HIGH COURT OF TRIPURA
AGARTALA

WP(C) 300 of 2019

Sri Sandeep Singh,
son of late Mohinder Singh,
Enrolment No.011215723, CT/GD,
resident of village: Hiranagar, Ward No.5,
P.O. & P.S. Hiranagar, District: Kathua,
Jammu & Kashmir, PIN:184142,
presently posted at 166 Battalion, Border Security Force,
Panisagar, District: North Tripura, PIN: 799 260

----Petitioner(s)

Versus

1. **The Union of India,**
   represented by the Secretary,
   Ministry of Home Affairs,
   having his office at South Block,
   New Delhi- 110001
2. **The Secretary,**
   Ministry of Home Affairs,
   Government of India,
   having his office at South Block,
   New Delhi- 110001
3. **The Director General,**
   Border Security Force,
   having his office at Block No.10, CGO Complex,
   Lodhi Road, New Delhi
4. **The Deputy Inspector General,**
   Border Security Force, Sector Head Quarters,
   Panisagar, District: North Tripura,
   PIN: 799 260
5. **The Commandant,**
   166 Battalion, Border Security Force,
   Panisagar, District: North Tripura,
   PIN: 799 260

---- Respondent(s)

For Petitioner(s)	:	Mr. Somik Deb, Adv. Mr. A. Dey, Adv.
For Respondent(s)	:	Mr. H. Deb, ASGI.
Date of hearing	:	05.04.2019
Date of delivery of Judgment & Order	:	**29.06.2019**
Whether fit for reporting	:	**YES**

HON'BLE MR. JUSTICE S. TALAPATRA

Judgment & Order

By means of this writ petition, the petitioner has challenged the order under No.166 Bn Sisubal/Staphna/Anupukta/2019/764-65 dated 18.02.2019 [Annexure-2 to the writ petition] whereby, on the recommendation of the board for compulsory retirement after the proceeding and having been approved by Deputy Director General, Regional Directorate, Border Security Force, Panisagar the petitioner has been compulsorily retired from his service with effect from 15.03.2019 under Rule 26 of the Border Security Force Rules, 1969, herein after referred to as the Rules without pensionary and other financial benefits on the ground of unsuitability.

02. The petitioner has been given the option to utilize the earned leave for 13 days as credited. Before the said order dated 18.02.2019 [Annexure-2 to the writ petition], the petitioner was issued a show cause notice on compulsory retirement on the ground of unsuitability under Rule 19 of the said Rules under No.166 Bn BSF/Estt/SCN(1286) 2018/638 dated 13.07.2018 [Annexure-1 to the writ petition] affording the petitioner an opportunity to reply the said show cause as to why he should not be compulsorily retired. It had been also stipulated that the reply must should the Commandant, 166 Bn BSF within 15 days from the day of receipt, failing which it would be presumed that the petitioner had nothing to urge in his defence. The ground assigned for such retirement may also be gathered from the said show cause notice. From the service record of the petitioner it was found that he was given the undernoted punishment till date:

a)	**U/S 19(a) on 24/06/2005**	**-**	**07 days RI in force custody**
b)	**U/S 19(a), 21(2) & 40 on 25/05/2006**	**-**	**14 days RI in force custody**
c)	**U/S 19(a) on 03/07/2006**	**-**	**28 days RI in force custody**
d)	**U/S 21(2) on 21/04/2015**	**-**	**14 days RI in force custody**
e)	**U/S 35(a) on 28/11/2017**	**-**	**07 days RI in force custody**
f)	**U/S 19(a) & 40 on 06/01/2018**	**-**	**02 days pay fine**

Thereafter, it has been observed in the show-cause notice that for the consistent bad performance, the Commandant 166 BN was tentatively of the opinion that the petitioner was unsuitable for further retention in the force and it had tentatively been proposed to have the petitioner retired him from the service under Rule 26 of the BSF Rules.

03. The petitioner who had entered the service on 28.09.2001 as the Constable (Kahar), Border Security Force was compulsorily retired by virtue of the impugned order dated 18.02.2019 [Annexure-2 to the writ petition] without any pension and other financial benefits. The petitioner has urged this court to ask the respondents to allow him to complete 20 years of service in the Border Security Force so that the livelihood of his family consisting of his wife and two minor daughters does not fall in peril. The petitioner has provided a translation of the said order dated 18.02.2019, which is grossly at variance with the order passed in Hindi. However, the petitioner has as well supplied the copy of the order dated 18.02.2019 in Hindi. This court is constrained to observe that the said translation is not even certified by any person taking the responsibility of its translation. Henceforth, whenever a translation of any document, written or typed, in the language other than English is translated into English, a certificate be attached by the filing counsel to the effect

that he has compared the text himself or with the help of the expert and that translation is literal and any part of the text has been left out or abridged by the translator. The Registry is directed to issue necessary order in this regard to avoid any such discrepancy in future.

