CHAPTER VIII

LIMITATION IMPOSED BY ARTICLE 311(2) ON LEGISLATIVE POWER OF STATE*

The legislative power 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 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 discussed below.

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). Therefore, a rule like 148(3) or 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).

(b) Even where the period is designated, 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]

The general approach as viewed by different high courts in a number of cases is that compulsory retirement does not amount to removal or dismissal,

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1 *Moti Ram Deka* v. *N.E. Frontier Railway*, AIR 1964 SC 600.

2 *Gurudev Singh* v. *State of Punjab*, AIR 1964 SC 1585.

as the same does not carry any stigma or incapacity.[3] The concept of premature retirement, which has found the expression in the rule, does not fall within the ambit of article 311.

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.[4]

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. While on the 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.[5] Overstay means a public servant after the end of the leave continues to stay away from work without the sanction of the competent authority.[6] Overstay can be treated as leave only if extended by the competent authority.[7] Unauthorised absence

3 *State of Assam* v. *Harnath Baru*, AIR 1957 Assam 77; *J.M. Sharma* v. *State of Haryana*, 1981 (1) SLR 554; *Punjab State* v. *Brij Lal*, 1984 (1) SLR 313.

4 See *supra* note 1.

5 *Jaishankar* v. *State of Rajasthan*, AIR 1966 SC 492; *Deokinandan Prasad* v. *State of Bihar*, AIR 1971 SC 1409; *Krishna Madiwala* v. *Inspector of Post Offices*, 1968(2) Mys. LJ 426.

6 *EC Joy* v. *The Principal Bharathmatha College*, 1981 (2) SLR 777 (Ker).

7 *Ibid.*

by reason of overstay could amount to misconduct.[8]

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 forfeiture of the lien after the expiry of leave contravenes the provisions of article 311(2) and is invalid.[9]

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). 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.[10]

Provision for selection of temporary employee for permanent absorption: Where the rules provide a method of recruitment into a new service constituted by the government and 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).[11]

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 prescribed in the rules has been held as not contravening the provisions of article 311(2), though such retirement is effected prior to the general age of

8 *Mohan Lal* v. *Union of India*, 1992 (2) SLR 533 (P&H).

9 *State of Mysore* v. *Anthony Benedlict*, 1968(1) Mys LJ 519: SLR 1969 Mys.21.

10 *State of Mysore* v. *Papanna Gowda*, AIR 1971 SC 191: (1968(2) Mys LJ 472 affirmed). *Laiq Ram* v. *State of H.P.*, SLR 1972 P&H 819.

11 *P.B. Roy* v. *Union of India*, AIR 1972 SC 908.

retirement fixed in the rules for such classes of government servants.[12] Explaining the reasonableness of the rules the Supreme Court observed that such rules 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 government 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.[13] As pointed out earlier the question was not examined with reference to the principle of security of tenure as laid down in *Motiram.*

Validity of rules fixing or altering age of retirement: Article 309 confers power on Parliament and the state legislature to regulate the conditions of service of persons appointed to the service under the Union and the state respectively. Subject to the Acts of appropriate legislature, proviso to article 309 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. article 310 incorporates the 'pleasure doctrine', but the exercise of the pleasure is made subject to article 311(2). 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. This is indicative of paramount importance attached to the 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 principles object of article 311(2) stands impaired.

After the commencement of the Constitution, starting from *Shyamlal*[14] the Supreme Court held that any termination or retirement of a civil servant under a rule regulating condition of service does not attract the provisions of article 311. In other words, the consistent view taken in all these cases was that under article 309 it is competent for the rule making authority to regulate conditions of service which include provision for termination or retirement of a civil servant and such a provision falls outside the purview of article 311.

12 *Shyam Lal* v. *State of Uttar Pradesh*, AIR 1954 SC 396: 1955(1) SCR 26; *State of Bombay* v. *Saubhagehand M.Doshi*, AIR 1955 SC 892; *Dalip Singh* v. *State of Punjab*, AIR 1960 SC 1305; *T.G.Shivacharan* v. *State of Mysore*, AIR 1965 SC 280.

13 *Union of India* v. *J.N.Sinha*, AIR 1971 SC 40.

