Jyoti Prokash Mitter vs Honble Mr. Justice Himansu Kumar Bose, ... on 9 November, 1964

Equivalent citations: 1965 AIR 961, 1965 SCR (2) 53

Author: P.B. Gajendragadkar

Bench: P.B. Gajendragadkar, K.N. Wanchoo, M. Hidayatullah, Raghubar Dayal, J.R. Mudholkar

PETITIONER:
JYOTI PROKASH MITTER

Vs.

RESPONDENT:
HON'BLE MR. JUSTICE HIMANSU KUMAR BOSE, CHIEFJUSTICE, HIGH

DATE OF JUDGMENT:
09/11/1964

BENCH:
GAJENDRAGADKAR, P.B. (CJ)
BENCH:
GAJENDRAGADKAR, P.B. (CJ)
WANCHOO, K.N.
HIDAYATULLAH, M.
DAYAL, RAGHUBAR
MUDHOLKAR, J.R.

CITATION:
1965 AIR 961 1965 SCR (2) 53
CITATOR INFO :
RF 1971 SC1093 (4)
D 1974 SC2192 (143)

ACT:
Constitution of India, Art. 217 as amended by Constitution (Fifteenth Amendment) Act, 1963-Dispute as to age of sitting High Court Judge Decision taken by Home Minister and approved by President-Evidence of appellant not before President--chief Justice of India not formally consulted -Decision whether satisfies terms of Art. 217(3).

HEADNOTE:
There was divergence between the appellant's date of birth

as given at the time of his appointment as Judge of the Calcutta High Court and as found in the records of the public examinations at which he had appeared. The Union Home Minister after correspondence with the parties concerned including the Chief Justice of India and the appellant determined the appellants date of birth to be December 27, 1901 as found in the records of the appellant's Matriculation Examination. The President, by order passed on May 15, 1961, approved the decision and the consequent order that the appellant be asked to emit his office on December 26, 1961 when be would reach the age of superannuation. The Punjab High Court dismissed the appellant's writ petition challenging the order and the Supreme Court dismissed in limine the petition for special leave to appeal. Pursuant to the orders of the Union Government the Chief Justiceof the Calcutta High Court asked the appellant to demit his office on December 26, 1961, and after that date did not allot him any work. The appellant thereupon filed a writ petition before the Calcutta High Court under Art. 226 of the Constitution which was dismissed. The Supreme Court granted him special leave to appeal.

The appellant in his appeal contended that the age of a Judge given by him at the time of appointment once accepted by Government, could not again be called in question and in any case could not be determined again by the Government by Executive order. The complexion of the controversy the passing of the Constitution by adding cl. (3) to Art. 217 provided that any dispute as to the ago of a Judge of a High Court would be decided exclusively and finally by the president of India in consultation with the chief justice of India. The Amendment Act also provided that the provision shall be deemed always to have been in the Constitution. The parties agreed that after the retrospective amendment the main question for consideration was whether the order of the Union Government determining the appellant's age and date of superannuation was an order which could be deemed to have been passed under Art. 217(3).

HELD : (i) If a dispute is raised about the age of a sitting Judge then it is desirable that the matter should be decided by the President. Whether the dispute is genuine or not is to be considered by the President in consultation with the Chief Justice of India. But it is certainly in the interests of the Judge himself, as much as in the interests of the purity and

54

reputation of the administration of justice that the dispute should be settled. it could not be held that the age of a Judge given by him at the time of ,,appointment could never again be called in question. (65 E-F]

(ii)The Chief Justice of the Calcutta High Court was justified in not allotting any work to the appellant after December 26, 1961, as any judgments delivered by him after

the date would have been open to question as to their validity. [66 B-C]

(iii)The judgment of the Punjab High Court dismissing appellant's ,writ petition did not operate as res judicata as it was not on merits. [71 A]

(iv)Article 217(3) gave to the President exclusive power to determine ,the age of a sitting Judge and divested the courts of jurisdiction in this regard. The procedure to be adopted was in the discretion of the President ,but the provision to formally consult the Chief Justice of India was man Also implicit in the Article, was the requirement that the Judge concerned should have a reasonable opportunity to give his version and 'Produce his evidence. [64 B-D]

(v)The provision having been expressly made retrospective the appeal had to be decided on the basis that the order passed by the President in the appellant's case could be treated as a decision under Art. 217(3), if, on merits, such a conclusion was justified. [65 A]

(vi)The order of the Union Government passed on May 15, 1961 did not satisfy the requirements of Art. 217 (3) and could not be held to be ,an order passed under the provisions of that Article. The decision had been taken by the Home Minister and that plainly was not a decision of the President. The offer to allow the matter to be decided by arbitration, and reopening of the matter after the decision had been taken, cannot be ,easily assimilated to the requirements of the Article. The informality of the consultation with the Chief Justice of India also did not squarely fit, in ,with the formal consultation which is mandatory. [67 B-C, G-H; 68 A]

Srinivas Mail Bairoltva v. King Emperor, I.L.R. 26 Pat. 460 and Alexander Brogden and others v. The Directors of the Metropolitan Rail.way Company (1876-7) 11 A.C. 666, referred to.

