Supreme Court of India
Himansu Kumar Bose vs Jyoti Prokash Mitter. (Chief ... on 14 October, 1963
Bench: P.B. Gajendragadkar, K. Subbarao, K.N. Wanchoo, M. Hidayatullah, J.C.

CASE NO.:
Appeal (civil) 485 of 1963

PETITIONER:
Himansu Kumar Bose

RESPONDENT:
Jyoti Prokash Mitter. (Chief Justices of High Courts)

DATE OF JUDGMENT: 14/10/1963

BENCH:
P.B. GAJENDRAGADKAR & K. SUBBARAO & K.N. WANCHOO & M. HIDAYATULLAH & J.C. SHAH

JUDGMENT:

JUDGMENT 1964 AIR (SC) 1636 The Judgment was delivered by GAJENDRAGADKAR, J Per Gajendragadkar, JThe short and initial question as to whether a rule nisi should be issued on the petition filed by the respondent, Jyoti Prokash Mitter, a Judge of the Calcutta High Court, against the appellant, the Chief Justice of the said High Court, has given rise to a difference of opinion amongst the Judges of the Calcutta High Court who have dealt with it. By his petition the respondent has claimed a writ in the nature of mandamus and/or appropriate directions order or writs under Art. 226(1) of the Constitution recalling the order passed by the appellant by which he has decided that the respondent has retired from his post as a judge with effect from 27 December 1961. The respondent also claims an appropriate order or direction restoring to him his duties and functions as well as his rights and privileges as a Judge of the said High Court. This petition was filed by the respondent on 2 January 1962. B. N. Banerjee, J., who heard this petition, held [vide 1962 (1) LLJ 708 ] this it was not necessary to issue a rule nisi on it, and so on 3 January 1962 he dismissed the petition in limine.

The respondent then took the matter before a Division Bench by an appeal. Mitter and Laik J.J. who constituted the Appellate Bench differed; Mitter J., held that the trial Judge was right in refusing to issue a rule nisi, whereas Laik J., took a contrary view. On this difference between the two learned Judges, the learned Chief Justice constituted a Special Bench of three learned Judges to deal with the appeal, P. N. Mookerjee Sankar Prasad Mitra and R. N. Dutta JJ., who constituted the Special Bench, heard the constituted the Special Bench, heard the matter and delivered three concurring judgments. They unanimously came to the conclusion that the trial Judge was in error in refusing to issue a rule nisi and so they allowed the appeal preferred by the respondent and directed that a rule nisi in terms of prayer (1) of the petition should be issued. It is against this order that the appellant has come to this Court by special leave, and the only question which is sought to be raised for our decision is whether the Special Bench which heard the appeal was justified in reversing the decision of the trial Judge by which he refused to issue a rule nisi on the respondent's petition.The respondent's case as set out in the petition shows that the main basis of his grievance is that whereas

he was born on 27 December 1904 the impugned order passed by the appellant proceeds on the basis that he was born on 27 December 1901. There is no doubt that, under Art. 217(1) of the Constitution, the respondent would not be entitled to hold office as a Judge on attaining the age of 60 years; but he contends that he would attain the age of 60 years on 27 December 1964. It appears that the respondent who was enrolled as a Barrister of the Calcutta High Court on 5 May 1931, was appointed as Additional Judge of the said High Court on 11 February 1949, and became a permanent Judge in January 1950. At the time of his appointment the respondent had given the date of his birth as 27 December 1904. In April 1949, the Ministry of Home Affairs in the Government of India raised the question about the correctness of the respondent's age as stated by him at the time of his appointment and as entered in the High Court's records. It would appear that the attention of the Home Minister, Government of India, was drawn to an extract from the Bihar and Orissa Gazette of 26 June 1918 which contained 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 respondent at the date of the examination as 16 years and 3 months. This would tend to show that the respondent was born on 27 December 1901. It also appears that the Home Minister came to know that when the respondent sat at the open competitive examination for the Indian Civil Service in July/August 1923, the date of the respondent's birth was given and shown as 27 December 1901. That is how the Home Minister raised the question about the correctness of the date given by the respondent as the date of his birth when he was initially appointed as Additional Judge of the Calcutta High Court. Subsequently, correspondence followed between the respondent and the Ministry Of Home Affairs, and it ultimately led to a communication addressed by the Secretary to the Government of India, Ministry of Home Affairs, to the respondent on 16 May 1961. In this communication, the respondent was told that the Government of India, having given their careful consideration to the explanation given by him, decided in consultation with the Chief Justice of India that his age as given in the Bihar and Orissa Gazette, dated 26 June 1918, should be taken as the correct age and that he should therefore demit his office of the Puisne Judge of the Calcutta High Court on 26 December 1961, after Court hours. The respondent, on the other hand, has contended throughout his correspondence with the Government of India that the correct date of his birth is 27 December 1904, and at a later stage of this controversy he relied on his horoscope and an entry made in the almanac which supported his case.On these facts, the respondent alleged in his writ petition that the Home Minister had no authority to determine his age and that the date of his birth which he had given prior to his appointment as Additional Judge in 1949, had been accepted by the Government of India, and could not be disputed thereafter. Basing himself principally on the conclusiveness of the date of birth given by him and accepted by the Government of India, the respondent claimed a writ in the nature of mandamus against the appellant on the ground that the impugned direction given by the appellant on the basis that the respondent had retired on 27 December 1961, should be recalled and appropriate relief given to him recognizing his status as a Judge of the said High Court until 27 December 1964. That, broadly stated, is the nature of the pleadings set out by the respondent in his writ petition and the scope of the enquiry which those pleadings would raise.

