

S.S. Garga Vs. the Coal Controller and ors.

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Court : Kolkata

Decided On : Jan-09-1973

Reported in : (1973)ILLJ575Cal

Judge : Anil Kumar Sen, J.

Appellant : S.S. Garga

Respondent : The Coal Controller and ors.

Judgement :

ORDER

Whereas the President is of the opinion that it is in the public interest to do so,

Now, therefore, in exercise of the powers conferred by Clause (j) of Rule 56 of the Fundamental Rules the President hereby give notice to Sri S. S. Garga, holder in the permanent post of Secretary to the Coal Controller, that he having already attained the age of 50 years on 11-11-68 shall retire from service from the date of expiry of three months computed from the date of the service of this notice on him.

S.B. Lal,

Joint Secretary of the

Government of India.

2. In the writ petition to this Court the petitioner primarily made out two grounds for his challenge to the order. In the first place, setting out in great details the invaluable service he had rendered to the different authorities he had served, which was not only appreciated but was commended from time to time, he has disputed the existence of the requisite satisfaction and the existence of any reason whatsoever which can support an order under Fundamental Rule 56(j). According to the petitioner the order is arbitrary, illegal and based on extraneous consideration. Secondly, setting out certain allegations of malice as against respondent No. 4 Sri P. K. Ghose, the Coal Controller, the petitioner has challenged the impugned order as mala fide being procured at the instance of Sri P. K. Ghose. This part of petitioner's challenge has, however, been given up at the time of hearing of the rule. Apart from these two principle challenges the petitioner had raised an additional ground being ground No. 12 of the writ petition to the effect that the respondents could not have exercised jurisdiction under Fundamental Rule 56(j) until the petitioner had attained the age of 55 years. Much importance to this ground has been given by the counsel for the petitioner at the time of hearing.

3. The rule is being contested by the respondents. Two affidavits were initially filed - one by the Joint Secretary to the Government of India on behalf of respondents 2 and 3 and Anr. by Sri P.K. Ghosh on behalf of respondents Nos. 1 and 4.

4. In neither of these affidavits the respondents have disclosed any ground or reason which led to the decision to pass the impugned order directing petitioner's compulsory retirement though there has been a denial of petitioner's claim that the impugned order is arbitrary, illegal or based on any irrelevant consideration. Petitioner filed an affidavit in reply to these two affidavits disclosing therein certain documents to indicate that his appointment as a Secretary to the Coal Mines Labour Welfare Commissioner was an appointment to a post under a statutory body, viz., the Labour Welfare Fund created under the Coal Mines Labour Welfare Fund Act of 1947 which was not an appointment under the Government. To meet these documents the respondents were given another opportunity to file a supplementary affidavit in opposition which has been filed. They have disclosed some documents to counter the documents disclosed by the petitioner in his

affidavit in reply. That apart, in this supplementary affidavit, the respondents have reiterated their broad denial of the allegation to the effect that the impugned order had been passed mechanically or without any grounds. It has further been stated:

In passing the order under Clause 56(j) the procedure for passing such order was duly followed. According to the procedure the matter was placed before the Review Committee along with other members of the service and ultimately the recommendations were placed before the Minister to approve the same. Thereafter the order annexure T was made as the President was of the opinion that the compulsory retirement of Sri Garga was in public interest.

As the petitioner has not pressed the ground of malice I consider it unnecessary to refer to the relevant pleadings of the parties on that issue.

5. Mr. Nani Coomar Chakravorty, appearing on behalf of the petitioner, has pressed two points in support of this writ petition. In the first place, he has contended that power has been exercised under Fundamental Rule 56(j)(i) though the said provision is wholly inapplicable so-far as the petitioner is concerned. Secondly, he has contended that when the petitioner has challenged the order as one which is arbitrary and not based on relevant consideration and when the respondents have not disclosed any material to show that the impugned order was based on consideration of relevant facts or grounds, the order cannot be sustained.

