CHAPTER VIII

Limitation Imposed by Article 311(2) on the Legislative Power of the State

The legislative or rule making power conferred under Article 309 cannot validly be exercised so as to curtail or affect the rights guaranteed to public servants under Article 311(2) of the Constitution. Article 311(2) is intended to afford a sense of security to public servants who are substantively appointed to permanent posts and one of the principal rights to which they are entitled to is to continue in service till the age of retirement fixed generally for such class of Government servants and thereafter to the benefit of pension as prescribed by the rules. It is not legitimate for the State to trespass on the rights guaranteed under Article 311 while exercising its legislative power.[1] Provisions which have been tested with reference to Article 311(2) are set-out hereinafter.

(1) *Rule authorising compulsory retirement without fixing any reasonable period or fixing unreasonable period, after which it can be exercised:* (a) Any rule which permits the appropriate authority to retire compulsorily a civil servant without imposing a limitation in that behalf that such civil servant should have put in a minimum period of service, would be invalid and the so-called retirement order under the said rule would amount to removal of a civil servant within the meaning of Article 311(2) of the Constitution. Therefore, a Rule (like 148(3) and 149(3) of Railway Establishment Code) which permits the termination of a permanent Government servant by giving three months' notice at any time before he reaches the age of superannuation is invalid because the termination of service which the said rule authorises amounts to removal of civil servant and it contravenes the Constitutional safeguard provided by Article 311(2) of the Constitution.[1]

(b) Even where the period after which the power to retire compulsorily before the age of retirement is fixed, the period so fixed must be reasonable. A rule authorising the compulsory retirement after a period of 10 years service before he attains the age of retirement at 55 is unreasonable and therefore invalid as it contravenes Article 311(2).[2]

1 Motiram Deka *V.* N. E. Frontier Railway—1964 SC 600.
2 Gurudev Singh *V.* State of Punjab—AIR 1964 SC 1585.

(2) *Existence of an invalid rule at the time of joining service is no ground to uphold it :* The fact that even before a civil servant entered service a rule authorising the compulsory retirement at any time subject to the requirement of the said rule existed, is no ground to hold that a civil servant who entered service with the full knowledge of such a rule cannot question the validity of such a rule. Such an approach may be relevant in dealing with the purely commercial cases governed by rules of contract but is wholly inappropriate in dealing with a case where the contract or the rule is alleged to violate the Constitutional guarantee afforded under Article 311(2). Even as to commercial transactions, it is well known that if the contract is void as for instance, under Section 23 of the Indian Contract Act, the plea that it was executed by the parties would be of no avail. In any case, an argument of contract and its binding character cannot have any validity in dealing with the question about the Constitutionality of the impugned rules.[1]

(3) *Rules providing for automatic termination after a specified period of absence :* A rule which provides that a person in permanent or quasi-permanent service who remains absent without permission or fails to resume duty on the expiry of the leave for a period prescribed in the rules shall be deemed to have resigned or sacrificed his appointment unless the competent authority orders reinstatement contravenes Article 311 of the Constitution. While on one hand, there is no compulsion on the part of the Government to retain a person in service if he is unfit and deserves dismissal or removal, on the other, a person is entitled to continue in service if he wants until his service is terminated in accordance with law. Overstaying after expiry of leave or unauthorised absence may be a ground for taking disciplinary action. It is open to the official to show sufficient cause for his absence. Such a removal from service is removal and it is punishment for unauthorised absence and Article 311(2) must be complied with. Hence, a rule providing for automatic termination is invalid.[3]

(4) *Rule providing for automatic removal of lien after specified period of unauthorised absence :* A rule which provides that Government servant who remains absent after the end of his leave ceases to have lien on his appointment amounts to removal of the civil servant from the substantive appointment which he holds. Therefore, a rule which provides for the forefeiture of the lien after the expiry of leave contravenes the provisions of Article 311(2) of the Constitution and is therefore invalid.[4]

3 (*a*) Jaishankar *V.* State of Rajasthan—AIR 1966 SC 492—Regulation 13 of Jodhpur Service Regulation held invalid.
(*b*) Deokinandan Prasad *V.* State of Bihar—AIR 1971 SC 1409.
(*c*) Krishna Madiwala *V.* Inspector of Post Offices—1968(2) *Mys. L. J.* 426—Rule 14-C of CCS (CCA) Rules held invalid.

