

Basanta Kumar Pal Vs. Chief Electrical Engineer and ors.

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Court : Kolkata

Decided On : Jun-12-1958

Reported in : AIR1958Cal657,62CWN765

Judge : P. Chakravartti, C.J. and ;S.C. Lahiri, J.

Acts : Railway Establishment Code - Rule 2046 and 2046(2); ;[Constitution of India](#)
- Articles 226, 311 and 311(2)

Appeal No. : A.F.O.O. No. 7 of 1956

Appellant : Basanta Kumar Pal

Respondent : Chief Electrical Engineer and ors.

Advocate for Def. : Bhabesh Narayan Bose, Adv.

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

Disposition : Appeal dismissed

Judgement :

P. Chakravartti, C.J.

1. A short point involved in this appeal has been argued shortly.

2. The appellant, Basanta Kumar Pal, entered service under the old East Bengal Railway on 6-9-1919 as, according to himself, a clerk, but as, according to respondent No. 1, a Fitter. There is, however, no dispute that in October, 1920, he was confirmed in a post of a Clerk under the Railway. After the Partition of India in 1947, he opted for the Dominion of India and his services having been transferred to the East Indian Railway, he was posted under the District Electrical Engineer, Dhanbad. It was there that he continued to serve till the date of his retirement.

3. The appellant was due to reach his fifty-fifth year on 1-7-1950. On 19-5-1949, he received a notice, dated the 18th May, by which he was informed that it was proposed to retire him from service on his attaining the age of fifty-five years and that if he desired to make any representation against such retirement, it would be considered before final orders were passed. Immediately on receiving that notice, the appellant addressed a letter to the District Electrical Engineer and prayed that since he was going to be retired, his leave and Provident Fund accounts might be adjusted and that the earliest possible action might be taken in that behalf. Although he sent that letter, which seemed to suggest that he was accepting the proposal for his retirement, he sent a representation on 10-6-1949, against the proposal to retire him. In that representation he stated that he was still capable of performing the normal duties of his Office and, therefore, he might be permitted to continue in service. The representation was forwarded by the District Electrical Engineer with a recommendation that the appellant might be granted an extension of service, subject to his being declared physically fit by the Medical Department, but the Chief Electrical Engineer, who was the final authority in the matter, was not prepared to accept the recommendation. By a note sent to the District Electrical Engineer, he informed him that he saw no reason why a special case should be made out for the retention of the appellant in the service and why a recommendation for his retention should be sent to Deputy General Manager (P), as required by SL. No. 1377. SL. No. 1377, I may point out, provided that, generally, a special case would have to be made out in each instance in which it was recommended that an employee should be retained in service after he had attained the age of fifty-five years, The decision not to retain him further apparently came to the knowledge of the appellant, because it appears that on 29-4-1950, he preferred an appeal to the General Manager of the East Indian Railway. His

petition appeal was not forwarded by the Chief Electrical Engineer on the ground that unless some strong reason could be shown, it would serve no useful purpose to forward the application to the General Manager. The appellant was informed of the decision on 27-6-1950 and as nothing further happened between that date and the date on which he attained the age of superannuation, he had to retire and did retire on the 1st of July following.

4. Thereafter, the appellant made several representations to the superior authorities. His prayer for reinstatement and retention in service till he attained the age of sixty was not conceded, but on 5-5-1952, he was given a temporary employment for a period of six months as a Clerk under the District Electrical Engineer, Kanchrapara. While the period of that employment was drawing to a close, he made another representation and prayed that he too might be allowed to continue in service up to his sixtieth year, since several other employees like himself had been recalled to duty after they retired and asked to continue till they reached the age of sixty years. This representation also was turned down, and yet another made by the appellant met with the same fate. Thereafter, he moved this Court under Article 226 of the Constitution and obtained a Rule from Sinha, J. At the final hearing of the Rule, however, the learned Judge discharged the Rule. It is against that order that the present appeal is directed.

5. Only one point was urged before us in Support of the appeal, but before I deal with it, I think I might point out two circumstances which seem to make it impossible for the appellant to succeed in the appeal. By his petition under Article 226, he asked for a writ in the nature of certiorari for the quashing of the 'order complained of'. Two orders were complained of in paragraph 25 of the petition and they were contained in two letters addressed to the appellant, one dated 30-6-1953 and the other dated 11-3-1953. As the learned Judge has pointed out, neither of those orders had anything whatever to do with the appellant's prayer for the reinstatement, because it was only his prayer for re-employment that was turned down by the orders communicated by those letters. It would thus appear that even if the orders complained of were quashed, it would avail the appellant nothing because, by the smashing of those orders, the decision of the authorities not to retain him in service up to his sixtieth year would by no means be affected.