6. Both these points have been contested by Mr. Nirmal Chandra Chakravorty, the learned Counsel for the respondents.

7. To support the first point raised the learned Counsel for the petitioner contends that Fundamental Rule 56(j)(i) could apply to a public servant in Class I and Class II service only when such a public servant had entered Government service before attaining the age of 35 years. According to him this Government service must mean service under the Government of India and that the public servant concerned must have a continued Government service upto the age of 50 years. The said rule on its amendment dated 26-8-1969 stood as follows:

(j) Notwithstanding anything contained in this rule the appropriate authority shall, if it is of the opinion that it is in the public interest to do so have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice.

(i) If he is in Class I or Class II service or posts and had entered Government service before attaining the age of thirty-five years after he has attained the age of fifty years.

(ii) In any other case after he has attained the age of fifty-five years. * * *

8. In the present case petitioner's date of birth is not in dispute and it is November 12, 1918. He, therefore, attained 35 years on November 12, 1953. It is also not in dispute that the petitioner had been put to retirement under Fundamental Rule 56(j)(i). So it would be necessary to consider whether the petitioner had entered the Government service before attaining the age of 35 years. It would be evident from the fact set out hereinbefore that long prior to attaining the age of 35 years the petitioner was appointed a member of the subordinate service of the Government of U.P. According to Mr. Chakravorty such appointment will not count as it was not the Government service contemplated by Fundamental Rule 56(j)(i). Next it is to be seen that at or about the time he attained the age of 35 years he was confirmed Secretary to the Coal Mines Labour Welfare Commissioner. If this appointment be an appointment to a post under the Government of India, the point raised by the learned Counsel for the petitioner must necessarily fail. But on this point there is serious controversy between the parties. According to the learned Counsel for the petitioner such appointment was made under Section 9 of the Coal Mines Labour Welfare Fund Act, 1947. Appointment under the fund was an appointment under a statutory body but it was not an appointment to a Government service as contemplated by Fundamental Rule 56 (j)(i). The learned Counsel for the respondents has, however, very strongly contended that the petitioner should not be allowed to make out such a case when he himself in paragraph 2 of the writ petition had stated that his appointment as secretary to the Coal Mines Labour Welfare Commissioner was an appointment to a Class I junior scale post under the Government of India, Ministry of Labour. The learned

Counsel for the respondents has further drawn my attention to the fact that a prayer made by the petitioner for amendment of the petition had earlier been rejected by this Court. Therefore, he contends that proceeding on this admission of the petitioner the petitioner must be held to be one who had been appointed to a Class I service under the Government of India before he had attained the age of 35 years.

9. It is undoubtedly true that there has been a misconceived claim by the petitioner in paragraph 2 that on being appointed secretary to the Coal Mines Labour Welfare Commissioner he was appointed to a Class I junior scale post under the Government of India. It is obvious that he was proceeding upon a misapprehension of his own legal position and similar claims were also put forward in certain letters and representations made to the respondents. But if in law it be found that such appointment was not an appointment in the service under the Government of India, in my opinion, no admission can change the position. It is not disputed by either of the parties before me that in March, 1949, the petitioner was appointed secretary to the Coal Mines Labour Welfare Commissioner. This fact not being in dispute if it can be established on the provisions of the statute and statutory rules that such post was not a post under the Government of India or in the cadre of the services of the Government of India, then the petitioner must succeed. The Coal Mines Labour Welfare Fund was set up by the Coal Mines Labour Welfare Fund Act, 1947. Section 9(1) provides :

9. Appointment and powers of officers,

(1) The Central Government may appoint a Coal Mines Labour Welfare Commissioner and such number of Inspectors, Welfare Officers and other staff as it thinks fit to supervise and carry out measures financed from the fund.