04. Mr. Deb, learned counsel has submitted that there is no dispute that the petitioner was punished for absence without leave [under Section-19 of the BSF Act], for showing disobedience to the superior officers [under Section-21 of the BSF Act], falsifying official documents and false declarations [under Section-35 of the BSF Act] and violation of good order and discipline [under Section-40 of the BSF Act]. Those punishment have been made the foundation, for exercising the power under Rule 26 of the Rules, which provides as follows:

> **"26. Retirement of enrolled persons on grounds of unsuitability.- <u>Where a Commandant is satisfied that an enrolled person is unsuitable to be retained in the Force, the Commandant may, after giving such enrolled person an opportunity of showing cause (except where he consider it to be impracticable or inexpedient in the interest of security of the State to give such opportunity), retire such enrolled person from the Force</u>."**

05. Mr. Deb, learned counsel has further submitted that it would reveal that the petitioner was lastly punished on 06.01.2018 and the show cause notice was issued on 31.07.2018, after a period of six months. Thus it can safely be inferred that the impugned order dated 18.02.2019 [Annexure-2 to the writ petition] is an instance of malice in law inasmuch as the Commandant had no intention to cause compulsory retirement of the petitioner on 06.01.2018. In the interregnum, the petitioner was not even proceeded with. According to Mr. Deb, learned counsel, the petitioner has served the BSF for last 17 years 5 months and if he is compelled to retire from the service, he would

be totally deprived from his pensionary benefits and in that event he will not have any source of livelihood. Such situation would be detrimental to his survival or survival of his family and thus 'viewed from humanitarian perspective' the petitioner be allowed to complete 20 years of service in BSF, so that he can get his post-retirement benefits. In this backdrop, the petitioner has urged this court to quash the order dated 18.02.2019 [Annexure-2 to the writ petition] and to prohibit the respondents from acting on the said order dated 18.02.2019 [Annexure-2 to the writ petition].

06. Mr. Deb, learned counsel appearing for the petitioner has submitted that from a bare reading of the show cause notice dated 13.07.2018 it would reveal that there is no reference to the board proceeding but the reference to that proceeding has found place in the final order dated 18.02.2019. Mr. Deb, learned counsel has further asserted that no reference has been made to ACRs or APRs of the petitioner in respect of assessing the performance of the petitioner. As such, the determination of unsuitability can be said to have been made whimsically and in contrast to principles of natural justice. Mr. Deb, learned counsel has candidly submitted that in the ACRs for the year 2016-17 the observation as recorded cannot be termed as adverse.

07. Mr. H. Deb, learned ASGI appearing for the respondents has at the outset raised a jurisprudential objection as to maintainability of the writ petition in view of the provisions of Rule 28A of the Rules which according to him and an inbuilt statutory mechanism for redressal of grievance, if generated by the decision taken by the Commandant in terms of Rule 26 of the Rules. For purpose of reference, Rule 28A is extracted hereunder:

> **"28A. Petition.- Any person subject to the Act, who considers himself aggrieved by any order of termination of his service passed under this Chapter may; in the case of an officer, present a petition to the Central Government, in the case of an Assistant Sub-Inspector or a subordinate officer, present a petition to the Director-General and in the case of an enrolled person, present a petition to the Inspector-General, who may pass such orders on the petition as deemed fit:**
>
> **Provided that the limitation period for filing such petition shall be three months from the date of order of termination or from the date of its receipt, whichever is later."**

08. Apparent it is that the said provision may create a confusion in the mind of an aggrieved person whether the compulsory retirement may come within the definition of 'termination' and as such the remedy as provided by Rule 28A of the Rules may not be applicable in the case of compulsory retirement. But on reading of Rule 21 of the said Rules, such ambiguity is dispelled Rule 21 provides in respect of termination of service of the officers by the Central Government on grounds other than misconduct. viz. (1) When the Director-General is satisfied that an officer is unsuitable to be retained in service, the officer- (a) shall be so informed (b) shall be furnished with particulars of all matters adverse to him and (c) shall be called upon to urge any reasons he may wish to put forward in favour of his retention in the service.

Provided that clauses (a), (b) and (c) shall not apply, if the Central Government is satisfied that, for reasons to be recorded by it in writing, it is not expedient or reasonably practicable to comply with the provisions thereof:

Provided further that the Director-General may not furnish to the officer any matter adverse to him, if in his opinion, it is not in the interest of the security of the State to do so.

(2) In the event of the explanation being considered by the Director-General unsatisfactory, the matter shall be

submitted to the Central Government for orders, together with the officer's explanation and the recommendation of the Director-General.

(3) The Central Government after considering the reports, the explanation, if any, of the officer and the recommendation of the Director-General may call upon the officer to retire or resign and on his refusing to do so the officer may be compulsorily retired from the service with pension and gratuity if any, admissible to him.

Rule 26 is pari materia of provision tuned with the status of the enrolled person. Therefore, the compulsory retirement can be considered as the termination of service on the ground other than misconduct.

