

Gopal Singh Vs. Executive Engineer (C.D.), Lok N. Vibhag and anr.

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Court : Allahabad

Decided On : Jan-17-2000

Reported in : [2000(84)FLR912]; (2000)1UPLBEC661

Judge : A.K. Yog, J.

Acts : Fundamental Rules - Rule 56

Appeal No. : Civil Misc. Writ Petition No. 26007 of 1997

Appellant : Gopal Singh

Respondent : Executive Engineer (C.D.), Lok N. Vibhag and anr.

Advocate for Def. : S.C.

Advocate for Pet/Ap. : Gopal Singh, Adv.

Disposition : Petition allowed

Judgement :

A.K. Yog, J.

1. Gopal Singh, Petitioner, has impugned order dated January 16. 1997, passed by Executive Engineer Construction Division (Nirman Khand), Lok-Nirman Vibhag, Bageshwar, District Almora (now reconstructed District Bageshwar)/Respondent No. 1 (Annexure-2 to the Writ Petition) whereby the said authority gave one

month's notice to the petitioner on purported attainment of age of superannuation under Rule 56 (c) of Financial Hand-book--Vols. 2 to 4 in public interest.

2. Rule 56(a), (b) and (c) which came in existence in the year 1975 is reproduced below:

56. (a) Except as otherwise provided in this Rule, every Government Servant other than a Government Servant in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty eight years. He may be retained in service after the date of compulsory retirement with the sanction of the Government on public grounds which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances.

(b) A Government servant in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years. He must not be retained in service after that date, except in very special circumstances and with sanction of the Government.

(c) Notwithstanding anything contained in clause (a) or clause (b), the appointing authority may, at any time, by notice to any Government servant (whether permanent or temporary), without assigning any reason, require him to retire after he attains the age of fifty years or such Government servant may by notice to the appointing authority voluntarily retire at any time after attaining the age of forty-five years or after he has completed qualifying service of twenty years.

3. The aforesid Rule was, however, amended by U.P. Fundamental (1st Amend) Rules, 1987 vide Government Order dated 28-7-1987 (enforced retrospectively, w.e.f. 5-11-1985) and reads :

56.(a) Except as otherwise provided in other clauses of this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty eight years. He may be retained in service on after the date of retirement on superannuation, with the sanction of the Government on public grounds, which must be recorded in writing, but he must not

be retained after the age of 60 years except in every special circumstances.

Provided that a Government servant, recruited before November 5, 1985 and holding the Group 'D' post shall retire from service on the afternoon of the month in which he attains the age of 60 (Sixty) years.

Explanation.--The above proviso shall not be applicable in those cases where the status of a post/posts referred to in the above proviso, has been changed after February 27, 1982 and categorized in higher Group of post/posts.

4. Learned Counsel for the petitioner initially argued that correct date of birth of the petitioner was February 14, 1942 as per horoscope; a copy of which has been filed as Annexure 3 to the petition.

5. Learned Standing Counsel Sri K. S. Kushwaha placed reliance on Rule 2 of Uttar Pradesh Recruitment to Services (Determination of Date of Birth) Rules, 1974. The relevant Rule 2 reads :

'2. Determination of Correct Date of Birth or Age.--The date of birth of a Government servant as recorded in the certificate of his having passed the High School or equivalent examination at the time of his entry into the Government service or where a Government servant has not passed any such examination as aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the Government service shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation of his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits and no application or representation shall be entertained for correction of such date of age in any circumstances whatsoever.'

6. Apart from the legal position that the Date of Birth recorded in service book could not be disputed, this Court required learned Counsel for the petitioner to produce original horoscope for perusal. The original horoscope has been placed for perusal but it is found that alleged original horoscope has been copied by someone (hand written) on plane paper and said copy has been pasted upon the

so-called original horoscope making it impossible for any one to peruse the contents of original document.

7. In view of the above, this Court is of the opinion that petitioner has no locus standi or case on merit to dispute the date of birth recorded in his service record which continued throughout and exists as on date.