(2) Any person so appointed shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. * * *

10. Section 5 provides that the cost of administering the fund and the salaries and allowances, if any, of the Commissioner, Inspectors, Welfare Officers and other staff appointed to supervise and carry out measures financed from the fund shall

be defrayed out of the fund. It is nobody's case that the petitioner was appointed in any Government service and then deputed to serve as the secretary to Coal Mines Labour Welfare Commissioner. Therefore, his appointment, in my opinion, must be considered to be an appointment under Section 9 and he was to draw his salary out of the fund. My attention has been drawn to the provisions of Rule 42 of the Coal Mines Labour Welfare Fund Rules, 1949 which provides as hereunder:

42-Employees of the fund not public servants.-Persons paid from the fund shall not be deemed to be Government servants, notwithstanding that the Central Government may direct that service rules, applicable to Government servants generally may apply, with or without modification, to such persons.

11. Thus a person appointed under Section 9 and paid from the fund under Section 5 clearly comes within the provisions of Rule 42 and he shall not be deemed to be a Government servant. Section 9(2) also by necessary implication supports the position that a person appointed under Section 9 would not otherwise be a Government servant. That such persons were not Government servants at the relevant time had been made further clear by the Government notification dated May 20, 1959 which directed that with effect from March 1, 1959 employees of the Coal Mines Labour Welfare Fund would be considered as Government servants and simultaneously Rule 42 of the rules were appropriately amended on April 18, 1959. In view of these provisions I must accept the contention of the learned Counsel for the petitioner that the petitioner on being appointed Secretary to the Coal Mines Labour Welfare Commissioner was not appointed to any post in the services of the Government of India. He was so appointed for the first time on August 3, 1955 when he was appointed as Secretary to the Coal Controller but at that point of time he had crossed over the age of 35 years and as such Fundamental Rule 56(j)(i) can have no application so far as the petitioner is concerned.

12. The learned Counsel for the respondents contended in the alternative that even if petitioner's appointment to the post of Secretary to the Coal Mines Labour Welfare Commissioner was not an appointment in a Government service yet his initial appointment to the subordinate service of the Government of U. P. should be

counted so that being appointed to a post in the Government service before attaining the age of 35 years he would be liable to compulsory retirement on attaining the age of 50 years irrespective of whether the initial appointment in the Government service continued or not. This contention has two answers. I agree with the learned Counsel for the petitioner that in Fundamental Rule 56(j)(i) the term 'Government service' means service under the Government of India and not service under the then Provincial Government. The note added to Rule 56(c) makes this clear by necessary implication when it provides that for the purposes of that clause only service rendered under a Provincial Government is considered to be Government service. If such extended meaning of the term 'Government service' be given only to Clause (c) necessarily it must be held that it was not intended to give the same meaning to the same term in other clauses. That apart, on the scheme of Fundamental Rule 56(j) a minimum guaranteed tenure of 15 years of service or service upto the 55th year where it is not possible to guarantee 15 years of service was intended by the said rule. If that is so, Rule 56(j)(i) would normally contemplate benefit of 15 years continued service before one can be put to compulsory retirement. Otherwise if a person enters the Government service once at the age of 25 years and then gives it up to re-enter when he is 45 years or 48 years, he could be put to retirement on attaining the age of 50 years. Such a position would follow if I accept the contention of the learned Counsel for the respondents but that would derogate from the guaranteed minimum tenure of service. The words in clause 'If he is in Class I or Class II service and had entered Government service before attaining the age of 35 years' clearly conveys an idea of continued service for 15 years. Therefore, for the aforesaid two reasons I am unable to accept the contention of the learned Counsel for the respondents.

