Supreme Court of India
Union Of India vs Jyoti Prakash Mitter on 21 January, 1971
Equivalent citations: 1971 AIR 1093, 1971 SCR (3) 483
Author: S C.
Bench: Shah, J.C. (Cj)

PETITIONER:
UNION OF INDIA

Vs.

RESPONDENT:
JYOTI PRAKASH MITTER

DATE OF JUDGMENT21/01/1971

BENCH:
SHAH, J.C. (CJ)
BENCH:
SHAH, J.C. (CJ)
SIKRI, S.M.
BHARGAVA, VISHISHTHA
HEGDE, K.S.
GROVER, A.N.
DUA, I.D.

CITATION:
1971 AIR 1093 1971 SCR (3) 483
1971 SCC (1) 396
CITATOR INFO :
D 1974 SC2192 (147)
D 1982 SC 149 (709,718,876,1005)
RF 1982 SC1029 (6)
RF 1991 SC 564 (5)

ACT:
Constitution of India, 1950, Arts. 132(1) & 217(3)-Grant of leave to Supreme Court against judgment of single Judge of High Court-When permissible-Procedure to be followed by President when acting under Art. 217(3).
Natural Justice-If party effected entitled to personal hearing.

HEADNOTE:
Article 217(3) of the Constitution incorporated by the 19th Amendment Act, was given retrospective effect from January 26, 1950, and hence, all questions relating to the age of a Judge of a High Court had to be decided by the President after consultation with the Chief Justice of India. The respondent raised a dispute regarding his age claiming that

his date of birth was December 27, 1904, and not December 27, 1901.

The Secretary of the Ministry of Home Affairs drew up a note tracing. the history of the dispute and invited the President to determine the age of the respondent. The note was submitted through the Minister of Home Affairs and Prime Minister. The President then called upon the: respondent to make such representation as he may wish to make and to produce such evidence as he may desire. Thereafter, all communication to and from the respondent, his representations to the President and documentary evidence on which he relied, were all submitted through the Secretary of the Ministry of Home Affairs. The respondent made a request for oral hearing in his various communications. He protested against the reference by the Ministry of Home Affairs to the Director of the Central Forensic Institute of the documents submitted by him and requested that the originals may be returned to him to enable him to have them examined by an independent expert. In reply to that letter the Secretary of Ministry of Home Affairs wrote that the procedure to be followed and the opportunities to be given to the respondent depended entirely upon the discretion of the President and the question of returning the documents produced by the respondent did not arise at that stage. The respondent was also informed that the question whether he should have an opportunity of filing expert evidence will be considered later and that he would be given an opportunity to put forward his case about the evidentiary value of the documents produced by him and that any decision thereon would be arrived at by the President after affording him reasonable opportunity in that behalf. After receiving the report of the Director of the Central Forensic Institute the President referred the question to the Chief Justice of India for his advice on the procedure to be adopted and the Chief Justice gave his advice to the President. The copies of the reports of the Director, Central Forensic Institute, were forwarded by the Home Secretary to the respondent with a forwarding letter by which the respondent was informed that if he had any comments to make on the opinion expressed by the Director they may be submitted and if the respondent desired he may also adduce evidence in rebuttal in the form of expert opinion supported by appropriate affidavits within one-

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month. The respondent submitted that the evidence tendered was conclusive in his favour and there was no question of adducing any further evidence or any evidence in rebuttal. He also requested the President to grant him an audience for the purpose of deciding the question of his age.

The President then referred the matter to the Chief Justice of India asking him for his advice and the Chief Justice of India, after considering the evidence in the matter, recommended that the age of the respondent be decided on the

basis that the respondent was born on December 27, 1901. The file relating to the matter was received in the President's Secretariat and was sent to the Secretary, Ministry of Home Affairs. The Secretary recorded a note requesting the Minister of Home Affairs, to recommend to the President that the age of the respondent may be determined in accordance with the advice of the Chief Justice ;of India, and the Home Minister and the Prime Minister countersigned that endorsement. The file then was placed before the President and on the same day he recorded his decision that he accepted the advice tendered by the Chief Justice of India and decided that the age of the respondent should be determined on the basis that he was born on 27th December 1901. The decision was communicated to the respondent by the Secretary, Ministry of Home Affairs.

The respondent then moved a writ petition in the High Court and a single Judge of the High Court allowed the petition on the grounds :

(1) that the function of President was quasi-judicial and he was not given sufficient time and opportunity to exercise his independent judgment on the question before him; (2) that the President had not given a personal hearing to the petitioner; (3) that the President had taken into account extraneous matters viz., the recommendation of the Home Minister and the Prime Minister.

The appellant then asked for a certificate and a certificate was granted under Art. 132(1) of the Constitution.

HELD : (1) A single Judge of a High Court may, in appropriate cases, certify that the case involves a substantial question of law as to the interpretation of the Constitution. But such a certificate is intended to be given in very exceptional cases where a direct appeal is necessary in view of the grave importance of the case or an early decision of the ,case must, in the larger interest of public or for similar reasons. be reached. The present case was not one in which a certificate should have been asked for or granted by the single Judge. Against the decision of the single Judge, an appeal lay to the Divisional Bench of the High Court under Letters Patent; and, the respondent could not, on the date of the order be reinstated because he had already passed 62 years of age,

1496 G-H; 497 A-B]

[The matter was however examined on merits since the appeal was before this Court-]

(2) The President in performing the functions under Art. 217(3) is invested with the judicial power of great significance which has a bearing on the independence of judges of the High Courts. In the exercise of this power even the slightest suspicion or appearance of misuse of that power should be avoided. Even in the matter of serving notices and asking for representation from judge of the High Court, when question of his age is raised, the President's Secretariat should ordinarily be

