-availability of the original service book and vigilance status report. The rejection order records that after receipt of vigilance status report from the Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, in short, (CBEC) vide letter F. No. B-11015/03/2016-Ad.v/1955 dated 15th March, 2017 the applicable Rule for provisional pension was shifted from Rule 64 to Rule 69 of CCS Pension Rules 1972. The said order highlighted the observation in the vigilance status report, namely, *"Since he was retired while under suspension, the departmental proceedings shall be deemed to have been initiated from date of suspension."*

The relevant observations in the vigilance report are:

"2. Based on the records of Directorate General of Vigilance, Customs & Central Excise and ad. V-Section of CBEC, vigilance status for the above mentioned officer is as under:

(i). As per RC-3(A)/98-PATNA M/s. G.R. Gaurishankar, Deoghar evaded duty on the aluminium wire manufactured from Aluminium Ingot imported under DEEC Scheme. They also availed modvat. M/s Jasidih Wires and M/s Shankar Conductors were not functioning during June-August, 1990 but filed monthly returns and revised returns respectively, falsely showing production of wires and their sale to M/s G R Gaurishanker, based on which they falsely claimed and received the refund of NCCD to the Extent of Rs. 14,28,125/-, CVC vide OM No. 99/CEX/014 dated 21.05.2003 advised initiation of RDA Minor. Chargesheeet for major penalty issued vide F.No.C-14011/23/03-AD.V dated 24.12.08.

(ii) CBI Kolkata RC 010 2014(A) 009 against Shri Arvind Mohan Sahay, Commissioner, Central Excise, Kolkata-II, and 5 others for alleging demand and agreeing to acceptance of illegal gratification, for undue favours during adjudication of show cause notice for evasion of central excise duty amounting to Rs.9.26 crores issued to M/s Ridhi Sidhi Udyog. A trap was laid successfully in Mumbai and Shri Sahay was arrested along with other accused persons at Kolkata on 05.04.2014. Shri Sahay was produced before the Ld. Court of Sol. Judge, CBI, Court, Kolkata on 05.04.2014. The Ld. Court remanded Mr. Sahay in police custody upto 07.04.2014 and thereafter sent him to judicial custody up to 10.04.2014. Shri Sahay is on bail vide Court order dated 29.04.2014. Shri Sahay was placed under deemed suspension from the date of his detention i.e. 05.04.2014. vide order F.No.C-14011/9/2014-Ad. V dated 25.04.2014. The suspension of Shri Sahay was reviewed by the Competent Authority on the recommendation of the Review Committee and the Competent Authority ordered to continue his suspension from time to time, last such continuation was ordered for a further period of 90 days w.e.f. 24.03.2016 vide order dated 22.03.2016 CBI vide their report dated 04.02.2016 recommended prosecution of Shri A.M. Sahay and sought sanction for prosecution. UO Note seeking advice of CVC recommending sanction of prosecution as well as initiation of RDA for Major Penalty sent on 22.03.2016. CVC vide OM No. 014/CEX/011/313475 dated 02.05.2016 advised Prosecution and RDA Major. DGoV has furnished a draft Chargesheet and order documents without authenticated copies of RUDs. Ad.V vide letter dated 20.09.2016 requested to DGoV to submit authenticated copies of RUDs. The same is awaited.. Meanwhile, ***Shri A.M. Sahay has been retired prematurely under FR 56(i) vide order dated 18.03.2016. Therefore, sanction for his prosecution is not required. Since he was retired while under suspension, the departmental proceedings shall be deemed to have been initiated from the date of suspension.*** *Further, SP,*

CBI, ACB, Kolkata vide their letter dated 23.02.2017 has intimated that chargesheet was filed on 30.06.2016 in the said case against Shri A M Sahay, Commissioner Retd.), and others. Presently, the case is pending trial at pre-charge stage in the Court of the Ld. Special Judge (CBI), 3rd Special Court, Bankshall Street, Kolkata.

4. This issues with the approval of CVO, CBEC."

Thus, it appears that the vigilance status report has stated that Shri A.M. Sahay has been retired pre-maturely under FR 56(j) vide order dated 18.03.2016 and therefore, sanction for his prosecution is not required, since the applicant was retired while under suspension, departmental proceeding shall be deemed to have been initiated from the date of suspension.

Mr. Sahay joins issue here.

Shri A.M. Sahay challenged this decision by filing the O.A. No.350/1291/2017 before the Hon'ble CAT, Calcutta Bench on 1st September, 2017 and prayed for release of his post retiral benefits. The prayers in the O.A. are:

"a. Direction do issue directing the respective respondent authorities to cancel and/or withdraw the following orders:

i. Memo dated 15th June, 2017 issued by the Additional Commissioner (P& V) Central Excise, Kolkata – I Commissionerate having the new nomenclature of GST & Central Excise, North Commissionerate Kolkata being Annexure 'A-7' hereto;

ii. Vigilance Status Report dated 30th March, 2017 issued by the Under Secretary to the Government of India, Ministry of Finance, Department of Revenue being Annexure 'A-8' hereto;

iii. Memo being No.II(25) 4-Pen/H.Q/C.Ex./Kol-I/16 dated 18th July, 2017 was issued by the Under Secretary of the Joint Commissioner (P&V) CGST & Ex, Kolkata Central Commissionerate being Annuxure 'A-9' hereto and/or to act strictly in accordance with law;

b) Direction do issue upon the respondent authorities, their men/agents/subordinates to make payment of the retirement benefits of the applicant including gratuity, pension and other accumulated dues including arrear of the service benefit of the suspension period of the applicant and/or all other consequential benefit in terms of 7th Pay Commission including the payment of balance amount of leave encashment upon calculating the same on the basis of the 7th Pay Commission along with 18% interest and further to act and proceed strictly in accordance with law;

c) Prohibition do issue prohibiting the respondent authorities, their men/agents/subordinates from acting on the basis of the following orders.

i) Memo dated 15th June, 2017 issued by the Additional Commissioner (P&V), Central Excise, Kolkata – I Commissionerate having the new nomenclature of GST & Central Excise, North Commissionerate Kolkata being Annexure 'A-7' hereto;

ii. Vigilance Status Report dated 30th March, 2017 issued by the Under Secretary to the Government of India, Ministry of Finance, Department of Revenue being Annexure "A-8" hereto;

iii. Memo being No.II(25)4-Pen/H.Q./C.Ex/Kol-1/16 dated 18th July, 2017 was issued by the Under Secretary of the Joint Commissioner (P&V), CGST & Ex, Kolkata Central Commissionerate being Annexure "A-9"hereto and/or from withholding the payment of retirement benefits of the applicant including pension, gratuity and other accumulated dues of the applicant and/or all other consequential benefit and further to prohibit them from acting otherwise than in accordance with law;

d) Direction do issue upon the respondent authorities to produce and/or cause to be produced the entire records relating to the matter and on such production being made to render conscionable justice;

e) Cost and costs incidental hereto;

f) And/or to pass such other or further order or orders as to your Lordships may seem fit and proper."

It is the contention of the applicant that in the affidavit filed by the respondent authorities before the Principal Bench, Central Administrative Tribunal, New Delhi it has clearly stated that the Review committee before arriving at a decision of recommending for premature retirement of the applicant under FR 56(j) considered the entire service records of the applicant. Furthermore the other independent committee namely the Representation Committee also concluded that the review committee had clearly indicated the reasons to substantiate the grounds on which the decision to prematurely retirement of the applicant had been taken.

The representation committee noted that the facts on records placed by the respondent i.e. the Department also clearly brought out that the decision had been taken in a reasoned manner strictly in public interest and without any prejudice or arbitrariness. In that view of the matter at this stage the vigilance report cannot alter the situation for application of Rule 69 in lieu of Rule 64 for grant of pensionary benefit to the applicant which is nothing but a colourable exercise of power.

The provisional pension was sanctioned in favour of the applicant under Rule 64 of the CCS (Pension) Rules, 1972, but after issuance of the vigilance status report dated 30th March, 2017 by the Under Secretary to the Government of India, Ministry of Finance, the Department of Revenue surprisingly converted from Rule 64 to Rule 69 of the CCS (Pension) Rules, 1972 in granting sanction of pension of the applicant. The Memo dated 15th June, 2017 purportedly stated that the applicant was retired while under suspension, departmental proceeding shall be deemed to have been initiated from the date of suspension as stated in the vigilance status report and consequentially Rule 69 of the CCS (Pension) Rules, 1972, was invoked which is not tenable in the eye of law.

The language of rule 69 of the pension rules, 1972 inasmuch as, the word suspension specifically used in that particular rule is not construed in the event the pension sanctioned prior to the charge sheet then the effective date would be the order of suspension because the charge sheet was issued after the date of suspension.

The respondent authorities initially sanctioned pension in favour of the applicant in terms of Rule 64 of the CCS (Pension) Rules, 1972, but subsequently application of Rule 69 from Rule 64 of the CCS (Pension) Rules, 1972 upon perusal of the vigilance report dated 30th March, 2017 is not permissible since the vigilance report cannot alter the situation and thus liable to be vitiated for the reasons as follows:

> *(a) Admittedly, on the date of issuance of the compulsory retirement order by the Hon'ble President of India under Rule 56(j) of the Fundamental Rule, no departmental proceeding was initiated against the applicant;*
>
> *(b) The applicant was only under suspension on 18.03.2016 when the order of compulsory retirement was issued;*
>
> *(c) Taking into consideration this aspect of the matter, the authority rightly invoked Rule 64 of the CCs (Pension) Rules, 1972;*
>
> *(d) Rule 69 of the CCS (pension) Rules, 1972 in respect of disbursement of the pensionary benefits can only be invoked, if the conditions of Rule 9(4) of the CCS (Pension) Rules, 1972 is fulfilled;*
>
> *(e) Rule 9(4) of the CCS (Pension) Rules, 1972 specifically states that a charge sheet should have been drawn up before the retirement of the applicant;*
>
> *(f) Admittedly, no charge sheet was filed on the date of issuance of the order of compulsory retirement dated 18th March, 2016 and, therefore, Rule 9(4) of the CCS (Pension) Rules, 1972 will not be applicable in the instant case and consequentially Rule 69 of the CCS (Pension) Rules, 1972 cannot be invoked for calculating the pension and other retiral benefits admissible to the applicant.*

In light of the above, it was contended that the order dated 15th June, 2017 issued by the Additional Commissioner (P&V), Central Excise, Kolkata-I Commissionerate, rejecting the claim of the applicant and the vigilance status report wrongly invoking Rule 69 of the CCS (Pension) Rules, 1972 in calculating the pensionary benefits of the applicant, is erroneous, colourable exercise of power and bad in law.