13. The learned Counsel for the respondents further suggested that when Rule 42 of the Coal Mines Labour Welfare Fund Rules provides that employees of the fund shall not be deemed to be Government servants the use of the word 'deem' would establish that contrary is the true position. Or, in other words, he suggests that as the employees are really Government servants the provision in Rule 42 by fiction makes them non-Government servants. Accordingly, he contends that the petitioner must be considered really to be a Government servant. I am, however, unable to accept this contention of the learned Counsel for the respondents. Rule

42 on terms is not like usual deeming clauses to statutes which introduce fiction. The word 'deem' has been used in Rule 42 only because the service rules as applicable to Government servants were being made applicable to such employees and notwithstanding such application the employees shall not be deemed to be Government servants. That apart, even if Rule 42 introduces a fiction that fiction has to be given effect to and there is no reason why in applying Rule 56(j) the action is to be ignored. In this view, I am unable to accept this contention of the learned Counsel for the respondents. For reasons aforesaid I accept the contention of the learned Counsel for the petitioner that Fundamental Rule 56(j)(i) could have no application on its own terms to the petitioner as conditions set out therein are not fulfilled. Fundamental Rule 128 relied on by the learned Counsel for the respondents makes no difference. Therefore, the impugned order must be held to be beyond the sanction of Fundamental Rule 56(j)(i).

14. The second point raised by Mr. Nani Coomar Chakravorty, the learned Counsel for the petitioner, is of some importance. In paragraphs 1 to 20 of the writ petition he has set out how in his service career he was promoted from post to post, how he had rendered invaluable service to the different authorities he had served, and how his merits and services were recognised by different authorities. It has further been stated by him that in recognition of his merits and the services rendered by him, he was offered in the public interest as late as on January 21, 1971 a permanent appointment to the post of a joint secretary in the Coal Board. He has further stated how a litigation by another employee led to the termination of his deputation. He has stated that while he was being considered in January, 1971 for permanent absorption in a higher post in public interest, it is not bona fide at all to suggest in April, 1971 that it is necessary in public interest that he should be made to go on compulsory retirement. It is clearly suggested by the petitioner that there existed no circumstance, reason or ground which could justify an opinion that the petitioner must be put to compulsory retirement. He has, therefore, clearly challenged the order as one which is illegal, arbitrary and based on extraneous materials. I have already pointed out that although there is a denial by the respondents of the petitioner's claim that the order is illegal, arbitrary or based on extraneous consideration the respondents have not disclosed any material ground

or reason which could even prima facie indicate that petitioner's retirement was necessary in the public interest. There is also no specific denial to the various statements made by the petitioner in paragraphs 1 to 20 regarding his service career though it had vaguely been suggested in one of the paragraphs of the affidavit in opposition that the petitioner's service career was not without any blemish. It is, however, not respondents' case before this Court that any such blemish constitutes the foundation for the order. On these pleadings I am now to consider how far the learned Counsel for the petitioner is justified in claiming that this Court should accept the petitioner's case in this respect and strike out the order.

15. According to the learned Counsel for the petitioner where, as in the present case, the person aggrieved raises a dispute that the order is arbitrary and is not based on any relevant consideration, it is necessary for the Government to satisfy the Court on appropriate disclosure of materials, grounds or reasons on which the opinion was formed that the order is based on relevant consideration as required by the rule. Otherwise, according to him, the Court must uphold the complaint that the order is arbitrary and is not based on any relevant consideration. This contention raises a fundamental issue as to the scope of challenge of an order made under Fundamental Rule 56(j), Mr. Nirmal Chandra Chakravorty, the learned Counsel for the respondents, contends that if the order recites the requisite opinion the person aggrieved cannot question it nor is it for the Court to probe into the materials to find out whether such opinion was formed on relevant consideration or not. Reliance is strongly placed on the decision of the Supreme Court in the case of *State of U.P. v. Shyamlal* : (1971)11LLJ325SC . In that case before the Supreme Court no issue of the kind now under consideration was raised or considered by the Supreme Court. There an order of compulsory retirement was challenged on the ground that it was a penalty in substance though not in form. In the context of such challenge the Supreme Court only observed that the Court must consider the order on its face to find out whether it attaches any stigma or not and it was further observed that the Court should not probe into the Government files to discover a stigma which is not there on the order itself. In my opinion, the principle so laid down cannot be extended to support a proposition contended for by the learned Counsel for the respondents.