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the channel and the President should have consultation with the Chief Justice of India as required by the Constitution; and there must be no interposition of any other body or authority in the consultation between the President and the Chief Justice. Further, normally, an opportunity for an oral hearing should be given to the judge were age is in question, though there is nothing in the Article which requires that the Judge should be given a personal hearing by the President and it is in the President's discretion to do so in appropriate cases. The question should be decided by the President on consideration of such materials as may be placed by the Judge concerned and the evidence against him after the same is disclosed to him. In such a matter the President cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President, this Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by. the advice or representation made by the executive or if it was founded on no evidence. Appreciation of the evidence however is entirely left to the President and it is not for the courts to substitute their view. [504 F-H; 505 A-E]

(3) There is no substance in the contention of the respondent that the decision was in truth rendered by the Chief Justice of India and not by the President. The President acted on the advice of the Chief Justice. He did not surrender his judgment to the Chief Justice. [497 E-F]

(4) It is not a condition of the validity of the decision by the President that the President and Chief Justice should meet and discuss across a table the pros and cons of the proposed action or, the value to be attached to any piece of evidence laid before the President and made available to the Chief Justice. Consultation contemplated by the Article is not a dialogue. The President must, before deciding the age of a Judge obtain the advice of the Chief Justice and for that purpose he must make available all the evidence in his possession to the Chief Justice and the Chief Justice has to submit his advice to the President on that evidence. The procedure followed in the present case of sending to the Chief Justice of India the file relating to the evidence against the respondent and in his favour, and of obtaining the advice of the Chief Justice, fully complied with the constitutional requirements as to consultation with the Chief Justice. [499 CF]

(5) Merely because the President was assisted by the machinery of the Ministry of Home Affairs in serving notices and receiving communications addressed to him it could not be inferred that he was guided by that Ministry. No rules had been framed regarding the inquiry to be made by the President of India under Art. 217(3), and the President had

no secretarial facilities for serving notices and for taking other steps in regard to the inquiries to be made under the Article.

(6) There is nothing in the order to indicate that the Minister of Home Affairs acted upon the request made by the Secretary; he and the Prime Minister merely countersigned the note. The argument that the Home Minister and the Prime Minister signified their assent and thereafter the President acted as if he was exercising his executive authority on the advice of the Ministers has no force. The resident was not swayed by anything which the Secretary to the Ministry of Home Affairs had noted or by the signatures of the Minister or the Prime Minister. The order shows that the President was acting only on the advice of the Chief Justice and he decided the age of the respondent on that basis.

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Any irregularity in the procedure followed by the Secretariat of the President and the Secretary of the Ministry in sending the papers through the Ministers did not affect the validity of the order made by President.

[498 G-H; 499 A-B]

(7) In the present case, the President had given ample opportunities at various stages to the respondent to make his representation. All evidence placed before the President and considered by him was disclosed to the respondent and he was given opportunity to make his representation. The respondent cannot claim that the order made without affording him an opportunity of personal hearing is invalid, because, though the President is performing a judicial function when he determines a dispute as to the age of a Judge he is not a court. Moreover, there was no likelihood of any bias or prejudice as no evidence was placed before the President or considered by him which was not disclosed, to the respondent.

[499 F-G; 500 A-G]

Surender Singh Kanda v. Govt. of the Federation of Malaya [1962] A.C. 322, referred to.

(8) There is no substance in the claim of the respondent that his request for an oral hearing was granted and that therefore the order passed Without an opportunity of oral representation was contrary to the rules of natural justice. In the present case the record supports the view that the President did not deem it necessary to give an oral hearing. There were no complicated questions to be decided by the President. The truth of the statements made by the respondent had to be judged in the light of his past conduct at various stages when he gave no evidence of the date of his birth. If upon such evidence the President was of the view that the disputed question may be decided without giving him an opportunity of personal hearing this Court cannot set aside the order on the ground that the order was made without following rules of natural justice. [500 H; 501 A-G]

(9) There is no reliable evidence that the President treated the matter as. formal and allowed himself to be guided by the advice of the Home Minister or that he mechanically accepted the advice of the Chief Justice and surrendered his own judgment to the Chief Justice of India. No attempt was made to have the matter investigated in the High Court as to when the papers were submitted to the President and what consideration he gave to the advice, whether (he made only a mechanical approach believing that he was bound to accept the advice of his minis-
this Court. [502 A-F]
(10) There is no evidence that beside tendering advice to the President in matters of procedure and final decision the Chief Justice of India bad given any advice to the Ministry of Home Affairs privately or otherwise. The argument that the Chief Justice in tendering the advice was influenced by extraneous considerations is not founded upon any materials Placed before this Court. [502 F-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 52 of 1968. Appeal from the judgment and order dated August 7, 8, 1967 of the Calcutta High Court in Civil Rule No. 1798(W) of 1966.

Jagadish Swarup, Solicitor-General, Ram Panjwani and S. P. Nayar, for the appellant.

The respondent appeared in person.