Mr. Sahay had relied upon a Memo being No.II(25)4-Pen/H. Q./C.Ex./Kol-I/16/ dated 18th July, 2017 issued by the Under Secretary of the Joint Commissioner (P&V), CGST & Ex, Kolkata Central Commissionerate was served upon him in regard to payments of his leave encashment and gratuity, which, inter alia, states:

01. As per Rule 69(1)(c) of the CCS (Pension) Rules, 1972 no gratuity or commuted value of pension should be paid in favour of the retiree due to in-conclusion of the departmental or judicial proceedings and issuance of final order (copy of Vigilance Status Report as received under F. No. B-11015/03/2016/A-d. V/1955 dated 15.3.2017.
02. In case of releasing of leave salary in favour of A.M. Sahay, Commissioner (Retd.), the Joint Secretary (Admin), CBEC North Block, New Delhi has been requested to give direction vide C. No. II(25)4-Pen/H. Q./C.Ex./Kol-I/16/18648B dated 08.08.2016, 22941B dated 26.09.2016, 1319B dated 17.1.2017 and 4140B dated 22.02.2017. But direction regarding leave salary is still awaited.

It has further contended that as per proper direction from the Board, the remaining post-retiral benefits of the applicant such as releasing gratuity and leave encashment should be initiated.

Though the 7th Pay Commission has been implemented from the date of retirement of the applicant, i.e. on 18th March, 2016, the respondent authorities have not disbursed the pensionary benefits to the applicant in terms of the 7th Pay Commission, neither the arrears to that effect has been paid to the applicant causing serious pecuniary loss to the applicant.

However, on 24.08.2017 by and under a Memo being C No.11(25) 16-Pen/AC/C/Ex./Kol-I/16/52/10582 issued by the Joint Commissioner (P&V) the applicant was sanctioned the leave encashment though the same has not been calculated and paid in terms of the 7th Pay Commission.

The Vigilance Status Report dated 15th March, 2017 has purportedly given a different picture and misled the order issuing authority by wrongly narrated Rule 69 of the CCS (Pension) Rules, 1972 and further requested to apply and implement the same for calculating the pensionary benefits of the applicant is absolutely whimsical, erroneous, bad and liable to be quashed.

It is further contended that Rule 69 of the CCS (Pension) Rules, 1972 is applicable for only computation of the pensionary benefits. The respondent authorities wrongly interpreted Rule 69 of the CCS (Pension) Rules, 1972 on the premises that the departmental proceeding was initiated against the application before the date of his compulsory retirement, i.e. 18th March, 2016; though in fact, no charge sheet was drawn up against him before the said date and unless the charge sheet in respect of the departmental proceeding is drawn up, Rule 9(4) of the CCS (Pension) Rules, 1972 cannot be invoked and, therefore, the applicant is entitled to get all his retiral benefits in terms of Rule 64 of the CCS (Pension) Rules, 1972.

During the pendency of the aforesaid applications the authorities issued a Memorandum dated 13th April, 2018 which is in the nature of a charge-sheet. The said Memorandum No.11 of 2018 dated 13th April, 2018 reads as follows:

> *MEMORANDUM NO.11/2018*
>
> *In pursuance of order issued from F.No.C-14011/09/2014-Ad. V dated 25.04.2014 placing Shri A.M. Sahay under deemed suspension from the date of his detention i.e. 05.04.2014 by the CBI in RC No.010 2014 A0009, which was continued for a further period of 180 days each, vide orders dated 30.06.2014 and 30.12.2014 and for a period of 90 days each, vide orders dated 26.06.2015, 24.09.2015 and 23.12.2015, and in terms of Rule 9(6)(a) of the CCS(Pension) Rules, 1972, it is proposed to hold an enquiry against Shri A.M. Sahay in accordance with the procedure laid down in the Rules 14 and 15 of the Central Civil Service (Classification, Control and Appeal) Rules 1965."* ***(emphasis supplied)***

Mr. Sahay received the charge memo on 16th July, 2018. He challenged this Memorandum by filing an application in the pending OA being M.A. No.621 of 2018 and prayed for quashing of the said charge sheet.

The said charge sheet has been challenged inter alia, on the grounds that:-

(i) Once an employee is compulsorily retired, the post retirement benefits are well assured to him, he is entitled to have a peaceful post retiral life without any stigma or strain whereas by issuing a

Memorandum a very serious attempt was made to take away his acquired right to post retirement benefits like gratuity, commutation of pension etc. which were otherwise guaranteed in terms of various judgments of the Hon'ble High Courts and Apex Court.

(ii) The alleged incident that had resulted in issuance of the subject Memorandum was fully considered by the Review Committee of the government while forming opinions for the applicant's compulsorily retirement in public interest. This was confirmed by the government in its counter affidavit filed in OA No. 2470/2016 before CAT, Principal Bench, New Delhi on 12th January, 2017. A Government servant cannot be punished twice one by way of compulsory retirement and the other by disciplinary proceedings for the same alleged incidence causing double jeopardy;

(iii) The charge Memorandum issued under Pension Rules 4 years after the alleged incident that too when deemed suspension has lost its force due to compulsory retirement, was totally unjustified. The charge memo under Pension Rules without approval of the Hon'ble President of India was grossly bad in law and liable to be quashed and set aside.

(iv) The charge Memo was issued in gross violation to Government of India's own instruction contained in CBEC's Circular dated 24.02.2011 which apprehends initiation of disciplinary proceeding on the basis of photocopies of relied upon documents which were neither certified nor authenticated.

The applicant was compulsorily retired from service vide order dated 18.03.2016 under Clause 56(j) of the Fundamental Rules with an assurance of pay equivalent to his pay and allowances for a period of 3 months.

Mr. Laxmi Gupta, the learned Senior Counsel appearing on behalf of the applicant in support of the impugned judgment has submitted that this assurance has now been belied which makes the order of compulsorily retirement punitive and the court in such a situation can lift the veil of the original order to find out its real character. Mr. Gupta in this regard has relied upon a decision of the Hon'ble Supreme Court in High Court of ***Punjab & Haryana through R.G. Vs. Ishwar Chand Jain & Anr.*** reported at **1999 (4) SCC 579** (Paragraphs 29 & 30).

The learned Senior Counsel has submitted that the authorities have also proceeded on the basis that Rule 64 of the CCS(Pension) Rules, 1972 would apply to the applicant and had processed the entitlement of the appellant and sanctioned leave encashment, however, all on a sudden they changed their stand and now purported to deny such entitlements in flagrant violation of all Rules and norms. It is strenuously argued that once the applicant was made to suffer an order of compulsory retirement on a clear assurance that his retiral benefits are protected and secured it is not open to the authorities to take a different stand after such order has been accepted by the applicant. The formation of opinion for compulsory appointment is based on the recommendation of the Review Committee & the Representation Committee.

The Committees considered the same material in recommending compulsory appointment. Although it was open to them to initiate departmental proceedings against such alleged misconduct in which case the superannuation of the applicant during the pendency of the departmental proceeding would not be a factor and a bar to such continuation in view of Rule 9(1)(6) of the CCS(Pension) Rules 1972, the authorities have invoked Rule 56(j) to compulsorily retire the applicant. This clearly establishes the mala fide and arbitrary conduct of the respondent authorities.

Per Contra, Mr. K.K. Maity the learned Counsel appearing on behalf of the appellant has submitted that the Learned Tribunal without properly appreciating the CCS (Pension) Rules wrongly passed the order by quashing the charge sheet. Rule 9(6)(a) clearly provides that departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the government servant or pensioner, or if the government servant has been placed under suspension from an earlier date, on such date.

The order of suspension has been issued on 25.04.2014 w.e.f 05.04.2014 and the same has been continued till the date of compulsory retirement of Shri Sahay. Hence Rule 9(6) (a) is applicable and rightly invoked against Shri Sahay.

It is submitted that the provision of Rule 9(2)(b) in this case is not at all applicable as the said Rules provides that the departmental proceedings, if not instituted while the government servant was in service, whether before his retirement, or during his re-employment (i) shall not be instituted save with the sanction of the President, (ii) shall not be in respect of any event took place more than 4 years before such institution.

The said Rule 9 (2) makes it clear that departmental proceedings if not instituted while the government servant was in service then the conditions mentioned therein will be followed. But in this case when Shri Sahay was in service the departmental proceedings has been initiated by issuing suspension order dated 25.04.2014 w.e.f 05.04.2014 and the same has been continued till his date of retirement by extension of suspension letter dated 23.12.2015. Therefore, the said provision of Rule 9(2)(b) has no manner of application in the present case.

The Learned Tribunal has wrongly applied such Rule and on complete misconstruction of the said Rule set aside the order and allowed the application.

The learned Counsel has relied upon the decision of the Hon'ble ***Supreme Court in Government of NCT (Delhi) –Vs- K. Srivatsan*** reported in **2014 (15) SCC 476** (Paragraphs 9, 11 and 12) and submits that in the said matter Rule 9, 9(1), 9(2) 9(6) and Rule 96 of CCS (Pension) Rules came up for consideration in the content of denial of gratuity due to pendency of departmental proceeding. The Apex Court has held that in terms of Rule 9(1) the gratuity can be withheld, if departmental or judicial proceedings is pending against the concerned employee. The Hon'ble Court has further held that Rule 9(6)(a) by a deeming fiction of law also mandates, that departmental proceedings will be deemed to have been initiated against an employee who has been placed under suspension. In such view of the matter the date of initiation of the departmental proceedings against the respondent, by a deeming fiction of law, would be the date when he was placed under suspension. Since the respondent was placed under suspension whilst he was still in service, it is apparent that Rule 9(2)(b)(ii) will have no applicability to the facts and circumstances to the present case.

Reliance has been placed on the decision of the Hon'ble ***Supreme Court in State of West Bengal and Ors. Vs. Aswini Mahato*** reported in **2016 (2) SCC 674** (Paragraphs 5 and 6) to emphasise that there was no bar to the impugned order being passed after superannuation as the enquiry had already been initiated before retirement which could have been continued even after the retirement.