09. Mr. Deb, learned ASGI has further submitted that no fundamental right of the petitioner has been infringed or abridged providing the basis to approach this court under its jurisdiction. It has been asserted that the petitioner without submitting his reply to the notice dated 18.02.2019 to the Commandant, 161 Bn BSF has approached this court. Even though Mr. Deb, learned ASGI has stated that the notice dated 18.02.2019 was amended but from the very content of the notice, it appears that that was a final decision of the authority after taking approval from the Deputy Inspector General, BSF. Mr. Deb, learned counsel having referred to the details of the various offences committed by the petitioner and punishments awarded, in addition to what has been reproduced above has referred to various advisories and warnings tendered to the petitioner. On 10.05.2006, the petitioner was warned for non-obeying the order dated 01.05.2006 for proceeding for border duty. By the order dated 14.05.2010, the

petitioner was warned for using criminal force against his wife. By the communication dated 26.01.2016 the petitioner was advised for non-cleaning of his personal weapon during Arms Inspection. By the order dated 21.04.2018, the petitioner was warned for using insubordinating language to the Superior Officer. That apart, the annual confidential reports or annual performance appraisal reports and gradings of the petitioner, according to Mr. Deb, learned ASGI, were considered for objectivity. For purpose of reference the court would reproduce the gradings and comments in the ACRs from the year 2001-02 [the year of commencement of the service] to 2017-2018, the last year which was considered for purpose of considering the suitability of the petitioner in the form of table which is as under:

YEAR	GRADING	REMARKS
2001-02	V. Good	
2002-03	Good	
2004-05	Adverse	Kaam chor tatha bahanebaaz rasoiya hai
2005-06	Average	
2006-07	Average	
2007-08	Good	
2008-09	Good	
2009-10	7.0	V. Good
2010-11	5.0	Good
2011-12	4.0	Good
2012-13	3.0	Average
2013-14	3.0	Average
2014-15	3.5	Average
2015-16	5.0	Adverse
2016-17	2.5	Adverse
2017-18	3.3	Adverse

10. That apart, Mr. Deb, learned ASGI has submitted that to weed out the unsuitable persons the periodical review is carried out in respect of the personnel having more than 03 bad entries in the service records. For that procedure, a board of officers is detailed with directions to scrutinize the service record of the unit personnel and prepare the list of indisciplined personnel of the unit having more than 03 bad entries. On such recommendation the show cause notice was issued to the petitioner and in reply to show cause notice, the petitioner has submitted his explanation on 19.07.2018. In this regard, Mr. Deb, learned ASGI has brought to the notice of this court a circular dated 02.03.2017 [Annexure-R/4 to the reply filed by the respondents] which deals with the retirement of BSF personnel on the ground of unsuitability. The said circular was scrupulously followed for identifying the persons liable to be weeded out on the ground of unsuitability. The respondents have shown the following grounds for declaring the petitioner unsuitable for retaining in the service and making him compulsory retired under Rule 26 of the Rules:

(a) The petitioner has been awarded 03 punishments during last 3/4 years.

(b) The petitioner has been consistently given adverse remarks in his APARs and also graded with "POOR GRADING" in last four years.

(c) The petitioner had been issued warning/advisory on four occasions and the last written warning was issued to him on 21/04/2018 for using insubordinating language to his superior.

The notice was issued under Rule 26 of the Rules, to the petitioner on compulsory retirement on the ground of

unsuitability without any pensionary benefits with effect from 15.03.2019.

11. The relevant parts of the said circular dated 02.03.2017 may be referred in the perspective of issuance of the said circular. It appears from its reading, that circular was issued in compliance to the judgment of the apex court on that aspect. The apex court had observed that the public is vitally interested in the efficiency an integrity of public services. It is as such in public interest and for public good that the Govt. servants who are inefficient, dishonest or corrupt or have become as security risk should not continue in service and that the protection afforded to them by the ACTs and Rules made under Article 309 and by Article 311 be not abused by them to the detriment of public interest and public good. In order to ensure greater care and caution, and to avoid arbitrary action at all levels in the Force and for having uniform procedure, the Director General was, in terms thereof, pleased to direct that formation of the Screening Boards, composition of which shall be as noted below, should be constituted from time to time to screen the performance of Officers, Subordinate Officers and Enrolled persons and others taking into account their CR Dossiers/APAR files, Service Records, Personal files as well as their overall performance and reputation in the Force. Usually for enrolled persons up to HC, the following persons shall be in the Screening Board- (i) Second-in-command of the unit of the person-Chairman (ii) Deputy Commandant of the unit of the person-Member (iii) Asst Commandant of the unit of the person- Member. The Screening Board so detailed shall screen the performance of the BSF personnel by taking into account their CR Dossiers/APAR files, service records, personal

files and overall performance in accordance with the guidelines and submit their recommendation to the concerned convening authorities within 15 days from the date of screening. On receipt of the recommendation of the Screening Boards, prompt actions shall be taken by the authorities concerned for ensuring retirement of those personnel whom they consider as unsuitable for further retention in service by complying with the procedure as laid down in Rules 21, 26 and 27 of the Rules. It has been further provided that where a Commandant is satisfied that an enrolled person is unsuitable to be retained in the Force, the Commandant may after giving such enrolled person an opportunity of showing cause (except when he considers it to be impracticable or inexpedient in the interest of security of the State to give such opportunity) retire such enrolled person from the Force under Rule 26 of the Rules. It has been also observed that the screening board proceeding in respect of the enrolled persons up to the rank of HCs should be submitted to the concerned DIG for his approval in order to have a proper check of the proceedings and the procedure. The DIG must furnish his remarks within one month. If DIG's remarks are not received within a month, it will be deemed to have been approved by the DIG and the action required would be taken. Once a tentative decision is taken to retire a particular member of the Force, the reasonable opportunity to represent has be given to the person, to show cause with exemption in the cases which are well categorised. The notice must contain not only the nature of administrative action proposed to be imposed but also the reasons thereof. In the circular the requisites of a legally valid notice are provided. Those requisites are:

