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Court : Kolkata

Decided On : Jun-08-1955

Reported in : AIR1956Cal93,59CWN1050

Judge : Sinha, J.

Acts : Constitution of India - Articles 141, 226 and 311; ;Code of Civil Procedure (CPC) , 1908

Appeal No. : Civil Revn. Case No. 1570 of 1953

Appellant : Basanta Kumar Pal

Respondent : The Chief Electrical Engineer and ors.

Advocate for Def. : Bhabesh Narayan Bose, Adv.

Advocate for Pet/Ap. : Balai Lal Pal, Adv.

Disposition : Application dismissed

Judgement :
ORDER

Sinha, J.

1. The facts in this case are briefly as follows. The petitioner, first entered service as a clerk in the then Eastern Bengal Railway, in the year 1919. Upon partition of

India, he opted for the Indian Union and was posted under the District Electrical Engineer Dhanbad. The petitioner was to reach his 55th year on 1-7-1950, and he will reach his 60th year on 1-7-1955.

2. On 19-5-1949, the petitioner received a notice from the District Electrical Engineer Dhanbad, to the effect that it was proposed to retire him from service when he reached the age of 55 years on 1-7-1950. He was further informed, that if he wished to make a representation, it would be duly considered before final orders were passed. On 19-5-1949, the petitioner wrote to the D. E. E. Dhanbad requesting that his Provident Fund subscription and leave salary might be adjusted.

3. On 10-6-1949, he replied to the notice dated 19-5-1949, stating that he was still capable of going on normally with his duties and prayed that his services might be continued until he reached the age of sixty. On 27-7-1949, the D. E. E. Dhanbad, forwarded the application to the Chief Electrical Engineer, Eastern Railway, with his recommendation that the extension might be granted subject to the petitioner being declared physically fit. Nothing however was said about his efficiency.

The C. E. E. however was not disposed to accept this recommendation. He replied on 19-8-1949, stating that he saw no reason why a special case recommending the petitioner's retention should be made out, in accordance with the circular No. S. L. 1377. I shall have something to say about this Circular, later on.

4. On 29-4-1950, the petitioner preferred an appeal to the General Manager through the proper channel, but this appeal was not forwarded, but merely filed. On 1-7-1950 the petitioner had to retire from service. Thereafter, the petitioner made a fresh representation to the C. E. E. for forwarding his appeal to the General Manager, but this was also turned down.

In February 1951, the petitioner applied for a temporary job and was given a temporary appointment as a clerk under the C. E. E. for 6 months. On 3-7-1952, he wrote a letter to the C. E. E. stating that several other employees like himself, who had retired at 55, had been called upon to carry on their services upto the age of 60 years, and prayed for his own reinstatement. This prayer was repeated in

December 1952. To this letter the C. E. E. gave a curious reply on 30-1-1953. He said that 'in view of the recommendation given by the D. E. E. Dhanbad', he did not 'consider to retain' the petitioner in service beyond the age of 55 years.

It will be remembered that the D. E. E., actually recommended the extension of the' period of service of the petitioner. In Feb-ruary 1953, the petitioner made a further representation, but on 11-3-1953, the C. E. E. finally informed the petitioner that no further representation of his would be entertained.

5. This rule was issued on 2-6-1953, calling upon the opposite parties to show cause why a writ of certiorari should not be issued quashing the order complained of in the petition and/ or why a writ in the nature of mandamus should not be issued directing the opposite parties to reinstate the petitioner in service, or why such other order or orders should not be made as to the Court may seem fit and proper. The orders complained of in the petition are the orders contained in letters dated 30-1-1953 and 11-3-1953. These are really not the orders by which the petitioner was compulsorily retired at the age of 55.

However, it is not necessary to consider this technical point, regard being had to the view I have taken in the matter. The petitioner is a ministerial servant and it is admitted that his case is governed by Rule 2046 (2) (a), Indian Railway Establishment Code (Vol. II p. 21) which runs as follows:

'A ministerial servant who is not governed by Sub-clause (b), may be required to retire at the age of 55 years, but should ordinarily be retained in service, if he continues efficient up to the age of 60 years. He must not be retained after that age except in very special circumstances, which must be recorded in writing and with the sanction of the competent authority'.

6. The whole question is as to whether, such a ministerial servant has a legal right to be retained in service after the age of 55, if he continues to be efficient. I do not think that there is really any question of the petitioner having turned out to be inefficient at any stage. The D. E. E. recommended extension of his service, and during his temporary appointment, the petitioner was considered as quite a useful hand at Kanchrapara.

