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Court : Kolkata

Decided On : Jun-08-1956

Judge : Sinha, J.

Appellant : Basantha Kumar Pal

Respondent : Chief Electrical Engineer and ors.

Advocate for Def. : Mr. Bose

Judgement :

Sinha, J.

1. 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 fifty-fifth year on 1 July 1950, and he will reach his sixtieth year on 1 July 1955.

2. On 19 May 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 July 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 May 1949, the petitioner wrote to the District Electrical Engineer, Dhanbad, requesting that his provident fund subscription and

leave salary might be adjusted.

3. On 10 June 1949, he replied to the notice dated 19 May 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 July 1949 the District Electrical Engineer, 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 Chief Electrical Engineer, however, was not disposed to accept this recommendation. He replied on 19 August 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 April 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 July 1950, the petitioner had to retire from service. Thereafter, the petitioner made a fresh representation to the Chief Electrical Engineer 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 Chief Electrical Engineer for six months. On 3 July 1952, he wrote a letter to the Chief Electrical Engineer stating that several other employees like himself, who had retired at 55, had been called upon to carry on their services up to the age of 60 years, and prayed for his own reinstatement. This prayer was repeated in December 1952. To this letter the Chief Electrical Engineer gave a curious reply on 30 January 1953. He said that 'in view of the recommendation given by the District Electrical Engineer, Dhanbad,' he did not 'consider to retain' the petitioner in service beyond the age of 55 years. It will be remembered that the District Electrical Engineer actually recommended the extension of the period of service of the petitioner. In February 1953 the petitioner made a further representation, but on 11 March 1953, the Chief Electrical Engineer finally informed the petitioner that no further representation of his would be entertained.

5. This rule was issued on 2 June 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 January 1953 and 11 March 1953. These are really not the orders by which the petitioner was compulsorily retired at the age of 56. 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) of the 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

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 District Electrical Engineer 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 up to the age of 60? Under Rule 2002 of the Railway Establishment Code (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 Fundamental Rule 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 up to the age of 60 years. The purpose of Fundamental Rule 56(2046) is not to confer upon Government servants any right to be retained in service up to a particular age but to prescribe the age beyond which they may not be retained in service' vide G.I.F.D. No. F/24R1/32, dated 9 May 1932, Railway Establishment Code, Vol. II, p. 178.

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 connexion 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 the Rule 2046(2) meant 70 years, such an interpretation 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.

6. 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 up to 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 exercised. 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 continues 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 be 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?

7. This very rule came to be interpreted in a Division Bench judgment of the Allahabad High Court, *R.N. Mathur v. Union of India* A.I.R. 1953 All. 352. It was argued there that this rule conferred a right upon the employee to be retained in service until the age of 60, [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 negative both these contentions and held that the Railway authorities 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 be removed.

8. A similar view was taken in *Krishnan Dayal v. General Manager, Northern Railway* A.I.R. 1954 Pun. 245 1955--I L.L.J. 408. That case also dealt with Rule 2046(2)(a). The learned Judges relied upon the Supreme Court decision *Shyam Lal v. State of Uttar Pradesh* 1954 S.C.A. 476 1954--II L.L.J. 139 and held 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.

9. Mr. Pal, appearing on behalf of the petitioner, placed strong reliance upon the Supreme Court decision *Jai Ram v. Union of India* 1954 S.C.A. 1251. In that case, the plaintiff was employed as a cleric 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 Fundamental Rule 56(b)(i), he was entitled to continue in service up to the age of 60. Speaking about the rule, Mukherjee, 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.

10. 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 Fundamental Rule 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 Shyam Lal case 1954 S.C.A. 476 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.

11. 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. AE3644, SL No. 1377, dated 1 April 1949 (mentioned in the letter of the Chief Electrical Engineer dated 19 August 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..

12. The policy was subsequently altered, as is evident from the copy of a letter written by the Railway Board (annexure I to the petition) which states that the emphasis had been shifted 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 administration 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 60. 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 May 1949, an order made before the Constitution came into being, and cannot therefore be the subject-matter of an application under Article 226. I do not think that the notice dated 19 May 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 July 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 substance in the point. The petitioner was continuing his representations to the authorities to continue him in service. Since he was not very successful in that representation, he had to accept temporary service in order to make out a living. He never accepted the position that he had been validly retired. 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.