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Basu (D.N.) Vs. State of Orissa

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Court : Orissa

Decided On : Mar-03-1964

Reported in : (1966)ILLJ670Ori

Judge : R.L. Narasimham, C.J. and ;G.K. Misra, J.

Appellant : Basu (D.N.)

Respondent : State of Orissa

Judgement :

R.L. Narasimham, C.J.

1. The petitioner was an ex-Bihar and Orissa ministerial officer who was in permanent Government service prior to the formation of the Province of Orissa on 1 April 1936. After serving in various capacities under Government, he rose to the rank of superintendent in the office of the Registrar of Co-operative Societies, Orissa, and attained the age of 55 years on 17 May 1953. The ex-Bihar and Orissa Government employees were governed by the provisions of Rule 71(b) of the Orissa Service Code, Vol. I, under which though they may be required to retire on their attaining the age of 55 years, nevertheless, ordinarily they should be retained in service up to the age of 60 years, provided they continued to be efficient. Various circulars have been issued by the Government of Orissa to the authorities concerned pointing out the factors to be carefully considered before allowing such ministerial officers to be retained in service after their attaining the

fifty-fifth year. The petitioner was permitted to continue in service for two successive years (ie., till 17 May 1954 and 17 May 1955) after attaining his fifty-fifth year by the orders of the Registrar of Co-operative Societies, Orissa. When the question of allowing him to be retained in service for one more year came up for consideration, the Registrar of Co-operative Societies by his order dated 31 January 1955 (see annexure 3 to the writ petition) held that it was in the public interest to retain the service of the petitioner for one more year and hence authorized the retention of his services till 17 May 1956. But when he sent a copy of this order of his to Government in the Local Self-Government Department, the Government of Orissa by their order dated 7 May 1955 (see annexure A) held that the petitioner should not, in the public interest, be retained in service beyond 17 May 1955 and that he should be superannuated with effect from that date. It was further added that Government were pleased to cancel the order of the Registrar authorizing the retention in service of the petitioner for one more year with effect from 18 May 1955. The aforesaid order was duly communicated to the petitioner and he was relieved of his duties on 17 May 1955. But with the concurrence of Government he was given leave on full average pay for four months from the date of his superannuation, viz., 17 May 1955. The petitioner then sent a memorial to the Chief Minister on 10 August 1955 (see annexure 6) in which he prayed that the aforesaid Government order dated 7 May 1955 be cancelled and the order of the Registrar of Co-operative Societies authorizing the extension of his services till 17 May 1956 be restored, by allowing him leave on half-average pay for eight months in continuation of leave on full average pay for four months already granted to him, so that he may remain on leave (both on full and half-pay) till 17 May 1956 and thereby get full pensionary benefits and gratuity. It should be noted that in this memorial he did not ask for being absorbed in active servioe. The memorial was rejected on 18 September 1956 by Government in the Co-operation and Forestry Department (vide annexure 7). But the petitioner persisted in his representations and eventually the Government of Orissa in the Development and Co-operative Department in their letter No. C-IV-M-2/80-38843-D, dated 10 November 1960, addressed to the Registrar of Co-operative Societies, Orissa, communicated the following order of Government. I am quoting the letter in full below as the petitioner's rights in this writ application are said to flow from the orders contained

therein :-

Government of Orissa Development (Co-operative) Department. No. C-4-IV-M-2/60/38843-D. From

Sri R.M. Das, b.a. (Hons.), m.d., p.a., Under Secretary to Government,

To

The Registrar of Co-operative Societies,

Orissa.

Dated, Bhubaneswar, 10 November 1960,

[Subject.-Memorial of D.N. Basu, ex-superintendent of the office of the Registrar of Co-operative Societies, Orissa.]

Sir,

With reference to your letter No. 343/XXVA-B-4355-Est.-1-C, dated 4 March 1959, on the above subject, I am directed to say that after careful consideration of the memorial of D.N. Basu, ex-superintendent of your office, Government have been pleased to vacate their order No. 3840-LSG, dated 7 May 1955, cancelling your office order communicated to Government with memorandum No. 260, dated 12 February 1955, authorizing Basu to continue in service for a further period of one year with effect from 18 May 1955.

2. Out of the period of extension of one year, granted by you in the aforesaid order the memorialist has already enjoyed four months leave during which period he will be deemed to have continued in service. In his memorial dated 10 August 1955 to the Chief Minister he prayed to retain him in Service by extending his leave on half-average pay for eight months till 17 May 1956. Government have been pleased to decide that so far these eight months are concerned, if the employee applies under Rule 160 of the Orissa Service Code, Vol. I, leave as permissible may be granted.

3. Basu may be informed of Government's decision in this regard.

Yours faithfully,

(Sd.) R.M. Das,

Under Secretary to Government.