It is submitted that in ***Union of India –Vs- Ajay Kumar Patnaik*** reported in **1995 (6) SCC 4412** (paragraphs 2, 9 and 10) it is clearly stated in the said decision [that since the competent authorities at different levels had considered the material and ultimately had decided to compulsorily retire the respondent from service, it cannot be said that it is an arbitrary decision]. In this regard reliance has been made to the decision of the Apex Court. It is clearly stated in the said decision that although pending the proceedings the respondent has already retired from service on attaining the age of superannuation, but that would not provide a ground to dispose of this matter without giving any finding on the action taken by the competent authorities. Otherwise, in all cases it would cause grave damage to public justice. The employee would get away with it due to pending proceedings. Therefore, it needs to be considered and decision rendered thereon whether the action taken by the government or the competent authorities is valid in law. In that perspective, mere retirement of the officer by efflux of time pending proceedings would not be a ground to close the matter.

Lastly, reliance has been placed on a Division Bench judgment of Delhi High Court in a writ petition being no.17221-22 of 2004 ***Union of India & Anrs –Vs- S.K. Mathur & Anrs.*** (Paragraphs 32 and 33), delivered on 21st October, 2010 to argue that the Court should interpret these Rules in a manner to give full effect to the purpose the Rules seek to achieve. It is submitted that the Hon'ble Division Bench has considered Rule 9(6) and in consideration of that the object of enactment of Rule 9 held that the cardinal principle of interpretation that no statue should be interpreted in a manner so as to render part thereof surpulsage should be applied in proprio vigour to the interpretation of the said Rules and full meaning and effect should be given to Rule 9(6)(a).

When interpreted in the said manner the result which emerges is that (i) Where a government servant was under suspension at the time of his retirement, the departmental proceedings shall be deemed to be instituted from the date of his suspension or the date of issuance of charge sheet to him, whichever is earlier and (ii) Where a government servant was not under suspension at the time of his retirement, the departmental proceedings shall be deemed to be instituted from the date of issuance of charge sheet to him. In that view of the matter, the Tribunal was not correct in holding that second part of Rule 9(6)(a) does not apply in a case of a pensioner.

The learned Counsel has strenuously argued that Compulsory retirement under 56(j) was not punitive or stigmatic. The Government has absolute right to take decisions of compulsory retirement without applying rules of natural justice and no show cause notice was required to invoke power under Rule 56(j) of Fundamental Rules as it was not in the nature of punishment. The order of compulsorily retirement did not suffer from mala fied/arbitrariness nor was it based on no evidence.

On the conspectus of the facts narrated above the impugned order needs to the scrutinized.

The learned Counsel for the parties have relied upon several Rules of CCS(CCA) and CCS(Pension) Rules. For the present purpose we may refer to Rule 9(1), 9(2)(a), 9(2)(b), 9(4), 9(6), 64 and 69 of CCS(Pension) Rules. These Rules are reproduced below:

"9(1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement:

Provided that the Union Public Service Commission shall be consulted before any final orders are passed:

*Provided further that where a part of pension is withheld or withdrawn, the amount of such pensions shall not be reduced below the amount of rupees three hundred and seventy-five (Rupees Three thousand five hundred from 1-1-2006-**See GID below Rule 49**) per mensem.]*

(9)(2)(a) The departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service:

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President.

(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment,-

(i) shall not be instituted save with the sanction of the President,

(ii) shall not be in respect of any event which took place more than four years before such institution, and

(iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.

(9) (4) In case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in Rule 69 shall be sanctioned.

(9) (6) For the purpose of this rule,-

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made, and

(ii) in the case of civil proceedings, on the date the plaint is presented in the Court.

(64) Provisional Pension.-(1) The various stages of action laid down in Rule 59 shall be strictly followed by the Head of Office. There may be an isolated case where, in spite of following the procedure laid down in Rule 59, it may not be possible for the Head of Office to forward the pension papers referred to in Rule 61 to the Accounts Officer within the period prescribed in sub-rule (4) of that rule or where the pension papers have been forwarded to the Accounts Officer within the prescribed period but the Accounts Officer may have returned the pension papers to the Head of Office for eliciting further information before issue of pension payment order and order for the payment of gratuity. If the Head of Office in such a case is of the opinion that the Government servant is likely to retire before his pension and gratuity or both can be finally assessed and settled in accordance with the provisions of these rules, he shall without delay, take steps to determine the qualifying years of service and the emoluments qualifying for pension after the most careful summary investigation that may be made. For this purpose, he shall,-

(i) rely upon such information as may be available in the official records; and

(ii) ask the retiring Government servant to file a written statement on plain paper stating the total length of qualifying service including details of emoluments drawn during the last ten months of service but excluding the breaks and other non-qualifying periods of service.

(69) Provisional pension where departmental or judicial proceedings may be pending.-

(1)(a) In respect of a Government servant referred to in sub-rule (4) of Rule 9, the Accounts Officer shall authorize the provisional pension equal to the

maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension." ***(emphasis supplied)***

A bare reading of the aforesaid Rules would show that the right of the President to withheld or withdraw pension is governed by Rule 9 of the Pension Rules.

Proceeding if initiated while in service in terms of CCS (CCA Rules) could be continued in terms of Rule 9(2)(a) of the Pension Rules. It contains a proviso which states that where the departmental proceedings are instituted by an authority subordinate to the President that authority shall submit a report regarding its finding to the President.

A plain reading of this Rule 9(2)(a) would show that it contemplates a situation where a departmental proceeding has already been instituted against a Government servant while he was in service but could not be finalised before his retirement. It provides a mechanism to be adopted after the final retirement of the government servant and lays down that departmental proceeding can be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service.

Proceeding if not initiated while the applicant was in service could still be initiated after his retirement in terms of rule 9(2)(b) provided (i) sanction is obtained from the President, (ii) it shall not be in respect of any event which took place more than four years before such institution,

***(See. Brajendra Singh Yambem v. Union of India & Ors.;* 2016 (9) SCC 20).** The third condition is not mentioned as it is not relevant.

In the instant case, to penalise the applicant Rule 9(6)(a) was invoked and not Rule 9(2)(b). The said Rule 9(6)(a) creates a legal fiction. It states that if an employee was suspended proceeding shall be deemed to be initiated on the date of suspension order was issued. The question is whether the said legal fiction can be applied to the applicant who has been compulsorily retired, that is to say, retired prematurely. The learned Counsel for the writ petitioner would make us read this legal fiction to extend to an employee who has been compulsorily retired. We are unable to accept such submission. Suspension in the present facts cannot continue beyond such retirement. The order of suspension merged with the order of compulsory retirement. The said Rule 9(6)(a) cannot be applied in the instant matter. Moreover, the invocation of Rule 69 instead of Rule 64 after the said Rule was applied to the applicant on the first opportune moment after the order of compulsory retirement is something more than its meet the eyes.

In this regard we may refer to sub rule 6(a) of Rule 9 of CCS Pension rules to clarify the position. This rule we have quoted above. On a careful reading of the said rule it can be seen that the rule makes a clear distinction between a government servant and a pensioner in extending the legal fiction for the purpose of continuation of the disciplinary proceeding after a person has retired. In order to attract such Rules the Government servant must be served with the statement of charges placed under suspension from an earlier date. For a pensioner the departmental proceedings shall be deemed to be instituted when he has received a statement of charges which clearly postulates that the government servant had received it during his service but the departmental proceeding could not be concluded before his retirement. None of these rules refer to a situation where an employee is compulsorily retired from service as opposed to a normal retirement as by reason of such premature retirement the order of suspension perishes and lost its force.

The tribunal interpreted the rules in the manner following:

"Whereas, to penalise the present applicant who was by then a pensioner, Rule 9(6) of Pension Rules was invoked and not Rule 9(2). The said Rule 9(6) talks of a legal fiction that if an employee was suspended proceedings shall be deemed to be initiated on the date suspension order was issued. <u>Such legal fiction cannot apply to a compulsorily retired employee who is retired prematurely</u>, <u>as suspension cannot continue beyond such retirement."</u>

……………………………………

***"**A plain and simple reading of the provision would suggest that in terms of this rule, while 'suspension' qualifies only a "Government servant" and not a "pensioner", issuance of "statement of charges" qualify both "a government servant" as well as a pensioner. Therefore, a proceeding can be deemed to be initiated against a pensioner only upon issuance of "statement of charges" and not otherwise. In absence of any proceeding already initiated Rule 9(6)(a) cannot be invoked to initiate proceedings against a pensioner on the ground that he was suspended earlier and disciplinary proceedings cannot therefore be deemed to be instituted w.e.f. the date of suspension when the suspension had already lost its force."* **(emphasis supplied)**

We are in agreement with the said interpretation.

These Rules are to be juxtaposed with the facts stated above. It is beyond any cavil of dispute that prior to the order of compulsory Retirement the applicant was put under suspension in view of adverse reports against him. The applicant was facing CBI investigation. The record reveals that the writ petition was in possession of Vigilance report prior to the order of compulsory retirement. The suspension of the applicant was reviewed by the Competent Authority on the recommendation of the Review Committee and the Competent Authority ordered to continue is his suspension from time to time, last such continuation was ordered for a further period of 90 days with effect from March 24, 2016. CBI in its report dated February 4, 2016 recommended prosecution of the applicant.

