Sri Ajoy Kumar Sur Vs Indian Council Of Agricultural Research

Court: Calcutta High Court

Date of Decision: Jan. 12, 1989

Acts Referred: Constitution of India, 1950 â€" Article 12, 21, 311

Citation: 93 CWN 983

Hon'ble Judges: Ajit Kumar Nayak, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: Saktinath Mukherjee and Bhaskar Ghosh, for the Appellant; Una Sanyal, for the Respondent

Final Decision: Allowed

Judgement

A.M. Bhattacharjee, J.
The plaintiff-appellant having been compulsorily retired by the Respondent from its service has filed the suit, giving

rise to this appeal, for a declaration that the order was illegal and for damages for such unlawful termination.

In view of the service of weighty authorities of the Supreme Court in Rajasthan Electricity Board (AIR 1967 SC 1867), Sukhdev Singh (AIR

1975 SC 1331), R. D. Shetty v. International Airport Authority (AIR 1979 SC 1628), Ajoy Hasia (AIR 1981 SC 487), Indian Statistical Institute

(AIR 1984 SC 363) and other decisions following them, which have expanded the concept of ""State"" as defined in Article 12 of the Constitution

with wide spactacular amplitude, the Respondent, Indian Council of Agricultural Research, was to be regarded as ""State"" for the purpose of that

Article. The authority of the Supreme Court decision in Sabhajit Tewari (AIR 1975 SC 1329) holding the Council of Scientific and Industrial

Research, a Society incorporated under the Societies Registration Act, not to be a ""State"" within the meaning of that Article 12 must now be taken

to be modified, and watered down to such an extent as to be confined to that case only. But now that we have a clear direct authority of the

Supreme Court-in P. K. Ramachandra Iyer v. Union of India (AIR 1984 SC 541) categorically ruling Indian Council of Agricultural Research, the

Respondent here, to be a ""State"" within the inclusive definition of Article 12, the matter ned not detain us any longer. In fact, the learned Counsel

for the Respondent also has not attempted to urge to the contrary, may be because of that direct decision.

But even though the Indian Council of Agricultural Research is a ""State"" within the emaning of Article 12 and, as such, for the purpose of the

Fundamental Rights in Part III and the Directive Principles in Part IV of the Constitution, it is not yet the law that it can be held to be regarded to

be either the ""Union"" or a ""State"" for the purpose of Article 311 and, therefore, the provisions of the Article are not available for the protection of

the holders of posts under the Indian Council of Agricultural Research in case of their removal or dismissal from service. And even otherwise, it

appears still to be the law that an order of compulsory retirement simpliciter in accordance with Rules governing the conditions of service, involving

no imputation of stigma or other prejudicial consequences, is not a dismissal or removal within the meaning of Article 311, even where the person

concerned is the holder of a civil post under the Union or a State. We would accordingly exclude the provisions of Article 311 from our

consideration in deciding this appeal, and would confine ourselves to the provisions of Rule 56(j) of the Fundamental Rules which, as admitted by

both the parties, govern the conditions of services of the employees of the India Council of Agricultural Research, as they apply to other Central

Government employees. Let us quote the relevant portions of the Rule itself, i.e., Rule 56(j) of the Fundamental Rules reading as hereunder :-

Notwithstanding anything contained in the 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 or allowances

in lieu of such notice.

2. Krishna Iyer, J., speaking for a two-Judge Bench of the Supreme Court in Baldev Raj v. Union of India (AIR 1981 SC 70 at 71) and referring

to these very provisions, declared that ""absolute power is anathema under our Constitutional order"". But even that apart, the right under the

provisions extracted above can not, even though so worded, be absolute in the sense of being unreasonable or arbitrary, as the terms of the

provisions make it clear that it can be exercised, not at will, whim or pleasure of the concerned authority, but only when the authority ""is of the

opinion that it is in the public interest"" to retire the Government servant. This formation of the requisite opinion, which has been made the condition

precedent for the exercise of the power, would not have been so made, if the power was intended to the that absolute in the sense of being

unfettered or unconditional. It is true that in a much later two-Judge Bench decision of the Supreme Court in Brij Mohan v. State of Punjab (AIR

1987 SC 948), there are some observations to the effect that such a Rule ""invests absolute right"" and ""does not lay down any criteria, guidelines

for the exercise of power"" and these obervations, if read divorced from the context, might give rise to an impression that the said decision regarded

such powers to be unguided and unconditional. But that the decision has not intended to declare the law to that effect would be obvious from the

observations made immediately thereafter to the effect that ""public-interest is specified in the Rule, which means power has to be exercised in the

public interest only"".

