
Sushil Kumar Mukherjee and Others Vs The Mother Dairy and Another

F.M.A.T. No. 3457 of 1990

Court: Calcutta High Court

Date of Decision: March 26, 1991

Acts Referred:

Constitution of India, 1950 – Article 12, 14

Citation: 96 CWN 163

Hon'ble Judges: Ajoy Nath Ray, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: J. Mitra, B. Sen, S. Ghosh and P. Khatra, for the Appellant; Hirak Mitra, Subrata Ray, Pratap Chatterjee, Subrata Dutt and Amal Mitra, for the Respondent

Judgement

A.M. Bhattacharjee, J.

The judgment of my learned brother Ray, J., admirably clear, precise and reasoned, having received my full

concurrence should have induced me into silence. But between what things are and that they should be there is very often a gap. This prefatory

note of mine may be such a manifestation. Not so much necessary, but not irrelevant either. Things around us are ephemeral and mortal. And

therefore our aspiration for eternity or immortality, even when cast in the frame of the Vedic prayer for being led from death to immortality

(Mrityormamamritam Gamaya), may sound to be mere wishful thinking. Our desire to stay for ever (Sthiratwamhchanti) was described by

Yudhisthira in Mahabharata as the greatest wonder. Knowing that everything would end, we still fondly hope that we would not end. Whether

young lovers clasped in amorous grasp (Kanthaslesha Pranavini Jane) or old men shattered with disease and decrepitude (Jarava Jarjara Dehe)

all go on praying in union for more and more time. If only we could build up a mental frame to meet the end with equanimity, ours would have been

altogether a different World.

2. But Law cannot afford to be either romantic or philosophic, and cannot but be pragmatic and has had to provide that, however desirable the

contrary might be, a right or privilege or benefit may not be available after certain age. For example. Laws have had to provide that in respect of

service under the Government one cannot come in before and also stay on after certain age.

3. If we were to accept the interesting argument of Mr. Jayanta Mitter advanced for and on behalf of the appellants (and, I may add, heard by us

with great pleasure), we would have been probably required to hold that fixation of any age or retirement from Government Services could be

challenged. But as ruled by a three-Judge Bench of the Supreme Court (consisting of three former Chief Justices of India) in K. Nagaraj and

Others Vs. State of Andhra Pradesh and Another, provision for age of retirement to public services must be held to be reasonable and rational,

unless fixed at an unreasonably low level so as to make it arbitrary and irrational".

4. As a result of Rovappa, Maneka and their numberless successors, it would have to be taken as the settled law that any State actions legislative

or administrative, would be shot down by the Equality Clause of our Paramount Law, if the same is unreasonable. I cannot afford to have the

temerity to question this proposition, so firmly established in our Constitutional as well as Administrative Jurisprudence. But I sometime wonder

that if "reasonableness" has that all-pervasive omnipresence in and emerges with such surging magnitude from the Equality Clause, then a separate

Due Process" Clause was probably not necessary in the American Constitution in view of its Equality Clause.

5. Be that as it may, if the Equality Clause embodies, as ruled by our apex Court, the principle of reasonableness, then it is all the more necessary

that the same must also be applied reasonably and not in a Quixotic fashion. As the Supreme Court has cautioned in Life Insurance Corporation of

India Vs. Escorts Ltd. and Others, Article 14 must not be construed to be carte blanche or "as a charter for judicial review of State actions and to

call upon the State to account for its actions in its manifold activities by stating reasons for such actions". These observations have again been

reiterated by the Supreme Court in Dwarkadar Marfatia (AIR 1989 SC 1542 at 1548) and (at 1650) observations of Prof. Dias in his

Jurisprudence (5th Edition, P. 91) have been referred to with approval to the effect that unless restriction is imposed on the Court by the Court,

the Court would under the guise of preventing the abuse of power, be itself guilty of usurping power which does not belong to it.

6. Multitudinous cases during the last two decades have made it almost platitudinous that State actions can be challenged on the ground of

unreasonableness and shall, if unreasonable, stand overturned. But it is time that we very clearly get rid of the erroneous impression that whenever

a State action affecting person is challenged on the ground of unreasonableness, it shall fall through unless the State affirmatively demonstrates its

reasonableness. This is not the Law and that would be manifest from a proper and careful reading of one or more of the leading decisions of the

Supreme Court on the point. It is trite to say that a statement, whether in the shape of a confession of an accused or judgment of a Court, must be

read as a whole, and there is no surer way of misreading the same than by reading portions thereof out of context. The decision of the Supreme

Court in, for example, *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and*

Kashmir and Another, is a leading decision on the point that the Government or any of its instrumentality, whether it makes an appointment to its

services or awards a contract, must act reasonably on pain of invalidation. But the three-Judge Bench has nevertheless ruled (at 2001) that "one

basic principle which must guide the Court in arriving at its determination on this question is that there is always a presumption that Governmental

action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed

with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the Court by proper and adequate material. The

Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because.....there are a large number

of policy considerations which must necessarily weigh with the Government in taking action and, therefore, the Court would not strike down

Governmental action as invalid on this ground unless it is clearly satisfied that the action is unreasonable or not in public interest".