It is discernable from the records that the Review Committee for ACC Appointees, that met on 12.02.2016 to consider invoking FR 56(j), recorded the following:-

> *"The Review Committee has very closely perused and examined the relecvant material relating to the service records of Shri A.M. Sahay, Commissioner (IRS:C&CE:1990) including the APARs for the period 2000-2001 to 2014-2015, IPRs filed by the Officer, material available with the Directorate General of Vigilance, CBEC and the general reputation of the Officer, Shri A.M. Sahay has attained the age of 50 years (DoB 07.07.1957) on 07.07.2007 and has completed 30 years of service in Government.*
>
> *2. The Review Committee finds that Shri A.M. Sahay has been repeatedly placed in Agreed Lists for the years 1993-94, 1995, 1997, 2001, 2002-03, 2014-15 and 2015-16. This aspect raises serious concerns on the integrity of the Officer's career spanning over three decades.*
>
> *3. The Review Committee has also come across two cases of serious nature reported against him. In the first case, the Officer's professional ability and competence had come into question in the year 2003 for his actions as Assistant Collector of Central Excise(Prev.), Patna which resulted in erroneous sanction of refund of Central Excise duty amounting to Rs.14,28,125/- by the Assistant Colector of Central Excise, Division Bhagalpur way back in 1992. The CBI recommended minor penalty proceedings against him in 2003. A charge Sheet was issued to him on 12.07.2004 which was challenged by him in Bombay High Court. The said Charge Sheet was quashed by the Hon'ble Bombay High Court purely on account of unreasonable delay in the issuance of the Charge Sheet without going into merits.*
>
> *4. In the second case, his personal integrity has come under serious cloud as Commissioner of Central Excise, Kolkata-II, in the year 2014 when he was arrested by the CBI in a case of demand of illegal gratification of Rs.50 Lakhs on the basis of material evidence available with CBI pertaining to the period, March & April, 2014. Shri A.M. Sahay had desired his share of bribe amount to Rs.50 lakhs be delivered to one Shri J.S. Chandok. Shri A.M. Sahay was arrested on 04.04.2014. He was placed under suspension on 25.04.2014 with effect from 05.04.2014 and is still continuing under suspension. The CBI has recently sought sanction for prosecution of Shri A.M. Sahay which is under scrutiny."*

5. The Review Committee examined these two cases in the light of instructions issued by the DoPT in its latest OM No. 25013/01/2013-Estt.A-IV dated 11.9.2015 and the judgments of the Hon'ble Supreme Court mentioned therein.

6. The Review Committee notes that in the first case the charge sheet dated 12.07.2014 issued to Shri A.M. Sahay was quashed by the Hon'ble Bombay High Court purely on technical grounds of unreasonable delay without going into the merits of the charges. The evidence clearly pointed out that he had miserably failed in his duties as Assistant Collector (Prev.) Hqrs. At the material time to alert the Assistant Collector Bhagalpur of the fraudulent refund claim, which also reflected poorly on the competence and professional ability of Shri A.M. Sahay as this led to revenue loss of about Rs.14.25 Lakh to the exchequer owing to erroneous refund.

7. The Review Committee also notes with concern that the investigations carried out by the CBI in the second case, on the basis of evidence collected during investigation and statements of various persons clearly establish the involvement of Shri A.M. Sahay, which cast serious doubts on his personal integrity.

8. The Review Committee in thus of the considered opinion that have regard to the facts as above, the integrity of Shri A.M. Sahay, Commissioner is in serious doubt. The Apex Court, in its judgment in the case of ***S. Ramachandra Raju Vs. State of Orissa*** *reported as* **(1994) 3 SCC 424** *has held that "The officer would live by reputation built around him. In an appropriate case, there may not be sufficient evidence to take punitive action of removal from service. But his conduct and reputation is such that his continuance in service would be a menace to public service and injurious to public interest". The Review Committee has already noted above the number of years in which Shri A.M. Sahay has been continually placed in the Agreed List. The Review Committee also refers to yet another judgment of the Hon'ble Supreme Court in the case of State of UP And Others Vs Vijay Kumar Jain Appeal (Civil)2083 of 2002 wherein it has been held by the Apex Court that conduct of a Government employee becomes unbecoming to the public interest on obstructs the efficiency in public services, the Government has an absolute right to compulsorily retire such an employee in Public interest.'*

9. The Review Committee has perused the APAR gradings of the Officer from 2000-01 onwards. The Committee notes that no APAR gradings are available for the periods 01.04.2009-30.07.2009, 2011-12, 01.04.2012-11.08.2012 and 2014-15, the last period the Officer having been under suspension during the period etc. The Review Committee is of the opinion that *despite the APARs not reflecting any sub-standard work, once the intergrity of the officer is clearly doubtful which is evident in this case in view of the fact that he has been repeatedly placed in the Agreed List, he has to be dealt with as per rules. The Review Committee takes into account the significant fact that Agreed List of officers is drawn after due deliberation in the joint meetings between the CBI and the CVO at the appropriate levels. The information available with CBI in respect of integrity aspect of the officers are shared with the Department. As already mentioned in para 2, Shri A.M. Sahay has time and again been place in the Agreed list. His repeated inclusion in the Agreed List in his service career of over three decades reflects very poorly on is intergrity.*

10. The Review Committee is of the considered view that probity in public life has to be maintained at all times and is sacrosanct for a public servant. However, Shri A.M. Sahay's integrity has come into question repeatedly. The arrest by the CBI in the case of seeking illegal gratification has reinforced the earlier assessment of the Officer of being included into he Agreed Lists of various previous years. Even though the APARs do not reflect adversely on the quality of his work, the fact remains that the Officer is of doubtful integrity. Therefore, the Committee is of the considered view that his continuance in service will be injurious to Public Interest. Under these circumstances, the Committee finds this to be a fit case for retirement by Government under the provisions of FR 56(j) and recommends accordingly ***(emphasis supplied)***.

The old record pertaining to the integrity of the applicant and an alleged incident of bribe in March and April, 2014 seems to have influenced the Committee to recommend the "compulsorily Retirement" by consciously ignoring the promotion in between as this "washed off theory" would have no manner of application when the case of the applicant was assessed to determine whether he is fit to be retained in service or requires to be given compulsorily retirement.

A bare perusal of the record and the facts narrated above would clearly show that the alleged acceptance of bribe was one of the factors that led to invoking FR 56(j) to compulsorily retire the applicant while the basis of indictments in the charge Memo dated 13.04.2018 are the following:-

> *"Investigation has revealed that M/s. Riddhi Siddhi Udyog(RSU) was facing serious enquiry be Central Excise Department, Kolkata-II Commissionerate, on the basis of an adverse reference received from Vigilance Department of RDSO, Lucknow, M/s. RSU which was manufacturing Phosphoric Iron(Medium Phosphorous) Brake Blocks for supply to various affices of Indian Railways, evaded Central Excise Duty for one of its units. Shri Arvind Mohan Sahay, Commissioner, Kolkata-II Commissionerate and Shri Mihir Sen Barman, Superintendent, working under said Shri A.M. Sahay negotiated with Shri Prateek Bhalotia in a meeting in order to reduce the burden of evaded Central Excise 90Duty and to return the inculpatory statement of Shri R.K. Bhalotia recorded on 18.03.2014. They demanded Rs.1 Crore for both of them which after desperate bargaining was settled to Rs.50 Lacs for Shri Sahay and Rs.25 Lacs for Shri Barman. The bribe amount of Shri Sahay was to be delivered at Mumbai while shri M.S. Barman agreed to accept the bribe at Kolkata. Shri Barman had accepted Rs.25 Lacs on 03.04.2014, while Shri Prateek Bhalotia arranged the delivery of Rs.50 Lacs to Mumbai through one Shri Rajkumar to Shri Jaspal Singh Chandok, Prop. Of M/s. Balu India and agent of Shri A.M. Sahay at Mumbai."*

Inquiry against an employee who had retired depends upon the nature of the statutory rule, which governs the terms and conditions of his service. The relevant rules governing the service conditions of an employee are the determining factor as to whether and in what manner the domestic enquiry can be held against an employee who stood retired after reaching the age of superannuation. Generally, if the enquiry has been initiated while the delinquent employee is in service, it would continue even after his retirement. In a case of retirement, master and servant relationship continue for grant of retiral benefits. Proceeding for recovery of financial loss from an employee is permissible even after his retirement. Superannuation as ordinarily understood has to be contradistinguished from compulsorily retirement. Unlike a retirement which happens after an employee completes his full length of service and till attains his age of retirement, compulsory retirement snaps his service prematurely in public interest and in the process he suffers being deprived of the full length of the service including retiral benefits that are likely to accrue for the remaining period of his service but for such compulsory retirement. The statutory age of superannuation is breached and curtailed. It is not a retirement as is normally understood and one would desire during his employment.

On the self same facts once the applicant was compulsorily retired with a promise to all retiral benefits and steps were taken in that regard the writ petitioner cannot suddenly change their mind and apply Rule 69 instead of Rule 64 of CCS(Pension) Rules to deny him retiral benefits and initiated a disciplinary proceeding almost after two years of his retirement. The writ petitioner in all the earlier proceedings have categorically stated that the said order of compulsory retirement was passed in public interest and it is not punitive or stigmatic.

The decision to retire an officer compulsorily is purely an executive function exercised in the light of the prevailing circumstances. The overriding aim at enabling administrators to further the public interest and public power self evidently be exercised in the interest of the public as a whole and that courts are the mere “hand maidens of public officials” to effectuate and facilitate the work of the bodies changed with acting in the public interest has insulated the decision to retire an employee compulsorily and hence rare interference by courts in judicial review of such a decision. In recent years, it is increasingly being realised that in a constitutional democracy the role of judicial review is to guard the rights of the individual against the abuse of public power. Hence now the question the court pose unto itself: Does the order cast aspersion or attain stigma to the officer when it purports to discharge him? If the answer to the question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held in substance to amount to dismissal.