3. An impression was gaining ground at one stage that compulsory retirement, without any accompanying loss of accrued rights, benefits or

privileges, was neither dismissal nor removal nor, for the matter of that, any punishment and, therefore, once the appropriate authority retires a

servant professing to do so in the public interest, its decision was not to be subjected to scrutiny by the Courts and could not be challenged even

on the ground of the servant concerned not having been afforded any reasonable opportunity of being heard against the proposed retirement. We

venture to think that unless the concerned Rule so provided, either expressly or by inevitable implication, the principle of natural justice, enshrined

in the maxim ""Audi Alteram Partem"", would require that before any step is taken affecting in any way, the life, liberty or property of a person, he

must be given a reasonable opportunity of making a representation against the taking of such step and that such a step must not be taken behind

His back. This principle was reitered by Vivian Bose, J., speaking for a three-Judge Bench of the Supreme Court in Sangram Singh v. Election

Tribunal (AIR 1955 SC 425 at 429), though in a different context. We are inclined to think that the recent five-Judge Bench decision of the

Supreme Court in Olga Tellis (AIR 1986 SC 180) holding that the Right to Life guaranteed under Article 21 of the Constitution includes the Right

to Livelihood also, and the Maneka Gandhi (AIR 1978 SC 597) and the series of post-Maneka decisions holding that no one can be deprived of

his Rights or Liberties under Article 21 save under a procedure which must be reasonable, right, just and fair would go a long way to countenance

our view that a srvant may not be compulsorily retired by a decision reached without his knowledge on the basis of some opinion formed, all

behind his back.

4. It is settled law since the celebrated decision of the Supreme Court in Parshotam Lal Dhingra (1958 SC 36) that a permanent servant has a right

to the post he holds. It is true that such a right is defeasible in accordance with the Rules governing the service and" one such Rule is Fundamental

Rule 56 providing that, though the age of retirement is otherwise higher, a servant may not be allowed to continue till that age and may be retired

earlier, provided he has attained a certain age or has put in service for certain number of years and provided his retirement is necessary in the

public interest"". We do not, as we can not under the law, as it now stands, question the potency or propriety of the Rule. But all that we are

endeavouring to suggest is that since the right of the servant to hold his post, which is his livelihood, until the ordinary age of retirement would be

denied by such an earlier compulsory retirement under that Rule, the procedure, in accordance with the theme expanded in Maneka Gandhi

(supra) and the other post-Maneka decisions and in Olga Tellis (supra), must be reasonable, just, right and fair and we are afraid that any

deprivation or short-circuiting of that right by any order on the basis of any opinion formed behind his back can not satisfy that Constitutional

requirement. The proposition that an order of compulsory retirement affects livelihood should require no citation of authority, but since we usually

like to walk on the crutches of precedents, reference may be made to the decision of the supreme Court in Baldev Raj v State of Punjab (1984

Supreme Court Case - Supplement - 221 at 225), where it has been held that ""the order of compulsory retirement affects the livelihood of the

person in whose respect it is made.

5. It appears that in a number of earlier decisions of the Supreme Court, e.g., in J. N. Sinha (AIR 1971 SC 40 at 42), in Tara Singh (AIR 1975

SC 1487), there are observations to the effect that since the public servant''s right to hold the post is a right to hold the same according to the

governing Rules and defeasible according to those Rules, he can not claim any opportunity of representation or of being heard if the relevant Rule

governing the matter does not provide for it. There are also observations, as in Tara Singh (supra), that the opinion of the authority as to the

requirement of the servant''s compulsory retirement in the public interest can not be challenged and that what can be challenged is that the requisite

opinion had not in fact been formed. We venture to think that all these cases would require serious reconsideration in view of Menaka Gandhi

(supra), Olga Tellis (supra) and other post-Maneka decisions.