7. However much one may resent, age has a withering effect on individual except on, to borrow from Shakespeare, such a one like Cleopatra

about whom it was said that "age cannot wither her". As pointed out in *K. Nagaraj* (supra, at 556), efficiency as a general rule decreases with the

advancement of age and even though it may vary from individual to individual, the age of retirement cannot be obviously allowed to vary on that

ground and a common scheme of general application governing age of superannuation has got to be evolved in the light of experience regarding

performance levels of employees, the need to provide employment opportunities to the younger section of the Society and other relevant

considerations. In fact, as pointed out in that decision (at 566), it would be rather contrary to public interest to allow or compel the State or retain

its employees in Service after they have passed the point of peak performance and the concerned Rules of the Government of Andhra Pradesh,

reducing the age of retirement from 58 to 55 were upheld. In that view of the matter, the action of the Respondent Mother Dairy not to award

contracts to run its Milk-Booths to persons who have crossed the age of 60 cannot be branded an unreasonable, unjust or unfair and the fact that

on some earlier occasions, persons, including one or more of the appellants, above the age of 60, were awarded contracts for short terms, is

entirely beside the point.

8. With these observations, I entirely concur in the Judgment of Ray, J., appearing herein below.

Ajoy Nath Ray, J.

9. The first respondent, which is a concerned of the second, i.e. the State of West Bengal has at present a hundred and twenty seven milk vending

booths in Calcutta, of which twenty are run by civilians, and the rest by retired servicemen like the three appellants. The running is under a

commercial contract for booth, for a period of six months. After six months, the first respondent ordinarily renews the contracts, but that as matter

of practice and not under any obligatory clause for renewal.

10. The last agreements of the appellants have expired in late December, 1990 and early January, 1991. They are still operating the three booths

under our interim orders. They were all recruited when they were each above sixty, they have each been allowed several six monthly terms are

now aged about seventy. Their initial engagement and continuance were on a basis of rehabilitation possibilities initiated by the army authorities and

rather non-committally taken up by the first respondent without any written published policy; the appellants were rehabilitated as they were

prematurely retired for certain reasons (e.g., one had lost an arm), and as their pension was, and is, low (e.g., one draws Rs. 379/- a month). Mr.

Jayanta Kumar Mitra, appearing for the appellants rather strikingly called it the princ pension of Rs. 379/-. The first respondent has not renewed

the agreement as it wants to rehabilitate other servicemen and now wants to go by the policy of not giving the booths to anyone aged above sixty.

In this appeal the constitutionality of that policy is in challenge. There is no other issue worth discussing.

11. The writ petition failed practically in limine in the court below. The first respondent has used an affidavit before us and we have heard the

matter for final disposal and have not considered a remand.

12. For the poor appellants, the question of misjoinder is also not a just or proper technicality to raise.

13. In the view, I take, I can assume that on behalf of the appellants it was correctly submitted that (i) the state cannot act arbitrarily even when

conferring social security benefits; (ii) deprivation of retiral benefits to people beyond a particular cut-off age is arbitrary. Some support can be had

for these propositions from the Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and the case of D.S. Nakara and

Others Vs. Union of India (UOI), But I only assume these propositions and do not decide them.

14. The turning point, to my mind, is this, that the administrative actions of an Article 12 authority shall not be judicially examined for

reasonableness when the sphere of operation under challenge is not within the scope of its avowed or normal activity or even activities necessarily

incidental thereto. The first respondent has no link with the army, and with its limited resources cannot rehabilitate any sizeable fraction of all the

prematurely retired army personnel. This is obvious, not questioned in arguments and I do not think I need search for the facts and figures of this

huge disproportion in the pleadings. The rehabilitation of some army personnel was fortuitous in inception, something of a windfall for the lucky few

who chose to get in, and such rehabilitation programme for those lucky few has happened to continue. To call upon the first respondent to consider

the case of all qualifying service men, numbering may be thousands, before making booth allotments, would not serve the cause of reasonableness,

it would be just the opposite. As the avowed or the normal activity or even activities necessarily incidental thereto, of the first respondent, do not

contain the sphere of rehabilitation of erstwhile army personnel, reasonableness is not in issue.

15. In Nakar's Case (supra) the situation was not such as to compel the deprivation of many pensioners, but that some were kept cut by choice.

Not so here. Indeed, choosing a few out of many, all needy, all deserving, will necessarily entail hardship, deprivation and an arbitrary application

of a rule of the thumb. Such are the ways of a poor state. The courts cannot do anything much to increase the state resources.

16. Mr. Hirak Kumar Mitra, appearing for the first respondent has relied, amongst others, on the case of K. Nagaraj and Others Vs. State of

Andhra Pradesh and Another, The varying circumstances affecting the constitutional validity of policies are noticed by Chandrachud, C.J. at para

7. This appeal illustrates how, the same policy, affecting the same type of people, may be quite valid when adopted by one authority, and yet,

might have to be much more closely scrutinized if adopted by another, e.g., an authority with resources to rehabilitate all or many ex-servicement,

and seeking to do the same. The appeal must really fail. However, the appellants, had prior to their last renewal, asked for a last term of six months

and had then agreed that they would thereafter vacate. They did not vacate, but came to court. Wholly unsuccessful in the court below, they have

enjoyed our interim order until now. We are aware that needy people sometimes cannot keep their promises even if they want to. It has been

undertaken on behalf of the appellants before us that the appellants will vacate the booths if they lose the appeal. We think the appellants should

vacate on the expiry of the month of June, 1991, rendering up the booths and machinery in good condition to the first respondent on or before 1-

7-1991. This is out of considerations which are more supportable in sympathy than in law. Until then they shall run the booths on the existing

arrangements under the first respondent. The appellants shall each file within a fortnight hereof an affidavit recording their undertaking to vacate and

render up, as stated above, by 1-7-1991, with copy to the first respondent; in default, appellants to render up the booths and machinery forthwith.

Prayer for stay of operation of this order prayed for and is declined.

Let xerox copies of this order be given to the parties on the usual undertaking to apply for certified copy of the order.