16. Fundamental Rule 56(j) no doubt invests absolute power in the prescribed authority to direct an employee's retirement. But such power should not be misread to mean any arbitrary power in the hands of the prescribed authority. The rule itself lays down a limitation that such power can be exercised when it is necessary in the public interest. Formation of the opinion in this respect is a condition precedent to the exercise of the power. The opinion again is to be formed with reference to an objective test of public interest. The decision itself may be subjective and as such is not open to judicial review. But what is beyond judicial review is the correctness of the decision but it is always open to the Court when a challenge is brought before it to see that the order is based on an appropriate opinion and that opinion again is based on consideration of relevant and not collateral or extraneous materials. It is so because an order not so based or an order based on an opinion founded on irrelevant consideration would be ultra vires the rule itself and the person aggrieved has always the right to challenge an order which is not within the sanction of the rule.

17. The learned Counsel for the respondents has contended that impugned order being appropriately authenticated in the name of the President it raises a presumption under Article 77(2) of the Constitution. It is next contended by him that it being an official act regularity must be presumed in accordance with Section 114 illustration (e) of the Indian Evidence Act. In my opinion, Article 77(2) only raises a presumption that it had been done by the President and such presumption does not extend to the regularity or the legality of the order. Section 114 illustration(e) no doubt provides that the Court may raise a presumption of regularity. But this is not an; irrefutable presumption. According to the learned Counsel for the respondents unless the irregularity is proved, regularity must be presumed. In my opinion, the regularity or legality would depend only on the fact as to whether the requisite opinion was honestly arrived at on consideration of materials, grounds or reasons relevant to the objective test prescribed. What was considered is exclusively within the knowledge of the respondents and in spite of the challenge thrown by the petitioner there is no disclosure before this Court. If this be the position, the petitioner can also claim for a presumption under Section 114 illustration (g) of the Indian Evidence Act that if the materials had been disclosed it would have been proved that they were all irrelevant to the required

test of public interest. Therefore, I am unable to accept the contention of the learned Counsel for the respondents, or to hold that I would be justified in rejecting the challenge thrown. An issue of regularity and legality has been raised and it was for the respondents who are possessed of the materials to disclose them before the Court and establish prima facie that the impugned order was based on consideration of relevant materials, grounds or reasons.

18. In the case of Union of India v. Col. J. N, Sinha : (1970)11LLJ284SC , it was observed by the Supreme Court, 'it is open to an aggrieved: party to contend that the requisite opinion was not formed or the decision is based on collateral grounds or it is an arbitrary decision.' It should be remembered that in that case before the Supreme Court the order recited the necessary opinion and in spite of such recital the Supreme Court after review of its decision dated August 12, 1970 remanded the proceeding to the High Court for rehearing on an issue similar to the one now raised before me. After such remand the Delhi High Court again allowed the writ petition on a finding, 'the position is that the averments and documents mentioned in the writ petition show that the petitioner had an unblemished service record and that the counter-affidavit tiled in opposition to the writ petition does not contain any suggestion as to why the retirement of the petitioner was considered to be in the public interest. In the circumstances, it has to be held that the opinion formed and the decision taken by the concerned authority was wholly arbitrary.' In this decision the Delhi High Court enunciated the principle to be applied in such circumstances in the following terms:

the said observation (observation of the Supreme Court referred to hereinbefore) clearly points out that the formation of the requisite opinion by the appropriate authority is one of the conditions for the exercise of the power conferred by the rule and that the decision to retire a Government servant under the rule should not be arbitrary which means that it should be based on some ground or material which is germane to the question whether it is for the public interest to retire the Government servant. If the decision is based on no such ground or material or is based on a ground or material which is not germane to the issue it would be an arbitrary decision. Since the rule provides for the formation of the requisite opinion by the appropriate authority and not by the Court, the sufficiency of the ground or

material is not justiciable. But, some ground or material germane to the issue must exist, and it is open to a Court to examine whether such ground or material exists or not.