4 State of Mysore *V.* Anthony Benedict—1968(1) *Mys. L. J.* 519—SLR 1969 Mys. 21—Rule 162 of MCSR held invalid.

(5) *Compulsory transfer of Government servants to a non-Governmental body :* It is not competent for the legislature to enact a law providing for compulsory transfer of civil servants to a non-Governmental body. The real effect of such transfer of civil servants to a non-Governmental body would amount to their removal from the civil posts in contravention of Article 311(2) of the Constitution. Therefore, any provision contained in a legislative enactment which authorises the issuance of a notification by the Government to transfer Government institutions to a private body and further providing that on the issuance of such notification the Government servants working therein cease to hold the civil posts which they held at the time when the notification is issued and they shall become employees of a non-Governmental body, is unconstitutional, as it amounts to removal from the civil posts in contravention of the provisions of Article 311 of the Constitution.[5]

(6) *Provision for selection of temporary employees for permanent absorption :* Where the rules provide method of recruitment into a new service constituted by the Government and the rules provide that persons who are already serving in the departments of the Government on temporary basis should be given the opportunity to appear before the committee constituted for making initial recruitment to such service and as a consequence of such selection, a person is selected and appointed to a lower post, it cannot be said that the rules which authorise such a selection contravene Article 311(2) of the Constitution.[6]

(7) *Rule authorising compulsory retirement after reasonably long prescribed service :* A rule which authorises the Government or any competent authority to order the compulsory retirement of a Government servant in public interest without casting any stigma and without forfeiting the retirement benefits which has accrued for the service already rendered after a reasonable period of service or age as prescribed in the rules has been held as not contravening the provisions of Article 311(2) of the Constitution, though such retirement is effected prior to the general age of retirement fixed in the rules for such classes of Government servants.[7] Explaining the reasonableness of the rules the Supreme Court observed that such a rule of compulsory retirement holds the balance between the rights of individual Government servants and the interest of the public. While a minimum service is guaranteed to the Govern-

5 (*a*) State of Mysore *V.* Papanna Gowda—AIR 1971 SC 191—(1968 (2) *Mys. L. J.* 479 Affirmed)
(*b*) Laiq Ram *V.* State of H.P.—SLR 1972 P & H 819.

6 P. B. Roy *V.* Union of India—AIR 1972 SC 908—Validity of Rule 5 of the Central Information Services Rules, (1959) upheld.

7 (*a*) Shyam Lal *V.* State of Uttar Pradesh—AIR 1954 SC 369—1955(1) SCR 26—Validity of Rule 465-A of UPSC held.
(*b*) State of Bombay *V.* Saubhagchand M. Doshi—AIR 1957 SC 892—1958 SCR 57—Validity of retirement under Rule 165-A of BCSR upheld.
(*c*) Dalip Singh *V.* State of Punjab—AIR 1960 SC 1305—1961(1) SCR 88—Retirement under Rule 2-278 of Patiala State Regulations upheld—Validity of the Rule not questioned.
(*d*) T. G. Shivacharan Singh *V.* State of Mysore—AIR 1965 SC 280.

ment servant, the Government is given the power to energise its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be retained in service in public interest.[8] As pointed-out earlier vide Item 10 of Chapter VII the question was not examined with reference to the principle of security of tenure as laid down in Motiram Deka's case.

(8) *Validity of rules fixing or altering age of retirement :* Article 309 of the Constitution confers power on the Parliament and the State Legislature to regulate the conditions of service of persons appointed to the services under the Union and the State respectively. Subject to the acts of appropriate legislature, proviso to the said Article confers power on the President or the Governor or his nominee, as the case may be, to frame rules relating to conditions of service. The power under Article 309 is "subject to the other provisions of the Constitution" as indicated by the opening words of the Article. Therefore, the power exercisable under Article 309 is subject to Articles 310 and 311 of the Constitution. Article 310 of the Constitution incorporates the 'pleasure doctrine', but the exercise of the pleasure is made subject to Article 311(2) of the Constitution. In other words, the pleasure of the President or the Governor, as the case may be, to remove a civil servant is not absolute, but has to be exercised in conformity with Article 311 of the Constitution. Article 311 is not however subject to any other provisions of the Constitution. The making of Article 311 as not being subject to any other provisions of the Constitution is indicative of paramount importance attached to the said Article. The age of retirement of civil servants is not fixed by the Constitutional provisions as has been done in the case of some offices dealt with in the Constitution such as Judges of the Supreme Court and the High Courts. The right of a civil servant to hold the post naturally comes to an end at the age of retirement. Therefore, if under Article 309, a provision for retirement of a civil servant could be made and altered without any limitation whatsoever, the security of tenure which is the principle object of Article 311(2) of the Constitution stands impaired.

