
(2014) 118 CLT 691 : (2014) 2 ILR 297 : (2014) LabIC 3537 : (2014) 2 OLR 381

Orissa High Court

Case No: W.P. (C) No. 11108 of 2013

Epari Vasudeva Rao

APPELLANT

Vs

State of Odisha

RESPONDENT

Date of Decision: May 15, 2014

Acts Referred:

Constitution of India, 1950 " Article 214, 226, 227, 233, 234#Motor Vehicles Act, 1988 " Section 112, 123#Penal Code, 1860 (IPC) " Section 294, 341, 353

Citation: (2014) 118 CLT 691 : (2014) 2 ILR 297 : (2014) LabIC 3537 : (2014) 2 OLR 381

Hon'ble Judges: I. Mahanty, J; B.N. Mahapatra, J

Bench: Division Bench

Final Decision: Allowed

Judgement

B.N. Mahapatra, J.

The petitioner, who was a member of the Orissa Superior Judicial Service has filed the present writ petition challenging

the impugned notification dated 13.03.2013 (Annexure-6) issued by opposite party No. 1-State of Odisha, represented through its

Commissioner-cum-Secretary to Government, Home Department, who in exercise of power under Rule 44 of the Orissa Superior Judicial Service

and Orissa Judicial Service Rules, 2007 (for short, "Rules, 2007") passed order for compulsory retirement of the petitioner from Government

service giving three months' pay and allowances in lieu of three months' notice as prescribed in the aforesaid Rules.

In fact, by means of this writ petition, the petitioner invokes extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution

of India to decide correctness of the order/decision of the Full Court giving him compulsory retirement from service while he was working as

Special Judge (Vigilance), Bhubaneswar on the ground that the order is arbitrary and unreasonable, as on the basis of materials available on record

an opinion could not have been reasonably formed to retire him from service prematurely in public interest.

2. Indeed, it is a very delicate and sensitive task to decide the reasonableness/correctness of the decision taken by the Full Court giving

compulsory retirement to the petitioner from service in which both of us were members. It is true that while deciding the matter in administrative

side our role was completely different and now we shall decide the matter on judicial side in a different capacity. The petitioner reposes highest

faith in this Court with the belief that the Court, which always strikes down anything done contrary to the rule of law or done in a whimsical manner

or arbitrarily, will do justice if anything wrong done to him. There are instances that orders of the Full Court giving compulsory retirement to a

judicial officer on the administrative side have been challenged in judicial side and the Judges who were part of the Full Court have quashed their

own administrative order/decision in exercise of their power of judicial review. That is why people of this country repose highest faith in judiciary

which always maintains its majesty, dignity and independence. This is a unique feature in our Constitution.

3. At this juncture, it would be appropriate to refer to the observation of the Hon"ble Supreme Court in the case of Madan Mohan Choudhary Vs.

The State of Bihar,

2. The recommendation of the High Court on the basis of which the appellant, who held the rank of Addl. District & Sessions Judge, was

compulsorily retired from service, exhibits the tragic fact that the highest judicial body of the State which abhors anything done contrary to the rule

of law or done in a whimsical manner or arbitrarily, can itself act in that manner on the administrative side. Still, the plea that High Court Judges

suffer from ""split personality"" cannot be accepted for the pleasant fact that though on the administrative side they might have had acted as ordinary

bureaucrat, once they don the robes they forget all their previous associations and connections. The transformation is so complete and real that

even though they themselves were part of the decision making process, they quash their own administrative decisions in exercise of their power of

judicial review and thus maintain the majesty and independence of the Indian judiciary in which the people have always reposed tremendous

faith.....

4. No doubt, there is very limited scope of judicial review of an order of premature retirement from service, but when an order of compulsory

retirement is challenged in a Court of law, the Court has to examine whether any ground or material germane to the issue exists or not.

5. Mr. B. Routray, learned Senior Advocate appearing for the petitioner submitted that the object of compulsory retirement is to weed out the

dishonest, corrupt and deadwood. There is no such allegation against the petitioner. The two incidents relying upon which the petitioner was

compulsorily retired are stale incidents; one of such incidents was of 27 years ago, wherein it was alleged that in the year 1985, petitioner illegally

refused bail in a bailable offence. However, the said proceeding against the petitioner was closed in 1987 with a warning to be more cautious in

future. The petitioner did not file any appeal against such warning as warning is not a punishment as contemplated in OCCA Rules. The second

incident is 15 years old, which relates back to the year 1997. The allegation was that the petitioner inflicted punishment more than what was

prescribed under law in respect of an offence u/s 341, IPC. In that case, three months' sentence was awarded in place of one month which was

the maximum punishment! Considering the show cause reply of the petitioner, he was cautioned in 2006. At the age of 55 years, i.e. in the year

2009, the petitioner passed the test of review. Three years thereafter, in 2012 at the age of 58 years, the very selfsame incidents were considered

which weighed the Hon"ble Full Court to retire the petitioner from service. If these two entries are kept out of consideration during the long 33

years of service, there has been no other incident which could put blame on the unblemished, sincere and dedicated service career which the petitioner has rendered.