Whether he continued to be efficient or not, of course depends upon the subjective satisfaction of the Railway authorities. Since however nothing is said as to his inefficiency, we shall assume that the petitioner continued to be efficient. Did that confer a legal right upon him to compel the Railway Authorities to employ him upto the age of sixty? Under Rule 2002 of the R. E. C. (Vol. II p. 1), the power of interpreting the rules is given to the President. The word 'ordinarily' has been the subject matter of interpretation by the President, as follows:

'Ordinarily -- In view of the occurrence of the word 'ordinarily' in P. B. 56 (b) (2046 (2)), a ministerial Government servant can be retired from Government service between the age of 55 and 60 years on grounds other than those of efficiency and that in such a case he has no claim to be retained in service upto the age of 60 years. The purpose of F. R. 56 (2046) is not to- confer upon Government servants any right to be retained in service upto a particular age but to prescribe the age beyond which they may not be retained in service'. (vide G. I. P. D. No. F/24R 1/32 dated 9-5-1932. R. E. C. Vol. II, p. 178).

7. An interesting question may arise as to whether the Courts are bound to accept the interpretation of a rule of law by the President. I do not think that as a general rule, the powers of the Court can be fettered in that way. It must be remembered however that the President has under Article 309 of the Constitution, the power to frame rules regulating the recruitment and conditions of service of persons appointed to posts in connection with the affairs of the Union.

Since he can frame a rule, there would be nothing extraordinary in his being able to explain the wordings of a rule which is not clear and capable of more than one meaning. For example, if the President said that 60 years in Rule 2046 (2) meant 70 years, such an inter- pretation would not be acceptable by the Courts. The meaning of the word 'ordinarily' in that rule however, is not by any means clear. I think, therefore, that the interpretation which has been given by the President, acting under Rule 2002, should be accepted and given effect to.

8. Let us now come to the rule itself. If the word 'ordinarily', was not there, it would plainly mean that a person should be retained upto 60 if he continues to be efficient. Even so, the matter would entail a lot of discretion, because it depends

upon the opinion of the Railway authorities as to whether a Railway servant was efficient or not, and no Court would interfere if the discretion was honestly exer-cised. But a further qualification introduced by the use of the word 'ordinarily' necessarily changes the whole complexion of the matter.

It follows that even when a man continued to be efficient, he need not be retained in service. It might be said that an efficient man can be removed only if there were extraordinary circumstances, and that normally he must be retained. But then, what is an ordinary or normal circumstance? Who is to judge whether the circumstances are normal or abnormal in a given case? There may be a thousand and one kind of circumstances arising in course of Railway administration which makes it depart from normalcy.

Suppose the administration thinks that there are too many old men in service, and that the efficiency of Railway administration is suffering as a consequence. This may he said to be a circumstance which is out of the ordinary and would justify action under the rule. Where, therefore, continuity of service depends upon such indeterminate factors, how can it be said that there is an enforceable legal right to continuance of employment?

9. This very rule came to be interpreted in a division Bench judgment of the Allahabad High Court in -- 'Raghunath Narain Mathur v. Union of India', : AIR1953 All352 . It was argued there that this rule conferred a right upon the employee to be retained in service until the age of sixty, subject to the reservation that he must continue to be efficient. It was further urged that if the employee was to be removed for inefficiency, he was to be charged with inefficiency and afforded an opportunity to explain why he should not be removed.

Although the interpretation by the President (which had come into existence) was not brought to the notice of the learned Judges, Sapru and Chaturvedi JJ., they negatived both these contentions and held that the Railway Au-thorities had an unfettered option to retire a person at the age of 55. They further held that it was not necessary to frame a regular charge of inefficiency, or give the employee an opportunity of explaining why he should not beremoved.

10. A similar view was taken in -- 'Kri-shnan Dayal v. General Manager, Northern Rly Baroda House, New Delhi', . That case also dealt with Rule 2046 (2) (a). The learned Judges relied upon the Supreme Court decision in -- 'Shyam Lal v. State of U. P.', : (1954)IILLJ139SC , and Meld that compulsory retirement was not 'removal' within the meaning of Article 311(1) of the Constitution. In this case, the President's interpretation was noticed and accepted.

