

A PERSPECTIVE ON THE ASSAM JUDICIAL SERVICE RULES, 2003

By

S.M. Deka
Director, NEJOTI

INTRUDUCTION

1. The Government of Assam by notification No.JDJ(E) 110/80/137 dated the 17th February, 2003 made and promulgated a new set of Rules regulating the recruitment and conditions of service of the persons appointed to the Assam Judicial Service. These rules were published in the Extra ordinary Assam Gazette dated Monday the 17th February, 2003 and they came into force on and from the same date.

To understand the genesis of these rules a historical look back will be worthwhile. In 1958 the Law Commission of India in its Fourteenth Report made several recommendations for bringing about uniform improved conditions of service for members of the Subordinate Judiciary throughout India. The Legislature and the Executive did nothing to implement the said recommendations. In 1989 All India Judges' Association filed a Writ Petition under Article 32 of the Constitution of India being Writ Petition (Civil) No. 1022 of 1989 before the Supreme Court seeking reliefs, amongst others, relating to uniform enhanced age of retirement, uniform enhanced pay scale and other perks and allowances. The first judgment of the Supreme Court in the said Writ Petition is reported in All India Judges' Association Vs Union of India A.I.R 1992 SC 165 also (1992) ISCC 119 (hereinafter referred to as Judges' Case 1992). Para 25 of the SCC Report contains a direction for alteration of Service Rules. Para 12 of the same report mentions requirement of alterations of Laws operating in the States. The second Judgement in the Writ Petition is reported in A.I.R 1993 S.C 2493 also (1993) 4 SCC 288 (hereinafter referred to as Judges' Case 1993). In Judges' case 1993 also there is a direction to States to amend service Rules, particularly in para 24 of the SCC Report. However the most important direction of the Supreme Court in Judges' case 1993 is the direction to set up a separate pay commission to prescribe the service conditions and uniform pay scales to the Judges all over

the country. Government of India, in pursuance of the said direction, by Resolution dated 21st March, 1996 constituted the First National Judicial Pay Commission under the Chairmanship of Justice K. Jagannatha Shetty, Retd. Judge of the Supreme Court (hereinafter referred to as the Shetty Commission). The Shetty Commission went into all aspects of Judicial office and submitted its detailed Report on the 11th November 1999. The Report, amongst others, contains a draft of Civil Court Bill and a Draft of Judicial Service Rules. The recommendations of the Shetty Commission came to be considered by the Supreme Court in the Writ Petition (Civil) No.1022 of 1989 and the Judgment dated 21.03.2002 reported in A.I.R 2002 SC 1752 also in (2002) 4 SCC 247 is the third in the series. This judgment hereinafter will be referred to as Judges' case 2002. By this judgment in the Writ Petition the Supreme Court accepted most of the recommendations of the Shetty Commission, modified some of them, rejected a few and made a few innovative recommendations on its own and issued directions to the States and the Union Territories to comply and submit compliance Report by 30th September 2002. The Judgment also directed to amend the relevant rules to implement the directions in the Judgment. Even in a certain paragraph of the judgment a dead line being 31st March 2003 for framing rules to implement the innovations mandated by the judgment was set. The above is the genesis of the Assam Judicial Service Rules 2003. Thus the three judgments in the Writ Petition No. 1022 of 1989 filed by the All India Judges' Association particularly, Judges case 2002 and the Shetty Commission Report more particularly the Draft Rules contained therein form the source material for the Assam Judicial Service Rules 2003, to be referred hereinafter as the Rules, 2003.

EVALUATION

2. A comparative study of the Assam Judicial Service Rules 1967 (hereinafter Rules, 1967) and the Rules, 2003 brings out the innovative features of the Rules, 2003. A few of them may be noticed. For recruitment to Grade III three years practice at the Bar has been dispensed with. Direct Recruitment to Grade II of the service from the Bar, though not resorted to for some time is completely abolished by the Rules, 2003. Assured Career Progression for Grade III and Grade II officers have been provided. The quota of promotion to Grade I has been raised to 75% and the 75% has again been bifurcated into

50% for pure promotion and 25% through a competitive examination which may be taken by certain Grade II officers. The provisions for probation, officiation and confirmation have been given in detail. In determination of seniority 40 point Roster has been introduced. Detailed procedure for evaluation of performance in the competitive examination and for training have been provided. A Code of Conduct has been made part of the Rules, 2003. Provisions for discharge during probation, for retirement in public interest and for reemployment on retirement at the age of 60 years are also new features of Rules, 2003.