After the commencement of the Constitution, starting from Shyamlal's case,[9] the Supreme Court interpreted that any termination or retirement of a civil servant under a rule regulating condition of service does not attract the provisions of Article 311 of the Constitution. In other words, the consistent view taken in all these cases was that under Article 309 of the Constitution it is competent for the rule making authority to regulate conditions of service which includes provision for termination or retirement of a civil servant and such a provision falls outside the purview of Article 311 of the Constitution. The correctness of such an interpretation given by the Supreme Court to the ambit and scope of Article 309 of the Constitution was questioned before the

8 Union of India *V.* J. N. Sinha—AIR 1971 SC 40—Validity of Rule 56(*j*) of Fundamental Rules upheld.

9 AIR 1954 SC 369.

Supreme Court in Motiram Deka's case. In the said case, the validity of Rule 148(3) and Rule 149(3) of the Railway Establishment Code which authorised the Railway Administration to terminate the service of the railway servants coming under the scope of those two rules by giving three months' notice and by allowing them other retirement benefits available under the rules was challenged. If the interpretation given earlier, namely, that the termination of service of a civil servant under a rule framed under Article 309 falls outside the scope of Article 311 were to stand, Rule 148(3) and Rule 149(3) could not have been struck down. In the said case, the Supreme Court was, therefore, called upon to interpret the scope of Article 309 read with Article 311 of the Constitution, and consequently as it involved the re-consideration of the view taken by the earlier several decisions, the matter was referred to a larger Bench for its opinion.[10]

The Supreme Court interpreted the scope and ambit of Article 309 and Article 311 of the Constitution in the said case and came to the following conclusions:—

(i) Article 311(2) of the Constitution is meant to ensure security of tenure to the civil servants in the interest of efficiency and incorruptibility of public administration so that the civil servants discharge their duties without fear or favour.

(ii) The power to regulate conditions of service under Article 309 being subject to the provisions of the Constitution, cannot be validly exercised so as to curtail or affect the rights guaranteed to public servants under Article 311(2).

The clear effect of the aforesaid decision is that no law or rule can be enacted in exercise of powers under Article 309 of the Constitution which affects the security of tenure of civil servants and any act or rule made by the State which affects the security of tenure will be hit by the provisions of Article 311 and therefore, invalid. No doubt in the above case, the Supreme Court was concerned with the validity of rule like Rules 148(3) and 149(3) of the Railway Establishment Code which authorised the Railway Administration to terminate the services of a civil servant after giving three months' notice before the general age of retirement fixed for all Railway servants and not the validity of a retirement rule. But it appears that the principles laid down in the said case applies even in a case where the rule purports to fix or alter the age of retirement in an unreasonable manner and adversely affects the security of tenure guaranteed under Article 311 of the Constitution. This view stands supported by the observations of the Supreme Court in the said judgement as well as in two subsequent decisions. In Motiram Deka's case though the Supreme Court declined to consider the question regarding the

10 Motiram Deka *V.* General Manager—AIR 1964 SC 600.

possibility of challenging the validity of a rule of superannuation as it did not arise for consideration made the following observations:—

> "In regard to the age of superannuation, it may be said prima facie that rules of superannuation which are prescribed in respect of public service in all modern States which are based on consideration of life expectation, mental capacity of the civil servants having regard to the climatic conditions under which they work and the nature of the work they do. They are not fixed on any *ad hoc* basis and do not involve the exercise of discretion. They apply uniformly to all public servants falling under the category in respect of which they are framed."

In the above observation, the Supreme Court has indicated the general principles adopted in all modern States regarding the fixation of age of retirement.[11] The same principles have been reiterated and age of retirement has been fixed by the Supreme Court in subsequent decisions arising under the Industrial Disputes Act.[12] In British Paints Co. case the Supreme Court observed as follows:—

> "(5) Considering that there has been a general improvement in the standard of health in this country and also considering that longevity has increased, fixation of age of retirement at 60 years appears to us to be quite reasonable in the present circumstances. Age of retirement at 55 years was fixed in the last century in Government service and had become the pattern for fixing the age of retirement everywhere. But time in our opinion has now come considering the improvement in the standard of health and increase in longevity in this country during the last fifty years that the age of retirement should be fixed at a higher level and we consider that generally speaking in the present circumstances fixing the age of retirement at 60 years would be fair and proper, unless there are special circumstances justifying fixation of a lower age of retirement."