6. While considering the case of compulsory retirement, all the materials available on record could have been taken into consideration. In the case

of the petitioner, all the entries were taken into consideration and were overthrown while reviewing his case at the age of 55 years. Therefore, the

self-same materials cannot stand on the way while reviewing again at the age of 58 years. Performance of the petitioner had been reviewed, as per

Rule 44 of the Rules 2007 on his attaining the age of 50 years and 55 years and he was found fit to continue in service and public interest did not

require him to be compulsorily retired from service. The service record of the petitioner between the age of 50, 55 and 58 is unblemished and the

CCRs have rated him "good", ""very good"" and ""very good"" in the later years respectively. There was no adverse entry against the petitioner after

review in the year 2009. The petitioner was given "selection grade" promotion in the rank of District Judge in the year 2009 with retrospective

effect from the year 2008. Another promotion was given in the year 2010 in the "super time scale". Although Rule 5 of the Rules, 2007 requires a

District Judge to be in three years service in the selection grade in order to be granted ""super time scale"", in the case of the petitioner, that rule has

been relaxed considering his merit. As per Rules 4 and 5 of the Rules, 2007, promotions were given on seniority-cum-merit basis. When the

petitioner was meritorious in 2009 and 2010, it is not known how he became less meritorious in 2012, more particularly on the face of his CCRs,

wherein he was rated "very good", "very good" and "good". This Court further recommended the petitioner's case for consideration of his

candidature to the post of Member, Central Administrative Tribunal in 2010. In fact, the Central Government considering his case had

recommended his name for appointment as Judicial Member, CAT and posted him as such at Bangalore, in view of the promotions and favourable

entries in CCRs after review at the age of 55 years in 2009.

7. Placing reliance upon the judgments of the Hon"ble Supreme Court in the cases of State of Gujarat Vs. Umedbhai M. Patel, and Baikuntha

Nath Das and another Vs. Chief District Medical Officer, Baripada and another, Mr. Routray submitted that principles with respect to compulsory

retirement have not been followed in the case of the petitioner.

8. Further, placing reliance upon the judgments of the Hon"ble Supreme Court in the cases of Baldev Raj Chadha Vs. Union of India (UOI) and

Others, , Swami Saran Saksena Vs. State of Uttar Pradesh, ; J.D. Srivastava Vs. State of M.P. and Others, Narasingh Patnaik Vs. State of

Orissa, ; Chandramouleshwar Prasad Vs. The Patna High Court and Others, ; Rajasthan State Road Transport Corporation and Others Vs. Babu

Lal Jangir, Mr. Routray submitted that the old adverse entries should not have been utilized against the petitioner.

Further, placing reliance upon the judgment of the Hon"ble Supreme Court in the case of M.P. State Co-op. Dairy Fedn. Ltd. and Another Vs.

Rajnesh Kumar Jamindar and Others, Mr. Routray submitted that as per the General Administration Department"s instruction in Circular No.

30495 dated 24.11.1987 the importance of the entries of later years should have been prevailed over the entries of the previous years.

9. It was also vehemently argued that the Governor is a consulter and the High Court is the consultee. It is essentially a matter of trust and

confidence between the Governor and the High Court. The High Court cannot act arbitrarily in giving its opinion to Governor, or else, it will be a

betrayal of that trust. If the advice is not supportable by any material on record and is arbitrary in a character, it may not have any binding value. In

support of his contention, he relied upon the judgments of the Hon"ble Supreme Court in the cases of Chandramouleshwar Prasad (supra); Madan

Mohan Choudhary Vs. The State of Bihar,

10. Further, placing reliance upon the judgment of the Hon"ble Court in the cases of Union of India (UOI) Vs. Mohan Lal Capoor and Others, ;

A.K. Kraipak and Others Vs. Union of India (UOI) and Others, and U.P.S.R.T.C. Vs. Jagdish Prasad Gupta, Mr. Routray submitted that

administrative action must be supported by reasons.

11. Mr. Routray also submitted that since before taking a decision of compulsory retirement, the decision of this Court in administrative side was

published in the daily local newspaper, the same is a stigma to the petitioner"s career, In support of his contention, he relied upon the judgment of

the Hon"ble Supreme Court in the case of Madan Mohan Prasad Vs. State of Bihar and Others, Concluding his argument, Mr. Routray prayed to

allow the writ petition and quash Annexure-6.

12. Per contra, Mr. M.S. Sahoo, learned Additional Standing Counsel appearing on behalf of the State vehemently argued that the writ petition is

misconceived both in the facts and the law and there is no cause of action for the present writ petition. The action of the Hon"ble Full Court is not

arbitrary but is in accordance with the law, which was taken in public interest basing on the entire service records of the petitioner. The decision

was taken after thorough examination and due deliberation by the Hon"ble Full Court as per applicable rules, established procedure and practice.

Placing reliance upon the judgment of the Hon"ble Supreme Court in the case of Chief Justice of Chief Justice of Andhra Pradesh and Others Vs.