3. The source material for the Rules, 2003 and the innovations thereto have already been indicated. Even so use of the materials by the draftsman of the Legislative Department of the Govt. of Assam has not been adequate nay has even been inefficient. Some of the new features are verbatim reproduction of the draft Judicial Service Rules proposed by the Shetty Commission yet others seek to implement the direction of the Supreme Court in Judges' case 2003. The draftsman has not done an efficient job of copying in some areas. The Code of Conduct at Appendix – A provided under Rule 24 of the Rules, 2003 may first be considered. Appendix- A is reproduced from chapter VII, Rule 23 to Rule 27 of the Draft Judicial Service Rules annexed to chapter 10 Vol.II of the Shetty Commission Report. The transfer of the Chapter VII of the draft Rules to the Appendix A has resulted in the use of the word "Chapter" in the last sentence of Clauses (1) of the Appendix- A. In the last sentence of clause (2) (iii) before the word "Subpoenaed" the word "unless" from the draft Rules has been left out.

In clause (2) (IV) Printer's devil has miss-pelt the word "Judge" as "Judgwe" and in the sixth sentence thereof "to" is missing before the word "discriminate".

There has been two clause (2). The second one before the heading "performance of duties impartially and diligently" should be clause (3) and the clause (3) should be clause (4).

Under the heading "performance of duties impartially and diligently" Sub-clause (i) the word "clamar" should be "clamour". In sub-clause (ii) after the word "should" the word "enforce" as in the model is missing. In sub-clause (iv) after the word "Communications" the group of words "or consider other communications" have been missing

In sub-clause (iv) which is copied from Rule 25(6) of the Draft Rules the second sentence in the Draft Rules has not been reflected and a whole group of words are missing. The first sentence should end with the word “prejudice” occurring first. In the second sentence before the word “including” the following words are missing.

“A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice,”

In Sub-clause (X) (b) in the third line before the word “apt” the word “are” should have been added.

In sub-clause (XV) before the word “appointment” in the first sentence the word “unnecessary” as in the draft Rules proposed by the Shetty Commission is missing. Under the heading “ Extra judicial and quasi-judicial activities” which should be clause (4) instead of (3) in sub-clause (1) second line article “a” before the word “unique” as in the Draft Rules is missing.

In sub-clauses (11) (a) last line after the word “the legal” the word “system” should be added to accord with the model.

Sub-clauses (iv), (v), (vi) and (vii) of clause (3) which should be clause (4), because of copying deficiency have become confusing. These are copied from Rules 26(3), 26(4) and 26(5) of the proposed Draft Rules in the Shetty Commission Report.

In sub-clause (iv) after the word should the word “not” is missing. Sub-clause (v) and (vi) according to the Draft Rules of the Shetty Commission should have been one clause as follows : “ A Judge should not act as an arbitrator or mediator, except in the performance of judicial duties. Sub-clause (v) and (vi) should be renumbered as (v).

Sub-clause (VII) would be Sub-clause (VI) and similarly all the subsequent Sub-clauses should be renumbered by subtracting one from each. Thus corrected the last Sub-clause that is (XIV) would be (XIII). In Sub-clause (VII) after correction which would be Sub-clause (VI), after the word “law” the word “for” is missing.

In Sub-clause (IX) which after correction as indicated would be sub-clause (VIII) the word “Form” would be the word “for”.

In Sub-clause (XII) which after correction would be sub-clause XI the word “not” after the word “shall” would have to be deleted to convey the real meaning as in the proposed Draft.

In Sub-clause XIV (c) which would be Sub-clause (XIII) (c) after proper enumeration the word “ordinarily” should be replaced by the word “ordinary”.

In the last Sub-clause of the Code of Conduct that is corrected Sub-clause (XIII) (h) the word “interest” would be “interests”.

In schedule B under the heading “GENERAL INSTRUCTIONS” in the last sentence the word “of” occurring second time would be “and”. Again in schedule B under the heading “Evaluating performance in competitive examination for judicial selection” the procedure has been reproduced from schedule –B under Rule 6(5) of the Draft Rules proposed by the Shetty Commission.

In item (4) thereof the third line should, to accord with the model read after the word, “above” as follows – “ the tabulator will reconvert the Grades’

In item (II) line six between the words “to” and “included” the word “be” is to be inserted.

Rule 9 of the Rules, 2003 has been copied from Rule 7 of the draft rules proposed by the Shetty Commission with the difference that clause “f” reading “if he has more than two children” has been deleted. This deletion is perhaps a reflection of the population policy of the Government. In clause (c) thereof the words “or any State Public Service Commission” have been inserted twice. Though remaining otherwise faithful to the model the word “who” in the second line of clause (c) could have been “he” even in the Draft Rules. Rule 10 of the Rules, 2003 is copied from rule 8 of the Shetty Commission Draft Rules.