(a) It should state that the administrative action was tentatively or provisionally proposed to be imposed. Omission to use these words may vitiate the proceedings.

(b) The authority issuing such a notice should furnish to the Government servant with particulars of all matters adverse to him for imposing the tentative action, in order to enable him to represent against the same. Omission to furnish the grounds will be a negation of natural justice. It would not be sufficient to say that the person concerned was professionally incompetent or is 'aged' or does not have any required qualification. The grounds of proposed retirement must be adequate and sufficient.

(c) The term 'retirement' only should be recorded in the notice. Any other term, such as 'dismiss', 'discharge' etc. would render the notice defective.

(d) A reasonable time should be given to the person concerned to enable him to submit his explanation. A minimum of a fortnight's notice is desirable.

(e) The show cause notice should be signed only by the competent authority.

The person concerned having submitted his explanation to the show cause notice, the authority concerned after applying its mind to it, should pass a final order. It has been prohibited that in no case of such retirement, the effect of the retirement could be ordered retrospectively. In case, earned leave is due to the person who is to be retired, it would be desirable

that he be given an opportunity to avail of this leave and his retirement should be ordered from the date such leave expires.

12. According to the respondents the petitioner had been consistently showing poor performance and he was not amenable to warnings and advice. Thus, following the due process in terms of the said circular read with Rule 26 of the Rules, necessary proceeding had been initiated against him. A screening board was detailed to scrutinize the service record, ACR/APARs etc. and submit recommendation. The screening board after having examined the service record and performance of the petitioner recommended to retire him on the grounds of unsuitability in terms of Rule 26. The recommendation was duly approved by the DIG, SHQ BSF, Panisagar. After approval of the DIG, the petitioner had been served with the notice dated 18.02.2019 [Annexure-2 to the writ petition].

13. The petitioner without responding to the notice dated 18.02.2019 has approached this court. The petitioner, according to the respondents, is at liberty to reply the notice dated 18.02.2019 and submit his case before the Commandant, 166 Bn BSF. After having the reply from the petitioner against the notice dated 18.02.2019 the Commandant, 166 Bn BSF shall take a decision whether the petitioner should be retired from the service on the ground of unsuitability or otherwise. The petitioner shall be at liberty to prefer statutory petition in terms of Rule 28A of the Rules to the appropriate superior authority, as prescribed, to pass such orders of the petition. Thus, the respondents have stated that the petition is bereft of merit and that should be slashed without further consideration.

14. This court has perused the proceeding minutes of the board of Officers in respect of the petitioner and their recommendation. Their recommendations are reflected in the memorandum dated 04.01.2019 [Annexure-R/6 to the reply]. That apart, this court has appreciated the circular dated 02.03.2017 [Annexure-R/4 to the reply] wherein it is noticed that the need for termination of the service of an personnel arises only when it is felt that the individual concerned has not only outlived his utility for the service but also his record of service has been uniformly bad and he had not shown any improvement over a reasonable period. In deciding the fate of an individual, the first and foremost factor which should be the utility of the individual, should normally be judged over a period of at least 3/4 years rather than on the basis of the last one or two years only. The ability of the individual to withstand hardship, stress and strain and to live for long spells in the border areas should be another consideration. The integrity, amenability to discipline, devotion to duty, professional competency, operational and administrative efficiency of the individual, boldness and resoluteness in the execution of duties in the face of odds and difficulties-should also be taken into consideration. Acts of cowardice should be seriously viewed. In addition to that, the following guideline has been provided for assessing the case of retirement on the ground of unsuitability:

> **"....it should be borne in mind that only those personnel who have been consistently showing poor performance and are not amenable to warnings and advice, are retired. Where no warning or extracts of adverse remarks have been communicated to the concerned person earlier, it would be unfair to surprise him with a declaration of his unsuitability through a show cause notice. <u>The communication of adverse remarks, for the first time, alongwith the show cause notice, is equally unfair. Unless a man has been told about his short comings, he could not reasonably be expected to improve upon the same.</u>**

> **Similarly, declaring a man unsuitable merely on the basis of a single adverse report, would also not be justified. In the interest of justice and fair play, it should be ensured that while judging a man's suitability for further retention in the Force, due regard is given to his overall performance over past few years."**
>
> **[Emphasis added]**