Retention in service, which means continued employment in the service in which an employee has been serving is quite a different thing from re-employment of an employee after he has retired. Consequently, a decision not to re-employ is very different from a decision not to retain.

6. The other prayer made by the petitioner was that a writ of mandamus might issue to the opposite parties to the petition, directing them to reinstate the appellant in Railway Service and keep him there till he reached his sixtieth year. It appears that even when Sinha, J., delivered his judgment, which was on 8-6-1955, the appellant had less than a month to complete the age of sixty years, because he would reach his sixtieth year on 1-7-1935. To-day he has left his sixtieth year far behind and it is obviously impossible that any relief can be given to him by a writ of mandamus in terms of his second prayer. The success of his first prayer would thus be a barren success and the success of the second prayer has now become impossible by reason of efflux of time.

7. I may, nevertheless, consider the single point which was urged before us by Mr. Pal on the appellant's behalf. He based his case entirely on Rule 2046 of the Indian Railway Establishment Code or, to be more precise, on Clause 2(a) of that Rule and submitted that if he failed to induce us to adopt the construction of the Rule which he suggested, or to agree with him that the Supreme Court had in a certain decision upheld the same construction, he was bound to fail. The point, so put, very conveniently narrows down the scope of the matter for our enquiry.

8. Rule 2046 (2) (a) of the Indian Railway Establishment Code is, so far as material, in the same terms as Rule 56(b)(i) of the Fundamental Rules. The first part of the Rule with which only we are concerned reads thus:

'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'.

Sub-clause (b) deals with ministerial servants who entered Government service after 1-4-1938, or who, being in Government service on 31-3-1938, did not yet hold on that date a lien or a suspended lien on a permanent post. The appellant is

obviously not governed by Sub-clause (b), because he entered Government service in 1919 and was confirmed as a permanent incumbent in 1920. He is thus entitled to whatever right Rule 2046 (2) (a) creates for ministerial servants to whom it applies.

9. According to Mr. Pal, what the Rule means is that a ministerial servant, coming within its purview, shall have a right to be retained in service up to the age of sixty years, the only condition being that he must continue to be efficient. In other words, if a ministerial servant governed by the Rule continues to be efficient after he has attained the age of fifty-five years, the Rule gives him a right to be retained in service up to the age of sixty years and he cannot be retired before he reaches that age. It was pointed out that the authorities had not found that the appellant had become inefficient since he had attained the age of fifty-five years and, indeed, that the learned Judge had found that, on the materials before the Court, continuation of the appellant's efficiency might properly be assumed. If, it was argued, the appellant had continued to be efficient or, to put it in another way, if he had not been found to have become inefficient, there was nothing else which could deprive him of the right to be retained in service up to the age of sixty years which Rule 2046(2)(a) gave him. The order retiring the appellant on his attainment of the age of fifty-five years, without any finding that he had become inefficient, was thus contrary to Rule 2046(2){a) and, therefore, liable to be quashed.

10. In my view, the construction of Rule 2046 (2) (a) suggested by Mr. Pal is plainly not tenable. The Rule begins with a declaration that a ministerial servant governed by it may be required to retire at the age of fifty-five years. The authorities are thus given the right to retire a ministerial servant governed by the Rule on his attaining the specified age, if they desire to do so. The next part of the Rule appears to state a policy and it is said that though a ministerial servant, governed by the Rule, may be required to retire at the age of fifty-five years, he 'should ordinarily be retained in service, if he continues efficient up to the age of 60 years.' It is to be noted that the statement that the ministerial servants concerned may be retained in service up to the age of sixty years is not unqualified. On the other hand, there are two qualifications, of which one is that they must continue to be efficient and the other is that they should be retained, not in every case, but