In Rule 10(2) (i) in the Seventh line in between the word “vacancies” and the word “reserved” the following words of the draft Rules namely “notified for recruitment and the number of vacancies, if any,” have been missing.

In Rule 10(2) (iii) in the third line after the word “for” the words “Scheduled Castes” have escaped the draftsman. The last portion of the same Rule to be faithful to the model should read thus – “..... a list of candidates eligible for appointment. The number of names of candidates to be included in the list shall be equal to the number of vacancies notified.”

In Rule 10(2) (v) after the word “published” the word “in the official Gazette” as in the model have been missing.

In Rule 10(2) (vi) inadvertently Rule 9 has been mentioned because the model mentions Rule 9. But Rule 9 of the Draft Rules has become Rule 11 of the Rules, 2003. Therefore instead of Rule 9 , Rule 11 should have been mentioned in Rule 10(2) (vi).

Sub-rule (8) of Rule 15 of the Rules 2003 is a copy of draft Rule 15 proposed by the Shetty Commission. But here also, after the word “his” in the second line the words “probation and a promotee who has been declared to have satisfactorily completed his” have been missing.

Rule 24 C of the Rules, 2003 has been taken from Rule 28 of the Draft Rules proposed by the Shetty Commission but in the process the word “chapter” remained there betraying its origin. Perhaps the words “the rules in this chapter” should have been substituted by the words “ these rules”.

Rule 16(II) of the Rules, 2003 mentioned “Column 3 of the schedule C”. But there is no such column in schedule C. There is only a clause 3.

Rule 24 D and E of the Rules, 2003 could better have been a separate Rule or a proviso to Rule 25 or the subtitle of the entire Rule 24 could have been “Conduct and Discipline”.

Rule 21 of the draft Rules proposed by the Shetty Commission has become Rule 23 of the Rules, 2003. This is a residuary provision to cover

conditions of service for which no express provision is made in the Rules, 2003. Rule 25 of the Rules, 2003 taken from Rule 14 of Rules, 1967 also speaks of “ other conditions of service” not provided for in the Rules, 2003. The resultant confusion could have been dispelled with a measure of precision and clarity. Moreover even in retaining the main provision of Rules 14 of the Rules, 1967 in rule 25 some mistakes like mention of “ Assam Mannual” instead of “Assam Pension Manual” have occurred. To be really accurate Rule 25 of the Rules, 2003 should have mentioned “Assam Services (Pension) Rules, 1969” instead of the words “ Assam Manual”.

A Rule beginning with a proviso must be very hard to find, if not totally non existent. But in the Rules, 2003 such a rarity has become a reality in the shape of Rules 22 of the Rules, 2003. Inspiration for this Rule is Rule 19 of the draft Rules proposed by the Shetty Commission. In Rule 14 of the Rules, 1967 the same provision with changes as to the period of addition etc. is there. Therefore Rule 22 of the Rules, 2003 could have, better, been a proviso to Rule 25 of the Rules, 2003.

4. Thus far only formal, structural, typographical and / or printing errors have been noticed. Apart from these deficiencies which are easily corrected and made good Rules, 2003 are also not free from vices both Constitutional and legal. These vices in the Rules, 2003 may now be considered in the following paragraphs.
5. The notification No. *JDJ (E) 110/80/133* serving as a preamble to the Rules, 2003 mentions the Constitutional source of power to frame these Rules that is proviso to Article 309 and the Article 234 of the Constitution of India. Under Article 234 it is imperative for the Governor to consult the State Public Service Commission and the High Court before Rules can be validity made. In *State of Bihar Vs Bal Mukunda Sah*, (2000) 4 SCC 640, a five Judge decision of the Supreme Court one can read, in para 51 of the judgment, about the nature and content of consultation and the difference between the consultation with the High Court and that with the Public Service Commission under Article 234 of the Constitution of India. The notification mentions consultation with the High Court but is silent about any consultation with the State Public Service Commission. A look at the Rules, 1967 repealed by the Rules, 2003 shows that in the similar notification prefacing the Rules, 1967 being notification No. LJJ 1464, dated the 17th August, 1967 consultation with “the Gauhati High Court and the Assam

Public Service Commission” has been mentioned. It can safely be assumed that no such consultation took place and as such the Rules, 2003 being in the teeth of the provision of Article 234 of the Constitution would be constitutionally invalid.