15. The procedure has been further laid down that once tentative decision is taken to retire a particular member of the Force, it is desirable, in the interest of justice to give such a person a reasonable opportunity to represent against such a tentative decision, by issuing him a show cause notice. The notice must contain not only the nature of administrative action proposed to be imposed but also the reasons thereof. The requisites of a legally valid notice are as follows:

> **"(a) It should state that the administrative action was tentatively or provisionally proposed to be imposed. Omission to use these words may vitiate the proceedings.**
>
> **(b) The authority issuing such a notice should furnish to the Government servant with particulars of all matters adverse to him for imposing the tentative action, in order to enable him to represent against the same. Omission to furnish the grounds will be a negation of natural justice. It would not be sufficient to say that the person concerned was professionally incompetent or is 'aged' or does not have the required qualification. The grounds of proposed retirement must be adequate and sufficient. (in the case of SI Balkishan Tiwari (74 Bn), the Hon'ble Calcutta High Court had struck down his retirement on the ground that the show cause notice did not contain sufficient details of grounds on which his retirement was proposed to be ordered, to enable him to know what was there for him to explain).**
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> **(c) The term 'retirement' only should be recorded in the notice. Any other term, such as 'dismiss', 'discharge' etc. would render the notice defective.**
>
> **(d) A reasonable time should be given to the person concerned to enable him to submit his explanation. A minimum of a fornight's notice is desirable.**
>
> **(e) The show cause notice should be signed only by the competent authority."**

16. Only having the explanation from the person concerned, or on his failure ex parte, the final order be passed. In the final order only the term 'retirement' should be recorded. It should be signed by the authority so empowered. From a prospective day or from the date when the order is signed, but in

no case, retirement could be ordered retrospectively. In case, earned leave is due to the person who is to be retired, it would be desirable that he be given an opportunity to avail of that leave and his retirement should be ordered from the date when such leave expires. It has been further observed in the said circular as follows:

> **"It may be borne in mind that premature retirement involves considerable pecuniary loss to the person concerned and is a very drastic administrative action. It is, therefore, very essential that authorities at all levels scrutinize each case minutely in a fair manner in the interest of public service and the organization and weed out only the incorrigible types or those who have outlived their utility and their capacity for work has been found beyond redemption."**

17. The passage as quoted above shows that the final order would be passed only when the authority competent, to send a person on compulsory retirement at all levels, scrutinized each case minutely and in a fair manner in the interest of public service and the organization. To weed out only the incorrigible types or those who have outlived their utility and their capacity for work that provision be applied. It should be reflected accordingly in the final order.

18. It appears from the records that the petitioner was given the show-cause notice on 13.07.2018, asking him to give the reply within 15 days of the receipt. In the notice, the punishment as quoted above is referred and his consistent poor performance, without particulars has been indicated. The proposal for retirement under Rule 21 of the Rules has been communicated thereof. In the reply to the said notice dated 13.07.2018 the petitioner has expressed his remorse to the authorities and assured not to repeat such act. Further he has stated that his children are minor and are prosecuting their study. On such

premises, he had asked for allow him to serve for another 3/4 years so that he can go for voluntary retirement.

19. As stated earlier, the said show cause notice was issued much before the recommendation made by the board of Officers on 04.01.2019 [Annexure-R/6 to the reply]. Therefore it is apparent on the face of the records the said show-cause notice was issued before the recommendation was received by the competent authority or before that was approved by the DIG as stated above. To put the said fact on record, it may be noted that the DIG approved the recommendation was made on 04.02.2014.

20. Mr. Somik Deb, learned counsel in rejoinder has stated that the entire proceeding is malicious. He has further submitted that while approving the order of premature and compulsory retirement of the petitioner, the DIG BSF had taken note of adverse entries recorded in the ACRs and APRs of the petitioner. The petitioner was not ever given any opportunity to submit his representation against such downgrading and adverse entries. The petitioner did prefer noy to file any rejoinder in this regard and as such there is no averment on record in this regard. According to Mr. Deb, learned counsel some of the entries in the ACR cannot be treated as the adverse entries. That apart, he has stated that the show-cause notice dated 13.07.2018 and the final order dated 18.02.2019 [see the written note] have referred to the incident of 24.06.2005, 25.05.2006 and 03.07.2006. In terms of the said circular, all the particulars were supposed to be provided to the personnel against whom the proceeding was drawn up satisfy the requirement of the principles of natural justice. To get nourishment, Mr. Deb, learned counsel has placed his reliance on **Veerendra Kumar Dubey vs. Chief of Army**

Staff and Others reported in **(2016) 2 SCC 627** where the apex court while considering the case of discharge made under Section 22 of the Arms Act, 1980 has observed inter alia:

> **"More importantly, a person who has suffered four such entries on a graver misconduct may escape discharge which another individual who has earned such entries for relatively lesser offences may be asked to go home prematurely. The unfairness in any such situation makes it necessary to bring in safeguards to prevent miscarriage of justice. That is precisely what the procedural safeguards purport to do in the present case."**

This court has failed to persuade itself how the decision in **Veerendra Kumar Dubey** (supra) becomes relevant in the present context.