8. Learned Counsel for the petitioner, in the alternative, submitted that assuming the date of birth recorded in financial hand book to be correct, petitioner could not be retired before attaining age of 60 years and he should have been allowed to continue up to 30th June, 1999. According to the petitioner the impugned order is arbitrary and the concerned authority was not competent to pass the same in view of the Fundamental Rule 56(b) (before Amend Rule 1987 came in force) as the concerned authority itself did not refer to the amended Rule 1987.

9. In para 2 of the petition it is stated that petitioner is an illiterate person residing in remote part of hill area of the State of U.P. He was appointed as a Muster Roll Labour in the year 1970. Learned Counsel for the petitioner claims that petitioner was working in the establishment on or before 19th February, 1988 as 'Incharge Beldar' in temporary establishment on the basis of District Seniroity and he was regularised against sanctioned posts of Beldar--which were vacant vide order dated 19th February, 1988 (to be operative w.e.f. 26th February, 1988); true copy of which has been filed as Annexure 1 to the petition.

10. It is argued by the learned Counsel for the petitioner that petitioner was in 'inferior service' and hence he was entitled to continue up to the age of 60 years as contemplated in Rule 56(b)--which existed prior to July, 1987 (and appears to have been relied upon in the impugned order-Annexure-2 to the Writ Petition).

11. On behalf of the petitioner it is contended that Petitioner was recruited before November 5, 1985 (See proviso of amended Rule 56)--as also apparent from Annexure 1 to the petition. On this basis it is argued that petitioner was entitled to continue up to the age of 60 years and no notice could be given at 58 years. It is further submitted that it was not within the competence of concerned authority to retire the petitioner at the age of 58 years.

12. Learned Counsel for the Respondent on the other hand referred to amended Rule 56 and submitted that no reliance can be placed on non-existent 'rule' and reference in impugned order to said Rule has to be referred to the existing rule. According to the respondents, petitioner was regularised after November 5, 1985 and hence he cannot claim to have been recruited prior to the date of regularisation given in the concerned order, i.e., Annexure-1 to the Writ Petition.

13. Respondent laid emphasis on the word 'recruitment' used in the proviso to amended Rule 56. Learned Counsel for the petitioner on the other hand, places reliance on the expression used in the regularisation order dated 19-2-1988 (Annexure-1 to the Writ Petition) and submits that the petitioner was recruited and working in 'temporary establishment' prior to regularisation and it shows that he is covered by the proviso to the amended Rule 56. It is argued that in absence of necessary pleadings and grounds on this aspect the respondents were not aware of the exact issue to be determined in this case and hence the respondents are handicapped.

14. Learned Standing Counsel, had no option but to concede that the impugned order was passed in ignorance of amended Rule and/or reference to the un-amended rule in the impugned order is due to inadvertent clerical mistake. Be that as it may be, the impugned order has to be read as it stands since there is no explanation on record by the concerned authorities.

15. As the record stands today, un-amended rule did not exist when the impugned order was passed and the validity of the said order is to be considered in the light of the amended rule. This position is not disputed by the learned Counsel for the Respondents.

16. Concerned Authorities and the parties, it appears, were not alive to the Amendment in the Rule. The parties thus had no opportunity to consider the applicability of amended Fundamental Rule 56, i.e., whether the proviso of the amended rule shall be applicable to the facts of the case of the petitioner or not.

17. No one dealing with the matter attempted to ascertain the date of recruitment of the Petitioner, i.e.,--to find out the exact extent and scope of the expression

'Recruitment'. In other words--Whether expression 'Recruitment' in the proviso to Fundamental Rule 56 include or exclude temporary appointment or it only means the date of regular/substantive appointment.

18. In this context--it will be useful to -have Definition of the word-- 'Recruit/Recruited' or 'Recruitment' as given in some of the Dictionaries--

THE NEW LEXICON WEBSTER'S DICTIONARY

(Vol.2) Encyclopaedia Edition Particular--Page 834

RECRUIT--'to enlist men for (an army)

--Newly enlisted member of the armed force.