'ordinarily.' If Mr. Pal's construction of the Rule were to be adopted, I do not see how the word 'ordinarily' could at all be fitted in with such construction, because if a ministerial servant, governed by the Rule, continued to be efficient, the authorities would be bound to retain him in service in every case and there would be no scope of their doing so 'ordinarily.' In my view, what the Rule means is that continuance of efficiency is in all cases an essential condition for retention in service after the attainment of the age of fifty-five years. If, on reaching that age, the ministerial servant is no longer efficient, no question of retaining him in service further can at all arise under the Rule. But even if he continues to be efficient, the Rule does not require the authorities imperatively to retain him, but only says that 'ordinarily' ministerial servants in such position should be retained in service up to the age of sixty years. There seems to be no doubt at all that even where the condition of retention of efficiency is satisfied, there still remains room for the exercise of a discretion by the superior authorities as to whether a particular ministerial servant should or should not be retained and they are clearly entitled to take into account all relevant administrative considerations in deciding the case of a particular ministerial servant. The Rule thus does not give to all ministerial servants, who have attained the age of fifty-five years and retained efficiency, an unqualified right to be retained in service up to their sixtieth year, but only makes them eligible for retention and only gives a direction to the authorities that they should ordinarily be retained. If they are to be retained only 'ordinarily' and not always and in every case, it is clear (that the Rule itself contemplates cases where a ministerial servant may not be retained in service after the age of fifty-five years, although he has continued to be efficient. Whether in a particular case a ministerial servant will or will not be retained is a matter entirely for the authorities concerned and into the reasons for their decision the Court will not enquire, particularly on an application under Article 226. Since Rule 2046 (2) (a) does not entitle ministerial servants governed by it to be retained in service up to the age of sixty years as of right, if only after attaining the age of fifty-five years they continue to be efficient, no claim of a right can be founded on the Rule by a ministerial servant whose services have not been retained, except perhaps in a case where he can prove mala fides on the part of the authorities. The authorities would plainly be entitled to take into consideration in each case the diverse administrative factors bearing upon

the need or expediency of retaining in service a ministerial servant after he has attained the age of fifty-five years and an adverse decision arrived at by them in the ordinary course said in a proper way cannot be questioned by means of an application for a writ.

11. In my view, therefore, the appellant's case as founded on Rule 2046 (2) (a), must fail, for it has now been held that Article 311(2) of the Constitution does not apply to compulsory retirement under the Rules governing a particular service. It was, however, said by the Supreme Court in the case of *Jai Ram v. Union of India*, : AIR 1954 SC584 (A) on which Mr. Pal relied, that even in such a case the Government servant concerned should be given an opportunity to show cause as to why he should not be retired, although the expression of opinion seemed to have been made by way of an obiter dictum. The appellant was in fact given an opportunity to show cause and cause was shown by him. The procedure followed in retiring him compulsorily did not, therefore, suffer from the defect of failing to give this person affected an opportunity to show cause against the step proposed to be taken against him. But Mr. Pal placed strong reliance on the decision of the Supreme Court to which I have already referred and insisted that the Supreme Court had declared the construction put forward by him as the proper construction of a Rule expressed in such terms as those of Rule 2046 (2) (a). Even if, it was said, there was not a direct decision, there was a statement of the Supreme Court's view, which would be binding on this Court as an obiter dictum of a superior Court. In my view, neither of these contentions is correct.

12. In the case before the Supreme Court, the Government servant concerned started asking for leave preparatory to retirement when he found that the date of his reaching the age of fifty-five years was nearing and made a series of importunate requests to the authorities. Each time he said that he desired to retire and that the circumstances of his family made it necessary for him to retire and that it was impossible for him to continue in service any longer. After a number of his petitions had been turned down, one was ultimately accepted and he was given leave preparatory to retirement on average pay for six months and on half average pay thereafter for five months and twenty-five days. He took that leave and, after enjoying almost the whole of it, made an application just as the period of

leave was due to expire, stating that he had not retired and that he might now be allowed to resume his duties immediately. The authorities informed him in reply that he had already retired, having voluntarily proceeded on leave preparatory to retirement and no question of permitting him to resume his duties could possibly arise. A number of representations subsequently made by the Government servant were all dismissed.

13. The Government servant in the case before the Supreme Court was not a railway servant, but an employee in the Research Institute at Kasauli and, therefore, governed by the Fundamental Rules. One of the contentions urged in his behalf was. that, under Rule 56 (b) (i) of the Fundamental Rules, he had a right to be retained in service up to the age of sixty years, provided he continued to be efficient. The proceeding which the Government servant had instituted was a suit and went to the Supreme Court on an appeal from a Letters Patent decision of a Division Bench of the Punjab High Court. The Supreme Court disposed of the case on the ground that the appellant before them had himself confessed his inability to continue in service any longer and sought permission for retirement and had thus waived his rights under Rule 56 (b) (i), whatever they were. In noticing the contention, to which I have just referred, however Mukherjea, J., as he then was, made certain observations which were the sheet-anchor of Mr. Pal's argument before us. His Lordship observed 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. We may assume, therefore, for purposes of this case that the plaintiff-had the right to continue in service till 60 and could not 'be retired before that except on the ground of inefficiency. But that by itself affords no solution of the question that requires consideration in the present case.'