(vii)The order was also not a proper order under Art. 217(3) because -the requirements of natural justice had not been satisfied inasmuch as the President did not have before him when he made the decision the evidence of the appellant. It is true that the appellant had refused to produce the evidence on the ground that the Executive had no jurisdiction to call into question and determine his age. This contention of the appellant when raised was fully justified as such a dispute in the legal situation which them existed had normally to be determined by judicial proceeding before the High Courts of competent jurisdiction, and therefore his failure or refusal -to produce his evidence could not be fairly pressed into. service against 'him. [69 D-F; 70 B]

The Court held that the appellant was entitled to a decision by the President of India as to his age under Art. 217(3) and passed orders in terms agreed to by both parties. [71 B-F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 856 of 1964. Appeal by special leave from the judgment and order dated May 21/22, 1964 of the Calcutta High Court in Matter No. II of 1962.

Me appellant appeared in person.

C.K. Daphtary, Attorney-General, Ranadeb Choudhury, P. K. Chatterjee, Somendra Chandra Bose and P. K. Bose, for respondent No. 1.

C. K. Daphtary, Attorney-General, N. C. Chatterjee and R. H. Dhebar, for respondent No. 2.

The Judgment of the Court was delivered by Gajendragadkar, C.J. The short question which arises in this appeal by special leave is whether the order passed by the President of India on May 15, 1961, approving the action which was proposed to be taken against the appellant, Jyoti Prokash Mitter, amounts to a decision on the question about the appellant's age as a Judge of the Calcutta High Court under Art. 217(3) of the Constitution. In the note placed before the President along with its accompaniments it was proposed that the appellant should be informed that his correct date of birth had been determined to be December 27, 1901, and so, he should demit his office of puisne Judge of the Calcutta High Court on December 26, 1961 on which date he would attain the age of 60. The draft of the letter which was intended to be sent to the appellant in that behalf was also placed before the President. On the file, the President made an order, "approved"; and the question is whether this is an order which can be related to Art. 217 (3). It is true that this order was passed on May 15, 1961, whereas clause (3) of Art. 217 which was added in the Constitution by the Constitution (Fifteenth Amendment) Act, 1963, came into force on October 5, 1963. Section 4(b) of the Amendment Act, however, provides that the said clause shall be inserted and shall be deemed always to have been inserted in the Constitution. In other words, in terms, the insertion of the relevant clause is made retrospective in operation. That is how it has become necessary to enquire whether the order passed by the President on May 15, 1961 can be said to amount to a decision within the meaning of the said clause.

Writ Petition No. 13 of 1962 from which this appeal arises was filed by the appellant in the Calcutta High Court on January 2, 1962. By his petition, the appellant claimed a writ in the nature of mandamus and/or appropriate directions, order or writs under Art. 226(1) against respondent No. 1, the Chief Justice of the Calcutta High Court, requiring him to recall the order passed by him by which he had decided that the appellant had retired from his post as a Judge with effect from December 27, 1961. This writ petition has had a checkered career. Banerjee, J.

before whom it came for the issue of a Rule Nisi, was not satisfied that it was necessary to issue Rule Nisi on it, and so, he dismissed the appellant's writ petition in limine on January 3, 1962.

The appellant challenged the correctness of this decision by preferring an appeal under Letters Patent before a Division Bench of the said High Court. Mitter and Laik JJ. who constituted this

Bench, however, differed, and so, the learned Chief Justice bad to constitute a Special Bench of three learned Judges to deal with the appeal. P. N. Mookerjee, Sankar Prasad Mitra and R. N. Dutt, JJ. who constituted this Special Bench, heard the matter and delivered three concurring judgments. They were, however, unanimous in holding that Banerjee J. was in error in refusing to issue a Rule Nisi, and so, they allowed the appeal preferred by the appellant and directed that a Rule Nisi in terms of prayer (1) of the petition should be issued.

Against this order, respondent No. 1 came in appeal to this Court by special leave. By its judgment pronounced on the 14th October, 1963, this Court held that the Special Bench was right in directing a Rule Nisi to be issued on the writ petition filed by the appellant, and so, the appeal preferred by respondent No. 1 was dismissed. The writ proceedings thus went back to the Calcutta High Court for disposal on the merits in accordance with it. At this stage, a Special Bench consisting of five learned Judges of the High Court heard the matter. The area covered by the controversy between the parties was very wide and several constitutional questions of law were exhaustively argued before this Special Bench. All the learned Judges constituting the Bench have delivered separate judgments each one elaborately dealing with the points urged before the Court. P. N. Mookerjee J. in substance, accepted the main pleas raised by the appellant and directed that an appropriate writ or an appropriate order or direction in the nature of a Writ do issue against respondent No. 1 calling upon him to forbear from giving effect to the impugned order until a proper determination by the President that the appellant has attained the age of superannuation. He, however, added that the operation of the order which he proposed to issue should remain stayed for three months to enable respondent No. 1, if he was so advised, to obtain the President's determination in the matter of the appellant's age and act upon the same in accordance with law.