6. Chapter – 5 Vol I of the Shetty Commission Report bears the title “Rechristening of Subordinate Judiciary”. There the Shetty Commission went into the question of appropriate nomenclature for the Judicial Service and for the different posts in the service. After taking into consideration the views of different State Governments, the High Courts and Judicial Service Associations the Shetty Commission recommended the name to be “Judicial Service” prefixed by the name of the State. This can be read in para 5.83 at page 407 of Vol.1. As regards name of the posts para 5.89 of the Report says : “ In the premise, we suggest that here afterwards, Civil Judge (Junior Division) be termed as Civil Judge and Civil Judge (Senior Division) as Senior Civil Judge. Para 5.84 and 5.90 of the Shetty Commission Report Vol.1 at page 407 and 408 are more or less similar in that in substance they contain a request to the State Govt. / Union Territories / High Courts to amend respective Enactments, Rules, Regulation and Circular to bring into force the suggestion made at para 5.83 and para 5.89. Even before this in Judges’ case, 1992 one of the heads of relief pressed by the petitioner was – “Uniformity in the Judicial Cadres in the different States and Union Territories.” The Supreme Court considered the relief at para 13, 14 and 15 at pages 124 and 125 of the SCC Report (1992) ISCC. Necessity of altering or modifying the laws in this regard operating in the States was emphasized and the ministry of Law and Justice was asked to monitor the entire process. The direction is as follows :

“We direct that the Ministry of Law and Justice of the Union Government would carry on the monitoring activity and all the States and Union Territories would follow the pattern indicated above by March 31, 1993.”

This deadline of 31.03.1993 was extended to 31.03.1994 by Judges’ case 1993. Even so only in 1996. The Bengal, Agra and Assam Civil Courts (Assam Amendment) ordinance, 1996 was promulgated to bring about the changes. Later on the ordinance was replaced by the Bengal, Agra and Assam Civil Courts (Assam Amendment) Act 1996, which came into

force on 18.04.1997. By virtue of the provision of Section 2 of the said Act the words “Assistant District Judge ” and “Munsiff” wherever they occur were replaced by the words “Civil Judge (Senior Division) and Civil Judge (Junior Division)”. Even much earlier by Amendment Act XII of 1967 the word “Subordinate Judge” in the Bengal, Agra and Assam Civil Courts Act 1887 was substituted by the word “Assistant District Judge”

Thus the nomenclature of Judicial officers is statutory and is a matter to be dealt with by the Legislature and not the Executive. The Shetty Commission was alive to this legal position. Hence the suggestion for alteration of the Enactments at para 5.90 to bring about the recommendation at para 5.89 indicated earlier. Thus until appropriate amending Legislation as in 1967 and 1996 is passed the Rules, 2003 has to stick to the old nomenclature that is Civil Judge (Senior Division) and Civil Judge (Junior Division), Rules follow Legislation and not the other way round. In the Rules, 2003 schedule – A under Rule 4(2) contains three Tables for three Grades. Under the Table for Grade II nomenclature of officers at item 4,5 and 6 fly in the face of section 2 of the Bengal, Agra and Assam Civil Courts (Assam Amendment) Act 1997. Similar is the legal position with regards to items 1,2 and 3 under the Table for Grade III. Perhaps this illegality in Rules, 2003 could have been obviated if the draftsman had noted that in the Draft Rules proposed by the Shetty Commission under Draft Rule 3(3) mention of “Senior Civil Judge” and “Civil Judge” is prefixed by an asterisk drawing attention to the note below indicating the request to States to change the law as indicated hereinbefore. Perhaps the inspiration for these illegal nomenclatures came from what has been stated in para 33 and 34 of the Judges’ case 2002. The two paragraphs deal with Assured Career Progression Scheme recommended by the Shetty Commission and the Supreme Court was only responding to a suggestion by counsel for giving different names in different Time Scale in the scheme. There is not a single sentence in these two paras about the mechanism to bring about the changes. Mechanism as indicated, can only be Legislation not Rules. One other comment on para 33 and 34 of the Judges’ case 2003 appears compelling. The three judgments that is Judges’ case 1992, Judges’ case 1993 and Judges’ case 2002 form a trilogy dealing with Writ Petition (Civil) No. 1022 of 1989 which is still pending. The first judgment at para 12,13 and 14 of the SCC Report mandates uniformity in designation. Even a deadline had been set. The second Judgment extends the deadline to 31.03.1994 as indicated hereinbefore. In this background can the Supreme Court be said to have

departed from the said prescription of uniformity of designation by the first three sentences in para 34 of Judges’ case 2002. Reading the three Judgments together to accord with the uniform thrust of the trilogy one cannot but say that these three sentences must be read only as incidental observation of the Supreme Court in response to Counsel’s Submission.

7. The Shetty Commission in chapter –II Vol II of its Report in great detail went into the question “whether the lower judicial service personnel could be made eligible for direct recruitment to the post of District Judges”. The recommendation at the end of the consideration of the question spanning pages 694 to 708 of Vol. II is a suggestion to amend clause (2) of Article 233 of the Constitution of India as Follows:

Art 233 (2) “ A person shall be eligible to be appointed directly as a District Judge if he has been for not less than seven years an Advocate or held judicial office in the territory of India and is recommended by the High Court for appointment.”