It will be noticed that in Para. 1 of this order Government vacated their previous order of 7 May 1955 and restored the order of the Registrar of Co-operative Societies dated 31 January 1955 authorizing the retention of Basu (petitioner) in service for one more year up to 17 May 1956, But in Para. 2 they indicated their view as to how the extension of service should be granted. They observed that the extension shall be in the form of four months' leave on full average pay and eight months' leave on half-average pay as prayed for by the memorialist himself in his memorial to the Chief Minister. But as regards the leave on half-pay for eight months they observed that this leave will be granted, ' if the employee applied under Rule 160 of Orissa Service Code, Vol. I.' The petitioner, however, cleverly did not submit any application for leave on half-average pay under the aforesaid rule, but continued to make further representations to Government. Ultimately, Government in their letter dated 21 July 1962 addressed to the Registrar of Co-operative Societies, passed the following order:

Copy of letter No. 2C-IV-M-1/62-11543/CF, dated 21 July 1962, from Sri G. V. L. N. Murti, Under Secretary to Government, to the Registrar of Co-operative Societies, Orissa,

[Subject.-Memorial of D.N. Basu, ex-effice superintendent of the office of the Registrar of Co-operative Societies,]

Sir,

In partial modification of Government order No. 38843/D, dated 10 November 1960, I am directed to say that out of the period of extension of twelve months granted to D. N. Basu, ex-office superintendent, of your office, in your office order communicated to Government in memorandum No. 260, dated 12 February 1955,

Basu has been granted leave on average pay for four months from 18 May to 17 September 1955. So far as the remaining eight months are concerned you were instructed to grant him leave as admissible under Rule 160 of Orissa Service Code, Vol. I, if he applied. It appears from your letter No. XXVA-29/62 Estt. 2041, dated 8 June 1961, that Basu has not applied for the leave and as such the concession granted to him in the aforesaid Government order has not be8n availed of by him.

2. It has since been decided that the memorial dated 10 August 1955 submitted by Basu to the Chief Minister, praying for leave for eight months on half-average pay, may be treated as application for leave and leave as admissible to Basu under the rules may be granted for the remaining period of eight months, without waiting for submission of fresh application by Basu.

Action taken in the matter may be intimated to this department.

This disposes of the memorial dated 10 April 1961 submitted by Basu to the Governor of Orissa. Basu may be informed of the decision mentioned above.

The effect of this order was that though the petitioner did not apply for leave on half-average pay his prayer in his memorial to the Chief Minister dated 10 August 1955 was itself treated as an application for leave on half-average pay and it was ordered that he be granted such leave for eight months, without waiting for a formal application under Rule 160, Orissa Service Code.

Sri C.V. Murli for the petitioner quite properly conceded that in view of the decision of the Supreme Court in 1961-II L.L.J. 639, construing Rule 2046(2)(a) of the Railway Establishment Code [which is identical with Rule 71(b) of the Oriasa Service Code, Vol. I] the petitioner had no justiciable right to be retained in service till his sixtieth year even though ho is an ex-Bihar and Orisaa ministerial officer. Their lordships pointed out in that decision that Government are not bound to retain this class of Government servants beyond their fifty-fifth year even if they continue to be efficient. The matter is one of discretion with Government and no justiciable right can accrue.

But Sri Murti contended, with considerable ingenuity, that the order of Government dated 10 November 1960 (annexure 5) itself gave a new right to the petitioner to be retained in service till 17 May 1956 and that consequently he was entitled to full pay till that date, as if he were retained in active service. Sri Murti urged that Para. 2 of the aforesaid order which directed that leave on half-average pay for eight months should be granted to the petitioner if he applied under Rule 109 of the Orissa Service Code, Vol. I, could not be implemented because the petitioner did not in fact apply for such leave, and hence this part of the Government order became inoperative. According to Sri Murti, the petitioner having been granted leave on full average pay for four months from 18 May 1955 was entitled as of right, after the expiry of that period, to be retained in active service on full pay till 17 May 1956. Sri Murti therefore urged that the subsequent order of Government dated 21 July 1962 (annexure 11) treating the prayer in the petitioner's memorial to the Chief Minister as an application for leave on half-average pay, was not justified in law.

I am not impressed with this argument. Once it is held that the petitioner has no justiciable right to be retained in service alter his fifty-fifth year (following the aforesaid Supreme Court decision), it is a matter entirely within the discretion of Government, to allow him extension or not according to the exigencies of service. It is true that in their first order dated 10 May 1960 (annexure 5) Government (in Para, 1) restored the order of the Registrar of Cooperative Societies authorizing the retention of the services of Basu for one year till 17 May 1956, but in Para. 2 they made it absolutely clear that this extension should be granted by way of leave on half-average pay for eight months. There could thus be no quastion of the petitioner being taken into active service. The only method by which Government wanted to retain the services of Basu beyond 18 May 1955, for on(c) year, was:

(i) to grant him leave on full average pay for four months, and

(ii) to grant him leave on half-average pay for eight months in continuation of the leave on full average pay.

The two paragraphs of the Government letter should be construed together, and when so construed, it is clear that the petitioner had no unconditional right to be

retained in active service on full pay as if he actually rejoined after the expiry of his leave on full average pay for four months granted to him. It is true that the Government indicated in that order that the petitioner may be granted leave on half-average pay for eight months if he submitted an application for the same under Rule 160 of Orissa Service Code, Vol. I. But the petitioner cannot, by deliberately refraining from applying for such leave, claim a higher right. The filing of an application for leave is a matter of procedure and Government may, in appropriate cases, waive the filing of such an application in a formal way if there was a prayer for such leave made in some other way. For this purpose Government rightly took into consideration the prayer made by the petitioner in his memorial to the Chief Minister dated 10 August 1955. We see therefore no illegality in the order of Government dated 21 July 1962 granting him leave on half-average pay for eight months without waiting for a formal application from him.

For these reasons, the petition is dismissed with costs. Hearing fee Rs. 50.

G.K. Misra, J.

I agree.

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