The four other learned Judges, Mallick, Banerjee, Das Gupta and Chatterjee J., however, took a different view. They held that the appellant was not entitled to any writ or order against respondent No. 1 as claimed by him. The approach adopted by these learned Judges is not uniform, but. on the whole, their final conclusion was against the appellant. In the result, in accordance with the majority decision, the writ petition filed by the appellant has been dismissed. It is against this decision that the appellant has come to this Court by special leave which was granted to him on August 24, 1964. On September 21, 1964, upon an oral prayer made by the Attorney-General for India, the Court allowed the Attorney-General to intervene in this matter, and by consent of parties, the Court directed that the appeal should be set down for hearing on the 26th October, 1964, subject to any part-heard matter. On the 26th October, 1964, when the appeal was called out for hearing, the Court allowed the appellant's prayer for adding the Union of India to the appeal as respondent No. 2. The Attorney-General of India who had already been allowed to intervene in the proceedings, accepted notice of the motion made by the appellant for joining the Union of India and agreed to appear for the Union of India. At his request, the appeal was adjourned to the 29th October, 1964 in order to enable him to file an affidavit on behalf of respondent No. 2. That is how this appeal came on for final hearing on the 29th October, 1964. At the hearing, both parties conceded that the only question which called for our decision is whether the order of the President passed on May 15, 1961, could be said to be a decision on the point about the age of the appellant within the meaning of Art. 217 (3). In view of the fact that the Amendment Act, 1963 inserted clause (3) in Art. 217 retrospectively during the pendency of the present writ proceedings, all other questions which had been argued

between the parties before the said Amendment, have now become immaterial and that has naturally narrowed down the scope of the present controversy. Though the controversy between the parties thus lies within narrow limits, it is necessary to set out the material facts in some detail in order to appreciate the background of the present dispute, because it is only in the light of the said background that the problem posed for our decision can be seen in its proper perspective. The appellant who was enrolled as a Barrister of' the Calcutta High Court on May 5, 1931, was appointed an Additional Judge of the said High Court on February 11, 1949. In January, 1950, he became a permanent Judge of the said High Court. At the time of his appointment, the appellant had given Sup./65-5 the date of his birth as December 27, 1904. It appears that some time in 1959, the attention of the Home Minister of the Government of India was drawn to an extract from the Bihar and Orissa Gazette of June 26, 1918 containing the results of the Matriculation Examination held by the Patna University in April, 1918. The relevant information contained in the said extract showed the age of the appellant at the date of the examination as 16 years and 3 months. This would indicate that the appellant was born on December 27, 1901. It also appears that later, the Home Minister came to know that when the appellant appeared at the open competitive examination for the I.C.S. in July/August, 1923, the date of his birth was given and shown as December 27, 1901. That is why the Home Minister raised the question about the correctness of the date of birth given by the appellant at the time of his appointment. As a result of the correspondence carried on between the Union Home Minister, the Chief Minister of West Bengal, the Chief Justice of the Calcutta High Court, and the appellant, the Government of India ultimately decided that the appellant's date of birth was December 27, 1901; and so, the file containing the said correspondence and other relevant material was placed before the President on May 15, 1961. Noting made on this file indicated that the Government of India intended to ask the appellant to demit his office on December 26, 1961, after court hours. After this proposal was approved by the President, the Government of India asked the Chief Minister of West Bengal to communicate this decision to the appellant through the Chief Justice of the Calcutta High Court.

At that stage, the appellant moved the Punjab High Court under Art. 226 of the Constitution by a writ petition filed on November 15, 1961, against the Union of India, praying that an appropriate writ or order should be issued against the Union of India restraining it from giving effect to its impugned order. The said High Court, however, dismissed the appellant's writ petition on December 4, 1961. The appellant then moved this Court for special leave to appeal against the decision of the Punjab High Court, but his petition was rejected in limine.

In due course, when occasion arose to give effect to the decision of the Government of India, respondent No. 1 passed an order directing that the appellant will demit his office of a puisne Judge of the Calcutta High Court on December 26, 1961 after Court hours. It is the validity of this order which has been impeached by the appellant in the present writ proceedings. The appellant contended that respondent No. 1 was patently in error in seeking to enforce an order passed by the Government of India as an executive order by which they purported to determine his age. On this basis, he claimed an appropriate writ or order against respondent. No. 1; and that raised several constitutional questions. But, as we have already indicated, the introduction of cl. (3) in Art. 217 has completely changed the complexion of the controversy and all that we are now required to consider is whether the approval given by the President can fall within the purview of Art. 217(3).