Ordinarily, the order of compulsory retirement is neither punitive nor stigmatic. It is based on subjective satisfaction of the employer and a very limited scope of judicial review is available in such cases. It is well settled in law that the order of compulsory retirement is not a punishment. It also does not cast a stigma. But when by any incorporation or some reference or otherwise some stigma is attached to the order of compulsory retirement, it would be treated as an order or punishment, falling in a different compartment altogether losing its features of order of compulsory retirement under the Rules or Regulations under which he is not allowed to continue after attaining a particular age. Interference is permissible only on the ground of non-application of mind, mala fide, perverse, arbitrary or extraneous considerations if there is non-compliance with statutory duty by the statutory authority. The right to pass an order of compulsory retirement is to be exercised only against the Government servant whose efficiency is impaired and against whom it is not desirable to make formal charges of inefficiency or who has ceased to be fully efficient but not to such a degree as to warrant his retirement on compassionate allowance. If a discretionary power has been exercised for an unauthorized purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. Power to retire compulsorily the government servant in terms of service rule is absolute, provided the authority concerned forms a bona fide opinion that compulsory retirement is in public interest. (**See.** ***Punjab State Power Corporation Limited and Ors. vs. Hari Kishan Verma,*** **2015 (13) SCC 156;** ***Rajasthan State Road Transport Corporation and Ors. vs. Babu Lal Jangir,*** **(2013) 10 SCC 551)**

The sudden change of mind of the authorities is smitten with bad faith and arbitrary. The notion of improper purposes is more akin to bad faith. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest **(<u>See De Smith's Judicial Review, Eighth Edition.</u>).** The relevant Rules do not permit them to take recourse to Rule 69 once the case of the applicant was considered under Rule 64. It is a clear manifestation of want of jurisdiction and usurpation of authority and unauthorized assumption of power. The provisional pension was sanctioned under Rule 64 on 13th January, 2017 by the Additional commissioner of

Central Excise. The immediate reason for delay in disbursement was non-availability of the original service book. However, subsequently in rejecting the claim for Provisional Pension under Rule 64 reliance was placed on the vigilance status report which was the basis of the order passed under Rule 56(j). The pretentious innocuous and innocent non-punitive order now started showing its teeth and skeleton in the cupboard. The real purpose and character of the otherwise seemingly innocuous order of compulsory retirement is now visible and make us inclined to lift the veil to find out the real motive and purpose of the said order. This ascertainment is necessary in the teeth of the decision to suddenly change the Rule to the disadvantage of the applicant. In this regard we are fortified by the decisions in ***Ishwar Chand Jain & Anr.(*****supra).**

Any decision tainted with mala fide on arbitrariness strikes at the very root of the constitutional ethoes, values and morality and disrupts the social order. In ***Nisha Priya Bhatia vs. Union of India*** reported at **(2020) SCC Online SC 394** this constitutional duty and obligation has been emphasised in the following words:

> *" .... Every public functionary, including the three organs of government, are bound to discharge their functions in a bona fide, unvitiated and reasonable manner. A mala fide exercise of power is essentially a fraud on the power. The law regarding mala fide exercise of power, running across a catena of cases, is well settled. For an exercise of power to steer away from the taint of mala fides, such power ought to be*

exercised within the contours of the statute/law bestowing such power. Any exercise which exceeds the limits laid down by law; or is driven by factors extraneous or irrelevant to such exercise; or guided by malicious intent or personal animosity; or reeks of arbitrariness must fall foul in the eyes of law. This legal position is consistently expounded by this Court in ***S. Partap Singh vs. State of Punjab, Express Newspapers Pvt. Ltd. & Ors. vs. Union of India & Ors., J.D. Srivastava vs. State of M.P. and Others*** *and* ***Jaichand Lal Sethia vs. State of West Bengal.”***

The applicant was made to retire compulsorily even before he attained the statutory age of superannuation in public interest. The said order once accepted is final and binding on the parties and become effective on and from 18th March, 2016. There was no fresh material available with the writ petitioner to initiate a disciplinary proceeding after the order of compulsory retirement was passed. The explanation for delay in disbursing the post retirement benefits was due to non-availability of the original service book and vigilance status report. The Vigilance Status report mentions certain alleged incidence of bribe and recommendation of the Review Committee and the Competent Authority to continue the suspension of the applicant. The writ petitioner at the relevant time had the option to initiate departmental proceeding on the basis of the materials gathered against the applicant. The order of suspension culminates in the order of compulsory retirement and perishes with it. It no more survives. On such facts Rule 9(6)(a) and Rule 69 of the CCS (Pension) Rules cannot have any manner of application.

A show cause notice can be quashed if it is without jurisdiction, mala fide, arbitrary and patently illegal. It can also be challenged if it is issued in colourable or mala fide exercise of power and/or in bad faith.

There possibly cannot be a set of guidelines in regard to proof of mala fides. Mala fide depends upon own facts and circumstances. Mala fide means want of good faith, improper motive, bias or ulterior motive.

In ***Punjab State Electricity Board Ltd. v. Zora Singh;*** **(2005) 6 SCC 776**, the Supreme Court held that there cannot be any doubt whatsoever that even if an order is found to be not vitiated by reason of malice on fact but still can be held to be invalid if the same has been passed for unauthorised purposes, as it would amount to malice in law. In this case, the Supreme Court referred to the decision in ***S.R. Venkataraman v. Union of India;*** **(1979) 2 SCC 491**, wherein the Supreme Court referred to the observations made by ***Viscount Haldane in Shearer v. Shields;*** **1914 AC 808 (HL),** which are as follows:

> *"A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently."*

Acting on a legally extraneous or obvisouly misconceived ground of action is a case of malice in law. (***Regional Manager v. Pawan Kumar Dubey,* (1976) 3 SCC 334)**

“Mala fides”, a Latin expression, means bad faith. “Bad faith” is an antonym of “good faith”.

Where power is conferred to achieve a purpose the power must be exercised honestly, bonafide, reasonably and in good faith to effectuate the purpose, and in this context “in good faith” means “for legitimate reasons”. Where power is exercise for extraneous or irrelevant considerations or reasons, it is unquestionably a colourable exercise of power or fraud on power and the exercise of power is vitiated. (***Collector, Allahabad v. Raja Ram Jaiswal,* (1985) 3 SCC 1)**

In law, the expression “mala fides” has its own meaning. The meaning was explained by the Calcutta High Court in ***Ram Chandra Chaudhari v. Secy. to Government, W.B.*; AIR 1964 Cal 265**, as follows:

“Mala fides does not necessarily involve malicious intention. It is enough if the aggrieved party establishes –

that the authority making the impugned order did not apply its mind at all to the matter in question,

or

that the impugned order was made for a purpose or upon ground other than that what is mentioned on the face of the order.”

When a statutory authority takes any unauthorised action it is mala fide. It is abuse of his statutory authority. (***Jagannath Rao v. State of Orissa,* (1968) 3 SCR 789)**

As lucidly stated by Prof. S.A. De Smith: If a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised.

Every administrative power is to be exercised to fulfil the real purpose and not for any extraneous purpose. A power is exercised fraudulently if its repository intends for an improper purpose to achieve an object other than that which he claims to be seeking. The order of compulsory retirement now seems to have been issued with the purpose, object and motive to initiate disciplinary proceedings after the said order is accepted and implemented. The order of compulsory retirement for the ostensible public interest reasoning in reality turns out to be a preparation and the launching pad and used as a plank to initiate a disciplinary proceeding. In ***State Of Mysore vs P.R. Kulkarni & Ors.,*** *reported at* ***(1973) 3 SCC 597,*** the Supreme Court has explained this proposition as follows:

> *"the exercise of every power, whatever its nature, lodged in Government authorities, is controlled by the need to confine it to the ambit within which it could justly and reasonably be expected to take place. A power used under the misapprehension that it was needed for effectuating a purpose, which was really outside the law or the proper scope of the*

> *power, could be said to be an exercise for an extraneous or collateral purpose."*

The Supreme Court reaffirmed this legal position in ***State of Assam v. Banshidhar; (1981) 4 SCC 283,*** *laying down:*

> *"There can be no doubt that if any authority exercised any power conferred on him by law in bad faith or for collateral purpose, it is an abuse of power and a fraud on the statute. In such a case there can be no difficulty is striking down that act of the authority by the issue of an appropriate writ under Article 226 of the Constitution."*

We find that the sudden change of Rule is unfair, unauthorised and issued in bad faith. The authorities lack jurisdiction to invoke Rule 9(6)(a).

The fact situation in each of the cases cited by Mr. Maity, the learned Advocate for the appellant, are completely different from the facts and the issues involved here. In none of the cited cases disciplinary proceeding was initiated after an employee had retired by invoking Rule 56(j) with a promise to release all retiral benefits. The cases in my respectful reading do not address the issues that we have been called upon to decide in instant matter. The facts are also different. The judgments are to be read contextually. The judgments cannot be read as statutes. Any change in facts is a relevant factor in applying the ratio of a judgment. Different set of facts would lead to different results. The rules are to be applied and interpreted depending on the facts of each case.

In view of the aforesaid, the order of the learned Central Administrative Tribunal is upheld.

(Soumen Sen, J.)

Saugata Bhattacharyya, J.:

1. I have had the opportunity to read the draft judgment prepared by my esteemed brother Justice Sen. I am in respectful agreement with the findings arrived at by my Brother. However, I wish to briefly indicate my reasons for concurrence.

2. In the present writ petition preferred by the Principal Commissioner of CGST and Central Excise, North Commissionerate, Kolkata, inter alia, has challenged the order dated 22nd January, 2020 passed on original application being O.A. 350/1291/2017 and M.A. 350/621/2018 by the Central Administrative Tribunal, Kolkata Bench, Kolkata (hereinafter refer to as "the said Tribunal") whereby and whereunder the Tribunal was pleased to set aside the charge-sheet dated 13th April, 2018 and directed the respondent authorities to release pension and gratuity of the original applicant in accordance with law

with the rider if there is no pendency of any judicial proceeding or departmental proceeding against the said original applicant.

3. Arivind Mohand Sahay was the original applicant before the Tribunal in O.A. 350/1291/2017. He was appointed as Custom Appraiser in 1980 and thereafter he was promoted to Indian Customs and Central Excise Service (Group-A) as Assistant Collector in 1990 and there was further promotion in 1994 to the post of Deputy Commissioner of Customs and Central Excise. Subsequently, he was promoted to the post of Joint Commissioner of Customs and Central Excise in 2005 and thereafter again promoted to the post of Additional Commissioner of Customs and Central Excise in 2009. Finally on the recommendations of UPSC as per the Order No. 181/2013 dated 30th July, 2013 on the strength of approval of Appointment Committee of Cabinet (ACC), the original applicant/respondent No. 1 was promoted to the post of Commissioner of Customs and Central Excise.

4. The respondent No. 1 was placed under deemed suspension with effect from 5th April, 2014 vide order dated 25th April, 2014 in terms of Rule 10 (2) (a) of CCS (CCA) Rules, 1965. The said suspension got extended time to time vide orders of the concerned respondent authorities dated 30th June, 2014, 30th December, 2014, 26th June, 2015, 24th September, 2015 and lastly on 23rd December, 2015. The respondent No. 1 was placed under suspension in view of registering the case of CBI at Kolkata being RC No. 010 2014 dated 3rd April, 2014 under Section 120 B of Indian Penal Code and Section 7, 12 and 13 (2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 against the respondent No. 1. The respondent No. 1 was arrested by CBI along with other

persons on 5th April, 2014 and remained under police custody up to 7th April, 2014 and thereafter under judicial custody up to 10th April, 2014.