Age limit recommended for Advocate was 35 to 45 years. The chapter ends with a request to the Central Govt. and other relevant authorities to take immediate action for amending clause (2) of Article 233 as indicated above.

In Judges’ case 2002 Supreme Court noticed this recommendation as also other recommendations of the Shetty Commission. The recommendation is at para 9 item (6) of the Judgement at para 1761 of the A.I.R Report. The recommendation was considered by the Supreme Court at para 27 and 28 of the judgment in Judges’ case, 2002. The Shetty Commission recommendation for amendment of the Constitution did not find favour with the Supreme Court. Instead the Supreme Court held

“..... while the ratio of 75 percent appointment by promotion and 25 percent by direct recruitment to the Higher Judicial Service is maintained, we are, however, of the opinion that there should be two methods as far as appointment by promotion is concerned. 50 percent of the total posts in the Higher Judicial Service must be filled by promotion on the basis of principle of merit-cum-seniority.The remaining 25

percent of the posts in the service shall be filled by promotion strictly on the basis of merit through the limited departmental competitive examination for which the qualifying service as a Civil Judge (Senior Division) should be not less than five years.”

In para 27 of the judgment there is no specification of the officers who can be promoted under the 50 percent quota and / or under the 25 percent. For that one has to look at para 28 which is as follows :

“ As a result of the aforesaid, to recapitulate, we direct that recruitment to the Higher Judicial Service i.e. the cadre of District Judges will be :

1. (a) 50 percent by promotion from amongst the Civil Judges (Senior Division)
- (b) 25 percent by promotion..... through limited competitive examination of Civil Judges (Senior Division) having not less than five years’ qualifying Service;
- (c)

On the words used above by the Supreme Court there can be no doubt that officers to be promoted under 1(a) above must be holding the post of Civil Judge (Senior Division). All officers of the Cadre of Civil Judge (Senior Division) which will include a Chief Judicial Magistrate do not qualify to be promoted. Unlike the Draft Rules proposed by the Shetty Commission 1(a) does not say Cadre of Senior Civil Judge. Therefore, the Table below Rule 7 of Rules, 2003 item (ii) under column 3 laying down method of recruitment is violative of the Supreme Court Judgment in Judges’ case, 2002. To obey the direction of the Supreme Court in para 28 of the Judgment in Judges case, 2002 item (ii) under column 3 of the Table needs to be amended by replacing the words “the Cadre of Grade II of the service” by the words “amongst the Civil Judges (Senior Division)’ as specified by the Supreme Court in the Judgment.

This direction of the Supreme Court may appear to be discriminatory but in reality if the periodical posting of the Grade II officers are methodically made there will not be any discrimination. Proper periodical

posting of the officers would also prevent repetition of the instance known to this writer where a Judicial Officer was promoted to become a District Judge without the officer having ever worked as a Munsiff and / or a Assistant District Judge. To complete this aspect it bears mentioning that in the Judges' case 2002 at para 31 the Supreme Court has said that, " the posts of Chief Judicial Magistrate and Chief Metropolitan Magistrate have to be equated and they have to be placed in the Cadre of Civil Judge (Senior Division)". Therefore at para 28 (1) (a) also had the idea been to include all the officers including the Chief Judicial Magistrate in 50 percent quota for promotion expression could have been "Cadre of Civil Judge (Senior Division)" instead of the words "Civil Judges (Senior Division)".

Turning now to para 28(1) (b) quoted above one is tempted, by adopting the same reasoning to say that only officers holding the post of Civil Judges (Senior Division) having a qualifying Service as such officer for five years are qualified to take the competitive examination. But to harmonise what is said in para 27 with those in para 28 (1) (b) of the judgment both must be understood as laying down the qualification for taking the competitive examination. So understood even a Chief Judicial Magistrate earlier acquiring that qualifying experience as Civil Judge (Senior Division) will be able to sit for the examination. Para 4 under column 4 of the Table prescribing the qualification age limit etc. is in breach of the direction of the Supreme Court in Judges' case 2002. As indicated above being in the Cadre of Grade II for a period of not less than five years is not the qualification mandated by the Supreme Court. Mandate of the Supreme Court is qualifying Service as a Civil Judge (Senior Division) for not less than five years.

8. Perhaps the most flagrant violation of the direction of the Supreme Court in the Judges, case, 2002 has occurred in Rule 19 of the Rules, 2003 relating to age of Superannuation of Judicial officers. All the Judicial officers will be adversely affected in that a right bestowed on them by the Supreme Court would have been taken away by Rule 19. To understand the implications of Rule 19 it is necessary to explore the background first.

