A UNION OF INDIA & ORS.

v.

A.K. BEHL, AVSM, PHS ETC.

B (Civil Appeal Nos. 9382-83 of 2014)

JULY 24, 2015

[T.S. THAKUR, R.K. AGRAWAL AND ADARSH KUMAR GOEL, JJ.]

C *Service Law:*

Tenure post – Fixed tenure – As provided in Order No.10(14)06/D(Med) dated 20th April, 2007 – Applicable to D *AFMS officers of the rank of Lt. General and its equivalent as well as to Director General Armed Force Medical Services – Constitutional validity of – Armed Forces Tribunal held that prescription of fixed tenure by the order dated 20.4.2007 was* ultra vires *the Constitution – On appeal, held: The courts* E *should exercise restraint in interfering with prescription of retirement age in public service unless such prescription is arbitrary and irrational – The tenure rule was made subject to the conditions that (i) the officer if completes the tenure before he touches 60 years of age, he can continue beyond* F *the tenure till he completes the age of 60 years, (ii) the officer must demit office at the age of 61 regardless whether he has completed his two years tenure – There is nothing wrong in stipulating a tenure conditionally – Such tenure rule is being applied on uniform basis in all cases without exception – Just* G *because some officers are allowed in certain situations upto 61 years does not bring about any discrimination between such officers and those officers who completed their tenure before attaining the age of 60 years – Tribunal was in error in*

H

interfering with the provisions made by the Government, prescribing the age of retirement. A

Allowing the appeals, the Court

HELD: 1. The courts should exercise restraint in interfering with any prescription of retirement age in public service unless the age stipulated is so unreasonably low as to make it arbitrary and irrational. [Para 11] [408-B] B

K. Nagaraj and Ors. etc. v. State of Andhra Pradesh and Anr. **1985 (2) SCR 579: (1985) 1 SCC 523;** *T.P. George and Ors. vs. The State of Kerala and Ors.* **1992 (2) SCR 311: 1992 Supp (3) SCC 191;** *B. Bharat Kumar and Ors. vs. Osmania University and Ors.* **2007 (6) SCR 168: (2007) 11 SCC 58 – relied on.** C D

2.1 The Government could classify Lt. Generals and those holding equivalent ranks for a tenure appointment. Such a classification for granting the incumbents a tenure of two years each was constitutionally permissible. Having regard to the experience, the professional capability and potential of officers who are appointed as Lt. Generals and equivalent, the Government could in its wisdom direct that officers appointed to that rank shall enjoy a tenure of two years. That prescription however gave rise to an anomaly where an officer who picked up the rank at a relatively younger age would have to go home even before he attained the age of 60 years. This was remedied by the Government by amending letter dated 1st May, 2000 and making the tenure rule subject to two important conditions *viz.* (i) if the officer concerned completes his tenure of two years before he touches 60 years of age, he can continue beyond the said tenure till he completes E F G H

A the age of 60 years; and (ii) an officer would demit office at the age of 61 years even if he has not completed his two years tenure by that time. [Para 13] [410-G-D; 411-A-D]

B 2.2 There is nothing wrong in stipulating of a tenure of two years conditionally, specially when unconditional prescription had resulted in an anomaly, where an officer who because of his merit picked-up the rank of Lt. General or equivalent early in life had to go out upon his C completing the period of two years in that rank, even before he completed the age of 60 years which incidentally is the age at which other similar ranks in the army and services, retire. So also, the Government was entitled to fix an upper age limit for officers who were D unable to pick-up the rank early. The stipulation of the two conditions afore-mentioned does not suggest that the Government has not specified tenure for those holding the rank of Lt. General and equivalent in AFMS. The Tribunal, therefore, committed a manifest error in E holding that there was actually no tenure prescribed for those serving in the rank of Lt. Generals and equivalent. The tenure rule being conditional, the same could and is being applied on a uniform basis in all cases without F exception. [Paras 13, 14] [411-D-F; 412-A, C-D]

3. Just because Lt. Generals and equivalent rank holders are allowed to continue in certain situations upto 61 years does not bring about any discrimination between such officers and others who complete their G two years tenure by the time they reach the age of 60 years. At any rate, the grievance assuming there is any legal basis for the same, could be made by such of the officers as were not allowed to complete their tenure just because they had completed 61 years of age. The H grievance of the respondents who had completed their

tenure of two years and 60 years of age was misplaced. The Tribunal was clearly in error in interfering with the provisions made by the Government prescribing the age of retirement and the orders of retirement issued by the competent authority. [Para 19] [419-A-E]