The Judgment of the Court was delivered by Shah, C. J. Joyti Prakash Mitter-hereinafter called 'the respondent-was a candidate for the matriculation certificate examination of the Bihar University, held in April, 1918. In the Bihar Government Gazette declaring him successful the age of the respondent was shown to be 16 years 3 months in April 1918. The respondent offered himself as a candidate for admission to the Indian Civil Service at an examination held in 1963 by the United Kingdom Civil Service Commission. On that occasion he declared that his date of birth was December 27, 1901. The respondent joined the High Court Bar at Calcutta in May 1931. On February 11, 1949 the respondent was appointed an Additional Judge and on December 26, 1949 he was recommended for appointment as a permanent Judge. He then declared that he was 45 years of age. In 1956 the Government of India collected information re- lating to the educational and other qualifications of the Judges of the High Courts and their respective dates of birth. The declaration made by the respondent that his date of birth was December 27, 1904 was accepted. The Government of India having received information that the true date of birth of the respondent was December 27, 1901 commenced an enquiry. On April 17, 1959 the Chief Justice of the High Court of Calcutta asked the respondent to make a formal statement relating to his date of birth. On May 27, 1959 the respondent wrote to the Chief Justice of the High Court, Calcutta that his age entered in the matriculation certificate was incorrect, and that he was shown to be three years older than he actually was, because a true declaration of his age would have prevented him from appearing for the

matriculation examination in 1918. The respondent also tendered an affidavit of one Panchakari Banerjee that the question of his age was discussed with Sir Arthur Trevor Harries who was in 1949 the Chief Justice of the High Court of Calcutta.

A suggestion made by the Chief Minister of West Bengal that the respondent may agree to abide by the decision of the Chief Justice of India on the question of his true date of birth was not accepted by him. The respondent also did not furnish any material in support of his case that he was born in December 1904. By order dated May 15, 1961 the President of India on the recommendation of the Minister of Home Affairs directed that the age of the respondent be determined on the basis of the date of birth declared in the matriculation certificate. The respondent then moved a petition in the High Court of Punjab at Delhi for a declaration that he was entitled to 'hold office till December 27, 1964 and for a writ of mandamus restraining the Union of India from giving effect to the order of the President. The petition was dismissed. The respondent then filed a petition on January 2, 1962 in the High Court of Calcutta impleading the Chief Justice of the Court of Calcutta as a party respondent praying for, an order directing the Chief Justice to treat him as continuing in office till December 27, 1964 and "to assign judicial work" to him. He urged that the decision of the Government of India in pursuance of which the Chief Justice of the High Court had acted was "illegal, arbitrary and uncon- stitutional" and that the Chief Justice had no Jurisdiction to act upon that decision. That petition was dismissed in limine. But a Special Bench of the High Court in appeal filed by the respondent directed that rule nisi be issued. This Court dismissed an appeal against the order of the High Court: Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and another v. Jyoti Prakash Mitter(1). A Special Bench of five Judges of the Calcutta High Court then heard the petition. The petition filed by the respondent was ordered to be dismissed and the rule was discharged. This Court in appeal against the order of the High Court : Jyoti Prakash Mitter v. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another(2) gave certain directions. To appreciate the reasons for making those directions it is necessary to take into account certain developments.

When the appeal was pending in this Court, Art. 217 of the Constitution was amended by the Constitution (Fifteenth Amendment) Act, 1963 and cl. (3) was added thereto to the following effect with retrospective effect "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." Clause (1) of Art. 217 was also amended by the Constitution (Fifteenth Amendment) Act, 1963, with effect from October 5, 1963 and the age of superannuation of Judges of tile High Court was fixed at sixty-two years.

(1) A.I.R. [1964] S.C. 1636 (2) [1965] 2 S.C.R.53.

This Court held that cl. (3) of Art. 217 having retrospective operation, validity of the order passed by the President must be adjudged, in the light of cl. (3) of Art. 217 and since the Ministry, of Home Affairs had placed the file before the President in accordance with the rules of business, the procedure could not be assimilated to the requirements of Art. 217(3). The Court observed "The question concerning the age of the appellant (respondent herein) 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 out to govern the enquiry contemplated by Art. 217 (3);" and that;

"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. 217 (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 age of superannuation."

Thereafter the President of India directed the Secretary, ,Ministry of Home Affairs, to call upon the respondent to "make ,such representation as he may wish to make in the matter and produce such evidence as he may &.sire to produce in support of .his claim that his correct age should be determined on the basis of his date of birth being taken as December 27, 1904", and after ,consulting the Chief Justice of India by order dated September 29, 1965, determined the date of birth of the respondent as .December 27, 1901. The legality of the procedure followed by the President in making the order is challenged by the respondent. It is, therefore, ,necessary to set out in some detail the various steps taken before passing that order. On November 17, 1964 the Secretary of the 'Ministry of Home Affairs drew up a note tracing the history of the .litigation upto the decision of this Court, and invited the President to determine the age of the respondent under Art. 217 (3). The note of the Secretary was submitted to the President through the Minister of Home Affairs and the Prime Minister. On November 21, 1964 the President signed an order calling upon the respondent to make such representation as he may wish to make in the matter and to produce such evidence as he may desire. The respondent submitted his representation on December 7, 1964 and annexed therewith photostat copies of two documents an almanac and a horoscope on which he relied and certain affidavits. By his forwarding letter the respondent prayed for an oral hearing before the President to enable him "to adduce his evidence and to produce in original the documents in the Annexures and to make submissions in support of his case". The respondent repeated his request for oral hearing by a letter addressed to the Secretary to the President on the same day. On December 9, 1964 the Secretary to the Ministry of Home Affairs wrote to the respondent asking him to send the original documents copies of which "re annexures to his representation to enable him-the Secretary to place them before the President. On the same date, the Secretary to the Ministry of Home Affairs