The Law Commission of India in its fourteenth Report in 1958 emphasized the necessity of fixing a relatively higher age of retirement of a Judicial Officer compared to that of an Executive officer. In 1958 when the age of retirement in public Services was 55 years the Law Commission

recommended the age of retirement of Judicial officers to be 58 years, In the Judges' case, 1992 the question was considered at para 16 to 24 of the SCC Report and the direction of the Supreme Court at para 24 was :

“ We accordingly direct that appropriate alterations shall be made in the Rules obtaining in the States and Union Territories in respect of Judicial Service so as to fix the age of retirement at 60 years with effect from December 31, 1992.”

Next in the Judges' case, 1993 the question of age of superannuation was considered first at para 25 to 28 of the SCC Report. The discussions there lent support to the enhancement of the age to 60 years. Then at para 30 to para 34 of the report the Supreme Court added some conditions to the enhancement of the age of retirement. These conditions in effect transformed what was supposed to be a right under the Rules as per direction of the Judges' case 1992 into a benefit to be bestowed at the discretion of the High Court.

In pursuance of these directions at para 30 to 34 of the judgment in Judge' case 1993, the Governor of Assam framed the Assam Judicial Officers' (Retirement on Superannuation) Rules 1995. By Rule 5 of the said Rules age of retirement is fixed at 60 years and the last two proviso to the Rule cover the conditions added by the judgment in Judges' case, 1993 by enabling the High Court to retire an officer at the age of 58 years.

Thereafter the Shetty Commission set up under the direction of the Supreme Court by the same Judgment considered the question of age of Superannuation of Judicial Officers. Details of the exercise undertaken by the Commission can be read in Vol. I of the Report in Chapter – 4 with the title “The trial Judge is really “on trial” at pages 350 to 366. Under the heading “Our Views” in that chapter divided into five section the Shetty Commission detailed its opinion. Section V is the most important for the present purpose. Section v starts with the following heading : “ Scrutiny on the eve of attaining 58 years for extending benefit of two years service.”

Para 30 to 32 of the Judgment in Judges case 1993 is quoted at para 4.36 at page 361 of Vol.I of the Report. Para 4.38, 4.43 and 4.45 contain the reasonings against the prescription as to scrutiny on the eve of attaining

58 years issued by the Supreme Court. Para 4.46 mentions the Draft Service Rule prepared by the Commission and annexed to the Report. Para 4.47 and 4.48 contain the recommendation of the Shetty Commission on the question of age of retirement.

Recommendation is to supersede all Rules incorporating the direction of the Supreme Court in Judges' case 1993 and to frame a Rule specifying only the age of retirement.

The Shetty Commission considered the question of fixing an appropriate age of retirement for Judicial Officer in Vol. III of its Report. Chapter – 21 of the Vol. III bears the title “Superannuation Age of Judicial Officers”. The Shetty Commission took into account the trends in this regard all over the world, the recommendations of the fifth Central Pay Commission, the views of the High Courts, the Judicial Officers Association and of State Governments and then made the recommendation to raise the age of retirement from 60 to 62 years at para 21.59 at page 1130 of the Vol.III of the Report. A suggestion of the Fifth Central Pay Commission was specifically quoted at para 21.22, the suggestion is that in the past the age of superannuation of Central Govt. employees has acted as a benchmark against which age of superannuation of other categories of employees, judicial officers etc. were fixed “it is expected that our recommendation will lead to suitable readjustments elsewhere to maintain the present relativities”. It may be mentioned that presently the age of retirement of the Central Govt. employee is 60 years.

In pursuance of its own recommendation Rule 18 of the Draft Rules proposed by the Shetty Commission is a one liner-namely. “The age of superannuation of a member of the service shall be sixty two years.”

All the above fell for consideration before the Supreme Court in Judges' case 2002. In para 9 of the judgement at pages 1760 to 1763 of the A.I.R Report the Supreme Court recorded a list of 14 recommendations of the Shetty Commission. Item No. (1) and item No. (12) of the list relate to the recommendation regarding age of superannuation. Relevant portion of item (1) reads thus – “(1) The High Courts were required to frame the rules specifying particular age of retirement.....”

At item (12) of the list is the recommendation as to increase of the age of retirement from 60 years to 62 years.

The Supreme Court considered the recommendation at item (12) in para 26 of the judgement in the Judges' case 2002 and modified the recommendation by saying –

“As of to-day, the age of retirement of a Supreme Court Judge is 65 years, of a High Court Judge it is 62 years and logically the age of retirement of a judicial officer is 60 years. This difference is appropriate and has to be maintained. However,..... it would be appropriate for the States to amend the service rules and to provide for reemployment of the retiring Judicial Officers till the age of 62 years..... . We direct this to be done as early as possible.”