State of Himachal Pradesh and Anr. vs. Kailash Chand Mahajan and Ors. **1992 (1) SCR 917: 1992 Supp (2) SCC 351;** *Nagaland Senior Government Employees Welfare Association and Ors. vs. State of Nagaland and Ors.* **2010 (7) SCR 630: (2010) 7 SCC 643;** *Yeshwant Singh Kothari vs. State Bank of Indore* **1993 (1) SCR 208: 1993 Supp (2) SCC 592 – relied on.**

Dr. L.P. Agarwal vs. Union of India & Ors. **1992 (3) SCR 567: (1992) 3 SCC 526 – distinguished.**

Case Law Reference

1985 (2) SCR 579	**relied on.**	**Para 11**
1992 (2) SCR 311	**relied on.**	**Para 12**
2007 (6) SCR 168	**relied on.**	**Para 12**
1992 (1) SCR 917	**relied on.**	**Para 15**
2010 (7) SCR 630	**relied on.**	**Para 16**
1993 (1) SCR 208	**relied on.**	**Para 17**
1992 (3) SCR 567	**distinguished.**	**Para 20**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 9382-9383 of 2014.

From the Judgment and Order dated 12.09.2014 in O.A. No. 250 of 2014 and dated 15.09.2014 in M.A. No. 541 of 2014 in O.A. No. 250 of 250 of 2014 & O.A. No. 296 of 2014

A of Armed Forces Tribunal Act, 2007.

Ranjit Kumar, SG, Binu Tamta, R. K. Verma, B. V. Balaram Das for the Appellants.

B Gopal Subramonium, SG, Chinmoy Sharma, R. N. Karanjawala, Nandini Gore, Abhishek Roy, Aditi Bhatt, Amar Dave, Brijesh Oberai (For Karanjawala & Co.) for the Respondents.

C Caveator-in-person.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. The short question that falls for determination in these two appeals filed by the Union of India D is whether the "Tenure Clause" applicable to AFMS officers of the rank of Lt. General and its equivalent as well as to Director General Armed Force Medical Services (DGAFMS) is constitutionally valid. The Tribunal has, while allowing the OAs filed by the respondents, taken the view that a fixed tenure of E two years provided in order No.10(14)/06/D(Med) dated 20th April, 2007 is *ultra vires* and accordingly set aside the clause with the direction that all the Lt. Generals and their equivalent in AFMS will retire only upon completion of 61 years of age provided in the said order. The controversy arises in the F following circumstances:

2. Respondent A.K. Behl was commissioned in the Army Medical Corps on 1st March, 1976 and was seconded to the Air Force in the rank of Flying Officer. He was in due course G promoted and appointed as Air Marshal (equivalent to Lt. General) w.e.f. 1st April, 2012. His date of birth being 17th September, 1954, he was under the provisions of the existing policy due to retire on 30th September, 2014 on attaining the age of 60 years after a tenure of two years which he completed H on 31st March, 2014.

3. Vice Admiral Shalesh Rohatagi, respondent in the connected appeal, whose date of birth is 24th September, 1954, too joined the Army Medical Corps and was promoted on 1st July, 2012 to the rank of Vice Admiral which is equivalent to the rank of Lt. General. He completed his tenure of two years in that rank on 30th June, 2014 and was due to retire on 30th September, 2014 upon completion of 60 years of age.

4. Orders dated 11th October, 2013 and 7th November, 2013 were issued to respondent Air Marshal A.K. Behl, intimating to him that he would retire from service on 30th September, 2014 (AN) on attaining the age of 60 years. Similarly, orders dated 11th October, 2013 and 11th December, 2013 were to the same effect issued to respondent Vice Admiral Shalesh Rohtagi.

5. Aggrieved, the respondents submitted statutory complaints which were disposed of by the Competent Authority as "untenable", on the ground that the officers had not been subjected to any military wrong and were being asked to retire from service on the basis of a Government policy that was uniformly applicable to all the officers of the rank of Lt. Generals and equivalent and DGAFMS in the AFMS. Aggrieved by the order rejecting his statutory complaint, respondent Air Marshal A.K. Behl filed OA No. 250 of 2014 before the Armed Forces Appellate Tribunal, Delhi, challenging the policy of the Government prescribing a tenure linked age of retirement for officers of the rank of Lt. General and equivalent in the Armed Forces Medical Services and praying for quashing of the retirement orders issued to him. A similar petition being OA No. 296 of 2014 was filed by respondent Vice Admiral Shalesh Rohtagi also. By an order dated 12-09-2014 the AFT allowed O.A. No. 250 of 2014 filed by Air Marshal A.K. Behl holding that the tenure clause of two years provided in the impugned order No.10(14)/06/D/(Med) dated 20th April, 2007 was *ultra*