Let us now examine the correspondence that took place bet- ween the parties in order to ascertain the procedure adopted by the Government of India in obtaining the approval of the President, and the pleas taken by the appellant during the course of these proceedings. On April 9, 1959, G. B. Pant, the Home minister, wrote to the Chief Minister, West Bengal, informing him that his attention had been drawn to the fact that the relevant extract from the Bihar and Orissa Gazette indicated that the date of birth given by the appellant at the time -of his appointment as an Additional Judge of the Calcutta High Court, was not accurate. In this letter. the Home Minister suggested to the Chief minister that he should arrange to have necessary enquiries made in that regard and let him know the result of the said enquiry.

The Chief Minister got in touch with Chief Justice K. C. Das Gupta on the is point, and the Chief Justice wrote to the appellant on April 17, 1959, sending him a copy of the letter which he had received from the Chief Minister. In this letter, the Chief Justice requested the appellant to furnish him with a full statement on all the points involved and inform him at the same time of any other material which may be relevant on the correct ascertainment of the date of his birth, and the consequential ascertainment of the date of his retirement. On the same day, the Chief Justice wrote another note to the appellant inviting him to meet him in order that be should be able to talk to him about a matter which vitally concerned the appellant. The appellant was asked to meet the Chief Justice at 4 P.m. that day. On May 27, 1959, the appellant wrote to Chief Justice Das Gpta suggesting that the date of his birth shown in the relevant extract from the Gazette was obviously incorrect. He expressed his satisfaction that the question of his age had not been raised directly by either the State Government or the Government of India, but had been raised at the instance of some mischievous person. He emphasised that there was hardly any reason for him to give an inaccurate date of his birth when he accepted appointment.

Chief Justice Das Gupta again wrote to the appellant on July 6, 1959 informing him about the report from the Civil Service Commission, London, regarding the date of birth given by the appellant to the Commission when he appeared for the I.C.S. Competitive Examination. A copy of the said report was forwarded to the appellant. The Chief Justice asked the appellant to send Ms comments on the said report. On August 12, 1959 the appellant sent a reply to this letter, and he pleaded that he did not recollect at that distance of time whether he had himself given to the Civil Service Commission the date of his birth. He was, however, certain that being then an undergraduate at Oxford, he did not obtain any certificate of age in terms of clause 4 of the Regulations concerning Examinations for the Indian Civil Service. In this letter, the appellant protested that he saw no valid reason for any further enquiry as to his identity with the examine and he urged that the question sought to be raised was one of principle. According to him, the date of birth given by him at the time of his appointment could not be questioned.

After these letters of the appellant were forwarded by the Chief Justice of the Calcutta High Court to the Government of India, the matter was sent to S. R. Das, the Chief Justice of India for his opinion. Chief Justice Das considered the material forwarded to him and expressed his definite view that the date of birth of the appellant should be taken to be December 27, 1901. In this connection, Chief Justice Das observed that in such matters they had always been insisting that the date of birth given in the birth register or school register or Matriculation Certificate should be conclusive. This opinion

was expressed by Chief Justice Das on September 9, 1959.

Thereupon, Chief Justice Lahiri of the Calcutta High Court intimated to the appellant on September 21, 1959, that he has been asked by the Chief Minister, West Bengal, to inform him that the Home Minister, Government of India, had considered the explanation given by him about his age and had decided, with the concurrence of the Chief Justice of India, that the age stated in his Matriculation Certificate would be treated as final and the will have to retire on the basis of the age as recorded therein. It appears that the Home Minister, Government of India, had written to the Chief Minister, West Bengal, on September 14, 1959, intimating to him that he had consulted the Chief Justice of India in regard to the question of the appellant's age and that he entirely agreed with the advice given by the Chief Justice of India; and he suggested that the appellant should be informed accordingly through the Chief Justice of the Calcutta High Court. That is how the appellant came to know about this decision through his chief Justice. After the appellant received intimation about the decision of the Government of India, he wrote to Chief Justice Lahiri expressing his emphatic disapproval of the said decision, and he made litter comments against the views expressed by Chief Justice Das in the note made by him while giving his advice to the Government of India in this matter, vide his letter of September 30, 1959. in his letter of April II, 1960, the appellant wrote to Chief Justice lahiri that he had repeatedly pointed out to Government that the controversy as to his superannuation involved a principle affecting the judiciary as a whole, and so, there could be no question of submitting to arbitration. He had already made it clear in his letter of September 30, 1959, that the procedure adopted by the Government of India from beginning to end was unwarranted and that he was not bound by the decision communicated to him by the Chief Justice of the Calcutta High Court on September 21, 1959. further correspondence went on between the parties, but it is not necessary to refer to it, because it does not give any further material which is relevant for our decision. That takes us to May 12, 1961, on which date the Ministry of Home Affairs prepared a note setting forth the history of the dispute as to the correct date of the appellant's birth. This note shows that the Government of India had consulted Chief Justice Sinha who succeeded Chief Justice S. R. Das; Chief Justice Sinha had so taken the same view as had been taken earlier by Chief justice Das. The note also points out that when an offer was made to the appellant to have the issue tried by arbitration, he had rejected the offer, and so, after considering all relevant facts, it was proposed to send a formal communication to him asking him to demit his office on December 26, 1961. This note has been signed by the Secretary to the Ministry of Home Affairs. In this note, the Secretary had stated that both the Law Minister and the Home Minister had approved of the note. This note was submitted to the Prime Minister who, on the same day, agreed with the course of conduct proposed to be adopted, and then it went to the President who expressed his approval on May 15, 1961. That the genesis of the impugned order.