11. Mr. Pal appearing on behalf of the petitioner placed strong reliance upon the Supreme Court decision in -- 'Jai Ram v. Union of India', : AIR 1954 SC584 . In that case, the plaintiff was employed as a clerk in the Central Research Institute at Kasauli. He insisted upon retiring from service on reaching the age of 55 and upon that footing obtained leave, preparatory to retirement. Thereafter, he changed his mind and insisted that under F.R. 56 (b) (i), he was entitled to continue in service upto the age of 60. Speaking about the rule, Mukherjea, J. said as follows:

'We think that it is a possible view to take upon the language of this rule that a ministerial servant coming within its purview has normally the right to be retained in service till he reaches the age of 60. This is conditional undoubtedly upon his continuing to be efficient ..... If the Government required him to retire in terms of the Fundamental Rule 56 (b) (i) it might be argued that he should have been given an opportunity to show that he was still efficient and able to discharge his duties and consequently could not be retired at that age.'

The learned Judge, however, pointed out that the question did not arise in that particular case because the Railway Authorities did not dispense with the services of the plaintiff; it was of his own seeking. It is evident that the learned Judge in stating what was a possible point of view or what might be argued was deciding nothing.

Mr. Pal argues that even an obiter of the Supreme Court is binding upon me. That would be so, if the Supreme Court had enunciated or declared some principle of law. Here, however, nothing was decided as to the interpretation of F. R. 56. On the other hand, it was held that a decision was unnecessary in view of the conduct of the plaintiff. There is, therefore, nothing to follow.

Mr. Bose, appearing for the respondents has also pointed out, that -- 'Shyamlal's case (C)' (Supra) is a later case, where the Supreme Court dealt at length with the question whether compulsory retirement was 'Removal' within the meaning of Article 311, holding that it did not. It will also be observed that in this case the petitioner did have an opportunity of showing cause and actually did show cause against his retirement order and the order was made after considering his representation.

12. In my view. Rule 2046 (2) (d), does not confer any legal right upon a Railway employee to be continued in employment after attaining the age of 55. After reaching that age, the Railway Authorities have no statutory duty to continue him in service. Whether they will do so or not, depends upon the policy which was being followed for the time being It appears that this policy is a variable one. In circular No. AE 3644, SL No. 1377 dated 1-4-1949 (mentioned in the letter of the C. E. E. dated 19-8-1949), it is stated as follows :

'The general policy is that special case-will have to be made out in each instance in which it is recommended that an employee should be retained in service after the age of 55. Any representations made by staff referred to in para 1 above would, therefore, have to be considered by the General Manager against the background of this general policy.

'When in the interest of the administration it is necessary to retain an employee in service beyond the age of 55 his retention would be considered by the General Manager on full justification being furnished by the Divisional Superintendent or other authority concerned in terms of the above policy.....'

This policy was subsequently altered, as is evi-dent from the copy of a letter written by the the Railway Board (Annexure 1 to the petition) which states that the emphasis had been shift-ed to the provision in the rule that an employee should ordinarily be retained in service up to the age of 60, if he continued to be efficient. I am told that recently the policy is again changing to the practice of retiring people at 55.

If however, the employee has no legal right to be employed beyond the age of 55 these-changes in the policy of the railway administra- tion, cannot be taken into account by the Court, for granting any relief. It is evident that under Rule 2046 (2) (a), the existence of special circumstances is only relevant for employment beyond the age of sixty.

If, the rule conferred a legal right to be employed after 55, it is obvious that S.L. 1377, is wholly bad because it lays down that a special case will have to be made out for retention in service between 55 and 60, whereas the rule lays down that such retention, in case of employees who continue to be efficient, should be the normal course. These questions however do not arise because there is no legal right to be employed after attaining the age of 55. Thereafter it is discretionary, and this Court cannot control a discretion, either by the issue of a Writ of Mandamus or Certiorari,

13. In view of this, it is unnecessary to deal with several other points urged by Mr. Bose, but I will mention them. He says that the real objection of the petitioner is against the order of termination of service made on 19-5-1949, an order made before the Constitution came into being, and cannot therefore be the subject-matter of an application under Article 228.

I do not think that the notice dated 19-5-1949, can be called an order of termination of service. It was merely a timely intimation that it was not proposed to keep the petitioner in service after 1-7-1950, a point of time, after the Constitution came into operation. The next point is that the petitioner accepted the position that he had been retired, by asking the Railway Authorities to give him a temporary job and accepting one, as also by praying to be reinstated.

I do not think that there is much substancein the point. The petitioner was continuing his representations to the authorities to continue him inservice. Since he was not very successful in thatrepresentation, he had to accept temporary service in order to make out a living. He never accepted the position that he had been validlyretired. Since, however, I am against the petitioner upon the main point, as regards the nature of his right, I must disallow this application. The Rule is accordingly discharged.There will be no order as to costs.

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