21. Mr. Deb, learned counsel has also placed his reliance on **K.P. Varghese vs. Income Tax Officer, Ernakulam and Another** reported in **(1981) 4 SCC 173**, in order to buttress the binding force of the circulars. It has been observed in **K.P. Varghese** (supra) as follows:

> "…..**These two circulars of the Central Board of Direct Taxes are, as we shall presently point out, binding on the Tax Department in administering or executing the provision enacted in sub-section (2), but quite apart from their binding character, they are clearly in the nature of contemporanea expositio furnishing legitimate aid in the construction of sub-section (2). The rule of construction by reference to contemporanea expositio is a well established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous. This rule has been succinctly and felicitously expressed in Crawford on Statutory Construction (1940 Edn.) where it is stated in paragraph 219 that**
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> > **"administrative construction (i. e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although non-controlling, is nevertheless entitled to considerable weight; it is highly persuasive."**
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> **The validity of this rule was also recognised in Baleshwar Bagarti v. Bhagirathi Dass: ILR 35 Cal 701 where Mookerjee, J. stated the rule in these terms:**

> **"It is a well-settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it."**
>
> **and this statement of the rule was quoted with approval by this Court in Deshbandhu Guptu & Co. v. Delhi Stock Exchange Association Ltd.(2) It is clear from these two circulars that the Central Board of Direct Taxes, which is the highest authority entrusted with the execution of the provisions of the Act, understood sub section (2) as limited to cases where the consideration for the transfer has been under- stated by the assessee and this must be regarded as a strong circumstance supporting the construction which we are placing on that sub-section.**
>
> **But the construction which is commending itself to us does not rest merely on the principle of contemporanea expositio. <u>The two circulars of the Central Board of Direct Taxes to which we have just referred are legally binding on the Revenue and this binding character attaches to the two circulars even if they be found not in accordance with the correct interpretation of subsection (2) and they depart or deviate from such construction.</u> It is now well-settled as a result of two decisions of this Court, one in Navnitlal C. Jhaveri v. K.K. Sen: AIR 1965 SC 1375 and the other in Ellerman Lines Ltd. v. Commissioner of Income-tax, West Bengal: (1972) 4 SCC 474 that circulars issued by the Central Board of Direct Taxes under section 119 of the Act are binding on all officers and persons employed in the execution of the Act even if they deviate from the provisions of the Act."**
>
> **[Emphasis added]**

22. Since the respondents have clearly acceded the said circular that they have observed the requirement of those circular, this court is not called upon to decide the issue of binding force of the said circular. Reliance has been placed on **R vs. Wandsworth London Borough Council, ex parte Beckwith** reported in **(1996) 1 ALL ER 129** [see Lord Hoffmann's speech] where it has been held that Mr. Gordon attempted to support his construction by reference to the legislative pedigree of ss 21 and 26 and the policy guidance issued by the Department of Health. The legislative history was interesting but ultimately unhelpful. The earlier Acts, which say expressly that private sector accommodation may be provided in lieu of directly managed

council homes, do not use the same drafting technique and one cannot therefore compare like with like. The policy guidance was issued under section 7 of the Local Authority Social Services Act, 1970 which says:

> **"Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State."**

The guidance contemplated that the move to greater private provision would take some time. It does not follow, however, that local authorities had to retain direct control of some unspecified proportion of every service. This would have been imposing a duty to make direct provision which had not existed before the amendments and which seems contrary to the general thrust of the government's policy. It is true that para 4 of Local Authority Circular LAC (93) says:

> **"…It is the view of the Department that the amendments introduced into the 1948 Act by section 1 of the Community Care (Residential Accommodation) Act 1992 will require authorities to make some direct provision for residential care under Part III of the 1948 Act."**

The opinion of the department is entitled to respect, particularly since it was assume that the Act was drafted upon its [the department's] instructions. But that statement is simply wrongly held. Even though the said observation holds that a departmental circular is entitled to respect but that is no right to the contention raised in this writ petition. Moreover, there is no such controversy as stated, raised by the respondents.

23. Mr. Deb, learned counsel has further referred a decision of the apex court in **Ajay Gandhi and Another vs. B. Singh and Others** reported in **(2004) 2 SCC 120** where the apex court had occasion to observe as follows:

"16. In Corpus Juris Secondum, Volume 82, PP. 761, it is stated that the controlling effect of this aid which is known as 'executive construction' would depend upon various factors such as the length of time for which it is followed, the nature of rights and property affected by it, the injustice resulting from its departure and the approval that it has received in judicial decisions or in legislation.

17. In Francis Bennion Statutory Interpretation, Fourth edition, the law is stated in the following terms at page 596:

"Section 231
The basic rule: In the period immediately following its enactment, the history of how an enactment is understood forms part of the contemporanea expositio, and may be held to throw light on the legislative intention. The later history may, under the doctrine that an ongoing Act is always speaking, indicate how the enactment is regarded in the light of developments from time to time.