6. But we need not, in this case, pursue this question further, since we are satisfied that the impugned order of compulsory retirement shall fail for

other weighty reasons. The plaintiff-appellant has been compulsory retired in 1976 and the ground urged by the respondent in support of such

order is that he absented himself for a large number of days on medical ground in 1976 and in the three preceding years, which would show that he

was unfit to carry on his duties and thus deserved retirement in the public interest. It has, however, not been disputed that in that very year 1976, in

which he has been compulsorily retired, the plaintiff-appellant was allowed to cross the Efficiency Bar and was awarded higher salary. All that we

know, and it has not been disputed by the Respondent also, that an officer can be allowed to cross the Efficiency Bar only when he is found to be

efficient and we have completely failed to understand as to how an officer, found efficient enough to cross the Efficiency Bar in 1976, could

immediately thereafter be treated to be such a one whose immediate retirement became necessary in the public interest on the ground of

inefficiency. The alleged long absence on leave for medical reasons in 1976 and the year preceding was very much within the knowledge of the

Respondent when it allowed the appellant to cross the Efficiency Bar in 1976 and nothing whatsoever has been alleged to have occured or to have

taken place since then which could in any view reasonably justify formation of any opinion on the part of the Respondent to sustain the compulsory

retirement of the appellant in that very year.

7. It was ruled by Krishna Iyer, J., speaking for himself and Pathak, J., in Baldev Raj v. Union of India (supra, AIR 1981 SC 70 at 72) that when

an order of compulsory retirement is challenged and its validity depends on its being supported by public interest, the State must disclose the

materials so that the Court may be satisfied that the order is not bad for want of any material whatever which to a reasonable man reasonably

instructed in the law, is sufficient to sustain the ground of ""public interest"" justifying forced retirement of the public servant. It is true that it has also

been ruled that ""Judges can not substitute their judgment for that of the Administrator"", but it has also nevertheless been ruled that ""Judges are not

absolved of the minimal review well-settled in the Administrative Law and founded on Constitutional obligations"" to see, at the least, as to whether

on ""an examination of the materials a rational mind may conceivably be satisfied that the compulsory retirement of the officer concerned is

necessary in the public interest.

8. In Swami Saran v. State of Uttar Pradesh (AIR 1980 SC 269 at 271), the same Bench, this time speaking through Pathak, J., dealt with a

similar question, as is before us, where an officer having been allowed to cross the Efficiency Bar only a few months back, was then compulsory

retired and it was observed that it was not at all possible to reconcile the apparent contradiction that although for the purpose of crossing the

Efficiency Bar, the officer was considered to be efficient and worthy, yet within few months thereafter he was found to deserve compulsory

retirement, particularly when, as is the case before us also, there is nothing to show "or even to suggest that suddenly thereafter there was such

deterioration in in his quality as to warrant such a retirement. The earlier two-Judge Bench decision in State of Punjab v. Dewan Chuni Lal (AIR

1970 SC 2086 at 2089) was also to the same effect where it was ruled that the officer having been allowed to cross the Efficiency Bar in a

particular year, no lapses or nothing occuring before that year could have been considered at all against him to justify any order of his compulsory

retirement. The ratio decidendi in a later two-Judge Bench decision of the Supreme Court in D. Ramaswami v. State of Tamil Nadu (AIR 1982

SC 793) is also to the same effect where the earlier decisions in Dewan Chuni Lal (supra) and in Swami Saran (supra), were, among others,

referred to and relied on.

9. As already stated, no evidence has been adduced to show as to how and under what circumstances the plaintiff-appellant was allowed to cross

the Efficiency Bar in 1976 even though, as now alleged, his services in that year and the years preceding were such as to require premature

termination of his service. The Respondent has not even cared to examine a single witness who could know the appellant and the nature and the

quality of the service rendered by him and the sole witness examined by the Respondent, D.W.I, was admittedly appointed in the station only in

1978 and admittedly had no personal knwowledge about any of these matters. The officers who could know all about these were available

according to this witness, but none has been examined for reasons not made known to us. The averment in paragraph 17 of the written statement

that the plaintiff-appellant was allowed to cross the efficiency Bar as a result of clerical mistake or the over-sight of the Director, is too bald a

statement to merit consideration, particularly when no evidence has been adduced, oral or documentary, as to why and how such mistake, error or

inadvertence could or did occur or to show as to what steps were taken to rectify such mistake.