In the judgment no modification was made to the recommendation of the Shetty Commission as regards framing of Rules specifying a particular age of retirement as listed in item (1) quoted above. Para 37 of the judgement (*page 1770 of the A.I.R Report*) may be quoted in full :

“37. Subject to the various modifications in this Judgment, all other recommendations of the Shetty Commission are accepted.”

The relevant recommendations of the Shetty Commission in this regard have been indicated hereinbefore. Read in the light of those recommendations only conclusion that flows from para 9, 26 and 37 of the Judgment of the Supreme Court in Judges' case 2002 is a clear and unambiguous direction to the States to fix the age of retirement at 60 years for all judicial officer and also to provide for reemployment till 62 years depending on need. By the mandate of the Supreme Court in Judges' case, 2002 the wheel is turned full circle in that by Judges case, 1992 age of retirement was fixed at 60 years.

As indicated earlier the Shetty Commission has, in no uncertain terms recommended supersession of the conditions imposed by para 30 to 34

of the judgment in Judges' case 1993 (SCC Report) and recommended specification of a particular age of retirement. The Supreme Court in Judges' case 2002 has accepted the said recommendations and issued the directions as at para 26 of the Judgment quoted above. In flagrant breach of the said directions of the Supreme Court Rule 19 resurrects the "intent and purpose" of the Judges' case 1993 on the question of age of retirement of Judicial Officers. There is only partial obedience to the mandate of the Supreme Court in Judges' case 2002 in Rule 21 providing for reemployment after 60 years. Thus Rule 19 in its entirety being violative of what has been stated in para 9,12,26 and 37 of the judgment in Judges' case 2002 is illegal.

It may be noticed at this stage that pursuant to the modification, of the age of retirement, fixed at 60 years by Judges' case, 1992, by Judges' case 1993 the State of Assam framed rules, namely- Assam Judicial Officers (Retirement on superannuation) Rules, 1995. These Rules hereinafter referred to as Rules, 1995 retrospectively came into force with effect from 1st January, 1993. While these Rules have the merit of being faithful to the directions of the Supreme Court in Judges' case, 1993 Rule 19 of the Rules, 2003 even cannot be said to have that merit in that Rule 19 A fixed the age of retirement at 58 years and not 60 years as in Rules, 1995 mentioned above. Rule 19 B provides for retention after 58 years up-to 60 years.

Moreover the draftsman appear to have forgotten about the existence of Rules 1995 incorporating the guidelines of the Supreme Court in Judges' case 1993. Otherwise since the selfsame guidelines though in a attenuated form has been incorporated in Rule 19B. Rule 26 with the heading "Repeal and savings" would have mentioned not only the Rules, 1967 but also the Rules, 1995.

This evaluation would not be complete unless a look at Rule 20 of the Rules, 2003 is taken. This Rule, modeled on Rule 20 of the Draft Judicial Service Rules proposed by the Shetty Commission provides for "Retirement In Public Interest". Rule 20 of the Rules, 2003 seems to have missed the substantive part of its model and provided only the procedure for retirement in public interest. The substantive part provided in Rule 20(1) of the Draft Rules proposed by the Shetty Commission may be adopted and Rule 20(1) and Rule 20(2) of the Rules, 2003 may be kept intact as Rule 20(2) and Rule 20(3) respectively. The necessity and anxiety to weed out dead wood from the service, which perhaps triggered the resurrection of the "intent and

purpose” of the guidelines of Judges’ case 1993 in the shape of Rule 19A and 19B of the Rules, 2003 is well taken care of by Rule 20 providing for retirement in public interest.

Some of the cases arising out of the conditions imposed by Judges’ case 1993 as in Rule 19B may now be considered. In *Rajat Baran Roy Vs. State of West Bengal* (1999) 4 SCC 235 three officers of the Cadre of District Judge were retired on attainment of 58 years as per recommendation of Calcutta High Court after scrutiny under the guidelines of Judges’ case, 1993. But under the Rule prevalent in West Bengal these officers are to be treated on par with IAS officers and the age of retirement of all central govt. officers was already raised to 60 years without any condition. The Supreme Court gave primacy to the rule rather than the guidelines saying that those are only transitional measure. The order of retirement was quashed. Incidentally the Shetty Commission has considered this case in its Report.