--a member or supporter of a society, cause, etc.'

MUKHERJEE'S THE LAW LEXICON--

(Vol. II) Second Edition, 1977--page 406

RECRUITMENT

--the dictionary meaning of the word 'Recruit'.

--fresh supply of number of persons either as additional or to make up for deceased so 'recruitment' is only for purpose of making up deficiency which occurs in the Cadre while 'appointment' means an actual act of posting a person to a particular.

--the term 'recruitment' and 'appointment' are not synonymous and connote different meanings.

--the term recruitment signifies enlistment, acceptance, selection or approval for appointment and no actual 'appointment' or positing in service while of 'appointment' means an actual act of posting a person to a particular office.

AIR 1969 Punjab and Haryana 178 (181)

THE LAW LEXICON--by Pramanatha Aiyer Reprint Edition 1987 (Wadhya and Company)

RECRUIT--

--is a newly enlisted and not trained soldier; a person who newly joins a society or organisation.

THE RANDAM HOUSE--DICTIONARY OF ENGLISH LANGUAGE--College Edition (1972)--(Published in India)

RECRUIT--

'..... a new mention of group, organization or the liketo raise or increase (a force) by enlistment to engage or hire (new employees, members etc.)'

Expression 'recruitment' is wider in scope as compared to the term 'appointment' in service jurisprudence.

19. The controversy in hand apparently will require perusal of original record and relevant materials, parties may like to adduce evidence before the question--which involves both mixed questions of fact and law, have to be adjudicated in the back ground of the circumstances in which the authority passed impugned order and whether the case of the petitioner is governed by amended Rule 56 fed under provison.

20. Consequently, it will be appropriate that Petitioner be directed to file a representation before the concerned authority for deciding the question in accordance with law, to determine the question as to when petitioner was recruited and thereafter the applicability of Rule 56 as a whole at relevant time.

21. Learned Counsels for the parties are in agreement that petitioner has already completed 60 years and thus, he has attained the age of superannuation (according to the date of birth mentioned in his service book). It is, therefore, submitted that Petitioner has no claim to be reinstated in the service. The only relief, which survives, is regarding payment of salary for the disputed period.

22. In view the above the impugned order January 16, 1997, passed by Executive Engineer Construction Division (Nirman Khand), Lok Nirman Vibhag, Bageshwar, District Almora (now reconstructed District Bageshwar)/Respondent No. 1 (Annexure-2 to the writ Petition) is set aside subject to the condition that petitioner files a comprehensive representation containing his grievance on the aspect referred to above in the judgment (along with a certified copy of this judgment) within six weeks from today. Petitioner will not be entitled to re-open controversy on the ground of horoscope or entry not being correctly recorded in service record. The concerned authority shall decide the said representation within three months by giving opportunity to the petitioner in accordance with law and shall a reasoned order which shall be communicated within two weeks of its being passed by Registered post acknowledgment due apart from any other mode to the Petitioner.

23. It is made clear that none of the observation made above shall effect the discretion of the concerned authority in deciding the issue before him. If it is found that petitioner was entitled to be continued up to the age of 60 years, the question of payment of arrears of salary on the basis of full wages shall be decided by concerned authority taking into account relevant circumstances (keeping in mind-employee in the instant case has not refused to work) on the basis of criterion pointed out in several decisions of this Court as well as Apex Court, whether employee was gainfully employed or not etc., during relevant period in question. See AIR 1991 SC 2010 Union of India v. K. V. Jankiramna, AIR 1999 SC 3265; AIR 1979 SC 75; AIR 1980 SC 840 (Paras 18 and 19); 1998 (78) FLR 530 (SC); AIR 1991 SC 1490 and (1998) 1 UPLBEC 304 (DB) (All. H.C.).

Writ petition stands allowed subject to the direction and observations made above.

No order as to costs.