L.V.A. Dixitulu and Others, Mr. Sahoo submitted that under Article 235 the control of the High Court over the subordinate judiciary is very wide

and premature and compulsory retirement is also within the control of the High Court. The views expressed by His Excellency, the Governor of

Odisha were duly considered by the Hon"ble Full Court and the decision was taken accordingly. Petitioner cannot take advantage of

communication between this Court in administrative side and the Governor of Odisha, To explain the scope and meaning of consultation between

the Hon"ble High Court and His Excellency Governor, Mr. Sahoo relied upon the judgments of the Hon"ble Supreme Court in the cases of S.P.

Gupta Vs. President of India and Others, , Supreme Court Advocates-on-Record Association and another Vs. Union of India, State of West

Bengal v. Nripendra Nath Bagchi, AIR 1966 SC 447 and State of Bihar and Another Vs. Bal Mukund Sah and Others, Name of the petitioner

was only recommended for the post of Judicial Member in the Central Administrative Tribunal but he was not finally selected. It is not correct that

during the entire service career of 32 years, the petitioner was rated ""very good"" in the recent two years, ""good"" for 29 years and ""average"" for

part of the year 1984. Petitioner has faced DP No. 1/86 on the allegation of misconduct and misuse of powers, for which he was also divested of

criminal power. The Inquiring Officer had also observed the action of the petitioner to be arbitrary and the same amounts to gross misuse of

power. This Court had disposed of the matter with a warning ""to be more careful in future"" and directed the warning to be entered in his CCR.

Petitioner was also cautioned by this Hon"ble Court in administrative side for awarding more punishment in the criminal case referred to supra.

Therefore, it cannot be said that the petitioner had an unblemished service record.

Mr. Sahoo further submitted that old entries in the C.C.R. are of relevant consideration for the purpose of giving compulsory retirement to a

judicial officer and it is purely subjective satisfaction of the Hon"ble High Court. In support of his contention, he relied upon the judgments of the

Hon"ble Supreme Court in the cases of Rajasthan SRTC v. Babulal Jangir, (2013) 10 SCC 551, Pyare Mohan Lal v. State of Jharkhand, (2010)

10 SCC 693, Rajendra Singh Verma v. Lt. Governor (NCT of Delhi), (2011) 10 SCC 1 and R.C. Chandel v. High Court of M.P., AIR 2012 SC

2962. The act or omission of this Court being not the source of information for publication of news item, no fault can be attributed to opposite

party No. 2 for its impact upon the petitioner. Placing reliance upon the judgment of the Hon"ble Supreme Court in the cases of Rajendra Singh

Verma (supra) and R.C. Chandel (supra), Mr. Sahoo submitted that compulsory retirement is neither punitive nor stigmatic. The petitioner could

have preferred an appeal against the decision of not supplying the document as prescribed by law. It is not at all a fact that the decision of

compulsory retirement was taken without materials and/or good and valid reasons. The decision of the Full Court does not suffer from any infirmity

or illegality as alleged.

13. Mr. Sahoo, further vehemently argued that the decision of this Court was in public interest. For the purpose of Rule 44 of Rules, 2007,

adverse remarks entered in the CCRs even, after promotion are relevant for consideration. Subjective satisfaction of the Hon"ble Court cannot be

questioned. There is no bar of invoking Rule 44 of Rules, 2007 even when only a short period is left for natural superannuation. Review can take

place at any stage. Judicial Officer is completely different from other civil servants. He stands apart. A single blot on his service career makes him

vulnerable. The entire service record of the petitioner makes it abundantly clear that further continuance of the petitioner in service is uncalled for.

In any view of the matter, the recommendation of the Review Committee and decision of the Full Court thereon cannot be faulted and hence is

beyond pale of challenge. Concluding his argument, Mr. Sahoo submitted that the petitioner is not entitled to any relief and hence the petition is

liable to be dismissed.

14. On rival contentions of the parties, the questions that would fall for consideration by this Court are as follows:

(i) Whether on the basis of materials available on the service record of the petitioner an opinion could have been reasonably formed to retire the

petitioner from service prematurely in public interest?

(ii) Whether the Full Court is justified in passing the order compulsorily retiring the petitioner from service in public interest?

(iii) What order?

15. Since the question Nos. (i) and (ii) are interlinked, they are dealt with together.

16. Before coming to merits of the case, let us have an idea about the constitutional provisions and statutory rules relevant for our purpose.

Under Article 214 of the Constitution, there shall be a High Court in each State. Article 233 deals with appointment of district Judges, which

provides as follows:

(i) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in

consultation with the High Court exercising jurisdiction in relation to such State.

Article 234 deals with recruitment of persons other than District Judges to the judicial service, which envisages as follows:

Appointment of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with

rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in

relation to such State.

Article 235 deals with control over subordinate Courts, which provides as under:

The control over district Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons

belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in

this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of

his service or as authorizing the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such

law.

17. Under Article 235, the High Court's control over the subordinate judiciary is very wide which includes posting, promotion and grant of leave,

transfers confirmation and also premature and compulsory retirement.

The Hon^{ble} Supreme Court in the case of Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others, held that the expression

"control", in Article 235 of the Constitution, includes ""Disciplinary Control"". Transfers, promotions and confirmations including transfer of District

Judges or the recall of District Judges posted on ex-cadre post or on deputation or on administrative post etc. is also within the administrative

control of the High Court. Premature and compulsory retirement is also within the "control" of the High Court.