It appears that in the morning of July 30, 1961, the appellant saw Prime Minister Nehru and complained against the order which had been passed in respect of his age. The Prime Minister wrote to the appellant the same day that he had told the appellant that he proposed to consult the Chief Justice of India and the appellant had agreed to that course. The appellant appeal to have requested the Prime Minister that he should be Given chance to place his viewpoint before the Chief Justice of India and the Prime Minister had assured him that he could meet the Chief Justice and place his case before him. In this letter, the Prime Minister has also stated that he had spoken to the Chief

Justice of India that evening and that he was told that some time back a rule had been framed to determine the age of sitting Judge of High Courts and that rule had been followed in his case. The letter also added that the Chief Justice of India had mentioned the Prime Minister that there had been some serious complain about the manner in which judicial work had been transacted the appellant. In the end, the Prime Minister advised the appellant to get in touch with the Chief Justice of India. It is true that in dealing with the question about the appellant's age, refer- ence to the quality of his judicial work was irrelevant; but the general tone and content of the Prime Minister's letter clear indicate that the Prime Minister had adopted a flexible, inform fair and sympathetic approach to the appellant's grievance and he was willing to re-examine the matter if it was found necessary to do so.

Accordingly, the appellant met the Chief Justice of India on July 31, 1961. It appears that when the appellant met Chief Justice Sinha, the latter advised him to retire on December 2, 1961 on the basis of the date of birth disclosed by his Matriculation Certificate. The appellant was told that was in consonance with the policy adopted by the Government of India recent cases. The Chief Justice assured the appellant that was not the intention of the Government of India to do anything to cast aspersions on the veracity of a Judge of a High Court, and he indicated that without going into the correctness of the a given by the appellant, it was desirable that he should retire the basis that the Matriculation Certificate correctly represent, his age. "I am glad", said Chief Justice Sinha, "that you have taken my assurance in the spirit in which it was given, namely to save you and to save the Government from any embarrassment in connection with such a controversy. This is the substance the letter which Chief Justice Sinha wrote to the appellant August 22, 1961. This letter also indicates that Chief Justice Sinha assured the appellant that no aspersion was intended to be cast on the veracity of his statement as to his age presumably because the appellant had indicated to him that he would be willing to retire in case it was made clear that no aspersion was cast on his veracity. As Chief Justice Sinha explained in a note made by him on a later occasion, the background of his letter clearly suggests that the conversation between the Chief Justice and the appellant was of an informal character and the Chief Justice was naturally willing to assure the appellant that if he quits office on the 26th December, 1961, it would save embarrassment both to the appellant and the Government. This approach again was flexible, fair and sympathetic to the appellant. As we have already seen, in due course before the 26th December, 1961 arrived respondent No. 1 passed an order directing the office to treat the appellant as having retired on December 26, 1961; and that has given rise to the present controversy.

Let us now revert to Art. 217(3) and ascertain its true scope and effect. Art. 217(3) provides that if any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final. We have already noticed that this provision has been expressly made retrospective in operation, so that whenever a question arises as to the age of a sitting Judge of a High Court, that question has to be decided by the President in the manner prescribed by Art. 217(3). The retrospective operation of this provision postulates that this provision must be read in the Constitution as from January 26, 1950; and so, it will apply even in regard to the determination of the ages of Judges of High Courts who had been appointed to their office before the actual provision was inserted in the Constitution by the Amendment Act of 1963. This provision vests the jurisdiction

to determine the question about the Judge's age exclusively in the President, and so, it follows that in the presence of this provision, no court can claim jurisdiction to deal with the said question. It is true that before this provision was inserted in the Constitution, the question about the age of a sitting Judge of a High Court could have been theoretically brought before the High Court in a proceeding by way of a writ for Quo Warranto under Art. 226. But now there can be no doubt that the question about the age of a Judge of a High Court has to be determined only in one way, and that is the way prescribed by Art. 217(3). This position is not disputed by the appellant before us.