19. Later in the decision the learned Judges further observed, 'as the petitioner has challenged the impugned order as being arbitrary and the matter has to be scrutinised by the Court, it is incumbent upon the concerned authority to indicate the reason or ground on which the retirement of the petitioner was considered to be in the public interest.': Col. J.N. Sinha v. Union of India (1971) Service Law Reports, 470. The same view has been shared by the Bombay High Court in the two cases, J.D. Raje v. State of Maharashtra 74 Bom. L.R. 320, and Duttaram S. Rane v. State of Maharashtra 74 Bom. L. R. 550, and the Madras High Court in the case of P. Shankar Rao v. Government of India 1971(1) M.L.J. 302. I am in respectful agreement with the views so expressed. I myself took the same view in an earlier decision dated 22-9-69 in the case of T.S. Ghosh v. Assistant Director General, Government of India, in C.R. 1339 (W)/68. To hold the contrary is to attach finality to the form and not to the substance. Because in that event once the order is made and expressed in the language of the rule it would be totally unassailable and it would be impossible for any aggrieved person to prove that the order is not legal or is not based on relevant consideration because the consideration would be within the special knowledge of the respondents and withheld from the Court. I think this principle is well supported by the decisions of the Supreme Court in the Case of Barium Chemicals Ltd. v. The Co. Law Board : [1967]1SCR898 , and Rohtas Industries Ltd, v. S.D. Agarwal : [1969]3SCR108 . Although in those cases the statutory provisions were somewhat different, there also the power was given to be exercised on an opinion to be formed with reference to certain objective test and it was held by the Supreme Court that if a challenge is thrown on the 'ground that the power had not been exercised on relevant consideration it is for the authorities to disclose prima facie materials to support the action. It was observed by Hidayatullah, J. (as his Lordship then was), 'since the existence of circumstances is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances existed and give no clue what they are because the circumstances must be such as to lead to

consequence of certain definiteness.' This, In my opinion, is the appropriate answer to the contention of the learned Counsel for the respondents. Mr. Nirmal Chandra Chakravorty relied on the decision of the Supreme Court in the case of Dr. N.V. Puttabhatta v. The State of Mysore : (1972)IILLJ191SC . But here again no issue of the present nature was raised or decided. It was no doubt a case of compulsory retirement but it would appear from the judgment itself that the material on which the order was passed was disclosed and the only point raised in disputing the order was the point of infringement of principles of natural justice, which, however, was negated by the Supreme Court following the earlier decision in Col. J. N. Sinha's case (supra). Mr. Nirmal Chandra Chakravorty also relied strongly on a decision of mine in the case of B. C. Biswas v. Union of India (C. R. 862 (W)/ 70 disposed of on 23-4-71) which was affirmed in appeal in FMA 435 of 1971 (judgment dated -10-11-71). It is true that in that case I attached a presumption of regularity to order on the recital of the requisite opinion. But that I did on the specific finding that on the pleadings there was no case made that the order is arbitrary or is not based on relevant consideration. It was further found that on petitioner's own admission, the order was based on consideration of adverse reports in confidential character roll and petitioner's plea that the order could not be based on consideration of such materials was overruled. Thus nothing was said by me in the said decision which can run counter to the view just expressed or earlier taken by me in the case of T. S. Ghosh v. Assistant Director General (supra). For these reasons I must, therefore, accept the contention of the learned Counsel for the petitioner that the impugned order must be held to be arbitrary and not based on relevant consideration because in spite of the challenge there is no disclosure before the Court.

20. On the conclusions as above both the points raised in support of this rule by Mr. Nani Coomar Chakravarti, the learned Counsel for the petitioner, must succeed.

21. The application accordingly succeeds and the rule is made absolute.

22. Let a writ in the nature of mandamus do issue directing the respondents not to give effect to the impugned order of compulsory retirement dated 29-4-71.

23. In the circumstances of the case I make no order as to costs.

24. On an undertaking given by Mr. S. N. Banerjee that the respondents would not implement the impugned order if it had not already been implemented for a period of fortnight from this date the operation of this order of mine shall remain stayed for a period of fortnight from date.

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