18. Rule 44 of Rules, 2007 reads as follows:

44. Retirement in public interest - (1) Notwithstanding anything contained in these rules the Governor shall, in consultation with the High Court, if

he is of the opinion that it is in the public interest so to do, have absolute right to retire any member of the service who has attained the age of fifty

years, by giving him/her notice of not less than three months in writing or three months pay and allowances in lieu of such notice.

(2) Whether any officer of the service should be retired in public interest under Sub-rule (1) shall be considered at least three times, that is, when

he is about to attain the age of fifty years, fifty five years and fifty eight years.

Provided that nothing in Sub-rule (2) shall be construed in public interest as preventing the Governor to retire a member of the service at any time

after he/she attains the age of fifty years on the recommendation of High Court under Sub-rule (1).

19. Thus, though officers of subordinate judiciary are government servants, their services in fact are placed under the control of the High Court and

His Excellency the Governor only in consultation with the High Court makes appointment or takes any disciplinary action including action for

removal or compulsory retirement.

20. At this juncture, it will also be beneficial to refer to the following two judgments of the Hon^{ble} Supreme Court. In the case of Baikuntha Nath

Das and another Vs. Chief District Medical Officer, Baripada and another, a three Judge Bench of the Hon^{ble} Supreme Court had laid down

principles regarding compulsory retirement in public interest, relevant portion of which is extracted herein below:

34. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily.

The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is

excluded altogether. While the High Court or this Court would not examine the matter as an appellate Court, they may interfere if they are satisfied

that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would

form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in

the matter - Of course attaching more importance to record of and performance during the later years. The record to be so considered would

naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a Government servant is promoted to a

higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not

upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse

remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above"".

(underlined for emphasis)

21. The Hon^{ble} Supreme Court in the case of Registrar, High Court of Madras Vs. R. Rajiah, held that though High Court, in its administrative

jurisdiction, has the power to recommend compulsory retirement of a member of the Judicial Service in accordance with the rules framed in that

regard, it cannot act arbitrarily and there has to be material to come to a decision that the officer has outlived his utility. It was also pointed out in

that case that the High Court while exercising its power of control over the subordinate judiciary is under a constitutional obligation to guide and

protect judicial officers from being harassed or annoyed by trifling complaints relating to judicial orders so that the officers may discharge their

duties honestly independently unconcerned by the ill-conceived or motivated complaints made by unscrupulous lawyers and litigants.

22. Now for our purpose, it is every much essential to know the relevant entries made in the character roll of the petitioner.

Some of the remarks made in CCRs of the petitioner, relevant for purpose, are as follows:

23. From records produced before us by opposite party No. 2, the CCRs of the petitioner pertaining to the years 2011 and 2012 is not available.

However, to have an idea about this, it may be relevant to refer to Annexure-9 (copy of the Note Sheets obtained by the petitioner under the RTI

Act) which contains the observations and findings of His Excellency the Governor of Odisha. The said Note Sheets inter alia reads as follows:

Shri E.V. Rao joined the judicial service as JMSC in 1980 and his service up to date is of 32 years. His confidential reports for these 32 years

include Very Good for the last 2 years, Good for 29 years and Average for part of one year 1984.

Thus, for the last two years i.e., 2011 and 2012, the petitioner has been rated ""very good"". There was no adverse entry regarding his integrity at

any point of time.

24. Needless to say that the objective of compulsory retirement is to weed out the dishonest, corrupt and dead wood. Now, we have to examine

whether the petitioner is a dishonest, corrupt and dead wood.

25. Let us first examine whether the petitioner is a dishonest and corrupt judicial officer. We have already extracted the entries made in the CCR.

During the petitioner's 32 years of service, there is no adverse remark with regard to his honesty and integrity in any year. Rather in the year 1985

the remark about reputation of integrity and impartiality is "undoubted integrity and impartiality" and for the period September, 1999 to June, 2000

the remark is "his general reputation and honesty are good and I certify his integrity". In all other years the remark is either "good" or "nothing heard

about his honesty or integrity". Therefore, undisputedly, the petitioner possess greatest asset of a judicial officer, i.e., honesty and integrity and

unblemished reputation.

26. It goes without saying that if an honest and sincere judicial officer will be given compulsory retirement from Government service, then a bad

message will go to other similarly placed judicial officers and they will be discouraged and lose their interest in judicial work. This will certainly

jeopardize the smooth functioning of the judiciary, the highly respected organ of the democracy.

27. This Court in the case of Kailash Chandra Padhi Vs. State of Orissa and Another, held as under:

7.....Needless to say that for effective administration of justice, honest, impartial and law knowing Judicial Officers are required. However, an

officer having knowledge in law but without integrity is a great danger to the smooth functioning of the Judiciary. Withholding the integrity of a

Government employee is a serious matter. As fire and water don't agree so also the judiciary and dishonesty cannot join their hands together.

28. Therefore, we are of the opinion that the petitioner is a judicial officer, who has unblemished record of maintaining highest level of integrity and

clean reputation which are attributes of a model judicial officer.