A *vires* and directing that all Lt. Generals and its equivalent rank holders in the AFMS shall retire only after completion of 61 years of age. On an application for clarification filed by the respondent separately, the Tribunal passed another order dated 15th September, 2014 whereby it held that orders of B retirement dated 11th October, 2013 and 7th November, 2013 shall also stand quashed. An oral prayer made on behalf of the Union of India for a certificate of fitness to appeal having been declined by the Tribunal, the Union has filed the present appeals by leave under Section 31 of the Act.
C

6. Civil Appeal Nos.9382-9383 of 2014 filed by the Union of India challenge order dated 15th September, 2014 passed in OA No.296 of 2014 filed by respondent Vice Admiral Shalesh Rohtagi relying upon its order in O.A. No.250 of 2014. D That is precisely how these appeals were heard together and shall stand disposed of by this common order.

7. Appearing for the appellant, Mr. Ranjit Kumar, learned Solicitor General, argued that the power to prescribe the age E of retirement vests entirely with the Government with which the Tribunal could not find fault. He urged that age of retirement of Lt. Generals and equivalent was approved by the Cabinet and accordingly prescribed in terms of letter dated 1st May, 2000. Experience, however, showed that a Lt. General could retire F even before attaining the age of 60 years due to the prevalent tenure clause, just because the incumbent had picked up that rank at an early age. To avoid any such anomaly the provision regarding retirement was amended to incorporate the expression "in any case not before attaining the age of 60 G years". It was argued that the proposal received from the Chief of Staff Committee (COSC) in May, 2001 recommending the removal of the tenure prescribed for Lt. General and its equivalent in AFMS while retaining the age of retirement at 61 years was examined by the DoPT, who opined that while there H

could be no objection to the removal of the tenure clause, the age of retirement would remain 60 years only. Retaining the maximum age of 61 years while removing the tenure clause was found to be tantamount to raising the age of retirement for this category of officers which was not acceptable keeping in view the recommendations of the 6th Pay Commission. A second proposal received from COSC for officers holding the rank of Lt. Generals and equivalent from 2 to 3 years was also considered and declined by the DoPT. The net result was that the age of retirement of Lt. Generals and equivalent continued to be as stipulated in letter dated 1st May, 2000 as amended by letter dated 20th April, 2007. Mr. Kumar argued that the age of retirement of Lt. General for other services remains at 60 years and that the very purpose of prescribing a tenure was to provide them a minimum period of two years as Lt. Generals subject of course to the upper age limit of 61 years in the case of officers who pick up that rank at the age of 59 years or above. There was, according to Mr. Kumar, no illegality, or constitutional infirmity in the provisions made by the Government in providing a tenure for those holding the rank of Lt. General and equivalent in AFMS subject to the condition that in case the officer completes his two years tenure before he attains 60 years of age he shall continue till that age. Officers who pick up the rank at the age of 59 years or more and were unable to complete two years tenure could continue till they completed 61 years. Such a provision was perfectly justified and did not result in any discrimination whatsoever leave alone a hostile discrimination *vis-a-vis* respondents who have served for more than two years before attaining the age of 60 years and, were, therefore, rightly retired from service.,

8. On behalf of the respondents a two-fold contention was urged before the Tribunal and so also before us. Firstly, it was argued that letter dated 1st May, 2000 as amended by letter dated 20th April, 2007 prescribes two dates for retirement of

A those serving in the rank of Lt. General in AFMS. This, according to the respondents, implies that the tenure clause of two years is not applicable to officers who complete two years service but are allowed to continue in service till they complete the age of 60 years. So also those who complete
B two years tenure after crossing the age of 60 years will retire by or before completion of 61 years. The contention is that the retirement of Lt. General or its equivalent in AFMS is not governed by a mandatory tenure clause but by retirement age which would vary between 60 to 61 years depending upon the
C age of the officers who picked up the rank of Lt. General or its equivalent. It is further contended that since meritorious officers generally pick up their ranks earlier they were bound to retire at the age of 60 years while less meritorious officers who picked
D up the rank later in point of time would retire at the higher age of 61 years. This, according to the respondents, militates against the concept of 'tenure appointments' which implies that the tenure starts with the appointment of an incumbent and comes to an end on completion of the tenure period. Officers
E serving in the rank of Lt. General and equivalent in AFMS would, however, continue till attaining the age of 60 years even when their tenure of two years is completed which implies that the post/rank of Lt. General is a non-tenure appointment and is governed by different retirement ages thereby making the
F entire basis arbitrary, illegal and discriminatory. It was alternatively argued that the post of Lt. General is not an appointment but a promotional rank. To describe the post of Lt. General in AFMS as a tenure post is, according to the respondents, a misnomer. The impugned tenure clause, at any
G rate, leads to a situation whereunder different retirement ages are applied to Lt. Generals and its equivalent in the AFMS and is, therefore, wholly arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