It is also clear that the decision of the President under Art. 217 (3) is final, and its propriety, correctness, or validity is beyond the reach of the jurisdiction of courts. What procedure should be followed in deciding the age, what opportunity should be given to the Judge whose age is being decided, and other allied questions pertaining to the decision, are entirely within the discretion of the President. The provision requires that before the President reaches his decision, he has to consult the Chief Justice of India; consultation with the Chief Justice of India is clearly a mandatory requirement of clause (3). It is thus clear that while leaving the decision of the relevant question to the President, the Parliament thought it necessary to provide that having regard to the gravity of the problem covered by the said provision, it is essential that the President should have the assistance of the advice given by the Chief Justice of India. It is also implicit in this provision that before the President reaches his decision on the question, he ought to give the Judge concerned a reasonable opportunity to give his version in support of the age stated by him at the time of his appointment and produce his evidence in that behalf. How this should be done, is, of course, for the President to decide; but the requirement of natural justice that the Judge must have a reasonable opportunity to put before the President his contention, his version and his evidence, is obviously implicit in the provision itself. These aspects of the matter are not disputed by the teamed Attorney- General before us. It is in the light of this position that we must now proceed to consider the question as to whether the decision of the President on which the Union of India relies can be said to be a decision under Art. 217 (3). The first point which arises in this connection is whether an earlier decision reached by the President when the provision in question was not factually included in the Constitution, can be treated as a decision under the said provision as a matter of law. It is well-known that where legislation makes retrospective provisions, it sometimes expressly provides that orders passed earlier under some other provisions should be deemed to have been passed under the subsequent provision retrospectively introduced. Such a provision has not been made by the Amendment Act, 1963 which inserted clause (3) in Art. 217. But in dealing with the present appeal, we are proceeding on the basis that an order passed by the President on May 15, 1961, can be treated as a decision under Art. 217(3) if, on the merits, such a conclusion is justified, because, in terms, the said provision is made retrospective.

Before dealing with this question, there are some incidental matters which must be considered. The appellant has urged before us that Art. 217(3) can come into play only if and when a genuine or serious question about the age of a Judge arises. He contends that if any person frivolously or maliciously and without any justification whatever raises a dispute about the correctness of the age given by a Judge at the time of his appointment, Art. 217 (3) should not be allowed to be invoked. It is true that it is only where a genuine dispute arises as to the age of a Judge that Art. 217(3) would be allowed to be invoked; but that is a matter for the President to consider. Under Art. 217(3) the

President should, and we have no doubt that he will, in every case, consult the Chief Justice of India as to whether a complaint received in respect of the age of a sitting Judge of any High Court should be investigated, and it is with such consultation that he should decide whether the complaint should be further investigated and a decision reached on the point. We think it is clear that if a dispute is raised about the age of a sitting Judge and in support of it, evidence is adduced which prima facie throws doubt on the correctness of the date of birth given by a Judge at the time of his appointment, it is desirable that the said dispute should be dealt with by the President, because it is of utmost importance that in matters of this kind, the confidence of the public in the veracity of a statement made by a Judge in respect of his age must be scrupulously maintained, and where a challenge is made to such a statement, it is in the interests of the dignity and status of the Judge himself as much as in the interests of the purity and reputation of the administration of justice that the dispute should be resolved and the matter cleared up by the decision of the President.

The appellant, however, contends that pending the decision of the dispute, the Judge concerned continues to be a Judge and should not be required to step down from his office. As a matter of law, the appellant is right when he contends that a Judge cannot cease to be a Judge merely because a dispute has been raised about his age and the same is being considered by the President; but in dealing with this legal position, considerations of prudence and expediency cannot be ignored. If a dispute arises about the age of a Judge, any prudent and wise Chief Justice would naturally think of avoiding unnecessary complications by refusing to assign any work to the sitting Judge if at the time when the dispute had been raised, it appears that the allegation is that at the relevant time the Judge in question has reached the age of superannuation. In such a case, if the decision of the President goes against the date of birth given by the appellant, a serious situation may arise, because the cases which the said Judge might have determined in the meanwhile would have to be rehealed, for the disability imposed by the Constitution when it provides that a Judge cannot act as a Judge after he attains the age of superannuation, will inevitably introduce a constitutional invalidity in the decisions of the said Judge, and it is plain that it would be the duty of the Chief Justice to avoid such a complication. Therefore, we do not think the appellant is entitled or justified in making a grievance of the fact that respondent No. 1 refused to assign any work to him after the 26th December 1961.

That takes us to question as to whether the impugned order can be said to fall under Art. 217(3). The Attorney-General has contended that the approval expressed by the President on May 15, 1961, in law amounts to a decision under Art. 217(3), because it satisfies all the requirements of the said provision. The Government of India had consulted Chief Justice S. R. Das as well as his successor, Chief Justice Sinha, the Government had asked the appellant to make his comments on the material which showed that the appellant was born on the 27th December 1901; a large volume of correspondence proceeded between the parties and it is only after the appellant had set out his contentions and his points that the Government ultimately came to a conclusion against the appellant and placed before the President the whole file containing all the material including the advice received from Chief Justice S. R. Das and Chief Justice Sinha. The Attorney-General has urged that it is not necessary that the President should himself write an elaborate order incorporating his decision on the question referred to him; the word "approved" used by him while signing the file amounts to his decision. In support of this argument, he has referred us to two

decisions :

> Srinivas Mall Bairoliva v. King Emperor(1), and Alexander Brogden and Others v. The Directors, & c., of the Metropolitan Railway Company (2) . He has also urged that the procedure followed by the Ministry of Home Affairs in placing the file before the President is in accordance with the rules of business prescribed in that behalf, and so, the decision of the President should be held to be a decision under Art. 217(3).
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> (1) (1947) I.L.R. 26 Pat. 460. (2) (1876-7) 11 A.C. 666.