Before the respondent filed the present writ petition in the Calcutta High Court, he had moved the Punjab High Court by a writ petition against the Union of India on 15 November 1961. This writ petition was, however, dismissed by a Division Bench of the said High Court consisting of G. D.

Khosala, C.J., and Bedi, J., on 4 December 1961. The respondent then moved this court for special leave to appeal against that decision, but the said petition was dismissed in limine by this Court.

Let us now briefly indicate the reasons given by the learned Judges who have had occasion to deal with this matter at the initial stage in the Calcutta High Court. Banerjee, J., who dealt with the respondent's petition as a trial Judge, refused to issue a writ because he thought that it was unnecessary to hear the appellant inasmuch as there was no substance in the contentions which the respondent sought to raise by his writ petition. The learned Judge appears to have taken the view that the decision of the Punjab High Court dismissing the respondent's writ petition filed in that court virtually amounted to res judicata. He was also disposed to hold that the appellant was not bound to accept the respondent's statement as to his age even though it was accepted at the time when the respondent was appointed as Additional Judge and as such, was entered in the official record. The learned Judge then considered the fact that the Ministry of Home Affairs, Government of India, had not been impleaded to the present writ petition and he apparently thought that unless the view taken by the said Ministry was reversed, the respondent would be entitled to no relief; apparently, on this reasoning the learned Judge drew the inference that the non-joinder of the Union of India was an infirmity in the respondent's writ petition. The learned Judge recognize that the appellant did not decide the date of retirement of the respondent, and he seemed to hold that the decision of the Government of India on that point was, in substance, binding, on the appellant. "The Chief Justice of this Court," said the learned Judge, "has merely taken note of that decision," and he added that "that was the only thing that he could do in circumstances of this case." It is in the light of these findings that Banerjee, J., refused to issue a rule nisi.When the appeal was heard before Mitter and Laik, JJ., Mitter, J., rejected the respondent's contention that the declaration made by him about his date of birth at the time when he was appointed as an Additional Judge, was conclusive, and so, he proceeded to formulate three which would fall to be considered on the respondent's writ petition. On these three points made findings substantially against the respondent, and so, he held that Banerjee, J., was justified in refusing to issue a rule nisi. The first point which the learned Judge formulated was as to whether the Government of India was entitled to reopen the issue about the respondent's age and determine it; the second question was whether the exercise of such power would, in effect, be an invasion of the rights of Parliament under Art. 124 of the Constitution; and the third was whether the question of a Judge's age is not justiciable in Court of Law. It is unnecessary to set out the reasons given by the learned Judge in support of his conclusions.

Laik, J., however, took a country view. He thought that the only question to be decided in the present writ petition was whether the appellant was right in treating the respondent as having retired from 27 December 1961 on the basis of the decision of the Ministry of Home Affairs, and he concluded that it would not be proper to dismiss the writ petition summarily as was done by Banerjee, J. It is because of the difference between the two learned judges, who constituted the Appellate Bench, that the matter was ultimately referred to a Special Bench consisting of three learned Judges.