H 9. Before we advert to the legal position relevant to the

issue that falls for determination, we may refer to the factual background in brief. The age of retirement for those serving in the rank of Lt. Generals and equivalent in AFMS has been prescribed by the Government in terms of orders issued on the subject from time to time. By a letter dated 1st May, 2000 the Government stipulated the age of retirement for Lt. Generals and equivalent in the AMC and DGAFMS, in modification of the orders issued earlier. The letter reads:

"To *1st May, 2000*

DGAMFS

Sub: Ages of Retirement of Officers of Lt General and equivalents of Army Medical Corps (AMC).

Sir,

I am directed to refer to paragraph 6 of Ministry of Personnel, Public grievances & Pension (Department of Personnel and Training) O.M. No. 25012/2/97-Est. (A) DATED 13.5.1988 and this Ministry's letter No. 14(3)/98/ D(AG) dated 30.5.98 and 29.7.98 and 3.9.98 as also letter No.622/2000/D(Med) dated 8.3.2000 and to convey the sanction of the President to that the following shall be the revised retirement age/tenure for officers of Army Medical Corps (AMC).

Rank	*Age of Retirement*
Lt. General &	*2 year tenure or on attaining 61 years of age, whichever is earlier*
DGAFMS	*3 year tenure or on attaining 62 years of age, whichever is earlier.*

3. These orders will come into force immediately.

4. The period of service of those officers who have

A *continued in service beyond their existing ages of retirement in pursuance of this Ministry's letters No.14(3)/98/D(AG) dated 30.5.98 and 29.7.98 will be regularized as extension in service as a special case. All such officers will demit their office with effect from31.5.2000.*

B

5. This issues with the concurrence of Ministry of Defence (Finance) vide their u.o. No. 1254/Addl.FA(V)/2000 dated 1.5.2000.

C

Yours faithfully,
Sd/-xxxxxxx
(Jose Thomas)

Under Secretary to the Govt. of India"

D

10. The application of the tenure clause appears to have led to the anomaly referred to by Mr. Ranjit Kumar making it necessary for the Government to modify letter dated 1st May, 2000 by stipulating that an officer who completes his tenure of E 2 years before attaining the age of 60 years would continue in service till he attains the age of 60 years. This modification was brought about by letter dated 20th April, 2014, which may also be extracted in *extenso*:

F *"To* *New Delhi 20th May, 2007*

DGAMFS

Sub: Age of Retirement of Lieutenant General and G *equivalents, in the Armed Forces Medical Services (AFMS).*

Sir,

I am directed to convey the sanction of the President H *of for amendment in the Ministry of Defence, letter No. 14(3)/*

98-D(AG) dated 1st May, 2000 as follows:

For

Rank	*Age of Retirement*
Lt. Gen & equivalents (except DGAFMS)	*2 year tenure or on attaining 61 years of age, whichever is earlier*
DGAFMS	*3 year tenure or on attaining 62 years of age, whichever is earlier.*

Read

Rank	*Age of Retirement*
Lt. Gen & equivalents (except DGAFMS)	*2 year tenure or on attaining 61 years of age, whichever is earlier, but in any case not before attaining the age of 60 years.*
DGAFMS	*3 year tenure or on attaining 62 years of age, whichever is earlier, but in any case not before attaining the age of 60 years.*

2. The other instructions on this subject will be deemed to have been amended accordingly.

3. These orders will be effective from the date of issue of this letter.

5. This issues with the concurrence of Ministry of Defence Finance vide their Diary No. 2483/Addl.FA(M) dated 19.4.2007.

Yours faithfully,

Sd/-xxxxxxx

(RC Raturi)

Under Secretary to the Govt. of India".