Prima facie, there appears to be substance in this argument; but on a closer examination of the material produced before us, we find that there are several difficulties in upholding it. Let us first enquire as to when this decision was reached and by whom ? We have already seen that in his letter of September 14, 1959 G.B. Pant, the then Home Minister, wrote to the Chief Minister, West Bengal, that he had consulted the Chief Justice of India and he agreed with the advice given to him by the Chief Justice, and so, he had decided that the date of birth of the appellant was December 27, 1901. It is this decision which was, in due course, communicated to the appellant. Now, if this be held to be the decision of the Government of India, then, of course, Art. 217(3) is inapplicable. The decision was reached by the Home Minister, no doubt after consulting the Chief Justice of India; but that plainly is not the decision of the President.

What happened subsequent to this decision also doe-, not assist the Attorney-General's contention. It is true that the attitude adopted by the Government of India was, on the whole, very fair. They were anxious to consider what the appellant had to say in respect of this dispute. They were also anxious to take into account whatever pleas the appellant might have to raise in favour of the date of birth given by him. They consulted Chief Justice S. R. Das as well as Chief Justice Sinha who followed him. They offered to take the question to an 'arbitrator of the choice of the parties, and when they found that the appellant was not agreeable to adopt any such course, they considered the matter and placed the file before the President. There is little doubt that this flexible and informal approach adopted by the Government in dealing with this question was inspired by a desire to be fair to the appellant; but the flexibility and the informality of the approach thus adopted by the Government out of a sense of fairness themselves tend to introduce an infirmity in the procedure when it is sought to be co-related. With the requirements of Art. 217(3). It is difficult to imagine that if the President were to act under Art. 217(3) he could or would ask the Judge concerned to go to arbitration. It is because of this flexible and sympathetic approach adopted by the Government that even after the Home Minister had come to a definite decision against the appellant, the matter was allowed to he reopened and the whole question was considered afresh. That, again, would not be quite consistent with the requirements of Art. 217(3). In this connection, it is hardly necessary to emphasise that when at the relevant time the Government were considering this matter and they consulted the Chief Justice of India, the informality of the said consultation does not squarely fit in with the formal consultation which is now made mandatory by Art. 217(3). Therefore, having regard to the procedure followed by the Government in dealing with this question, we feel some hesitation in accepting the Attorney-General's argument that what has been done prior to the decision of May 15, 1961, can be easily assimilated to the requirements of Art. 217(3).

There is one more objection which is fatal to the Attorney- General's contention. and that must now be considered. It is true that at all material stages, the appellant had taken an alternative stand in support of his case that the date of birth given by him was correct and could not be challenged. His first contention was that where a lawyer gives the date of his birth on the occasion of his appointment as a Judge of the High Court and the said date is accepted by the Government and entered in official records, its correctness cannot be impeached at any time. This contention is clearly not well-founded. Whether or not the Government of India accept the date of birth given by a lawyer before he is appointed, it is difficult to hold that a litigant would be precluded from putting that question in issue in a proceeding taken by him under Art. 226 for the issue of a writ of Quo Warranto. It is true that no such applications are known to have been made; and that naturally speaks for the respect in which Judges of High Courts are held by the litigants and the public in this country. But speaking constitutionally prior to the insertion of cl. (3) in Art. 217, it would have been open to a litigant, if he has material in his possession in that behalf, to apply to a High Court and urge that a particular Judge is not competent to act as a Judge, because, according to him, he has already reached the age of superannuation. Therefore. we are satisfied that the stand taken by the appellant that the statement made by him as to the date of his birth before he took office can never be questioned, is not well-founded. The alternative stand which the appellant took was that the Executive was not entitled to determine his age; and it must be remembered that this stand was taken before Art. 217 (3) was inserted in the Constitution, the appellant was undoubtedly justified in contending that the Executive was not competent to determine the question about his age, because that is a matter which would have to be tried normally in judicial proceedings instituted before High Courts of competent jurisdiction. There is considerable force in the plea which the appellant took at the initial stages of this controversy that if the Executive is allowed to determine the age of a sitting Judge of a High Court, that would seriously affect the independence of the Judiciary itself. Basing himself on this ground, the appellant did not produce his evidence in the proceedings taken by the Government of India before the impugned order was passed. The appellant stated before us and he apparently suggested this fact even to the Punjab High Court when he moved that Court under Art. 226 that he had in his possession evidence which supported the date of birth given by him before he was elevated to the Bench. It is true that he did not produce this evidence, though Chief Justice Das Gupta had asked him to do so. We are not impressed by the appellant's plea that he had not received the letter of Chief Justice Das Gupta written on April 17, 1959, in which he had been asked to communicate to the Chief Justice what material he had in support of the date of birth given by him; and so, we proceed on the basis that the appellant did not produce his evidence, though he was called upon to do so. He also refused to go to arbitration. But the question which arises for our decision is : can the appellant's failure or refusal to produce evidence be fairly pressed into service against him when basically he was right in contending that the Executive cannot decide the issue of his age by itself ? If the appellant was right in this contention, then no adverse inference can be drawn against him because he failed or refused to adduce evidence before the Executive. We are satisfied that having regard to the circumstances in which the enquiry was made, and bearing in mind the fact that the appellant was justified in contending that his age could not be determined by the Executive in proceedings initiated by it, the impugned order passed by the President must be held to suffer from the serious infirmity that the evidence of the appellant was not available to the President when he reached his decision. The question concerning the age of the appellant on which a decision was reached by the President on May 15. 1961, affects the appellant in a very serious