14 AIR 1954 SC 369.

The correctness of this interpretation was questioned before the Supreme Court in *Motiram*. The Supreme Court, as noted earlier, interpreted the scope and ambit of article 309 and article 311 in the said case and came to the following conclusions:

(i) Article 311(2) 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).[15]

The clear effect of the decision is that no law or rule can be enacted in exercise of powers under article 309 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 rules 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 principle laid down in the 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. In Motiram though the Supreme Court declined to consider the question regarding the validity of a rule of superannuation, as it did not arise for consideration, it 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 climate conditions under which they work and the nature of 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.[16]

In the above observation, the Supreme Court has indicated the general principles adopted in all modern States regarding the fixation of age of retirement.[17] The same principles have been reiterated and age of retirement

15 See *Motiram* at 610.

16 *Ibid.*

17 *British Paints Co.* v. *Its Workmen*, AIR 1966 SC 732; *Hindustan Antibioties* v. *Its Workmen*, AIR 1967 SC 948.

has been fixed by the Supreme Court in subsequent decisions arising under the Industrial Disputes Act.[18] In *British Paints* the Supreme Court observed as follows:

> 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 lower age of retirement.[19]

As noted in the previous chapter, in *Gurudev Singh,* the Supreme Court after having laid down the two exceptions for the rule of retirement in order to be outside the mischief of article 311(2), 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.

The validity of age of retirement at the age of 58 years of the paid secretaries of the cooperative societies who were under the charge of Industries Department was challenged in *M.Chellappan* v. *The Director of Handloom.*[20] In this case the Director of Handloom who was empowered to perform the functions of registrar was competent to determine the age of retirement of the employees. No age of retirement was provided in the rules. Under the circumstances, the petitioner was to retire at the age of 58 years. In *N.Chellappan Pillai* v. *State of Kerala*[21] the government issued an order to retire employees whose services were regularised after 7.4.1970, even though rule 60(b) of the Kerala Service Rules, Part-1 provided 60 years as age of retirement. It was held that the executive instructions could not override the statutory provisions. Similarly, where the services of a teacher were terminated in a previous organization, it was held that his relationship with the management of previous employer discontinued and accordingly, he could not get any benefit of previous service in the matter of retirement in the new organization. His

18 See *supra* note 11.
19 *Id.* at 733.
20 1983(2) SLJ 559 (Ker).
21 1982 (2) SLJ 620 (Ker).

retirement at the age of 55 years under the Kerala University Statutes was not interfered with.[22]

In *Bishan Narain* v. *State of Uttar Pradesh*,[23] the validity of a rule reducing the 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 had a right to continue in service till 58 years and any reduction of the said age of retirement is violative of article 311(2). This contention was rejected by the Court on the ground that a retirement at the age fixed for retirement under the rules falls outside article 311(2) and the principles laid down in *Motiram* have no application. It should be noted that in *Motiram* the rule was not questioned on the ground that it brought about an unreasonable reduction in the age of retirement. The Supreme Court there made a significant observation, which is as follows:

> "Alteration in the circumstances of this case at least cannot be regarded as unreasonable."
>
> This observation suggests that if alternation 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* and a clear enunciation as to the scope of a rule framed under article 309 relating to age of retirement made in *Gurudev Singh* and the observation made in *Bishn Narain* 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 by demonstrating before the court that it 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 a number of cases have come up subsequent to *Motiram* questioning 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 refixing age of retirement does not attract article 311(2).

The above question is assuming importance because various States have raised and reduced the age of retirement frequently for several classes of civil

22 *K.A.John* v. *Directorate of Collegiate Education*, 1982 (2) SLJ 66 (Ker); *C.K.Kulkarni* v. *Dy. Director of Collegiate*, 1982 (2) SLJ 633 (Ker).

23 AIR 1965 SC 1567.

servants including judicial service. The basis for reducing the age of retirement does not alter during such short intervals if the age of retirement as indicated by the Supreme Court in *Motiram* and in other decisions[24] 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 the age of retirement so fixed can be revised only after a thorough investigation if frequent changes of age of retirement also lead 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. The age of retirement ought to be fixed on a relevant basis taking all relevant criteria into account and the age so fixed should not be altered or refixed until the time has come when the criteria itself have 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).

In *Amit Roy Choudhury* v. *Metallurgical & Engineering Consultants (India) Ltd.*[25] *(MECON)*, retirement age was rolled back from 60 years to 58 years. It was held by the court that employer has the right to increase or reduce the age of retirement.[26]

There has been an instance of change of age of retirement with the change of government in Andhra Pradesh. The age of retirement of civil servants of that state had been 58 years. After the Telugu Desam Party took over the reign of the state in January 1983, by notification dated 8th February 1983, the age of retirement was reduced to 55 years and thousands of employees were all of a sudden retired from service. The validity of the rules was challenged before the Supreme Court.[27] It was upheld on the ground that reduction of age of retirement from 58 to 55 was not irrational. After referring to all relevant factors including the employment policy of the government to provide employment to the eagerly awaiting qualified unemployed persons, the Supreme Court said:

> On the basis of this data, it is difficult to hold that in reducing the age of retirement from 58 to 55, the State Government or the Legislature acted arbitrarily or irrationally. There are precedents within out country itself for fixing the retirement age at 55 or for reducing it from 58 to 55. Either the one or the other of these two stages is regarded generally as acceptable, depending upon employment policy of the Government

24 See *supra* note 11.
25 2004(1) SLR (Jharkhand) 783.
26 *Ibid.*
27 *K. Nagaraj* v. *State of Andhra Pradesh*, AIR 1985 SC 551.