5. While the respondent No. 1 was manning the post of Commissioner of Central Excise and Customs at Kolkata by the dint of an officer order No. 26/2016 dated 18th March, 2016 issued under the signature of Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, was compulsorily retired from the said post in terms of 56(j) of the Fundamental Rules (FR) with immediate effect. The order of compulsory retirement dated 18th March, 2016 is reproduced below:

"F.No.C. 50/09/2016-Ad.II

Government of India

Ministry of Finance

Department of Revenue

Central Board of Excise & Customs

North Block, New Delhi

Dated, the 18th March, 2016

<u>Order No. 26/2016</u>

WHEREAS the President is of the opinion that it is in the public interest to do so:

NOW THEREFORE in exercise of the powers conferred by clause (j) of Rule 56 of the Fundamental Rules., the President thereby retires Shri A.M Sahay IRS (C & CE: 1990), Commissioner of Customs and Central Excise (U/S): with immediate effect, he having already attained the age of 50 years. The President also directs that Shri A.M. Sahay shall be paid a sum equivalent to the amount of his pay plus *allowances for a period of three months calculated at the same rate at which he was drawing them immediately before his retirement.*

(Jai Prakash Sharma)

Under Secretary to the Government of India

To

Shri A.M. Sahay, IRS (C&CE: 1990)

Commissioner (U/S),

Kolkata Central Excise – II

Kolkata"

6. The respondent No. 1 being aggrieved by the said order of compulsory retirement dated 18th March, 2016 preferred an original application before the principal bench, Central Administrative Tribunal, New Delhi questioning the compulsory retirement order but ultimately the said application stood withdrawn by him.

7. That after issuance of the order dated 18th Mach, 2016 by the respondent authorities compulsorily retiring the respondent No. 1 initially no retiral benefits were extended to the respondent No. 1. Thereafter, provisional pension was sanctioned by the Additional Commissioner (P & V) of Central Excise Kolkata – I Commissionerate under Rule 64 of the CCS (Pension) Rules, 1972 on 13th January, 2017. However, the grievance has been ventilated by the

respondent No. 1 that without giving effect to the revision of pay as recommended by 7th Pay Commission the provisional pension was sanctioned in favour of the respondent No. 1. Due to sanction of provisional pension by the concerned authorities instead of sanctioning final retiral dues compelled the respondent No. 1 to approach the concerned authorities by preferring representations for finalizing all his dues including retiral benefits. The date of such representation was 7th March, 2017.

8. Due to non-payment of the service benefits of the respondent No. 1 including retiral dues prompted him to file another original application being No. 350/00450 of 2017 before the said Tribunal, for clearing his dues expeditiously which was disposed of vide order of the Tribunal dated 13th April, 2017. The Tribunal in the said order dated 13th April, 2017 directed the Secretary, Ministry of Finance, Department of Revenue, Government of India, New Delhi, to consider and dispose of the representation of the respondent No. 1 by passing a reasoned order and communicate the same to the respondent No. 1 within a period of three months from the date of receipt of the copy of the said order.

9. That in terms of the order of the Tribunal dated 13th April, 2017, the Additional Commissioner (P & V), Central Excise, Kolkata – I Commissionerate passed order relating to release of service benefits and retiral dues to the respondent No. 1 under Memo dated 15th June, 2017. It appears from the said memo dated 15th June, 2017 that considering vigilance status report issued on behalf of Central Board of Excise and Customs (CBEC) addressed to the Principal Commissioner of Central Excise, Kolkata – I Commissionerate instead of Rule 64, Rule 69 of CCS (Pensions) Rules, 1972 was made applicable in

determining the issue of extending the benefits of retiral dues of the respondent No 1. Eventually it was communicated to the respondent No. 1 vide said memo dated 15th June, 2017 that arrear of provisional pension from 18th March, 2016 to December 2016 amounting to Rs.5,10,419/- and bill of provisional pension of each month to be sent to P.A.O. and order amounting to Rs.1,64,474/- dated 31st January, 2017 was sanctioned and vide a connected bill the same was forwarded to P.A.O. for making payment to the respondent No. 1. It was also intimated that final payment of General Provident Fund is also a part of retiral benefits which is to be credited in due time.

10. The vigilance status report communicated by CBEC under letter dated 15th March, 2017 elaborating two incidents touching upon the service rendered by the respondent No. 1 at the material point of time containing certain allegations is also part of the record might be the reason for granting provisional pension to the respondent No. 1 in terms of Rule 69 of CCS (Pension) Rules, 1972. The relevant part of the vigilance status report vide order dated 15th March, 2017 is quoted below:

"To,

The Principal Commissioner

Officer of the Principal Commissioner of Central Excise, Kolkata-I Commisonerate

1st Floor, Room No.114, 180, Shantipally, Raj Danga Main Road,

Kolkata – 700 107

Subject: *Vigilance status / clearance in respect of Shri Arvind Mohan Sahay, Commissioner (Retd.) [IRS(C&CE) / Group 'A' officer] – Settlement of pensionary benefits (retired from Govt. service under FR rule 56 (j) on 18.03.2016) – Regarding.*

Sir,

I am directed to refer to your office letter dated 02.12.2016 seeking vigilance status/clearance in r/o Shri Arvind Mohan Sahay, Commissioenr (Retd.) [IRS (C&CE) / Group 'A' officer] on the captioned subject.

2. Based on the records of Directorate General of Vigilance, Customs & Central Excise and Ad. V – Section of CBEC, vigilance status for the above mentioned officer is as under:

(i) As per RC-3(A)/98-PATNA M/s G.R. Gaurishankar, Deoghar evaded duty on the aluminum wire manufactured from Alminium Ingot imported under DEEC Scheme. They also availed modvat. M/s Jasidih Wires and M/s Shankar Conductors were not functioning during June-August, 1990 but filed monthly returns and revised returns respectively, falsely showing production of wires and their sale to M/s G R Gaurishanker, based on which they falsely claimed and received the refund of NCCD to the extent of Rs. 14,28,125/- CVC vide OM No. 99/CEX/014 dated 21.05.2003 advised initiation of RDA Minor. Chargesheet for major penalty issued vide F.No.C-14011/23/03-Ad.V dated 12.07.2004 which was however quashed by Hon'ble Mumbai High Court in Writ Petition No. 1063/06. The Chargesheet was withdrawn vide order under F.No.C-14011/23/03-Ad.V dated 24.12.08.

(ii) CBI Kolkata RC 010 2014(A) 009 against Shri Arvind Mohan Sahay, Commissioner, Central Excise, Kolkata –II, and 5 others for alleging demand and agreeing to acceptance of illegal gratification, for undue favours during adjudication of show cause notice for evasion of central excise duty amounting to Rs. 9.26 crores issued to M/s Ridhi Sidhi Udyog,. A trap was laid successfully in Mumbai and Shri Sahay was arrested along with other accused persons at Kolkata on 05.04.2014. Shri Sahay was produced before the Ld. Court of Spt. Judge, CBI, Court, Kolkata on 05.04.2014. The Ld. Court remanded Mr. Sahay in Police custody upto 07.04.2014 and thereafter sent him to judicial custody up to 10.04.2014. Shri Sahay is on bail vide Court order dated 29.04.2014. Shri Sahay was placed under deemed suspension from the date of his detention i.e. 05.04.2014 vide order

F.No.C-14011/9/2014-Ad.V dated 25.04.2014. The suspension of Shri Sahay was reviewed by the Competent Authority on the recommendation of the Review Committee and the Competent Authority ordered to continue his suspension from time to time, last such continuation was ordered for a further period of 90 days w.e.f. 24.03.2016 vide order dated 22.03.2016. CBI vide their report dated 04.02.2016 recommended prosecution of Shri A.M. Sahay and sought sanction for prosecution. UO Note seeking advice of CVC recommending sanction of prosecution as well as initiation of RDA for Major Penalty sent on 22.03.2016 CVC vide OM No. 014/CEX/011/313475 dated 02.05.2016 advised Prosecution and RDA Major DGoV has furnished a draft Chargesheet and other documents without authenticated copies of RUDs. Ad.V vide letter dated 20.09.2016 requested to DGoV to submit authenticated copies of RUDs. The same is awaited.. Meanwhile, Shri A.M. Sahay has been retired prematurely under FR 56 (j) vide order dated 18.03.2016. Therefore, sanction for his prosecution is not required. Since he was retired while under suspension, the departmental proceedings shall be deemed to have been initiated from the date of suspension. Further, SP, CBI, ACB, Kolkata vide their letter dated 23.02.2017 has intimated that Chargesheet was filed on 30.06.2016 in the said case against Shri A M Sahay, Commissioner Retd.), and others. Presently, the case is pending trial at pre-charge stage in the Court of the Ld. Special Judge (CBI), 3rd Special Court, Bankshall Street, Kolkata

This issues with the approval of ***CVO, CBEC*** *(sic).*

Yours faithfully,

(Sukh Lal Meena)

Under Secretary to the Government of India"

11. That after issuance of memo dated 15th June, 2017 another memo was issued on 18th July, 2017 by the Joint Commissioner (P & V), Central GST and

Central Excise, Kolkata, North Commissionerate on payment of leave encashment and gratuity to the respondent No. 1. Citing Rule 69 (I) (c) of CCS (Pension) Rules, 1972 the officer concerned denied payment of gratuity and commuted value of pension due to pendency of departmental proceedings and on payment of leave salary it was intimated to the respondent No. 1 that the Joint Commissioner (P & V) was awaiting the direction from the Joint Secretary Administration, CBEC.

12. Challenging memo dated 15th June, 2017 by which provisional pension was allowed to the petitioner from the date of his compulsory retirement and questioning the vigilance status report dated 30th March, 2017 as well as memo dated 18th July, 2017 by which payment of gratuity and commutation of pension was denied to the respondent No. 1 the connected original application being OA No. 350/1291/2017 was filed before the said Tribunal. During pendency of the said original application the respondent No. 1 took out one application being MA 350/621/2018 bringing into the record the charge-sheet issued under memo dated 13th April, 2018 issued by Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, CBEC. The Charge-sheet is annexed to the present writ petition, page 137 to page 159.

13. Before the Tribunal the writ petitioner used reply to the original application dealing with the statements made in the original application on the issue of compulsory retirement of the respondent No. 1 and also dealt with the statements made in MA application wherein challenge was thrown to the charge-sheet dated 13th April, 2018. In paragraph 10 of the said reply it has been contented on behalf of the respondents that premature retirement of the respondent No. 1 under FR 56(j) and the departmental proceedings initiated

vide impugned charge-sheet dated 13th April, 2018 under Rule 9 of CCS (Pension) Rules, 1972 are not interlinked. It was also stated in paragraph 11 that under FR 56(j) the performance of a government servant on attaining specific age or qualified years of service is to be reviewed and he or she can be retired in public interest and the respondent No. 1 was prematurely retired in public interest and not as a penal measure in-connection with the departmental proceedings.