29. Next we have to examine whether the petitioner is a dead wood ? The term "dead wood" as understood in Service Jurisprudence is that

people in organization who are not useful any more and who need to be removed for better administration. Thus, for augmenting efficiency in the organization it is necessary to chop off dead wood.

30. The Hon"ble Supreme Court in the case of Bishwanath Prasad Singh Vs. State of Bihar and Others, held as under:

12.....The object of such compulsory retirement is not to punish or penalize the government servant but to weed out the worthless who have lost

their utility for the administration by their insensitive, unintelligent or dubious conduct impeding the flow of administration of promoting stagnation.

The country needs speed, sensitivity, probity, non-irritative public relation and enthusiastic creativity which can be achieved by eliminating the dead

wood, the paper logged and callous.

31. The Hon"ble Supreme Court in the case of T. Ramegowda Vs. R. Krishnamurthy and others, held as under:

Though the order of compulsory retirement is not a punishment and the government servant on being compulsorily retired is entitled to draw all

retiral benefits, including pension, the Government must exercise its power in the public interest to effectuate the efficiency of service. The dead

wood needs to be removed to augment efficiency. Integrity of public service needs to be maintained. The exercise of power of compulsory

retirement must not be a haunt on public servant but act as a check and reasonable measure to ensure efficiency in service, and free from

corruption and incompetence. The officer would go by reputation built around him. In appropriate case, there may not be sufficient evidence to

take punitive act of removal from service. But his conduct and reputation in such that his continuance in service would be a menace in public

service and injurious to public interest.

32. Now, what is to be examined is the overall performance on the basis of entire service record to come to the conclusion as to whether the

petitioner has become a dead wood and it is in public interest to retire him compulsorily. Perusal of CCR extracted above does not show that at

any point of time the petitioner was found inefficient to discharge his judicial duty and has become a dead wood. He is in almost all the time rated

as an efficient judicial officer.

In the year 1981 the remark is that he is industrious; in the year 1982 the remark is ""he is industrious and cope with heavy work""; in 1983 remark

is, ""he is sincere and hard-working"", but for the next six months, i.e., from 2.1.1984 to 11.6.1984 the remark is ""industrious but needs

improvement to deal with heavy work."" From 18.6.1984 to 3.12.1984 the remark was, he is industrious and cope with heavy work; for the year

1985 ""he was industrious and giving better yardstick; for the years 1987 to 1996 the remarks was he is industrious and cope with heavy work. For

the year 1998 to 2001 his quality of work has been rated as ""good/very good"". For the years 2004 and 2005, his quality of work is rated as

good"". For the period 7.11.2005 to 31.12.2007, the C.C.R. entry shows that he is very capable, competent, sincere, dedicated and hard

working officer. He has very good and sound legal knowledge and outstanding performance. His general reputation and honesty is very good, as

an outstanding officer. For the period from 4.12.2009 to 23.3.2010 remark is that ""he is a sincere worker"". For the period 25.3.2010 to

26.06.2010 remark is ""he is sincere, dedicated officer with full of zeal and drive to work and taking responsibility also"".

So far his knowledge of law and judicial capacity, remarks for the period from 1981 to November, 1996 given is either good, fairly good,

satisfactory, better, a capable judicial officer, a competent judicial officer.

Remarks about his promptness in disposal of cases as given in the CCR during the period 1981 to November, 1996 in almost all the years is either

prompt, very prompt, good except the year 1981 that he is improving gradually and in the year 1984 he ""needs improvement"".

His promptness in pronouncing judgment/order/award the remarks during the year 1998 to October, 2005 is either good or prompt except for the

period 5.9.2001 to 31.12.2001 he ""needs improvement

With regard to his punctuality and regularity the remarks given for the period 1998 to June, 2005 is that he is punctual and regular.

With regard to the petitioner's ability, the remarks given for the period 4.12.2009 to 23.03.2010 is that ""he has knowledge of rules and

amendments etc."" and for the period from 25.3.2010 to 26.6.2010 the remarks is ""able and capable officer and very alert, noting and drafting is

good, he is skilled and able to take decision and maintains cordial relationship with his colleagues and subordinate officers and employees"".

33. Mr. Sahoo also relied upon the statistical figure of the petitioner for the period from 2008 to 2012 to justify the action of the Hon"ble Full

Court in giving compulsory retirement to the petitioner. Perusal of the record reveals that while the petitioner was functioning as District Judge,

Balasore Judgeship, he failed to achieve the target in the 1st and 2nd quarter of the year of his joining i.e. in the year 2008, which deficiency he has

made good in succeeding quarters by exceeding the target.

34. During the course of argument, submission was made on behalf of the State that the performance of the petitioner during the period of his

incumbency as Special Judge (Special Court), Bhubaneswar was also taken into consideration while passing the impugned order of compulsory

retirement. To this, the petitioner at the outset, raised objection to the effect that it was not open to the opposite parties to raise any contention or

ground other than those taken in the counter affidavit. According to the petitioner, in the counter affidavit, the State having not taken any such

ground, it is estopped from addressing any argument on that score. However, alternatively, the petitioner in his additional affidavit filed on

25.02.2014 inter alia clarified the situation with regard to his performance as Special Judge (Special Court) at Bhubaneswar. In his affidavit, he

stated that he joined as Special Judge, Special Court at Bhubaneswar on 28.06.2010 and continued as such till 15.03.2013 when he was

prematurely retired. At the time of his joining as Special Judge, Special Court, Bhubaneswar, there were only 38 cases pending. Out of them, 29

cases were not capable of being proceeded with as stay orders were in operation in different writ applications filed by different accused persons.