COMMENT

On a superficial view, it may be though that nothing that happens after an Act is passed can affect the legislative intention at the time it was passed. This overlooks the two factors stated in this section.
Contemporanea exposition.- The concept of legislative intention is a difficult one. Contemporary exposition helps to show what people though the Act meant in the period immediately after it was passed. Official statements on its meaning are particularly important here, since every Act is supervised, and most were originally promoted, by a government department which may be assumed to know what the legislative intention was."

18. In R. vs. Wandsworth London Borough Council, Ex parte, Beckwith: (1996) 1 All E.R. 129, the House of Lords has held that a departmental circular is entitled to respect. It can only be ignored when it is patently wrong. The said principle has also been followed in Indian Metals and Ferro Alloys Ltd. vs. Collector of Central Excise: 1991 Supp(1) SCC 125, Keshavji Ravji and co. vs. Commissioner of Income Tax: (1990) 2 SCC 231, Raymand Synthetics Ltd. vs. Union of India: (1992)2 SCC 255, Kasilingam vs. P.S.G. College of Technology: 1995 Supp (2) SCC 348 and Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries: (2002) 2 SCC 127.

19. The Central Government admittedly never exercised its purported power of transfer and posting in its capacity as an employer or otherwise. From the impugned order, furthermore, it would appear that even therein the source of power had not been traced from the provisions of the Income Tax Act but to the Delegation of Financial Powers which have no nexus therewith. By reason of amendment to certain circular letters also, the Central Government cannot confer upon it such statutory power of transfer and posting of the members of the Appellate Tribunal."

[Emphasis added]

24. Further reliance has been placed on **S. B. Bhattacharjee vs. S.D. Majumdar and Others** reported in **(2007) 10 SCC 513** where the apex court had occasion to observe on the same aspect i.e. on the doctrine of *contemporanea expositio* as follows:

> **"27. It may be that in a given case, the court can with a view to give effect to the intention of the legislature, may read the statute in a manner compatible therewith, and which would not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. But, however, it is also necessary for us to bear in mind the illustration given by the executive while construing an executive direction and office memorandum by way of executive construction cannot be lost sight of. It is in that sense the doctrine of cotemporanea expositio may have to be taken recourse to in appropriate cases, although the same may not be relevant for construction of a model statute passed by a legislature.**
>
> **28. In G.P. Singh's 'Principles of Statutory Interpretation, 10th Edn. at p. 319, it is stated :**
>
> > **"But a uniform and consistent departmental practice arising out of construction placed upon an ambiguous statute by the highest executive officers at or near the time of its enactment and continuing for a long period of time is an admissible aid to the proper construction of the statute by the Court and would not be disregarded except for cogent reasons. The controlling effect of this aid which is known as 'executive construction' would depend upon various factors such as the length of time for which it is followed, the nature of rights and property affected by it, the injustice result from its departure and the approval that it has received in judicial decisions or in legislation.**
>
> **Relying upon this principle, the Supreme Court in Ajay Gandhi v. B. Singh having regard to the fact that the President of the Income Tax Appellate Tribunal had been from its inception in 1941 exercising the power of transfer of the members of the Tribunal to the places where Benches of the Tribunal were functioning, held construing sections 251(1) and 255(5) of the Income Tax Act that the President under these provisions has the requisite power of transfer and posting of its members. The court observed: "For construction of a statute, it is trite, the actual practice may be taken into consideration."**
>
> **<u>Contemporary official statements throwing light on the construction of a statute and statutory instruments made under it have been used as contemporanea expositio to interpret not only ancient but even recent statute both in England and India."</u>**
>
> **[Emphasis added]**

25. Again Mr. Deb, learned counsel has made reference to **Spentex Industries Limited vs. Commissioner of Central Excise and Others** reported in **(2016) 1 SCC 780** where the apex court had observed on the same subject matter in the following words:

> **"26. We are also of the opinion that another principle of interpretation of statutes, namely, principle of contemporanea expositio also becomes applicable which is manifest from the act of the Government in issuing two notifications giving effect to Rule 18. This principle was explained by the Court in Desh Bandhu Gupta and Co. and others v. Delhi Stock Exchange Association Ltd: (1979) 4 SCC 565 in the following manner:**
>
> > **"9. It may be stated that it was not disputed before us that these two documents which came into existence almost simultaneously with the issuance of the notification could be looked at for finding out the true intention of the Government in issuing the notification in question, particularly in regard to the manner in which outstanding transactions were to be closed or liquidated. The principle of contemporanea expositio (interpreting a statute or any other document by reference to the exposition it has received from contemporary authority) can be invoked though the same will not always be decisive of the question of construction. (Maxwell 12th Edn. p. 268). In Crawford on Statutory Construction (1940 Edn.) in para 219 (at pp. 393-395) it has been stated that administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction commonly referred to as practical construction although not controlling, is nevertheless entitled to considerable weight it is highly persuasive. In Baleshwar Bagarti v. Bhagirathi Dass: ILR (19908) 35 Cal 701 the principle which was reiterated in Mathura Mohan Saha v. Ram Kumar Saha: 1915 SCC online Cal 194 has been stated by Mukerjea J. thus:**
> >
> > **"It is a well-settled principle of construction that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. I do not suggest for a moment that such interpretation has by any means a controlling effect upon the Courts; such interpretation may, if occasion arises have to be disregarded for cogent and persuasive reasons, and in a clear case of error, a Court would without hesitation refuse to follow such construction."**
>
> **Of course, even without the aid of these two documents which contain a contemporaneous exposition of the Government's intention, we have**