14. Taking note of the entire factual gamut of the original application and the reply and the pleadings exchanged by the parties the said Tribunal passed order on 22nd January, 2020 allowing the original application thereby directing the authorities to release pension and gratuity to the respondent No. 1 upon quashing the charge-sheet dated 13th April, 2018. The said order of the Tribunal dated 22nd January, 2020 is subject-matter of challenge in the present writ petition preferred by the Principal Commissioner of CGST and Central Excise, North Commissionerate Kolkata.

15. The learned advocate appearing for the writ petitioner in course of hearing relied upon chiefly Rule 9(6) of Central Civil Services (Pension) Rules, 1972 which is reproduced below:

"(6) For the purpose of this rule,--

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date, and

(b) judicial proceedings shall be deemed to be instituted –

(i) *in the case of criminal proceedings, on the date on which the complaint or report of a police officer, of which the Magistrate takes cognisance is made, and*

(ii) *in the case of civil proceedings, on the date the plaint is presented in the Court."*

16. The main plank of argument advanced on behalf of the writ petitioner is based on the provision as couched under the said Rule 9(6)(a) wherein it is provided that departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the government servant or pensioner, or if the government servant is placed under suspension by an earlier order, on such date. It is submitted that the respondent No.1 was compulsorily retired with effect from 18th March, 2016 but he was placed under suspension with effect from 5th April, 2014, therefore, applying Rule 9(6) (a) the date of commencement of disciplinary proceedings is to be considered from the date from which the respondent No. 1 was placed under suspension and not from the date when the charge-sheet memo was issued that is on 13th April, 2018. It is further contention of the learned advocate appearing on behalf of the writ petitioner that Rule 9(2)(b) of Central Civil Services (Pension) Rules, 1972 is not applicable in the present case which speaks of conditions of initiation of disciplinary proceedings against government servant while the departmental proceeding is not instituted when the government servant was in service or before his retirement or during his re-employment. Relying upon the date of suspension of respondent No. 1 with effect from 5th April, 2014 it has been submitted that it is not the case where disciplinary proceeding has been initiated after retirement of the government servant or the government servant was not within a tenure of re-employment. We find it apposite to recollect Rule 9(2)(b) of the Central Civil Services (Pension) Rules, 1972 which reads infra:

"9.

(2) (b) The departmental proceedings, is not instituted while the Government servant was in service, whether before his retirement, or during his re-employment,--

(i) shall not be instituted save with the sanction of the President,

(ii) shall not be in respect of any event which took place more than four years before such institution, and

(iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in relation to the Government servant during his service."

17. The learned advocate for the writ petitioner in support of his contention has relied upon the judgment reported in **(2014) 15 SCC Pg. 476 [GOVT. OF NCT (DELHI) Vs. K. SRIVATSAN]**, judgment dated 23rd June 2016 of the Apex Court in **Civil Appeal No. 4689 of 2011 [STATE OF WEST BENGAL AND OTHERS Vs. ASWINI KUMAR MAHATO]** and the judgment reported **(1995) 6 SCC Pg. 442 [UNION OF INDIA Vs. AJOY KUMAR PATNAIK]** and an ureported judgment dated 20th September, 2010 in **WP (C) 17221-22/2004 (Union of India & Anr. Vs. S.K. Mathur & Anr.)**.

18. Per contra the learned senior advocate appearing on behalf of the respondent No. 1 has submitted that considering the initiation of case by the CBI against the respondent No. 1 he was placed under suspension with effect from 5th April, 2014. After suspension of the respondent No. 1 and prior to taking decision to compulsorily retiring him under FR 56 (j) with effect from 18th March, 2016 the authority concerned could have initiated the disciplinary proceedings against the respondent No. 1 but they chose a short-cut means to remove the respondent no.1 from service. It is further been submitted on behalf of the respondent No. 1 that the impugned order of compulsory retirement dated 18th March, 2016 is though innocuously worded in effect an order of his

removal from his service and cannot be countenanced. The learned senior advocate has also contended that on chronological consideration of facts right from the date of suspension of the respondent No. 1 with effect from 5th April, 2014, thereafter order of compulsory retirement dated 18th March, 2016 and the issuance of charge-sheet dated 13th April, 2018 during pendency of the original application before the said Tribunal virtually lifts the veil of apparently innocuous order of compulsory retirement dated 18th March, 2016 issued against the respondent No. 1 with an object to oust him from service without concluding the disciplinary proceedings and offering him opportunity to defend in the enquiry proceedings. It is the contention on behalf of the respondent No. 1 that the logical synthesis of facts would definitely lead to a conclusion that the order of compulsory retirement dated 18th March, 2016 is in reality an order of punishment leaving no further scope to the writ petitioner to keep the window open for initiating disciplinary proceeding against the respondent No. 1 at the belated stage by issuing impugned charge-sheet dated 13th April, 2018; therefore, the charge-sheet dated 13th April, 2018 cannot survive and respondent No. 1 is entitled to receive his retiral dues including gratuity and other service benefits upon giving effect to the recommendation of the 7th Pay Commission. In support of the submission advanced on behalf of the respondent No. 1 realiance has been placed on the decision of the Apex Court reported in **(1999) 4 SCC Pg. 579 [HIGH COURT OF PUNJAB & HARYANA Vs. ISHWAR CHAND JAIN AND ANOTHER]**.

19. Considering the facts narrated above and taking note of the arguments advanced by the respective parties the issues crop-up for consideration before us is in view of the relevant facts of the present case – (i) whether after issuance of compulsory retirement order dated 18th March, 2016 against the respondent No. 1 retiring him with immediate effect from the post of

Commissioner of Customs and Central Excise was it open to the writ petitioner and the concerned authorities to initiate disciplinary proceedings against the said respondent No. 1 by issuing charge-sheet dated 13th April, 2018 upon application of Rule 9 (6) (a) of the CCS (Pension) Rules, 1972? (ii) Whether the respondent No. 1 is entitled to receive retiral dues including final pension, gratuity and other service benefits in accordance with law based on the order of compulsory retirement dated 18th March, 2016 under FR 56(j)?

20. We will answer the first issue as formulated above which will virtually determine the entitlement of the respondent No. 1 to receive final pension, gratuity and all other outstanding service benefits taking note of his date of compulsory retirement with effect from 18th March, 2016 which is issue No. (ii).

21. From the facts it transpires that the respondent No. 1 while working on the post of Commissioner of Customs and Central Excise was compulsorily retired by the concerned authorities vide order dated 18th March, 2016 in terms of FR 56(j). Prior to such compulsory retirement of the respondent No. 1 he was placed under suspension with effect from 5th April, 2014 vide suspension order dated 25th April, 2014. The suspension order was time to time extended vide order dated 30th June, 2014, 30th December, 2014, 26th June, 2015, 24th September, 2015 and 23rd December, 2015. After compulsory retirement of the respondent No. 1 he was denied payment of final pension, gratuity, leave encashment and leave salary and commutation of pension which triggered presentation of original application before the said Tribunal and Tribunal in its turn vide order dated 13th April, 2017 directed the concerned authorities to take decision on the representation of the respondent No. 1 on his entitlement to receive retiral benefits including other service benefits as prayed for by

passing reasoned order. Pursuant thereto, the concerned authorities vide issuing impugned memo dated 15th June, 2017 decided to sanction provisional pension in terms of Rule 69 of the CCS (Pension) Rules, 1972 and final pension and gratuity was not allowed to the said respondent No. 1 upon referring to the vigilance status report which was communicated vide letter dated 15th March, 2017. By a separate order dated 18th July, 2017 the concerned authorities decided not to sanction gratuity in favour of the respondent No. 1 and could not release leave salary in favour of the respondent No. 1 due to want of direction from the Joint Secretary, Administration, CBEC, North Block, New Delhi. However, vide order dated 24th August, 2017 leave salary was sanctioned in favour of the respondent No. 1 without granting benefit of 7th Pay Commission recommendation.

22. That after placing the respondent No. 1 under suspension with effect from 5th April, 2014 vide order dated 25th April, 2014 it was open to the concerned authorities to initiate disciplinary proceedings against the respondent No. 1 in order to delve into the allegations as emanating from the charge-sheet belatedly issued on 13th April 2018 prior to his compulsory retirement; which was issued more than 2 years after the compulsory retirement of the respondent No. 1. In order to assess the viability of acts and actions of the concerned authorities in the matter of first compulsorily retiring the respondent No. 1 with effect from 18th March, 2016 and subsequently issuing charge-sheet dated 13th April, 2018 we find it apposite to consider the provisions of FR 56 (j) which is quoted below:

> *"56.*
>
> *(j) Notwithstanding anything contained in this rule, the Appropriate Authority shall, <u>if it is of the opinion that it is in the public interest so to do</u>, have the absolute right to retire any Government servant by 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 Group 'A' or Group 'B' service or post in a substantive, quasi-permanent or temporary capacity and had entered Government service before attaining the age of 35 years, after he has attained the age of 50 years;*
>
> *(ii) in any other case after he has attained the age of fifty-five years;"*
>
> (emphasis supplied)

23. One of the conditions as contemplated under FR56(j) is appropriate authority needs to take decision on compulsory retirement of government servant provided an opinion is formed that such compulsory retirement is required in public interest which postulates formation of an opinion on subjective consideration by the concerned authority upon taking note of the service record of the government servant whether it is required to compulsorily retire the said government servant or not. On reading of the compulsory retirement order dated 18th March, 2016 it appears that there was an exercise of power under FR 56 (j) by the President since the opinion was formed in the public interest and it was necessary to take such decision. From the words couched in the compulsory retirement order dated 18th March, 2016 and taking note of the provisions of FR 56 (j) it can be deduced that there was a prior formation of opinion by the authority concerned taking note of the service records of the respondent No. 1 which ultimately led to the decision of retiring the respondent No. 1 compulsorily with effect from 18th March, 2016. Accordingly, we may say that there was formation of opinion that it was in public interest to prematurely retire the respondent No. 1 by the authority concerned on exercise of power under FR 56 (j). In this regard reliance is placed on the decision of the Apex Court reported in (**1970) 2 SCC Pg. 458 [Union of India vs Col. J.N. Sinha & Anr.] paragraphs 9 and 10**. The formation of opinion that it was in public interest to prematurely retire an employee must be based on relevant materials. In the case of **Brij Mohan Singh Chopra vs.**

State of Punjab reported in **(1987) 2 SCC Pg. 188** in **paragraph 5** it was laid down that the condition for the exercise of power is public interest only. In this context Supreme Court has explained the expression "public interest" – "the public interest in relation to public administration envisages retention of honest and efficient employees in service and dispensing the services of those who are inefficient, dead-wood or corrupt and dishonest. Therefore, the rule contemplates premature retirement of the inefficient, corrupt or deadwood which would subserve the public interest." It can also be described that the power to retire compulsorily is absolute provided the authority concerned forms the opinion bona fide that such retirement is in public interest.