> of the day. It is not possible to lay down an inflexible rule that 58 years is a reasonable age for retirement and 55 is not. If the policy adopted for the time being by the Government or the legislature is shown to violate recognised norms of employment planning, it would be possible to say that the policy is irrational since in that event, it would not bear reasonable nexus with the object, which it seeks to achieve. But such is not the case here. The reports of the various Commissions, from which we have extracted relevant portions, show that the creation of new avenues of employment for the youth is an integral part of any policy governing the fixation of retirement age. Since the impugned policy is actuated and influenced predominantly by that consideration, it cannot be struck down as arbitrary or irrational. We would only like to add that the question of age of retirement should always be examined by the Government with more than ordinary care, more than the State Government has bestowed upon it in this case. The fixation of age of retirement has minute and multifarious dimensions, which shape the lives of citizens. Therefore, it is vital from the point of view of their well being that the question should be considered with the *greatest objectivity and decided upon the basis of empirical data furnished by scientific investigation.* What is vital for the welfare of the citizens is, of necessity, vital for the survival of the State. Care must also be taken to ensure that *the statistics are not perverted to serve a malevolent purpose.*[28]

These observations indicate that an arbitrary reduction of age of superannuation is liable to be struck down as violative of articles 311, 14 and 16.

Shortly after the rule was upheld, on change of government, the age of retirement was raised to 58.

Within a very short time again, there was change in the government. The party which reduced the age of retirement again came to power. But it decided to retain the age of retirement at 58 years. The ex-civil servants moved the Supreme Court, as the benefit was not extended to them. On those petitions, the Supreme Court held that the State having, by its own decision raised the age of retirement from 55 to 58 established that the earlier reduction of age of retirement which was upheld in *Nagaraj* was without any rational basis, ought to have given retrospective effect to the Amendment with effect from 8th February 1983, on which date it was reduced. Failure to do so, the Supreme Court held, was discriminatory against those thousands of officers who were relieved on attaining 55 years. The court held that failure to give retrospective effect in this case was irrational, and that in such a case it was competent for the court to give appropriate relief, and in this aspect of the matter said thus:

28 *K. Nagaraj, ibid.*

> We must further remember, quite apart from any question of retrospectivity, that, unlike in the United Kingdom here in India we have a written Constitution which confers justiciable fundamental rights and so the very refusal to make an Act retrospective or the non-application of the Act with reference to a date or to an event that took place before the enactment may, by itself, create an impermissible classification justifying the striking down of the non-retroactivity or non-application clause, as offending the fundamental right to equality before the law and the equal protection of the laws. That is the situation that we have here.[29]

The Supreme Court directed reinstatement of all those who had been retired and who were within 58 years of age, or to give salary till those who were retired earlier to 58, attained 58 years, and to give retirement benefits on that basis.

Having reached the satisfaction that it is in public interest to retire the employee, the competent authority must further find out whether the concerned employee has on the relevant date completed the specified years of qualifying service or has attained the stipulated age.[30] But merely because the employer has allowed the employee to continue in service beyond the age of 55 years (i.e. the stipulated age) it does not lose its power of prematurely retiring an employee before attaining the age of 58 years.[31] Again if the rules provide that the case of an employee should be considered immediately on his attaining the age of 50 years it only connotes that steps should be taken "as soon as possible" by the government after the employee attains the age of 50 years i.e. the word 'immediately' is not to be given a rigid interpretation.[32]

The rule may require three month's prior notice to be given or payment of three month's pay and allowances in lieu of compulsorily retiring an officer. In *State of Orissa* v. *Balakrushna Sathpathy*,[33] it has been held that the validity of the order of compulsory retirement does not depend on its full payment, as prerequisite and therefore deduction of income tax at source will not vitiate such an order.

An order of compulsory retirement will not be vitiated merely because of inadequate payment of three months salary in lieu of notice[34].

This latest incident underscores the need for an amendment of the Constitution determining the age of superannuation of all civil servants to avoid vagaries in governmental action based on narrow political considerations.

29 *B.Prabhakar Rao* v. *State of AP*, 1985 Lab IC 1555.
30 *Hans Raj v. State of Punjab*, AIR 1985 SC 69 at 72.
31 *Roshan Lal v. State of Haryana*, 1993 (4) SLR 26 (P&H-DB).
32 *Harish Chandra Srivastava v. State of U.P.*, Lab IC 2267 (All).
33 AIR 1994 SC 1127.
34 *State of A.P.* v. *T.K.Seshadri*, (2001) 9 SCC 353.