also supplied to the respondent a copy of his note dated November 17, 1964, seeking the determination of the President, and copy of the President's directive dated November 21, 1964. After receiving the copies the respondent by letter dated December 10, 1964 submitted an additional representation. On the same date the respondent submitted to the Secretary, Ministry of Home Affairs, documents in original relied upon by him in his representation. On December 14, 1964 the respondent addressed a letter to the Secretary to the President, forwarding a copy of his additional representation, with a request that representation together with the original documents, which he had handed over to the Ministry of Home Affairs, be called for from that Ministry and be placed before the President. On December,21, 1964 the Secretary, Ministry of Home Affairs sent a reply to the letter directing the respondent to send all the. evidence that he desired to rely upon and informing him that no oral evidence of witnesses will be received, the respondent being free to submit affidavits of witnesses. Referring to his request for personal hearing it was stated in the letter that the President will decide after considering the evidence produced by the respondent whether any personal hearing would be necessary, and that "should he decide that you should be heard in person, you will be informed in due course". On December 31, 1964 the originals of the horoscope and the almanac submitted by the respondent were sent to the Director of the Central Forensic Institute, Calcutta by the Ministry of Home Affairs with the request that the horoscope and the entry in ink in the margin of the almanac be examined .,with a view to determine its genuineness with particular reference to the age of the paper on which the horoscope had been prepared; the age of the ink used; and the age of the writing "with a similar report as to the genuineness of the entry in ink in the almanac. On January 4, 1965 the respondent submitted four additional affidavits including his own affidavit affirming that the writing on the margin of the almanac against the date 12 Paus, 1311 B.S. was that of his maternal uncle, Jadunath Bose, who had died \,\hen he the respondent was a student of Oxford. By his letter dated February 3, 1965 addressed to the Secretary, Ministry of Home Affairs, the respondent protested against the reference of the documents to the expert, contending that the documents were obtained from him on the representation that they "were required to be placed before the President". The respondent demanded that he be supplied a copy of the order of the President by which such .reference to the expert had been made and also copies of the correspondence between, the Home Ministry and the forensic expert. He also requested that the originals of the documents be returned to him so that he might have them examined by an independent expert, who would, after his examination, give evidence as to his opinion, by affidavit or otherwise. In reply to that letter, the Secretary, Ministry of Home Affairs wrote that the procedure to be followed and the opportunities to be given to the respondent depended entirely upon the discretion of the President and the question of returing the documents produced by the res- pondent before determination of the matter, pending before the President, did not arise at that stage. The respondent was also informed that the question whether he should have an Opportunity of filing expert evidence will be considered in due course. He was also informed that the respondent will be given an opportunity to put forward his case about the evidentiary value of the documents produced by him and any decision thereon would be arrived at by the President after affording him reasonable opportunities in that behalf.

There was some correspondence between the Director of the Central Forensic Institute, Calcutta and the Ministry of Home Affairs. The Commandant of the Institute opined that it was " extremely difficult to solve dating problems in a completely satisfactory manner". He initially sought

instructions whether he was at liberty to deface or mutilate the documents, because the "test required could not be made without extracting parts of the documents, but later wrote that the mutilation of documents by the chemical test was not desirable and moreover that by such application it would not be possible to give an absolute date to the document. Thereafter the Director reported on a "limited examination" that could be carried out that it was not possible to give any opinion relating to the age of the ink writing on the almanac", but in his view the horoscope could not have been written earlier than 1909, because the paper on which it was written contained bamboo pulp which was not brought into the use by the Titaghur Mills in the manufacture of paper before 1912. The Director said nothing about the age of the ink in which the After consultations between the Ministry of Home Affairs and the Ministry of Law, the Home Ministry sent certain old writings of the year 1904, 1949, 1950 and 1959, and requested the Director to determine the age of the writing of the disputed horoscope and marginal note in the almanac by comparison. The Director on April 17, 1965 wrote that it "was impossible to give any definite opinion by such comparisons particularly when the comparison writings were not made with the same ink on similar paper and not stored under the same conditions as the documents under examination", and that it "will not be possible for a document expert, however reputed he might be, anywhere in the world, to give any definite opinion on the probable date of the horoscope and the ink writing in the margin of the almanac".

After receiving the second report from the Director, the Ministry of Law raised the question about the opportunity to be given to the respondent before the President in the enquiry for determining the age of the respondent under Art. 217 (3) . It was then decided to refer the question to the Chief Justice of India for his advice. On July 24, 1965 the Chief Justice of India advised the President about the procedure to be adopted in the determination of the age of the respondent. Thereafter pursuant to a suggestion made by the Law Minister the Ministry of Home Affairs wrote to the respondent on July 31, 1965 requiring him to state the date or year of the horoscope. The respondent by his letter dated August 4, 1965, stated that it was not possible for him to give definitely the date or year of the horoscope but he asserted that it was at least in existence in the year 1921 when it was consulted on the occasion of his marriage. On February 23, 1965 the respondent addressed a telegram to the President requesting that an early decision of the question of his age may be reached. On March 15, 1965 he addressed another telegram to the President requesting leave to produce other documentary evidence which he claimed may be available in East Pakistan, but sometime thereafter he informed the Secretary, Ministry of Home Affairs, that owing to lack of co-operation on the part of the people in East Pakistan it was not possible to get the evidence which was mentioned in his letter to the President and that he must content himself with the evidence he had already produced and which in his view was "overwhelming". He further stated : "You can, therefore, take it that I have no evidence to produce on the subject of my age, unless I am driven to call an expert or experts as indicated by me in my letter to you, dated 3rd February, 1965".

On August 13, 1965, copies of the reports of the Director of the Forensic Science Laboratory were forwarded by the Home Secretary to the respondent with a forwarding letter by which the respondent was informed that if he had any comments to make on the opinion expressed by the Director they may be submitted and that if the respondent desired he may also adduce evidence in rebuttal in the form of expert opinion supported by proper affidavit, and that the comments,

evidence and affidavits, if any, may be sent within one month of the letter. On receipt of the letter of the Home Secretary the respondent sent a telegram addressed to the Home Secretary on September 1, 1965, praying that the President may call for all papers and documents, if not already sent for and grant him an audience, "If at all necessary". The respondent also wrote a letter on that day submitting that the evidence tendered by him was "conclusive" and there was no question of adducing any further evidence or any evidence in rebuttal. He also submitted that the entry in the Bihar and Orissa Gazette (declaring him successful at the matriculation examination) was erroneous and concluded the letter that all relevant documents be placed before the President, and that the President "may be graciously pleased to grant "him" an audience for the purpose of deciding the question of his age".