In *High Court of Judicature at Allahabad Vs Sarnam Singh* (2002) SCC 339, axe fell on Sarnam Singh a judicial officer of U.P in the shape of guidelines under the Judges’ case 1993 reenacted in Rule 19B in Rules, 2003. This happened despite the State Government of U.P having framed U.P Judicial Officers (retirement on superannuation) Rules 1992. These were framed pursuant to the direction in Judge’ case 1992 raising the age of retirement to 60 years. Retirement after the scrutiny as in Rule 19B was quashed by the High Court and the Supreme Court upheld the decision.

In *Ramesh Chandra Acharya Vs Registrar, High Court of Orissa* (2000) 6SCC 332, Ramesh Chandra Acharya a judicial officer was retired on completion of 58 years not under the guidelines of Judges’ Case 1993 but under the Service Rules applicable to him which already contained similar guideline. He sought benefit under the Judges’ case 1992 and 1993 to remain in service till 60 years. His case was not entertained.

In *Biswanath Prasad Singh Vs State of Bihar* (2001)2 SCC 305, Biswanath Prasad Singh an officer of the Bihar Superior Judicial Service was retired at 58 years after scrutiny under the guidelines of Judges’ case 1993. He approached the Supreme Court seeking to curve out a right to remain in service till 60 years under direction of the Supreme Court in Judges’ Case 1992 and 1993. The Supreme Court went into the conditions imposed by the

Judges' case 1993 on the age of retirement fixed at 60 years by the Judges' case, 1992 and rejected his prayer. This case decided on 15.12.2000 could consider only the Judges' case 1992 and Judges case 1993 and the para 36 thereof urging the States to expedite amending of the Rules keeping "the intent and purpose of directions of this court in 1993 case in view" cannot have any bearing on the direction of the Supreme Court issued by judgment 21.03.2002 on the question of the age of retirement on acceptance of the recommendation of the Shetty Commission Constituted under the direction of the Supreme Court in the same 1993 case.

Lastly mention may be made of Jogeswar Borah Vs State of Assam (2003) IGLR 277 Jogeswar Borah an officer of Assam Judicial Service could not survive the scrutiny by the High Court under the proviso to Rule 5 of the Rules, 1995 and was retired on attaining 58 years on 31.12.2001. His challenge to the denial of the benefit of extension of two years i.e upto 60 years failed.

To sum up in order to obey the direction of the Supreme Court in Judges' Case, 2002 Rule 19 of the Rules, 2003 needs to be amended to be one liner like the Draft Rule 18 proposed by the Shetty Commission by specifying the age of retirement as 60 years or in the Rules, 2003 Rule 19 B may be deleted, and 19A may be amended by deleting the letter A and the words "Except..... in this Rule" and replacing the figure "58" occurring at two places by the figure "60". The word "every" in the opening sentence would be "Every". Rule 26 providing for Repeal and Savings also will have to be amended to include not only The Assam Judicial Service Rules, 1967 but also the Assam Judicial Officers' (Retirement on Superannuation) Rules, 1995.

CONCLUSION

9. To conclude two comments, one facetious and the other serious, appear apt.

Under Rule 12 of the Assam Civil Services (Conduct) Rules, 1965 applicable to Judicial Officers before the Rules, 2003 came into force it was permissible for the Judicial Officer to engage occasionally in literary, artistic

and / or scientific pursuits. Rule 12 is a reflection of Rule 13 of All India Service (conduct) Rules, 1968. Because of the Code of Conduct in Appendix A despite the residuary provision in Rule 23 of the Rules, 2003 Judicial Officers of literary and / or artistic bent of mind will be disappointed after the coming into force of the Rule, 2003 in that now “A Judge may speak, write, lecture, teach and participate in other activities concerning only the law, the legal system and the administration of Justice”.

Now to the serious one. To regain the right conferred by the Judges’ case, 2002 but taken away by the Rules, 2003 as indicated above only way seems to be to seek relief from the Judiciary. The Judgments of the Supreme Court in the Judges’ case, 1993 and in Judges’ case, 2002 contain the following : (*quoted from para 40 of the Judgment in Judges’ case, 2002*)-

“Any clarification that may be required in respect of any matter arising out of this decision will be sought only from this Court. The proceedings, if any, for implementation of the directions given in this judgment shall be filed only in this Court and no other Court shall entertain them”.

Judges’ case 1993 also contain the same paragraph at para 56 of the SCC Report with the addition of the words “and from no other Court” at the end of the first sentence quoted above as also of the word “Further” at the beginning of the second sentence. The Assam Judicial Service Association may act under the paragraph quoted above or may request the All India Judges’ Association the petitioner in the Writ Petition (Civil) No. 1022 of 1989 which is still pending to act under the paragraph, on behalf of the Assam Judicial Service Association. It may be mentioned that the Supreme Court by the latest order dated 25.11.2002 in the said Writ Petition directed the case to come up again in the 2nd week of May, 2003.