A 11. In ***K. Nagaraj and Ors. etc. v. State of Andhra Pradesh and Anr. (1985) 1 SCC 523*** a three-Judge Bench of this Court examined the rationale underlying prescription of retirement age in public service and sounded a note of caution for the courts to exercise restraint in interfering with any such B prescription unless of course the age stipulated is so unreasonably low as to make it arbitrary and irrational. This Court accepted the proposition that there ought to be an age of retirement in public service and that if the same is prescribed it would be accepted as reasonable unless of course it is found C wholly unacceptable being arbitrary or irrational. Chandrachud, CJI, as His Lordship then was, succinctly summed-up the rationale underlying the prescription of retirement age for public services and the need for judicial restraint in dealing with any D challenge to the age prescribed for purposes of retirement. The following passage from the judgment is instructive:

> *"... ... ...The fact that the stipulation as to the age of retirement is a common feature of all of our public services establishes its necessity, no less than its* E *reasonableness Public interest demands that there ought to be an age of retirement in public services The point of the peak level of efficiency is bound to differ from individual to individual but the age of retirement cannot obviously differ from individual to individual for that* F *reason. A common scheme of general application governing superannuation has therefore to be evolved in the light of experience regarding performance levels of employees, the need to provide employment* G *opportunities to the younger sections of society and the need to open up promotional opportunities to employees at the lower levels early in their career. Inevitably, the public administrator has to counter balance conflicting claims while determining the age of superannuation. On* H *the one hand, public services cannot be deprived of the*

benefit of the mature experience of senior employees; on the other hand, a sense of frustration and stagnation cannot be allowed to generate in the minds of the junior members of the services and the younger sections of the society. The balancing of these conflicting claims of the different segments of society involves minute questions of policy which must as far as possible, be left to the judgment of the executive and the legislature. These claims involve considerations of varying vigour and applicability. Often, the Court has no satisfactory and effective means to decide which alternative, out of the many competing ones, is the best in the circumstances of a given case. We do not suggest that every question of policy is outside the scope Of judicial review or that, necessarily, there are no manageable standards for reviewing any and every question of policy. Were it so, this Court would have declined to entertain pricing disputes covering as wide a range as cars to mustard-oil. If the age of retirement is fixed at an unreasonably low level so as to make it arbitrary and irrational, the Court's interference would be called for, though not for fixing the age of retirement but for mandating a closer consideration of the matter. "Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14."(1974 [4] SCC 3) But, while resolving the validity of policy issues like the age of retirement, it is not proper to put the conflicting claims in a sensitive judicial scale and decide the issue by finding out which way the balance tilts. That is an exercise which the administrator and the legislature have to undertake. As stated in 'The Supreme Court And The Judicial Function' [Edited by Philips B. Kurland, Oxford & IBH Publishing Co., page 13] : "Judicial self-restraint is itself one of the factors to be added to the balancing process, carrying

A *more or less weight as the circumstances seem to require".*

(emphasis supplied)

12. To the same effect is the decision of this Court in ***T.P. George and Ors. vs. The State of Kerala and Ors. [1992 Supp (3) SCC 191]*** where this Court held that even when the age of retirement fixed at 55 years in the case of teachers of affiliated colleges was too low having regard to the fact that teachers require several years of teaching experience before they really become adept in their jobs, yet, it is not for the courts to prescribe the correct age of retirement but a policy function requiring considerable expertise which can be done only by the State Government or the State Legislature. With that observation the Court left it to the government to consider the question and determine the age of retirement considered suitably in its wisdom. Reference may also be made to the decision of this Court in ***B. Bharat Kumar and Ors. vs. Osmania University and Ors. (2007) 11 SCC 58*** where this Court observed:

"19.....it is not for this Court to formulate a policy as to what the age of retirement should be as by doing so we would be trailing into the dangerous area of the wisdom of the legislation. If the State Government in its discretion, which is permissible to it under the scheme, decides to restrict the age and not increase it to 60, or as the case may be, 62, it was perfectly justified in doing so."

13. Coming to the case at hand, the Tribunal has clearly held and, in our opinion, rightly so that the government could classify Lt. Generals and those holding equivalent ranks for a tenure appointment. Such a classification for granting the incumbents a tenure of two years each was constitutionally permissible said the Tribunal. There can be even otherwise no quarrel with that proposition. Having regard to the

experience, the professional capability and potential of officers who are appointed as Lt. Generals and equivalent, the Government could in its wisdom direct that officers appointed to that rank shall enjoy a tenure of two years. That prescription however gave rise to an anomaly where an officer who picked up the rank at a relatively younger age would have to go home even before he attained the age of 60 years. This was remedied by the Government by amending letter dated 1st May, 2000 and making the tenure rule subject to two important conditions *viz.* (i) if the officer concerned completes his tenure of two years before he touches 60 years of age, he can continue beyond the said tenure till he completes the age of 60 years; and (ii) an officer would demit office at the age of 61 years even if he has not completed his two years tenure by that time. There is nothing wrong in stipulating of a tenure of two years conditionally, specially when unconditional prescription had resulted in an anomaly, where an officer who because of his merit picked-up the rank of Lt. General or equivalent early in life had to go out upon his completing the period of two years in that rank, even before he completed the age of 60 years which incidentally is the age at which other similar ranks in the army and services, retire.