In three others, case records were called for by this Court; three cases we're not ready for trial and were posted for consideration of charges; one

case was pending for appearance of accused. It is thus only two cases were pending for trial. However, during the year 2012-13, some more

cases were received on transfer. The petitioner has disposed of eleven cases, which cannot in any way said to be less in view of the nature of the

trials required to be undertaken, i.e., large number of witnesses and documents involved in those cases. That is the reason it was submitted why no

yardstick was prescribed for Special Courts after its establishment.

The petitioner further stated that he has gathered information about disposal of cases in the Special Courts during the periods prior to his joining as

such both at Cuttack and at Bhubaneswar and came to know that the disposal of cases of the petitioner was much more than that of the other

officers holding the said position. It is stated that his predecessor during his period from 17.05.2008 to 30.11.2009 could dispose of only one case

whereas his successor who assumed office on 17.06.2013 could dispose of only four cases till 31.12.2013. It is further stated that disposal of

cases in the Special Court, Cuttack, during the period from 17.05.2008 to 18.12.2009 and 18.06.2010 to 31.01.2011 was nil whereas four cases

could be disposed of during the period from 29.06.2011 to 01.04.2012 and four cases during 03.08.2012 to 31.12.2013.

Further, referring to the information received under the RTI Act, it was submitted that during the period from 2008 to 2013 judgments were

delivered in 13 cases in Special Court, Cuttack whereas during the same period judgments were delivered in 21 cases in the Special Court,

Bhubaneswar.

35. The above statements of the petitioner have not been denied by the opposite party-State except taking stands that stay orders in respect of 29

cases were vacated within three months from the date of joining of the petitioner as Special Judge, Special Court, Bhubaneswar and that the

petitioner cannot claim continuation of service beyond the age of 58 on a comparative assessment with the record of other officers.

36. Admittedly, in its counter, the opposite party-State has not taken any specific stand that the performance of the petitioner during his

incumbency as Special Judge (Special Court), Bhubaneswar was not satisfactory/adequate which was taken into consideration while giving

compulsory retirement to the petitioner from service.

37. Needless to say that a party cannot be permitted to argue on an issue which is not pleaded in the petition/counter.

Law is well settled that a party has to plead the case and produce/adduce sufficient evidence to substantiate his stand taken in the petition and, in

case the pleadings are not complete, the Court is under no obligation to entertain the plea. (See Bharat Singh and Others Vs. State of Haryana and

Others,

38. Moreover, the performance of the petitioner during his incumbency as Special Judge (Special Courts), Bhubaneswar alone cannot be taken

into consideration to assess the efficiency of the petitioner for the purpose of giving compulsory retirement from service. The entire service record

of the petitioner is required to be taken into consideration for the purpose of giving compulsory retirement from service.

Further, although entitlement to continuance of service of a judicial officer beyond the age of 58 years cannot be considered on a comparative

assessment with record of other officers, yet from comparison of number of cases in which judgments were delivered in Special Court, Cuttack

and Special Court, Bhubaneswar, no adverse view can be drawn against the petitioner.

39. In view of the entries made in the C.C.R. of the petitioner and on examination of overall performance of the petitioner, it is difficult on our part

to accept the contention of opp. party-State that the petitioner is not an efficient officer and he is a dead wood who needs to be removed for better

administration.

40. Mr. Sahoo also emphatically argued that the petitioner was given compulsory retirement basing on two past incidents; in one case the matter

was disposed of with a warning to him to be more careful in future and in other incident, the petitioner was cautioned by the Court.

No doubt, compulsory retirement is based on subjective satisfaction of the concerned authority, but such satisfaction must be based on valid

materials, in the present case, the materials available are the two remarks as stated above, i.e. (i) warning and (ii) caution.

Therefore, it becomes expedient to know what is the nature and gravity of the adverse remarks on the basis of which order of petitioner's

compulsory retirement was passed in public interest.

41. One adverse remark is given on the basis of D.P. No. 01 of 1986 which was initiated against the petitioner on the charges that on 14.02.1985,

while the petitioner was functioning as S.D.J.M., Nawarangpur, tried through one of his Office Clerks to reserve a three seater against one ticket in

ORT Bus No. 2941 for travelling from Nawarangpur to Berhampur which was refused by the Driver, Sri Narayan Samantaray and the Conductor

of the said Bus. He was further charged on the allegation that in course of the day the said Driver Sri Samantaray was arrested in the execution of

an NBW in U.I. Case No. 26/82 u/s 112, 113(A), 123 of M.V. Act and was produced before the petitioner and the accused Driver applied for

bail. Even though the offences are bailable in nature, the accused was remanded to custody on a flimsy ground. The matter was enquired into by

the then learned District and Sessions Judge, Bolangir. The Inquiring Officer observed that the order of the petitioner directing issuance of non-

bailable warrants against the accused driver was grossly irregular and the order was passed arbitrarily which amounted to gross misuse of power,

without application of judicial mind. It was further observed that refusal of bail in the circumstances of the case was grossly improper and the said

conduct of the petitioner amounted to misuse of power. After consideration of the inquiry report and after hearing the petitioner in person the

Hon"ble Full Court was pleased to dispose of the matter with a warning to be more careful in future with a further direction that the warning to be entered in his CCRs.