After the decision in Motiram's case the Supreme Court was called upon to consider the validity of a compulsory retirement rule which authorised the retirement of civil servants after they have put in 10 years of service, and before the general age of retirement at 55 years, in the case of Gurudev Singh *V.* State of Punjab. In the said case the Supreme Court has stated in unmistakable terms about the ambit and scope of Article 309 regarding fixation of age of retirement and stated as follows:—

> "(12).....for the efficient administration of the State, it is absolutely essential that permanent public servants should enjoy a sense of security of tenure.....Therefore, it seems that only two exceptions

11 AIR 1964 SC 600 at 610 para 25.

12 (*a*) British Paints Co., *V.* Its workmen—AIR 1966 SC 732 at 733 para 5.
(*b*) Hindustan Antibiotics *V.* Its workmen—AIR 1967 SC 948.

can be treated as valid in dealing with the scope and effect of the protection afforded by Article 311(2):—

(i) If a permanent public servant is asked to retire on the ground that he has reached the age of superannuation which has been reasonably fixed, Article 311(2) does not apply, because such retirement is neither dismissal nor removal of the public servant.

(ii) If a permanent public servant is compulsorily retired under the rules which prescribe the normal age of superannuation and provide for a reasonably long period of qualified service after which alone compulsory retirement can be ordered, that again may not amount to dismissal or removal under Article 311....."

After having laid down the two exceptions for the rule of retirement in order to be outside the mischief of Article 311(2), the Supreme Court examined the reasonableness of the period after which the power to retire compulsorily could be exercised under the rules which came up for consideration in the said decision. The Supreme Court held that the period of 10 years was unreasonable and therefore the rule was struck down.

In Bishun Narain *V.* State of Uttar Pradesh,[12] the validity of a rule reducing the age of retirement from 58 to 55 years was questioned on the ground that it is violative of Article 311(2). The sole ground of attack in the said case was that once the age of retirement was fixed at 58 years, the civil servant concerned got a right to continue in service till 58 years and any reduction of the said age of retirement is violative of Article 311(2) of the Constitution. The said contention was rejected by the Supreme Court on the ground that a retirement at the age fixed for retirement under the rules falls outside Article 311 (2) of the Constitution, and the principles laid down in Motiram's case has no application. It should be noted that in the said case the rule was not questioned on the ground that it brought about an unreasonable reduction in the age of retirement. The Supreme Court also made a significant observation which is as follows:—

"Alteration in the circumstances of this case at least cannot be regarded as unreasonable."

The above observation also suggests that if alteration of age of retirement in a given case is unreasonable, the rule can be challenged and may be declared as violative of Article 311(2).

In view of the principles laid down in Motiram Deka's case and a clear enunciation as to the scope of a rule framed under Article 309 relating

12 AIR 1965 SC 1567.

to age of retirement made in Gurudev Singh Siddu's case and the observation made in Bishun Narain's case extracted above, it appears, that even a rule relating to fixation or re-fixation of age of retirement in respect of any class of civil servants can be questioned before the court on the ground that it is violative of Article 311 of the Constitution by demonstrating before the Court that the fixation or re-fixation of such a retirement is arbitrary and unreasonable and the question is justiciable. If a rule of retirement is held to be not justiciable, it would be open to the State not to fix an age of retirement at all or to reduce the age of retirement arbitrarily without any basis or justification whatsoever and render the provisions of Article 311(2) ineffective and illusory.

Though number of cases have come up subsequent to Motiram Deka's case questioning the validity of the rules reducing the age of retirement in no case the question that the reduction of age of retirement in any particular case was unreasonable when tested with the criteria for fixing the age of retirement was raised. In the absence of such plea and proof, the conclusion reached is that a rule re-fixing age of retirement does not attract Article 311(2).

The above question is assuming importance for the reason that there are number of instances where various States in India have raised and reduced the age of retirement frequently as applicable to several classes of civil servants including Judicial service. The basis for reducing the age of retirement does not alter during such short intervals if the basis for fixing the age of retirement as indicated by the Supreme Court in Motiram Deka's case[10] and in other decisions[12] coming under the Industrial Disputes Act are taken as the rational basis for fixing the age of retirement. The age of retirement has to be fixed on a thorough investigation of matters which have a bearing on the criteria to be adopted for fixing the age of retirement and once an age of retirement is so fixed can be revised only after a thorough investigation of the said matter if and when such an occasion for investigation arises. The frequent change of age of retirement also leads to the criticism that it is meant to favour certain individuals who are on the verge of retirement when the age of retirement is raised or to get rid of certain individuals by reducing the age of retirement. Therefore, it appears that an age of retirement has to be fixed on a relevant basis taking all relevant criteria into account and the age so fixed cannot be altered or re-fixed until the time has come when the criteria itself has changed. In the absence of any such change of circumstances, reducing of age of retirement cannot be resorted to arbitrarily and if resorted to it is open to be questioned before the court, on the ground that it is violative of Article 311(2) of the Constitution.