manner; and-so, we think considerations of natural justice and fair-play require that before this question is determined by the President, the appellant should be given a chance to adduce his evidence. That is why we think that, on the whole, it would not be possible to accept the Attorney-General's contention that the order passed by the President on May 15, 1961, can be treated as a decision within the meaning of Art, 217 (3). We ought to make it clear that in dealing with the grievance of the appellant that his evidence was not before the President at the relevant time, we are not prepared to hold that his failure or refusal to produce evidence at that stage should be judged in the light of the retrospective operation of Art. 217(3); such a consideration would be totally inconsistent with the concept of fair play and natural justice which ought to govern the enquiry contemplated by Art. 217(3). In dealing with this aspect of the matter, it would be unreasonable, unjust and unfair to refuse to recognise the position of law as it actually and in fact existed at the relevant time merely because by the fiction introduced by the retrospective operation of the constitutional amendment, the said position cannot now be deemed. to have then existed in the eyes of law.

The Attorney-General faintly attempted to argue that the decision of the Punjab High Court in the writ petition filed by the appellant in that Court in 1961 (Civil Writ No. 479- D/ 1961) amounts to res judicata on the question about the appellant's age. In his judgment, Chief Justice Khosla has no doubt observed that he was convinced upon all the material which had been produced before the Court including the horoscope and the entry in the almanac that the Home Ministry was not wrong in accepting the correct age of the appellant as that given in the Bihar & Orissa Gazette and in the certificate which the appellant had filed with, his application when he sat for the I.C.S. Examination. This argument is obviously misconceived. First and foremost, if Art. 217 (3) is retrospective in operation, any decision of the Court on this question must be deemed to be without jurisdiction, because from January 26, 1950 itself this question must be deemed to have fallen within the exclusive Jurisdiction of the President. Since the plea of res judicata on which the Attorney-General relies is a plea of law, the appellant is entitled to repel the said plea on the legal ground that the constitutional amendment in question is retrospective, and at the relevant time the High Court had no jurisdiction to decide this point. But quite apart from this technical constitutional position, it is impossible to hold that the observation on which the Attorney-General relies can be said to be 'a decision which can operate as res judicata in law. Chief Justice Khosla, in substance, dismissed the writ petition of the appellant on the around that it was premature, and so, he expressly observed that the question about the age of the appellant was of an academic nature. He also seemed to rely on the doctrine of approbate and reprobate. Besides, it does not appear that the documents to which he refers were formally proved before the Court in those proceedings and had been the subject-matter of any argument before it. Under these circumstances, the plea that this judgment creates a bar of res judicata must be rejected without any hesitation. We ought to add that if this Court had felt inclined to treat this decision as a decision on the merits of the appellant's age, it would certainly not have dismissed in limine the appellant's application for special leave to appeal to this Court against that judgment. That raises the question as to the proper order which should be passed in the present proceedings. The appellant has contended before us that if we hold that the impugned decision of the President does not amount to a decision under, Art. 17(3), he is entitled to have a formal decision of the President in terms of the said provision. The Attorney-General has conceded that this contention of the appellant is well-founded. He, therefore, stated to us on behalf

of the Union of India that in case our decision on the main point is rendered against the Union of India, the Union of India will place the matter before the President within a fortnight after the pronouncement of our judgment inviting him to decide the question about the appellant's age under Art. 217(3). Both parties have agreed before us that in case the decision of the President is in favour of the appellant, the appellant will be entitled to claim that he has continued to be a Judge notwithstanding the order passed by the Chief Justice of the Calcutta High Court and will continue to be a Judge until he attains the acre of superannuation. On the other hand, if the decision of the President goes against the appellant, the said order of the Chief Justice of the Calcutta High Court would be held to be valid and proper. Having regard to the circumstances of this case, we think that the present appeal should be disposed of in terms of this order. There would be no order as to costs.

Ordered accordingly.