42. The other adverse remark is that during inspection of the Court of the Addl. District and Sessions Judge, Rayagada by Hon"ble Sri Justice M.

Papanna on 24.01.2004, His Lordship had inspected Criminal Appeal No. 5 of 1998 arising out of G.R. Case No. 313 of 1994 of the Court of

Civil Judge (Sr. Division)-cum-JMFC, Rayagada presided over by the petitioner. The accused of that case was convicted under Sections 294/341

and 353 of IPC and was sentenced to undergo simple imprisonment for three months on each count. The Hon"ble Judge observed that imposition

of S.I. for three months u/s 341 of IPC by the petitioner was highly irregular and inconsistent with the statutory provisions of Section 341 of IPC

which prescribed maximum punishment for one month. So a report was called for from the petitioner through the District and Sessions Judge,

Koraput, Jeypore. The petitioner submitted a report to the Hon"ble Court through the District and Sessions Judge, Koraput explaining that in

anxiety and hurry to dispose of the criminal case such mistake was committed and he regretted and repented for the same. He took the plea that it

was a bona fide mistake. The Hon"ble Court after careful consideration of his explanation was pleased to caution the petitioner to be careful in

future while imposing sentence u/s 341, IPC. This was communicated to the petitioner through the District and Sessions Judge, Koraput, Jeypore

vide Court's Letter No. 7644 dated 16th November, 2006.

43. The above two incidents give rise to two questions for consideration, which are dealt with hereinafter.

44. The first question is if the petitioner was allowed to continue in service at the age of 50 and 55 years despite the incidents of the above two

adverse remarks whether at the age of 58 years the selfsame adverse reports can form basis for giving compulsory retirement to the petitioner.

Rule 44 of 2007 Rules extracted above envisages that case of a judicial officer shall be considered at least three times i.e. when he is about to

attain the age of 50 years, 55 years and 58 years for the purpose of giving compulsory retirement. In the present case, the petitioner was allowed

to continue in the judicial service at the age of 50 years and 55 years despite existence of the above two adverse remarks against him.

Records reveal that at the age of 55 years, there is a review in the year 2009. At that time it was under consideration as to whether the petitioner

shall be allowed to continue in service. The Full Court after considering the entire period of service which obviously includes two incidents of the

years 1985 and 1998 allowed the petitioner to pass in the test of review. Needless to say that the standard of consideration for review at the age

of 55 and 58 years is same. Therefore, we are unable to reconcile how three years thereafter in the year 2012 i.e. in review at the age of 58 years,

the same two incidents weighed the Hon"ble Full Court to retire the petitioner compulsorily.

45. In view of the above, we are of the considered opinion that at the age of 58 years the selfsame two adverse remarks alone cannot form basis

for giving compulsory retirement to the petitioner.

46. The second question that arises for consideration is whether the gravity/weight of two adverse remarks is very serious and over-weighed the

record and performance of the petitioner during later years so as to justify the compulsory retirement.

47. The Hon"ble Supreme Court in the case of Baikuntha Nath Das (supra) held that the Government or the Review Committee, as the case may

be, shall have to consider the entire record of service in the matter of taking decision of compulsory retirement, ""of course attaching more

importance to the record and performance during the later years.

48. At this juncture, it will be appropriate to refer to the judgment of the Hon"ble Supreme Court in the case of Swami Saran Saksena Vs. State of

Uttar Pradesh, In that case, the Hon"ble Supreme Court quashed the order of compulsory retirement which was found to be in sharp contradiction

with his recent service performance and record. In that case, the Hon"ble Supreme Court observed as follows:

3. Ordinarily, the Court does not interfere with the judgment of the relevant authority on the point whether it is in the public interest to compulsorily

retire a government servant. And we have been even more reluctant to reach the conclusion we have, when the impugned order of compulsory

retirement was made on the recommendation of the High court itself. But on the materials before us we are unable to reconcile the apparent

contradiction that although for the purpose of crossing the second efficiency bar the appellant was considered to have worked with distinct ability

and with integrity beyond question yet within a few months thereafter he was found to unfit as to deserve compulsory retirement. The entries in

between in the records pertaining to the appellant need to be examined and appraised in that context. There is no evidence to show that suddenly

there was such deterioration in the quality of the appellant"s work or integrity that he deserved to be compulsorily retired. For all these reasons, we

are of the opinion that the order of compulsory retirement should be quashed. The appellant will be deemed to have continued in service on the

date of the impugned order.