The file of the respondent's case was then submitted to the President. On September' 16, 1965 the President referred the matter to the, Chief Justice of India asking him for his advice. On September 28, 1965 the Chief Justice recommended that the age of the respondent be decided on the basis that the respondent was born on December 27, 1901. The Chief Justice set out in detail all the evidence including the reports of Dr. Iyengar, Director of the Central Forensic Science Laboratory, Calcutta bearing on the dispute as to the true date of birth of the respondent. The Chief Justice of India thereafter observed :

"..... the question which the President has to decide is whether the date of Mr. Mitter's birth mentioned on the occasions when he appeared for the Matriculation Examination as well as for the Indian Civil Service Examination, is incorrect; and that would naturally turn upon whether it is shown that the entry in ink on the margin of the almanac showing that Mr. Mitter was born on 27-12-1904, was contemporaneously made and is correct as alleged by him. The horoscope on which Mr. Mitter relies, refers to the date and time of his birth, but that does not help Mr. Mitter very much, because it is obviously based upon information given to Jyotish-Sastri Shri Jogesh Chandra Deba Sarma on the basis of the entry in the almanac. I have carefully considered the reports made by Dr. Iyengar, the comments on them made by Mr. Mitter, the affidavits on which Mr. Mitter relies, and the almanac and the horoscope on which he bases his case. I have also taken into account all the other relevant facts relating to the past history of this dispute, the conduct of Mr. Mitter, the grounds on which he challenged the earlier orders passed in this matter, and I have come to the conclusion that it is not shown satisfactorily that the entry in ink on the margin of the almanac was made contemporaneously and is correct as alleged by Mr. Mitter. I am, therefore, unable to accept his case that the date of his birth which was shown at the time when he appeared for the Matriculation Examination as well as for the I.C.S. Examination "was exaggerated". I would, therefore, advised the President to hold that Mr. Mitter has failed to show that he was born on 27-12-1904 and not on 27-12-1901; and that the question about his age should be decided on the basis that be was born on 27-12- 1901".

The file containing the advice was then returned to the Pre- sident. It appears however that after the file was received in the President's Secretariat, it was sent to the Secretary, Ministry of Home Affairs for putting it up before the Home Minister before submitting it to the President. The Home Secretary on September 29, 1965 put up the matter before the Home Minister with the following endorsement : "A summary of the case will be found at slip 'Z'. The Chief Justice of India has offered

his advice in his minute..... after going into the relevant material, H.M. (Home Minister) may recommend to the President ,that the age Shri J. P. Mitter may be determined in accordance with the advice of the Chief Justice of India."

Home Minister and the Prime Minister countersigned that endorsement. The file was then placed before the President on the same day i.e. September 29, 1965. The President recorded his decision that he accepted "the advice tendered by the Chief Justice of India and "decided" that the age of Sri Jyoti Parkash Mitter should be determined on the basis that he was born on the twenty-seventh December nineteen hundred and one".

The Secretary, Ministry of Home Affairs communicated the decision of the President to the respondent. On October 15, 1965 the respondent addressed a letter to the President praying that the decision which had been made without affording him an audience should be reopened and that he should be granted an audience in the presence of the Chief Justice of India and a representative of the Home Ministry. The Home Secretary informed the respondent that the President's decision was final and could not be reopened. He also pointed out that though the respondent was offered the opportunity of commenting on the opinion of the Government expert, he-the respondent-had by his letter of September 1, 1965 declined that offer.

On August 3, 1966, the respondent moved the petition out of which this appeal arises claiming a writ in the nature of mandamus commanding the Union of India (i) to act and proceed in accordance with law, (ii) to rescind, recall and withdraw the purported decision of the President conveyed to him by the Secretary to the Government of India in his letter dated October 13, 1965 and (iii) to forbear from giving effect or further effect to the, purported decision of the President.

The petition was heard by D. D. Basu, J. After an elaborate discussion of the history of the dispute and decisions of the Courts in India and abroad, under diverse heads, the learned Judge concluded :

that"..... the impugned order of the President, the purport of which was communicated to the petitioner (respondent) by the letter of the Home Secretary, dated '13- 10-1965 is not a 'decision' of the President in term of Art. 217 (3), because-

A. Whether the function is quasi-judicial or admini- strative he acted as recommended by the Home Minister and the Prime Minister, who are extraneous to the function under Art. 217 (3);

B. The function being quasi-judicial-

(i) the President was not given sufficient time and opportunity to exercise his independent judgment on the question before him;

(ii) the petitioner was not given a personal hearing before the President, as called for by the circumstances of the case.

C. The jurisdiction of this Court to interfere on the above grounds is not barred by the finality under Art. 217 (3)".

He directed the Union of India not to give effect to the order ,of the President as communicated by the letter of the Home Secretary dated October 13, 1965. The learned Judge observed that ,-the Union of India, may, if so advised, place the matter before the President again, within two months from the date of the judgment, inviting him to decide the age of the respondent in accordance with Art. 217 (3). On behalf of the Union of India a prayer for a certificate under Art. 132(1) of the Constitution was made. Observing that the case involved a substantial question of law as to the interpretation of article 217(3) of the Constitution, D.D. Basu, J. granted the certificate prayed for under Art. 132 (1) of the Constitution. This appeal is filed pursuant to that certificate.