14. So also, the government was entitled to fix an upper age limit for officers who were unable to pick-up the rank early. The reason for doing so apparently was the government's resolve to keep the Indian army relatively young at senior positions. The tenure rule if allowed to have an unhindered application may have taken the retirement age of those who picked-up the rank around the time they were 60 years old to 62 years. The government in its wisdom did not approve of such a scenario and made the tenure rule subject to the condition that an officer holding the rank of Lt. General or equivalent in AFMS must demit office at the age of 61 regardless whether he has completed his two years tenure.

A The stipulation of the two conditions afore-mentioned does not in the least suggest that the Government has not specified a tenure for those holding the rank of Lt. General and equivalent in AFMS. This is amply demonstrated by the fact that an officer who picks-up his rank let us say at the age of 58½ years will B have to demit office when he completes his tenure at 60½. He will not be entitled to continue because the tenure rule clearly stipulates that he will have to demit when he completes a tenure of two years or when he completes 61 years "whichever is earlier". The Tribunal, therefore, committed a manifest error C in holding that there was actually no tenure prescribed for those serving in the rank of Lt. Generals and equivalent. It is one thing to say that an officer will continue till the age of 60 years even after he completes two years tenure but an entirely different thing to say that there is no tenure at all. The tenure D rule being conditional, the same could and is being applied on a uniform basis in all cases without exception.

15. We may, at this stage, refer to a decision of this Court in ***State of Himachal Pradesh and Anr. vs. Kailash Chand*** E ***Mahajan and Ors. [1992 Supp (2) SCC 351]*** in which a somewhat situation arose for consideration. The respondent in that case had been appointed as the Chairman of the Himachal Pradesh State Electricity Board initially for a period of two years. That period was extended from time to time by F successive notifications issued under Section 5 of the Electricity (Supply) Act. The last of such notifications extended the appointment of respondent Mahajan for three years with effect from July 25, 1989 ending 25th July, 1992. In January, G 1990 elections to the Legislative Assembly of the State of Himachal Pradesh were held and a new government installed in the State. A notification issued on 6th March, 1990 superseded the earlier notification issued and restricted the appointment of respondent as Chairman of the Board from H July 25, 1989 to March, 6, 1990 only. Another notification issued

on March 6, 1990 directed someone else to function as Chairman with effect from March 7, 1990. Aggrieved by the steps taken by the State Government respondent preferred a writ petition before the High Court challenging the notifications issued by the State Government. During the pendency of the said petition another notification dated 30th March, 1990 terminating the appointment of first respondent as Member of the Board was issued. Both these notifications were eventually withdrawn by the Government and the writ petition disposed of. But, on 11th June, 1990 a show cause notice was issued to the respondent and he was placed under suspension in exercise of powers vested under Section 10 of the Act. Respondent, then, filed a writ petition and by way of an interim order the High Court stayed the order of suspension. At this stage the Chief Secretary of the State of Himachal Pradesh wrote to the Secretary, Government of India, Ministry of Home Affairs emphasising necessity for introducing an upper age limit for holding the office of Chairman or Member of the Board through an Ordinance. The Government of India advised the State to explore the feasibility of amending the Rules. The Government, thereupon, issued the Electricity (Supply) (H.P. Amendment) Ordinance, 1990 which later became Act 10 of 1990. Thereby the age of superannuation for the Chairman and the Member of the Board was fixed at 65 years. As a sequel to the Ordinance and the Act, the respondent was told that he had ceased to be the Member of the H.P. Electricity Board and consequently the Chairman of the said Board, having attained the age of more than 65 years. The respondent questioned that action before the High Court. In appeal by the State before this Court one of the contentions was that the State could not by stipulating an upper age limit for the incumbent of a tenure post oust the incumbent. This Court, however, rejected the contention holding that there was no legal impediment in the State prescribing an upper age limit even for a tenure post. This Court observed:

A B C D E F G H

A *"We are also unable to accept the arguments advanced on behalf of the first respondent that for a tenure post no period can be fixed. Instances are not wanting in this regard. Therefore, rightly reference is made by Mr. Shanti Bhushan to Article 224 of the Constitution extract of which*
B *is given below:-*

224. Appointment of additional and acting Judges - (1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it
C *appears to the President that the number of the Judges of that court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.*

D

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may
E *appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.*

(3) No person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of
F *(Sixty- two years).*

Again, a reference can be made to Section 8 of the Administrative Tribunals Act. That Section reads as follows :-

G *Term of Office - The Chairman, Vice Chairman or other Member shall hold office as such for a term of five years from the date on which he enters upon his office, but shall be eligible for reappointment for another term of five years:*

H

Provided that no Chairman, Vice-Chairman or other Members shall hold office as such after he has attained –

(a) in the case of the Chairman or Vice- Chairman, the age 963 of sixty five years, and

(b) in the case of any other Member, the age of sixty-two years".