In his judgment, Mookerjee, J., has dealt with the points urged before the special Bench and has expressed his concurrence with the elaborate judgment delivered by his colleague on the Bench,

Mitra, J. Mookerjee, J., held that the materials then present before the Court did not prima facie involve a dispute of fact of such magnitude or complication as to justify the dismissal of the writ petition in limine. He also referred to the fact that the learned Advocate General did not argue before the Special Bench that no writ lies against the appellant. Then he considered the two points which had been urged on behalf of the appellant pertaining to the irregular presentation of the respondent's writ petition and the suppression of the material facts. He rejected both these contentions and held that a rule nisi should issue.Mitra, J., who has delivered an elaborate judgment, came to the same conclusion, though for somewhat different reasons. He held that the judgment of the Punjab High Court did not create a bar of res judicata. He found that though disputed questions of fact may arise in the present proceedings, that was no reason for refusing to issue a rule nisi on the respondent's petition. In dealing with this question he considered some of the relevant decisions bearing on the point. He also thought that some serious arose in his mind as to whether the appellant should have acted on the decision or suggestion of the Ministry of Home Court. That is why the learned Judge held that a rule nisi should be issued.

The judgment delivered by Dutt, J., shows that the learned Judge took the view that the matter before the Special Bench was "of a very limited scope." The only question which they had to consider at the stage was whether on the facts disclosed in the respondent's writ petition and the annexure thereto, there was a prima facie for the issue of a rule nisi against the appellant or not. He observed that some of the contentions raised by the respondent appeared prima facie to have considerable force, and though it was neither necessary nor desirable to determine those questions at that stage, it was clear that the case was in one in which a rule nisi should be issued. In the end, the Special Bench reversed the decision of Banerjee, J., and directed that a rule nisi should be issued. That, in brief, is the position with regard to the opinion expressed by the six learned Judges who have dealt with this matter in those proceedings.

It may prima facie be assumed at the outset that the extreme stand taken by the respondent in his writ petition that the declaration about the date of his birth which he made before he was appointed as an Additional Judge of the Calcutta High Court and which was entered in the official records, concludes the matter and that at no stage during his tenure as a Judge can anyone raise the question about the correctness of the said declaration may not be justified. It may be urged that a Judge of the High Court whilst he is in office must satisfy the constitutional requirement that he not attained the age of 60 years and it would be unreasonable for any Judge to suggest that the question about his age cannot be raised just because he made a declaration before his appointment and without any examination of the question the said declaration was accepted by the Government of India when his appointment was made. Apart from the Government of India, it would, prima facie be theoretically open to any litigant to raise the question about the competence of a Judge to hold his office as such on the ground that he attained the age of 60 years, and if a serious allegation is made in that behalf, it may have to be judicially determined in a proper proceeding.Even so, the alternative stand which the respondent is entitled to take is that the Government of India could not have administratively determined this question in the absence of any legal constitutional provision in that behalf, and prima facie, he would be justified in asking the high Court to deal with the matter judicially and give him appropriate reliefs in case he is able to prove to the satisfaction of the Court that he was born not on 27 December 1901 as held by the Government of India, but on 27 December 1904 as declared

by him when he was appointed as an Additional Judge. It is on that basis that we propose to deal with the present appeal. In this connection we ought to make it clear that we are referring to the constitutional position as it stood at the time when the writ petition was filed.

The learned Attorney-General contends that the Special Bench was not justified in reversing the order passed by the trial Judge when he refused to issue a rule nisi. He argues that the issue of a rule nisi on a writ petition presented by a party under Art. 226 (1) is a matter of discretion and the Court of appeal should not have interfered with the exercise of discretion on which the refusal to issue a rule nisi was based. There are two obvious answers to this contention. The first answer is that the order passed by the special Bench like that of the trial Judge is an interlocutory order and though the powers of this Court under Art. 136 are very wide, usually this Court does not interfere with interlocutory orders passed by High Courts. It may be that the trial Judge exercised his discretion against the respondent, but, in appeal, the Special Bench has chosen to exercise its discretion in favour of the respondent and against the appellant, and all that the order under appeal means is that a rule nisi should be issued and the questions which the respondent seeks to aggregate before the Court should be finally decided after obtaining from the appellant are turn in respect of the material allegations made by the respondent in his writ petition. In such a case, we do not see why we should interfere in our jurisdiction under Art. 136.But apart from this technical aspect of the matter, it seems to us that the reasons given by the trial Judge for refusing to issue a rule nisi on the respondent's petition are far from satisfactory. As we will presently point out, the view taken by him about the effect of the judgment of the Punjab High Court is prima facie open to the criticism that the learned Judge did not properly appreciate the legal effect of that judgment. Besides, the learned Judge held that the decision of the Government of India administratively reached, may be in consultation with the Chief Justice of India, in regard to the age of the respondent, concluded the matter. In substance, he has observed that the appellant could not have reconsidered the matter for himself and was, in fact, bound to take the decision of the Government of India as conclusively determining the matter in issue. Then, as to the non- joiner of the Union of India, the learned judge had not before him any plea made by the appellant in that behalf, and so, without a plea made by the appellant, it was not fair that the learned Judge have treated the non- joinder of the Union of India as introducing such a fatal infirmity in the respondent's writ petition as to justify the refusal to issue a rule nisi on it. We have carefully considered the reasons given by the learned trial Judge for refusing to issue a rule nisi and we are satisfied that the Special Bench was right in coming to the conclusion that the course adopted by the learned trial Judge was not satisfactory or sound. Experience shows that in writ petitions filed in High Courts Under Art. 226 which raise arguable issues of much less significance and importance, Rule nisi is usually issued and, speaking broadly, there seems to be no justification for holding that in the present case which undoubtedly raises question of considerable importance, that course should not be adopted.The learned Attorney-General argued that four questions fall to be considered in the present appeal, and his suggestion was that the answers to these four question would be decisively against the respondent and in favour of the appellant, and so, it was urged that the refusal of the learned trial Judge to issue a rule nisi on the respondent's petition was justified. We are not impressed by this plea. We wish to make it clear that in referring to the four points made by the learned Attorney-General, we propose to express no opinion on the merits of the said points; all that we propose to do is to indicate that each one of the points deserves to be carefully considered and that itself would clearly bring out the