Under Art. 132 (1) of the Constitution an appeal lies to the Supreme Court from any judgment, decree or final order of a High Court, whether in a civil, criminal or other proceedings, if, the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. A single Judge of the High Court may in appropriate cases certify that the case involves a substantial question of law as to the interpretation of the Constitution. But such a certificate is intended to be given in very exceptional cases where a direct appeal is necessary and in view of the grave importance of the case an early decision of the case must in the larger interest of the public or similar reasons be reached. This case was not one in which a certificate should have-

been asked for or granted. Against the decision of the learned Judge,, an appeal lay to a Division Bench of the High Court under the Letters Patent and no reason was suggested for not moving the High Court. The order of the President was made in 1961. The respondent could not on the date of the order be reinstated because he was even on his case more than 62 years of age. Since, however, a certificate was asked for on behalf of the Union of India and has been given, we have not thought it necessary to vacate the certificate and to ask the Union to have resort to the normal remedy of an appeal to the High Court. Article 217 (3) incorporated by the Fifteenth Amendment Act in the Constitution was given retrospective effect from January 26, 1950. On that account all question arising as to the age of a Judge of the High Court had to be decided by the President after consultation with the Chief Justice of India. A dispute, relating to the age of the respondent who was a Judge of a High Court in India was raised and the President of India after consultation with the Chief Justice of India decided that question. Normally judicial power must be exercised by the authority in whom that power is vested. But under Art. 217(3) power to decide the question as to the age of a Judge of the High Court has to be exercised after consultation with the Chief Justice of India.

There is no substance in the contention of the respondent, who argued his case personally that the decision was in truth rendered by the Chief Justice of India and not by the President. The President has expressly recorded that he accepted the advice tendered by the Chief Justice of India and that he decided that the age of the respondent be determined on the basis that the respondent was born on the twenty-seventh December nineteen hundred and one. The President acted on the advice of the Chief Justice; he did not surrender his judgment to the Chief Justice. The order of the President is not open to challenge on the ground that he did not reach his own conclusion.

It was, then urged that in rendering his decision there was no consultation between the President and the Chief Justice as required by the Constitution; that the President was guided by the Minister of Home Affairs and by the Prime Minister; that the President did not apply his mind to the evidence in the case: that it was obligatory upon the President to grant to the respondent an oral hearing and since hp, did not do so the order was liable to be declared invalid; that in any case the respondent had requested on several occasions that an opportunity be given to him of an oral hearing before deciding the case and that the case was otherwise one in which an oral bearing should have been given; that the executive was closely associated with the President in making the Ministry of Home Affairs, and the papers were sent by the 'Chief Justice of India to the President but were diverted by the Secretary to the President to the Ministry of Home Affairs and after they were received with the advice of the Chief Justice of India they were considered by the Minister of Home Affairs and the Prime Minister and it was only after they assented to the advice of the Chief Justice of India that the papers were submitted to the President and that the part played "by the Chief Justice of India was contrary to all principles of natural justice". We do not propose to deal with those contentions in the se- quence in which they were urged before us for many of those contentions overlap. It is true that the notice requiring the respondent to show cause was issued pursuant to the papers being submitted to the President and the notice was in fact sent by the, Secretary to the Ministry of Home Affairs. But we do not think that because the President was assisted by the machinery of the Ministry of Home Affairs in serving notices, and receiving communications addressed by him it can be inferred that he was guided by that Ministry. Apparently no rules have been framed regarding the enquiry to be made by the President of India under Art. 217 (3). This was the first case which arose in which the question of age of a Judge of the High. Court had to be decided. The President has no secretarial facilities for serving notices and for taking other steps in regard to enquiries to be made under Art.. 217 (3).

After the Chief Justice of India sent the file of papers with his advice to the President, the papers were not immediately submitted to the President but were, sent to the Ministry of Home Affairs. The Secretary recorded a note requesting the Minister of Home Affairs to recommend to the President that the age of the respondent may be determined in accordance with the advice of the Chief Justice of India. The Minister for Home Affairs and then the Prime Minister placed their initials below the note. There is nothing in the order that the Minister for Home Affairs acted upon the, request made by the Secretary; he merely countersigned papers and sent them- to the Prime Minister who also countersigned the note. The argument that the Home Minister and the Prime Minister signified their assent and thereafter the President acted as if be was exercising the executive authority on the advice of his Ministers has no force. There is no reason to think that the. Minister for Home Affairs or the Prime Minister acted in pursuance of the request made, by the Secretary. There is again nothing in the order of the President which may suggest that he was swayed by anything which the Secretary to the Ministry of Home Affairs bad noted or by the signatures of the Minister for Home Affairs or the Prime Minister. The terms of the order of the President are clear : they show that the President was acting on the advice of the Chief Justice of India and that he decided the age of the respondent on that basis. Any irregularity in the procedure, followed by the Secretary to the President and the Secretary, Ministry of Home Affairs, in sending the papers through the Minister of Home Affairs and the Prime Minister as if the matter dealt with was executive in character, does not, in our judgment, affect the validity of the order made by the President or vitiate it on the ground

that he was guided by the Minister for Home Affairs or by the Prime Minister.

The argument that there was no consultation between the Chief Justice of India and the President is also without substance. Consultation contemplated by the Constitution is not a , dialogue. Under Art. 217(3) the President is required to consult the Chief Justice of India before determining the question as to the age of a Judge of the High Court. The President must before deciding the age of a Judge under Art. 217 (3) obtain the advice of the Chief Justice of India. For obtaining that advice the President undoubtedly must make available all the evidence in his possession to the Chief Justice of India. The Chief Justice has to submit his advice to the President on that evidence. It is not a condition of the validity of the decision by the President that the President and the Chief Justice should meet and discuss across a table the pros and cons of the proposed action, or the value to be attached to any piece of evidence laid before the President and made available to the Chief Justice. The procedure followed in the present case of sending to the Chief Justice of India the file of papers relating to the evidence against the respondent and in his favour, and of obtaining his advice fully complied with the constitutional requirements as to consultation with the Chief Justice of India when he rendered his advice to the President.