24. It can be summed up that the right to be in public employment is a right to hold it according to rules. The right to hold is defeasible according to rules. The rules speak of compulsory retirement. There is guidance in the rules as to when such compulsory retirement is made. When a government servant attained the age of 50 years and completed 15 years of service in case of Group 'A' or Group 'B' service, the efficiency of such persons is impaired and yet it is desirable not to bring any charge of inefficiency or incompetency, the government passes orders of such compulsory retirement. The government servant in such cases does not lose the benefits which a government servant has already earned. These orders of compulsory retirement are made in public interest. This is the safety valve of making such orders so that no arbitrariness or bad faith creeps in. In this regard reliance is placed on the decision of the Apex Court in the case of **Tara Singh & Ors. Vs. State of Rajasthan & Ors. reported in (1975) 4 SCC Pg. 86**. Borrowing interpretation of the Apex Court as contained in Tara Singh (Supra) we can safely conclude that in view of the order dated 18th March, 2016 compulsory retiring the respondent No. 1 by the concerned authorities in terms of FR 56 (j) the said respondent No. 1 ought not

lose the benefits which a government servant has already earned. Therefore, upon issuing belated charge-sheet two years after the compulsory retirement the concerned authorities cannot shut the door in front of the respondent No. 1 in the matter of releasing final pension and gratuity and other benefits after his compulsory retirement with effect from 18th March, 2016.

25. We are also tasked to find out whether a government servant compulsorily retired during the period of suspension can be proceeded with departmentally subsequent to the order of compulsory retirement for imposing punishment.

26. Apart from the cases cited by the learned advocates appearing for the respective parties we have come across the decision of the Supreme Court reported in **(1997) 7 SCC Pg. 85 [Haryana State Electricity Board vs. K.C. Gambhir]** where Hon'ble Supreme Court was considering the viability of the compulsory retirement order which was passed after enquiry in connection with the disciplinary proceedings initiated against the respondent was over. This was a case where the enquiry in connection of the disciplinary proceedings stood completed on 4th August, 1993 and the respondent was compulsorily retired with effect from 3rd February, 1994, nine months prior to date of his superannuation. In paragraph 8 of the said judgment the Hon'ble Supreme Court expressed its view that though the employer could have taken action of compulsorily retiring the respondent earlier it acted very fairly and allowed him to remain in service till the representation against the adverse remark was considered on the first occasion and subsequently, till the departmental enquiry was completed. No grievance can legitimately be made by the employee for not taking the impugned action earlier as the employee had not

suffered adversely as a result of delay and ultimately upheld the decision of compulsory retirement nine months prior to superannuation of the employee concerned. But in the present case at our hand the arbitrariness of the concerned authority can be perceived from the issuance of charge-sheet dated 13th April, 2018, two years after the order of compulsory retirement was passed against the respondent No. 1. We could appreciate the steps taken by the authorities concerned, if, prior to issuance of order of compulsory retirement on 18th March, 2016 an enquiry into the allegations made against the respondent No. 1 would have been completed. On the contrary the concerned authorities upon formation of opinion as contemplated under FR 56 (j) retired the respondent No. 1 compulsorily in public interest and two years thereafter issued the charge-sheet for initiation of disciplinary proceedings, goes long way to demonstrate arbitrariness of the authorities concerned in taking steps against the respondent No. 1.

27. There is another case reported in **(1995) 1 SCC Pg. 336 [State of U.P. And Another vs. Abhai Kishore Masta]** where the Hon'ble Supreme Court was considering the viability of the order of compulsory retirement during pendency of the disciplinary proceedings against the employee concerned and the fate of compulsory retirement when final order of punishment was passed subsequent to the order of compulsory retirement. Paragraph 9 of the said judgment is reproduced below:

> ***"9. It is true that merely because the order of compulsory retirement is couched in innocuous language without making imputations against the government servant, the court need not conclude that it is not penal in nature. <u>In appropriate cases the court can lift the veil to find out whether, in truth, the order is penal in nature</u> vide Ram Ekbal Sharma v. State of Bihar."***

(Emphasis supplied)

In State of U.P. (Supra) in paragraph 7 the Apex Court has held that it cannot be said as a matter of law nor can it be stated as an invariable rule, that any and every order of compulsory retirement made under Fundamental Rule 56 (j) (or other provision corresponding thereto) during the pendency of disciplinary proceedings is necessarily penal. It may be or it may not be. It is a matter to be decided on a verification of the relevant record or the material on which the order is based.

28. Therefore having followed the decisions of the Supreme Court as alluded above it can be inferred that the High Court in appropriate case upon consideration of the entire gamut of relevant facts can decide whether the subsequent charge-sheet dated 13th April, 2018 after the compulsory retirement order passed against the respondent No. 1 on 18th March, 2016 is a product of arbitrary action on the part of the concerned authority. While testing the conduct of the respondent authorities we will also rely upon the judgment of the Apex Court reported in **(1994) 4 SCC Pg. 579 [High Court of Punjab & Haryana Vs. Iswar Chand Jain And Another]**. Paragraph 30 of the said judgment deals with the situation which resembles the factual aspect involved in the present writ petition to some extent. In the said paragraph the Apex Court accepted the contention of the compulsorily retired employee of the High Court and concluded that the High Court being the employer during pendency of the disciplinary proceedings retired the employee concerned upon finding the same as short-cut method to get rid of the said employee. It was further held by the Apex Court that the impugned order of compulsory retirement though innocuously worded is in fact an order of removal from service and cannot be sustained.

29. Drawing inspiration from the judgments cited above we can conclude that issuance of charge-sheet by the concerned authorities on 13th April, 2018 against the respondent No. 1 more than two years after the order dated 18th March, 2016 compulsorily retiring the respondent No. 1 cannot be a bona fide act on the part of the concerned authorities which undermines the embedded principle of fairness which is the very basis of bona fide acts on the part of model employer while taking decision of compulsory retirement against the employee concerned under FR 56 (j); therefore, the said charge-sheet dated 18th March, 2016 cannot qualify the test of fairness as a result thereof the charge-sheet dated 13th April, 2018 is set-aside.

30. We are not unmindful of the decisions cited on behalf of the writ petitioner in support of his case made out in the writ petition. The case reported in **(2014) 15 SCC Pg. 476 [GOVT. OF NCT (DELHI) Vs. K. SRIVATSAN]** was relating to the question whether Rule 9 (2)(b)(ii) of CCS (Pension) Rules, 1972 was applicable in case of an employee who was suspended on two consecutive occasions prior to the date of his superannuation. Ultimately, the Apex Court held since the employee was under suspension during his tenure the said Rule 9(2)(b)(ii) is not applicable and by virtue of deeming fiction of law date of initiation of departmental proceeding against the employee concerned is to be treated from the date of suspension of the employee. The second judgment relied upon by the writ petitioner is the decision of the Supreme Court rendered in **Civil Appeal No. 4689 of 2011 [State of West Bengal And Others Vs. Aswini Kumar Mahato]** wherein question arose whether after cessation of master-servant relationship by superannuation of an employee whether the employer by imposing order of punishment make curtailment of retiral dues. The Apex Court answered that

the imposition of punishment upon conclusion of disciplinary proceedings after superannuation of the employee is permissible. The third judgment relied upon on behalf of the writ petitioner is reported in **(1995) 6 SCC Pg. 442 [Union of India Vs. Ajoy Kumar Patnaik]** wherein in paragraph 10 the Apex Court has held that mere retirement of the officer by efflux of time pending proceedings would not be a ground to close the matter. We are not deviating from the decisions as contained in these judgments where Supreme Court has held that even in the compulsory retirement if there was a bonafide initiation of proceedings that should be allowed to see the light of the day in spite of the fact the employee concerned retires prior to conclusion of the said disciplinary proceedings. But in the present case at our hand no charge-sheet was issued for a period of more than two years after the decision was taken to compulsorily retire the respondent No. 1 which smacks of arbitrariness on the part of the concerned authorities in dealing with the matter relating to initiation of the disciplinary proceeding against the respondent No. 1. The writ petitioner has also relied upon an unreported judgment dated 20th September, 2010 in **W.P. (C) 17221-22/2004** in the case of **Union of India & Anr. Vs. S.K. Mathur & Anr.** wherein the Delhi High Court laid emphasis on requirement of strictly interpreting Rule 9 of Central Civil Service (Pension) Rules, 1972 but such interpretation of Rule 9 was attributed by the High Court completely on a different context where there was contemplation of departmental proceeding by the authorities after placing the employee under suspension. Meanwhile the employee retired on superannuation resulting in sanction by the President for initiating departmental proceedings under Rule 9(2)(b)(i) of CCS (Pension) Rules. It was not the issue before the High Court whether the employer was entitled to initiate departmental proceedings after compulsory retirement of the employee upon obtaining sanction from the President in terms of the said Rule 9(2)(b)(i). In view of the above discussion the judgments relied upon by the writ petitioner in support of his case are of no help.

31. Accordingly, the issue No. 1 is decided in favour of the respondent No. 1 thereby the charge-sheet memo dated 13th April, 2018 is set-aside.

32. As a corollary to the decision on the issue No. (i) the respondent No. 1 is entitled to receive all the service benefits including outstanding retiral dues as directed by the Tribunal.

33. In the above premise this writ petition does not merit consideration and we do not find any reason to interfere with the order dated 22.01.2020 passed by the Tribunal.

34. Urgent xerox certified copy of the judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Saugata Bhattacharyya, J.)