(Underlined for emphasis)

49. In the case of High Court of Judicature at Patna, through R.G. v. Shyam Deo Singh and others, [Civil Appeal No. 2529 of 2002, disposed of

on March 28, 2004], a three Judge Bench of the Hon"ble Supreme Court, held as under:

9.....The subsequent ACRs of the respondent for the years 1997-1998 and 2000-2001 are sufficiently positive and depicts the respondent as an

efficient judicial officer with a good reputation for honesty and impartiality. The respondent was promoted to the post of District and Sessions

Judge on 5.9.1998. By Notification dated 17.2.2000 he was promoted to the selection grade of the Bihar Superior Judicial Service with effect

from 1.1.1997. Therefore, not only the adverse remark dated 15.12.1995 was not acted upon but subsequent thereto promotion to the highest

level in the district judiciary as well as selection grade in the said cadre was granted to the respondent. Promotion to the highest post of District

Judge and placement in the selection grade is on an assessment of positive merit and ability. The said promotion (s), therefore, would have the

effect of wiping out the adverse remark dated 15.12.1995. Such a view has in fact been expressed in Brij Mohan Singh Chopra v. State of Punjab

(para 10). In the light of the above facts, we do not see how the High Court, on the administrative side, can be found to be justified in refusing to

continue with the service of the respondent beyond the age of 58 years. The order dated 20.2.2001 passed by the High Court setting aside the

said decision, therefore, will have to be affirmed and the present appeal dismissed. We order accordingly.

50. Now, let us see what are the performances of the petitioner during later years. The above discussed two adverse remarks relate to the years

1985 and 1998.

51. On 8.8.2008, the petitioner was substantially appointed to the cadre of OSJS (Sr. Branch). On 19.8.2009 the petitioner was permitted to hold

Selection Grade at the age of 55 years. It is relevant to note here that after 2009 the petitioner earned ""very good"" CCR for two years i.e. during

the year 2009 and 2010 and ""good"" CCR for the part of the 2009. On 3.8.2010 the petitioner was granted Super Time Scale. Here it is pertinent

to mention that although Rule 5 of Rules, 2007 requires the District Judges to put three years service in Selection Grade in order to be granted

Super Time Scale, in the case of the petitioner considering his merit though he did not complete three years such promotion was given relaxing Rule

5 of Rules, 2007. As per Rules 4 and 5 the promotions are based on seniority-cum-merit. If the petitioner was found meritorious in 2009 and

2010, it is difficult on our part to accept the contention of Mr. Sahoo that the petitioner became non-meritorious in 2012 more particularly on the

face of the CCR, wherein he was rated ""very good"" during interregnum period, as per the observation of His Excellency the Governor of Odisha in

Note Sheets (Annexure--9)

52. Moreover, as stated above with regard to the petitioner's ability, the remarks given for the period 4.12.2009 to 31.3.2010 is that ""he has

knowledge is rules and amendments etc."" and for the period 25.3.2010 to 26.6.2010 the remarks is ""able and capable officer and very alert,

nothing and drafting is good, he is skilled and able to take decision and maintains cordial relationship with his colleagues and subordinate officers

and employees.

53. From the above facts, it is amply clear that the performance of the petitioner for a considerable period prior to the date of compulsory

retirement is very much satisfactory. Moreover, the gravity of the adverse remarks given in respect of two incidents of remote past is not very

serious as in one incident the petitioner was given warning only and in other incident he was censured and warning was directed to be entered into

his CCR. Ultimately, it may be case of error of judgment which happened long back and thereafter there is no repetition of such instance.

54. For the purpose of considering the gravity/weight of two adverse reports, it may be relevant to refer to the judgment of this Court in the case of

Purna Chandra Pattnaik v. State of Orissa and two others, (2009) 1 OLR 243, wherein it has been held that direction ""to be cautioned and be

careful in future and shall be kept under observation"" is outside the purview of Rule 13 of the Orissa Civil Services (CCA) Rules, 1962 which

provides for major and minor punishments.

55. Undisputedly, the two remarks are of remote past, one relates back to 27 years and other 15 years back from the date of compulsory

retirement. Despite the same, the petitioner was promoted to the higher post thereafter. Therefore, such adverse remarks lose their stings.

Promotions in the petitioner's case is based on merit and selection. The Full Court has to consider the entire record of service before taking

decision in the matter of compulsory retirement and while doing so more importance should be attached to record all performance of later years.

If we compare the two adverse remarks with the subsequent performances of the petitioner certainly the later performance outweighed the former

adverse remarks.

56. As it appears, the Full Court was selective in taking into consideration the character roll entries of the petitioner, which is not permissible under

law.

57. It may not be out of place to note here that this Court further thought it fit to forward the name of the petitioner for consideration of his

candidature for the post of Member, Central Administrative Tribunal in 2010.

58. For the reasons stated above, the notification dated 13.03.2013 (Annexure-6) issued by opposite party No. 1 giving compulsory retirement to

the petitioner is quashed. The petitioner be treated to be continuing in service uninterruptedly from the date he was given compulsory retirement.

Consequently, he shall be paid salary from the date he was given compulsory retirement till reinstatement in service in accordance with law and

accordingly, on completion of 60 years of age, he shall be entitled to all retiral benefits including pension.

59. In the result, the writ petition is allowed but there shall be no order as to costs.

I. Mahanty, J.

I agree.