The President had given ample opportunities at diverse stages to the respondent to make his representation. All evidence placed before the President when he considered the question as to the age of the respondent was disclosed to him and he-respondent-was given an opportunity to make his representation thereon. There is nothing in cl. (3) of Art. 217 which requires that the Judge whose age is in dispute, should be given a personal hearing by the President, The President may in appropriate cases in the exercise of his discretion give to the Judge concerned an oral hearing but he is not bound to do so. An order made by the President which is declared final by cl. (3) of Art. 217 is not invalid merely because no oral hearing was given by the President to the Judge concerned. An Opportunity to make representation to the Judge, after apprising him of the evidence which was likely to be used against him and consideration of the representation and the evidence comply with the requirements of Art. 217 (3). The respondent it is true did make requests that the President should give him an oral hearing. The respondent claims that his request was granted and he remained under an impression that he would be given an oral hearing, and the order made without granting him an opportunity of an oral representation was contrary to the rules of natural justice. By his representation dated December 7, 1964, the respondent had requested that he be given an oral hearing before the President and an opportunity to adduce his evidence and to produce in original the documents, viz. an almanac and a horoscope, and to make submission in support of his case. IL-repeated that request in the letter addressed to the Secretary to the President also on the same day. In reply thereto by letter dated December 21, 1964, the Secretary to the Ministry of Home Affairs informed the respondent that no oral evidence of witnesses would be received but the respondent was free to submit the affidavits of Witnesses as he relied upon. Regarding his request for the personal hearing the respondent was informed that the President will decide after considering the evidence whether any personal hearing was necessary. He was also informed that should the President decide that the respondent should be heard in person, he will be informed in due course. Again in reply to the letter written by the respondent on January 4, 1965, the Secretary to the Ministry of Home Affairs informed the respondent that the procedure to be followed and the opportunities to be given to the respondent were entirely to depend upon the direction of the

President and the res- pondent will be given an opportunity to put forward his case about the evidentiary value of the documents produced by him and any decision thereon would be arrived at by the President after affording him reasonable opportunities in that behalf. By his letter dated April 28, 1965, to the Secretary, Ministry of Home Affairs, ,the respondent stated that he had no further evidence to produce on the subject of his age, beside the evidence he had already produced. By his telegram dated September 1, 1965, the respondent requested the President to send for the papers and documents, if not already sent for, and, to grant him an audience "if at all necessary". But in his letter addressed to the Secretary of the Ministry of Home Affairs on the same day he stated that all the papers may be placed before the President and the President may be "pleased to grant an audience for the purpose of deciding the question of his age."

Article 217 (3) does not guarantee a right of personal hearing. In a proceeding of a judicial nature, the basic rules of natural justice must be followed. The respondent was on that account entitled to make a representation. But it is not necessarily an inci-

dent of the rules of natural justice that personal hearing must be given to a party likely to be affected by the order. Except in proceedings in Courts, a mere denial of opportunity of making an oral representation will not, without more, vitiate the proceeding. A party likely to be affected by a decision is entitled to know the evidence against him, and to have an opportunity of making a representation. He however cannot claim that an order made without affording him an opportunity of a personal hearing is invalid. The President is performing a judicial function when he determines a dispute as to the age of a Judge, but he is not constituted by the Constitution a Court. Whether in a given case the President should give a personal hearing is for him to decide. The question is left to the discretion of the President to decide whether an oral hearing should be given to the Judge concerned. The record amply supports the view that the, President did not deem it necessary to give an oral hearing. There were no complicated questions to be decided by the President. On the one hand there was the evidence of the matriculation certificate and the representation made by the respondent before the Board of Commissioners in the United Kingdom when the respondent submitted himself for being admitted to the Indian Civil Service Examination. On the other hand there was the evidence of the assertion made by the respondent that he was born on December 27, 1904, which was sought to be supported by the almanac with an entry in the margin, a horoscope, an affidavit of Panchkari Banerjee, Secretary to the then Chief Justice Sir Arthur Trevor Harries in which it was stated that the question about the age of the respondent was discussed with the Chief Justice. The truth of the statements made by the respondent had to be judged in the light of his conduct, that he gave no evidence of the date of his birth when he was appointed permanent Judge of the High Court, nor when in 1960 opportunity was given to him to furnish material in support of his contention regarding his age. If upon this evidence the President was of the view that the disputed question may be decided without giving an opportunity of personal hearing, this Court cannot set aside the order on the ground that the order was made without following the rules of natural justice.

It was urged that the President left India in the afternoon of September 29, 1965 on a tour of East European countries and that he had not sufficient time to consider the advice tendered by the Chief Justice of India and of going through all the evidence which was placed before him and of giving any