justification of the respondent's contention that a rule nisi should be issued in the present case. The first point is in regard to the competence of the High Court to issue a writ against the Chief Justice of the said High Court. On this point, the learned Advocate-General made a concession in favour of the respondent before the special Bench. The learned Attorney-General that he should not be held bound by the said concession, because he points out that the learned Advocate-General had to make the said concession in view of the fact that the question about the competence of the writ against the Chief Justice of the High Court had been concluded so far as the Calcutta High Court is concerned by a recent decision of the said High Court in Pramatha Nath Mitter v. Chief Justice of the High Court, Calcutta 1961 AIR(Cal) 545 (S.B.)]. He also points out that a contrary view had been taken by a Special Bench of the Calcutta High Court in the case of Pradyat Kumar Bose v. Chief Justice of the High Court, Calcutta [Matter No. 189 of 1952, dated 27 October 1953 - Cal.) (S.B.)] and that when the said decision was brought before this court in Pradyat Kumar Bose v. Chief Justice of the High Court, Calcutta 1956 AIR(SC) 285 ], this Court had expressly left this issue open. On the merits, this Court Confirmed the decision of the Calcutta High Court then under appeal and observed that so far as the question about the competence of the writ petition was concerned, this Court did not feel called upon to enter into the discussion of the merits of the said question. Jaganathadas, J., who spoke for the Court, however, added that "we consider it desirable to say that our view that the exercise of power of dismissal of a civil servant is the exercise of administrative power may not necessarily preclude the availability of remedy under Art. 226 of the Constitution in an appropriate case, "though he took the precaution of adding that" that is a question on which we express no opinion one way or the other in the case."

It appears that the Special Bench of the Calcutta High Court in the case of Pramatha Nath Mitter 1961 AIR(Cal) 545 ] (vide supra) has read these observations of Jagannathadas, as subsequently amounting to a decision that a writ can lie against the Chief Justice of the High Court; the learned Attorney-General's argument is that that is a matter which calls for our decision, and in dealing with it, the appellant should not be held to be precluded by the concession which the learned Advocate General had to make before the Special Branch of the Calcutta High Court.

The respondent also agreed that this question should be decided by this Court on the merits. But the learned Attorney-General made it clear to us that in case we were inclined to confirm the view taken by the Special Bench, it would be appropriate that we should leave the decision of this question also to the Calcutta High the first instance. It is quite true that in such matters, this Court generally desires that points at issue between the parties should first be determined by the trial Court, and the Court of appeal if an appeal lies against the decision of the trial Court, so that when the said question is raised before this Court, we should have the advantage of the Conclusions reached by the learned Judges of the High Court. Having regard to the conclusion which we have reached in the present case, we have decided to accede to the request made by the learned Attorney-General, and so, we do not propose to deal with the merits of this point. In this connection, we ought to add this point was not argued before the learned trial Judge and that was substantially because the learned trial Judge did not issue a rule nisi and the appellant was not called upon to make a proper return to the respondent's writ petition.The second point which the learned Attorney-General has formulated is in regard to the effect of the judgment delivered by the Punjab High Court in dismissing the respondent's writ petition before it. On this point again, we propose to express no opinion. We

would, however, only point out that the decision of the Punjab High Court rests on two grounds. The first ground emphatically set out in the judgment of the learned Chief Justice, who delivered the principal judgment for the Division Bench, was that at the time when the writ petition was filed by the respondent, no order removing them from his post had been passed, and so, it was observed that the respondent could disregard the opinion of the Home Ministry and insist that the only manner in which he could be made to leave his office is by means of an order passed on an address by each House of Parliament as laid down in proviso