Earlier his Lordship has made certain other observations, but he made them by way of stating the contention urged on behalf of the appellant and not by way of giving any opinion of his own.

14. With reference to the passage which I have just read, Mr. Pal submitted that the Supreme Court had said that the view which he was putting forward before us was a possible view of the Rule and that they had also said that the Government servant before them had the right to continue in service till sixty and could not be retired before that except on the ground of inefficiency. In my opinion, to read the observations of the Supreme Court in that way is to misread them completely. Their Lordships had before them the contention to which I have already referred and what Mukherjea, J., as he then was, was saying in the passage, on which Mr. Pal relied, was obviously that assuming that the view of Rule 56 (b) (i) put forward on behalf of the appellant was a possible view and that, according to it, the appellant could not be retired before he had reached the age of sixty, unless he was found inefficient, such meaning of the Rule was quite irrelevant for the purposes of the case before them, because the Government servant concerned was bound to fail by reason of his own action, The Supreme Court was careful to qualify the construction of Rule 56 (b) (i) stated by them by saying that they were only assuming it. I am entirely unable to agree that any decision on the meaning of Rule 56 (b) (i) was given or even intended to be given.

15. It was then contended by Mr. Pal that even if the Supreme Court had not given a direct decision on the true meaning of Rule 56 (b) (i), they had at least expressed their opinion as to the meaning of the Rule by way of an obiter dictum and that, consequently, this Court was bound to accept that view and act according to it. He offered to cite to us decisions as to the binding character of even obiter dicta of superior Courts. There need be no doubt that even obiter dicta of superior Courts are binding on a Court subordinate to them, but in order that a particular statement may be so binding, it has, in the first instance, to be an obiter dictum. In my view, the observations of the Supreme Court which I have read do not contain even an obiter dictum, but they merely take notice of certain arguments advanced on behalf of the appellant and then proceed to point out that they would avail the appellant nothing, even if the arguments or the view of Rule 56 (b) (i) put forward by him were taken to be correct.

16. For the foregoing reasons, I am clearly of opinion that there is nothing in the decision of the Supreme Court, on which Mr. Pal relied, which compels us to take

a view of Rule 2046 (2) (a) different from what the plain words of the Rule suggest. It appears, as the learned Judge has pointed out, that other High Courts also have taken the same view of the Rule that he took and that we are now taking.

17. I have omitted to mention another point which the learned Judge has referred to without deciding but which, I think, may be noticed. Rule 2046 (2) (a) occurs in the Indian Railway Establishment Code and the Code itself provides by Rule 2002 that the power of interpreting the rules, contained in it, shall be in the President. It appears that the President has interpreted Rule 2046 (2) (a) and laid it down that the effect of the word ordinarily used in the rule is to provide that a Government servant may be retired between the ages of 55 and 60 years on grounds other than inefficiency and that the purpose of the rule is not to confer any right on Government servants to be retained in service up to the age of 60 years, but merely to prescribe the maximum age beyond which they may not be retained. It is true, as the learned Judge has pointed out, that if it falls to a Court to give its independent opinion as to the proper construction of the rule, it will not be bound by the President's interpretation, but it appears to me that there is another point of view from which it may be proper, even for Courts, to give effect to the President's interpretation in a question between a Government servant and the State. The rules contained in Railway Establishment Code' are the conditions of service which the Railway servants accept when they take up employment under the Railways and which thus govern and control their rights. If those rules contain an interpretation clause and such clause provides that the rules shall be taken to mean what the President may interpret their meaning to be, it would seem to follow that it is one of the conditions of service of Railway servants that they shall accept the President's interpretation of the rules and that what they are really governed by are not the rules, as such, but the rules as interpreted by the President. If so, the Courts may, in a question between a Railway servant and the employer Railway, properly give effect to the President's interpretation of the rules as a matter of agreement between the parties.

18. Since the sole argument of Mr. Pal was based on the right supposedly created by Rule 2046 (2) (a) of the Indian Railway Establishment Code and since that argument fails, the present appeal cannot succeed.

19. It is, accordingly, dismissed, but there will be no order as to costs.

S.C. Lahiri, J.

20. I agree.

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