judicial consideration to the matter before him. Having regard to the "strict-time-table" which was required to be observed, it was urged that the President treated the matter as formal, and guided by the advice of the Home Minister and the Prime Minister he mechanically accepted the advice of the Chief Justice of India and surrendered his own judgment to the judgment of the Chief Justice of India. But on this part of the case there is no reliable evidence. No such ground was raised in the High Court. In this Court in the affidavit in reply filed by the respondent on February 24, 1967 in answer to the additional affidavit of the Union of India the respondent stated two new grounds (I) that the Chief Justice of India had privately advised the Ministry of Home Affairs as to the conduct of the enquiry or reference under Art. 217 (3) of the Constitution and he was on that account disentitled to tender advice to, or to be consulted by, the President under Art. 217 (3), and that the "part played by the Chief Justice of India relative to the reference was against all principles of natural justice and fair play and vitiated his own purported advice to the President as well as the purported decision of the President rendering the purported decision a nullity"; and (2) that "the President of India left New Delhi shortly after noon on September 29, 1965, on a tour of East European countries and Ethopia and that shortly before his departure a relative to the said reference was placed before him for his signature in token of his purported decision as to "the respondent's age with the recommendation of the Prime Minister and the Home Minister to determine the age of the respondent in accordance with the advice of the Chief Justice of India". He annexed thereto a copy of the daily edition of the Statesman dated September 30. 1965, evidencing the departure of the President as aforesaid and his purported decision as to the question of the age of the respondent before his departure for Europe. But no attempt was made to have the matter investigated in the High Court as to when the papers were submitted to the President and what consideration he gave to the advice, whether he made only a mechanical approach believing that he was bound to accept the advice of his Ministers. These are matters which cannot be canvassed for the first time in this Court.

On the plea that the Chief Justice of India had improperly advised the Minister of Home Affairs as to the conduct of enquiry and the reference, and on that account he had disentitled himself to tender any advice to the President also no allegation was made in the petition and no argument was raised in the High Court. There is no evidence that beside tendering advice to the President in matters of procedure and the final decision, the Chief Justice of India had given any advice to the Ministry of Home Affairs privately or otherwise. The argument that the Chief Justice of India in tend,--ring the advice was influenced by extraneous considerations is not founded upon any materials placed before this Court and must be rejected. The respondent invited our attention to a judgment of the Judicial Committee in B. Surinder Singh Kanda v. Government of the Federation of Malaya.(1). In that case the Commissioner of Police Malaya passed an order dismissing one Kanda, an Inspector of Police, on the ground that at an inquiry before an adjudicating officer Kanda was found guilty of failing to disclose evidence at a criminal trial. Kanda contended that after the coming into force of the Constitution of Malaya that power was only in the Police Service Commission, to which the, Commissioner was a subordinate authority and that failure to supply him a copy of the report of the board of inquiry which contained matters highly prejudicial'to him and which had been sent to and read by the adjudicating officer before he sat to inquire into the- charge, amounted to a failure to afford the appellant Kanda "a reasonable opportunity of being heard", in answer to the charge within the meaning of article 135 (2) of the Constitution of Malaya and to a denial of natural justice.

Lord Denning who delivered the judgment of the Judicial Committee considered the question whether the hearing by the adjudicating officer was vitiated because that officer was furnished with the report without inspector Kanda being given any opportunity of correcting or contradicting it. Before the High Court of Malaya the question posed was whether there was a real likelihood of bias, that is "an operative prejudice, whether conscious or unconscious" on the part of the adjudicating officer. The Court of Appeal held that there was no likelihood of bias. In the opinion of Lord Denning however the proper approach to the case was different. "The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have- been made affecting him : and then he must be given a fair opportunity to correct or contradict them. It follows of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe (1) [1962] A.C. 322.

he has been fairly treated if the, other side has had access to the Judge without his knowing ".

Relying upon the observation the respondent contended that a likelihood of prejudice is sufficient to vitiate the proceedings. But in this case we do not think that there was any likelihood of bias or of prejudice. All evidence which the President had to consider had been placed before him at diverse stages. When the notice to show cause was issued, the President had prima facie material before him. Thereafter certain other evidence was collected and that was also placed before the President. it is not suggested that any evidence against the respondent was not disclosed to him. The principal argument raised by the respondent was that the President himself did not determine the question relating to the age of the respondent because he surrendered his judgment to the Chief Justice of India or that he was persuaded to reach his conclusion only because the Home Minister and the Prime Minister had countersigned the notation made by the Secretary of the Ministry of Home Affairs. We do not think that the President had heard any evidence or received any representation from one side behind the back of the other. If he had done so the question whether any representation was made which worked to the prejudice of the respondent would arise. The Court will not then consider the question whether the representation had in fact worked to his prejudice. A reasonable possibility may be sufficient. In the present case no evidence was placed before the President or considered by him which was not disclosed to the respondent. The principle in B. Surinder Singh Kanda's case(1) has therefore no application. It is necessary to observe that the President in whose name all executive functions of the Union are performed is by Art. 217 (3) invested with judicial power of great significance which has bearing on the independence of the Judges of the higher Courts. The President is by Art. 74 of the Constitution the constitutional head

who acts on the advice of the Council of Ministers in the exercise of his functions. Having regard to the very grave consequences resulting from even the initiation of an enquiry relating to the age of a Judge, our Constitution makers have thought . it necessary to invest the power in the President. In the exercise of this power if democratic institutions are to take root in our country, even the slightest suspicion or appearance of misuse of that power should be avoided. Otherwise independence of the judiciary is likely to be gravely imperilled. We recommend that even in the matter of serving notice and asking for representation from Judge of the High Court where a question as to his age is raised, the President's Secretariat should ordinarily be the channel, (1) [1962] A.C. 322.

that the President should have consultation with the Chief Justice of India as required by the Constitution and that there must be no interposition of any other body or authority, in the consultation between the President and the Chief Justice of India. Again we are of the view that normally an opportunity for an oral hearing should be given to the Judge whose age is in question, and the question should be decided by the President on consideration of such materials as may be placed by the Judge concerned and the evidence against him after the same is disclosed to him. The President acting under Art. 217(3) performs a judicial function. of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. But this Court will not sit in appeal over the judgment of the President, nor will the, Courts determine the weight which should be attached to the evidence. Appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence placed before the President on which the conclusion is founded, if they were called upon to decide the case they would have reached some other conclusion.

The appeal is allowed. Having regard however to the circum- stances of the case, we direct that there will be no order as to costs.

Y.P. Appeal allowed.