(b) to Art. 217(1) of the Constitution. In fact, the learned Chief Justice stated that on that ground alone, the writ petition of the respondent was liable to be dismissed. It is true that the judgment also appears to have expressed on opinion on the merits, because the learned Chief Justice has observed that he was convinced on the material which had been produced before the Court that the Home Ministry was not wrong in accepting the correct age of the respondent as that given in the Bihar and Orissa Gazette and a certificate which the respondent had filed with his application when he sat at the I.C.S. examination. The question is whether this latter finding can operate as per judicata. In dealing with this question the whole judgment may have to be considered and the effect of the two findings may have to be judged. That obviously is a matter which needs arguments, and so, the course adopted by the trial Judge in incidentally referring to this judgment and treating that as one of the reasons for refusing to issue a rule nisi does not appear to be justified.The third ground urged by the learned Attorney-General is that the Union of India is not a party to the present proceedings. That again is a matter which can be pleaded by the appellant and then considered. If the respondent is not able to satisfy the court that it is unnecessary to join the Union of India to the present writ proceedings, he may ask for liberty to add the Union of India, and the Court may have to consider whether permission should be granted to the respondent to add the Union of India. That incidentally shows that without a return filed by the appellant the learned trial Judge should not have dismissed the respondent's writ petition.

The last argument is that the question about the date of the respondent's birth is a disputed question of fact which should not be tried in writ proceedings. On this question arguments may have to be heard and the effect of the relevant judicial decisions may have to be determined. In fact, Mitra, J., who was a member of the special Bench, has referred to some decisions of this Court in support of the view expressed by him prima facie that in a proper case even disputed questions of fact may be tried in writ proceedings. On this question, we express no opinion whatever, but we are referring to the view taken by Mitra, J., just to emphasize the fact that when a writ petition is likely to raise questions of law of this character, that clearly is a ground for issuing a rule nisi, so that the parties should be fully heard before the said questions are judicial determined.

Thus, it would be noticed that the four contentions which the learned Attorney General has raised before us themselves indicate that the issues which fall to be considered on the respondent's petition are, in sense, triable issues, and so, it would be inappropriate to dismiss the petition in lamine. As we have already indicated, the main question round which the whole controversy centers is the competence of the Home Minister to determine the question about the correct age of a judge of the High court and this question obviously is a matter of great importance as its decision is vitally connected with the status, dignity and independent of the judiciary in this country; incidental to the

decision of this question are other points to which we have just referred. Therefore, we are satisfied that the Special Bench was right in coming to the conclusion that the learned trial Judge should have issued a rule nisi and should have called upon the appellant to file his return, so that the points of dispute between the parties would have been clearly defined and the matter could have been decided in accordance with law after allowing the parties to place before the Court such material as may be permissible under Art. 226. It is, we think, unfortunate that the matter should have had to go through three hearings and that too without a return from the appellant. In the result, we see no reason to interfere with the order passed by the Special Bench.When this appeal was argued before us, it was reported that the Fifteenth Constitution Amendment Act had been signed by the President and we enquired from the learned Attorney-General whether he wanted to urge any argument on the strength of the relevant provision of the said Act which dealt with the question of determining inter alia the age of a Judge of the High Court if a dispute arises in respect of it. Indeed, we suggested to the learned Attorney-General that in case he wanted to raise any such contention, we would have to give time to the respondent to consider the point since the said Act had been signed only a day before this appeal was called out before us. Sri Mittar (the respondent), who appeared in person, however, stated that he did not want any time and would be prepared to meet the argument which the learned Attorney-General may raise under the said provision. Even so, at the hearing before us, the learned Attorney-General did not refer us to the said provision and urged no argument on its basis. That is why we have dealt with the present appeal without reference to the said Constitution Amendment Act, and on the basis of the law as it stood at the time when the present writ petition was filed.

Before we part with this appeal, we may incidentally observe that it would have been better if, in dealing with the matter before them, the learned Judges, constituting the Special Bench, had not criticized the manner in which the reference to the Special Bench in which the reference to the Special Bench was made, and had refrained from commenting on the policy underlying the amendment which the Fifteenth Constitution Amendment Act then intended to make in regard to the determination of the age of a Judge of the High Court or the Supreme Court in case a dispute arises in that behalf.The result is, the appeal fails and is dismissed. There would be no order as to costs.