Therefore, where the State has taken a policy decision to prescribe an outer age limit for the Members or the Chairman of the Electricity Board it is perfectly legal."

16. In ***Nagaland Senior Government Employees Welfare Association and Ors. vs. State of Nagaland and Ors. (2010) 7 SCC 643*** this Court was examining whether a provision prescribing that employees shall retire from public employment in the State of Nagaland on completion of 35 years service from the date of joining or on attaining the age of 60 years whichever is earlier was arbitrary, irrational or violative of Articles 14 and 16 of the Constitution. It was, *inter alia,* contended on behalf of the employees that prescribing a different basis for retirement from public service for employees situate similarly was discriminatory. It was argued that employees who had joined the Government service at an age below 25 years would be asked to retire upon completion of 35 years although they may not have attained the age of 60 years, while those who joined after attaining the age of 25 years could continue serving till they attained 60 years of age. This dichotomy was, according to the employees, discriminatory and violative of Articles 14 and 16 of the Constitution. The substance of the contention urged on behalf of the employees can be gathered from the following passage from the report:

"Mr. Ram Jethmalani, learned senior counsel for the

A *appellants submitted that retirement by way of superannuation in respect of government employees is permissible only on the basis of age and not on the basis of length of service. The contention is that retirement by way of superannuation in respect of government*
B *employees relates to discharge of an employee on account of attaining a particular age fixed for such retirement, which is uniformly applicable to all employees without discrimination. He submitted that where there is minimum and maximum age of entry into any service,*
C *the alternative method of retirement by way of length of service would inevitably result in different age of superannuation of employees holding the same post depending upon their age of entry to the service and that*
D *would result in manifest violation of Article 14 and Article 16 of the Constitution; it would also be inconsistent with the valuable right of a permanent government employee to continue service till the age of superannuation subject to rules of compulsory retirement in public interest and*
E *abolition of posts."*

17. This Court, however, rejected the contention relying upon the decision of this Court in ***Yeshwant Singh Kothari vs. State Bank of Indore [1993 Supp (2) SCC 592]***. This
F Court observed:

"The impugned provision that prescribes retirement from the public employment at the age of 60 years or completion of 35 years of service, whichever is earlier,
G *is apparently consistent with the decision in the case of Yeshwant Singh Kothari1 and the ratio in that case is squarely applicable to the case in hand. If 30 years' period of active service was not held a small period for gainful employment, or an arbitrary exercise to withhold the right*
H *to hold an office beyond 30 years, having not attained*

58 years of age, a fortiori, retiring a person from public service on completion of 35 years of service without attaining age of 60 years may not be held to be unjustified or impermissible.

The impugned provision prescribes two rules of retirement, one by reference to age and the other by reference to maximum length of service. The classification is founded on valid reason. Pertinently, no uniformity in length of service can be maintained if the retirement from public employment is on account of age since age of the government employees at the time of entry into service would not be same. Conversely, no uniformity in age could be possible if retirement rule prescribes maximum length of service. The age at the time of entry into service would always make such difference. In our view, challenge to the impugned provision based on the aforesaid ground must fail."

18. In ***Yeshwant Singh's*** case (supra) also the regulation prescribed a dual basis for purposes of retirement viz. attaining the age of 58 years or completing 30 years of service whichever was earlier. The challenge to the rule was repelled by this Court and the provision upheld with the following observations:

"In K Nagaraj and others etc. etc. v. Chief Secretary of Andhra Pradesh, AIR 1985 SC 551 this Court repelled a challenge to the reduction of retirement age from 58 to 55 on the basis of the policy of the Government, which was found not to be irrational or violating recognised norms of employment plan. It was also noticed that not to provide for an age of retirement at all would be contrary to public interest because the State cannot afford the luxury of allowing its employee to continue in service after they have passed the point of peak and that rules of retirement do not take away the right of a member to

A *his livelihood, the only limit is to the right to hold office till the stated number of years. The provision in the Regulation in hand for maintaining the age of retirement at 58 years as before but in the same breath permitting retirement on the completion of 30 years of service,*
B *whichever occurs earlier, is in keeping with the policy of reckoning a stated number of years of office attaining the crest, whereafter inevitably is the descent, justifying retirement. In this context 30 years period of active service is not a small period for gainful employment, or*
C *an arbitrary exercise to withhold the right to hold an office beyond thirty years, having not attained 58 years of age."*