> **come to the conclusion that on a plain construction of the notification the proviso permitted the closing out or liquidation of all outstanding transactions by entering into a forward contract in accordance with the rules, bye-laws and regulations of the respondent."**
>
> **[Emphasis added]**

26. The respondents have clearly stated that they have followed all the requisites of the said circular. Before we embark on the legality of the procedure that has been followed in issuing the letter/notice/order dated 18.02.2019, a decision of the apex court in **Baikuntha Nath Das and Anr. vs. Chief Distt. Medical Officer** reported in **AIR 1992 SC 1020** may be referred. In **Baikuntha Nath Das** (supra) the apex court had occasion to observe that it is unlikely that adverse remarks over a number of years remain un-communicated and yet they are made the primary basis of action. Such an unlikely situation if indeed is present, may be indicative of malice in law. To remedy the malice as noted, the jurisdiction under Article 226 of the Constitution is an important safeguard and that jurisdiction may be invoked by the aggrieved. Even with its well-known constraints, the remedy is an effective check against mala fide, perverse or arbitrary action. **Baikuntha Nath Das** (supra) has laid down some well entrenched principles in respect of compulsory retirement which however may be subject to any statutory provision which has been specifically enacted. Those principles are as follows:

> **"(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.**
>
> **(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.**
>
> **(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an**

> **appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be perverse order.**
>
> **(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.**
>
> **(v) <u>An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interfere. Interference is permissible only on the grounds mentioned in (iii) above."</u>**
>
> **[Emphasis added]**

27. It is apparent that usually the principles of natural justice does not have any sway in the context of the order of compulsory retirement. But it cannot be contended that the judicial scrutiny is excluded together. If it is found that the said order is malafide and is based on no evidence, and is grossly arbitrary and in that sense, no reasonable person would form the opinion on the given material. In short, if it is found to be a perverse order, the court has the jurisdiction under Article 226 of the Constitution to interfere with such order.

28. From the scrutiny of records, even though the allegation of malice does not surface, but the instructive circular for purpose of operating Rule 26 of the BSF Rules has not been followed inasmuch as no valid notice was furnished to the petitioner after the recommendation was made by the board of officers and the approval by the DIG, BSF, was made in terms of the said circular dated 02.03.2017. It has been clearly stated that

once a tentative decision is taken to retire a particular member of the Force, it is desirable in the interest of justice to give such person a reasonable opportunity to represent his case against the tentative decision by issuing him a show-cause notice. After the tentative decision on observance of the procedure as adverted by the respondents as referred before, no notice has been issued in terms of the said circular. The said circular dated 02.03.2017 [Annexure-R/4 to the reply] clearly states that the authority issuing such a notice should furnish the government servant all particulars adverse to him for imposing the tentative action, in order to enable him to represent against the same. Omission in citing all the grounds will be a negation of natural justice. It would not be sufficient to say that the person concerned was officially incompetent. The grounds for the proposed retirement must be adequate and sufficient. If the notice does not contain the sufficient details of the ground on which his retirement is proposed to be ordered, such notice cannot be treated as valid. In the reply, the respondents have come out that they have considered ACRs, APARs etc., but in the so called purported notice dated 18.02.2019 [Annexure-2 to the writ petition] there is no reference to those materials. That apart, this court is unable to accept the letter/notice/order dated 18.02.2019 as a notice to show-cause as the said notice dated 18.02.2019 is structured in the form of a final order.

29. Having observed thus, this court is persuaded to set aside the said notice dated 18.02.2019 [Annexure-2 to the writ petition]. Since this court has quashed the said notice/letter/order dated 18.02.2019 [Annexure-2 to the writ petition] for procedural defect, the respondents are given liberty, if they are so inclined,

to issue the fresh notice in conformity to the circular dated 02.03.2017 [Annexure-R/4 to the reply] by affording a reasonable opportunity to the petitioner. If such notice is issued, the petitioner shall be allowed to continue in the service till the final decision is taken in accordance with law. It may be further clarified that the notice that was received by the petitioner on 13.07.2018 [Annexure-1 to the petition] cannot be treated as the notice for purpose of retiring the petitioner compulsorily under Rule 26 of the Rules.

30. As this is fallen for consideration of this court whether the pensionary and other financial benefits can be taken away from the petitioner, for the reason that the petitioner has been made retired under Rule 26 of the BSF Rules, this court shall declare that a conjoint reading of Rule 21 and 26 of the Rules would definitely make it abundantly clear that for compulsory retirement, pension and other retiral benefits can be forfeited or be taken away by the authority competent to send someone on compulsory retirement.

Having observed thus, this writ petition is allowed to the extent as indicated above.

There shall be no order as to costs.

JUDGE

Moumita