10. Under the law as stated hereinbefore, we would, therefore, have no hesitation to hold that the conduct and the nature and quality of the service

upto 1976, when the plaintiff-appellant was allowed to cross the Efficiency Bar, were not to be taken into consideration by the Respondent in

forming the requisite opinion as to whether the plaintiff-appellant was required to be compulsorily retired in the public interest. And once we hold

so, we also would have to hold that the Respondent has placed no material before the Court from which it could be held (borrowing from Baldev

Raj - supra- AIR 1981 SC 70 at 72) that any rational mind could conceivably be satisfied that the compulsory retirement of the appellant was

necessary in the public interest or that the quality of his service subsequent to the crossing of the Efficiency Bar suffered such deterioration sufficient

to persuade any reasonable mind to hold that it was so necessary.

11. This is sufficient to dispose of the appeal and to allow the same and we. accordingly may not go into the question as to whether the plaintiff-

appellant was at all given reasonable facilities to make representation against his proposed retirement. It is not disputed that by the Memo dated

28/3/1977, Exht. 2(c), the plaintiff-appellant was asked to show cause by 12/4/1977 against the proposed order of compulsory retirement. The

plaintiff-appellant''s case is that because of some indisposition he could not show cause by that date and that on 16/4/1977 he attempted to hand

over his show cause to one Mr. B. L. Chowdhury, Superintendent of the Director''s office, who refused to accept the same on granting receipt.

The appellant accordingly sent the same by registered post on that very date and the postal documents exhibited in the trial court show that the

same was duly received in the office of the Respondent on 19/4/77. The Memo conveying the impugned order of compulsory retirement, Exht. 3,

also bears the date 19/4/77, though the order sought to be conveyed thereby has been shown as signed on 16/4/77. We have our doubts as to

whether the Respondent should'' have given effect to the impugned order on 19/4/77 if the appellant''s representation reached it on that date. There

is no witness and no evidence to rebut the appellant''s case in the plaint and also at the trial that the appellant''s representation was handed over on

16/4/77 and was refused as alleged or to show that the same reached the Respondent''s office on 19/4/77 by registered post only after the

impugned order was already despatched. The Memo, Exht. 3, itself goes to show that ''''no satisfactory reply has been received'''' and not that ''''no

reply was at all received''''. In paragraph 27 of the written statement, however, the respondent averred that the plaintiff did not give any reply to the

show cause notice. Again in paragraph 22 of the written statement the Respondent has averred that ''''plaintiff''s explanation for submitting his reply

beyond time was not found convicing'''' by the administration and not that no reply was received at ail. It is trite to say that justice is not to be done

by the hands of the clock and even in Courts, an exparte order is very often recalled if appearance is made by the party affected before the Court

rises for the day. It may be that the principle has, on occasions, been over-stated, but nevertheless the principle that should guide Courts and all

authorities empowered to pass orders prejudicially affecting a person''s rights is that justice must not only be done but must also be shown to have

been done. If it was necessary for us to decide the question, we might have held that the appellant was denied due consideration of his

representation; but we need not do so, since, as already pointed out hereinbefore, we have decided to hold the impugned order to be illegal on

another ground.

12. We would like to place on record that our attention was drawn to a single-Judge decision of this Court delivered by Samir Kumar

Mookherjee, J. in S. P. Chattakhandi v. State Bank of India (91, Calcutta Weekly Notes 532) and that even though the questions in issue in that

case were somewhat different, we have derived considerable assistance from and have concurred with respect with the observations made by our

learned brother in that thoughtful and well-written judgment.

13. We accordingly hold that the impugned order of compulsory retirement of the plaintiff-appellant was illegal and that his service was wrongfully

terminated. It has not been disputed that if the order is illegal, the plaintiff appellant''s claim for damages for such unlawful termination, as claimed in

the plaint, is in any way exessive, as in that case the plaintiff-appellant would have to be treated as if in service till the age of retirement at 58 years

and would have been entitled to all the emoluments and other consequential benefits on that basis. And that is what the plaintiff -appellant has

claimed as damages in this suit and, as already stated, the larned Counsel for the Respondent has not disputed at any stage that if the termination

was unlawful, the amount claimed as damages could not be claimed by the plaintiff-appellant. Taking into consideration the total emolument which

the plaintiff-appellant was receiving at the time of his retirement, we have also found the amount claimed to be quite reasonable. We accordingly

allow this appeal, set aside the judgment and decree passed by the trial court and decree the suit for Rs. 50,000/-as claimed together with interest

at the rate of 6% per cent per annum on such amount from this date to the date of payment and together with costs in this Court and the Court

below.

Ajit Kumar Nayak, J.

I agree.