19. What follows from the above two decisions is that the number of years an employee actually puts-in before he retires
D from service or the age of the employee may not be the sole basis for retirement. There can be a dual basis namely number of years which he puts-in and the age at which he would retire. Application of such a dual basis for purposes of retirement may, in certain situations, as noted in ***Nagaland Senior***
E ***Government Employees's*** case (supra) and ***Yeshwant Singh's*** case (supra) result in employees falling in the same category being asked to go out at different ages. For instance, an employee who joins at the age of 20 under the Rules
F applicable in ***Nagaland Senior Government Employees's*** case (supra) and ***Yeshwant Singh's*** case (supra) could be asked to leave after completion of 35 years or 30 years as the case may be, meaning thereby that he could be asked to go out from service at the age of 55 years, as in ***Nagaland Senior***
G ***Government Employees's*** case (supra) and 50 years as in ***Yeshwant Singh's*** case (supra). In contradistinction, an employee who joined at the age of 25 years would continue to serve till he attains the age of 60 years. The challenge to the provisions sanctioning such dual basis for retirement having
H been authoritatively repelled by this Court, we have no

hesitation in holding that just because Lt. Generals and equivalent rank holders are allowed to continue in certain situations upto 61 years does not bring about any discrimination between such officers and others who complete their two years tenure by the time they reach the age of 60 years. At any rate the grievance assuming there is any legal basis for the same could be made by such of the officers as were not allowed to complete their tenure just because they had completed 61 years of age. They could perhaps argue that the tenure rule could not be controlled or conditioned by the requirement that the incumbent does not go beyond 61 years of age, although the decision in ***Kaliash Chand Mahajan's*** case (supra) is a complete answer to the same. No such grievance has been made by those who are asked to leave before the completion of tenure just because they have completed 61 years of age. The grievance of the respondents who had completed their tenure of two years and 60 years of age was in that view misplaced. The Tribunal was clearly in error in interfering with the provisions made by the government prescribing the age of retirement and the orders of retirement issued by the competent authority.

20. We may, before parting, deal with the decision of this Court in ***Dr. L.P. Agarwal vs. Union of India & Ors. (1992) 3 SCC 526***, reliance whereupon has been placed by the Tribunal in support of its conclusion that the post of Lt. General and equivalent in AFMS are not tenure posts.

21. In ***Dr. Agarwal's*** case (supra) Dr. Agarwal was appointed as Director of All India Institute of Medical Sciences (AIIMS) for a period of five years or till he attains the age of 62 years whichever is earlier. He was, during the continuance of the tenure, retired from the service in public interest by giving him three months' pay and allowances, in lieu of notice. The said order was challenged by Dr. Agarwal in a writ petition

before the High Court. The writ petition was dismissed by the High Court holding that the removal order did not suffer from any illegality. In an appeal filed by Dr. Agarwal before this Court, this Court took the view that the post of Director being a tenure post under the Recruitment Rules to which he was appointed by way of direct recruitment, the tenure could not be cut short by bringing in the concept of superannuation or premature retirement which expressions were alien to a tenure post. This Court also held that although, according to proviso to Regulation 30(2) of the Regulations, there was an upper age limit of 62 years fixed for the incumbent yet, the appointment of Dr. Agarwal was for a period of five years, the appointment did not cease to be a tenure post. This Court held that even an outsider could be selected and appointed to the post of Director, but, any such employee could not be prematurely removed by curtailing his tenure. This Court held that the concept of superannuation applied to an appointment like the one made in favour of Dr. Agarwal. The decision of this Court in ***Dr. Agarwal's*** case (supra), does not, in our opinion, help the respondents. The present are not the cases where services of the respondents have been terminated during the time the respondents were enjoying their tenure of two years as was the decision in ***Dr. Agarwal's*** case (supra). It is also not a case where a lateral entry was possible for appointment as Lt. General or equivalent in AFMS. The only additional feature to the concept of tenure, as applicable to the rank of Lt. General and equivalent, is that in case the officers pick-up their ranks relatively later in life their tenure would be terminated by the time they attain the age of 61 years. The factual matrix and the Rules on the subject as applicable in the case at hand are totally different from what was the position in ***Dr. Agarwal's*** case (supra).

22. In the result these appeals succeed, the impugned orders passed by the Armed Forces Tribunal are, hereby, set

aside and OA Nos.296 of 2014 and 250 of 2014 filed by the respondents dismissed but in the circumstances of the case without any orders as to costs. A

Kalpana K. Tripathy Appeal allowed.