SUPREME COURT OF INDIA

State of Assam

Vs.

Padma Ram Borah

C.A.No.301 of 1962

(S. K. Das, J. L. Kapur, A. K. Sarkar, M. Hidayatullah and Raghubar Dayal, JJ.)

23.11.1962

JUDGEMENT

S.K. DAS, J.:

1. This is an appeal by special leave of this court. On August 25, 1929 Padma Ram Borah, respondent before us, was appointed lower division assistant in the office of the Registrar, Joint Stock Companies, Assam. The office was situated at Shillong and the respondent was appointed first as a probationer. After the expiry of the probationary period, he was confirmed in service. Later he was promoted to the post of an upper division assistant and ultimately on May 1, 1953 he was appointed superintendent in the office of the Excise Commissioner, Shillong. He was born on January 1, 1906 and was due to superannuate on attaining the age of 55 from January 1, 1961. It appears that the respondent applied for leave preparatory to retirement for four months from September 1, 1960. He did not however actually go on leave till December 22, 1960 on which date an order of suspension was passed against him as per notification No. 4/60/42 which was in the following terms:

"Shri P. R. Borah, Superintendent of the office of the Commissioner of Excise, Assam is placed under suspension with effect from the date of this order till departmental proceedings to be drawn up against him, are finalised."

A copy of the notification was sent to the respondent with a memo which stated that as the respondent was due to retire with effect from January 1, 1961 his services would have to be extended beyond that date till the completion of the departmental proceedings and necessary orders in this respect would be issued in due course. The case of the State of Assam, appellant before us, is that on December 22, 1960 the respondent left the office without obtaining any orders. On January 6, 1961, a second notification. No. 229/59/16 was issued by the appellant. This notification said:

"The term of the services of Shri P. R. Borah, Superintendent (under suspension) of the Office of the Commissioner of Excise, Assam is extended for a period of 3 (three) months with effect from the 1st January 1961 or till the disposal of the departmental proceedings, whichever is earlier."

A copy of this notification was also sent to the respondent. Apparently, the departmental proceeding against the respondent was not disposed of within the period of three months mentioned in the notification, and that period came to end on March 31, 1961. On May 9, 1961 a third notification bearing No. 229/59/ 30 was issued and this notificationsaid:

"The term of the services of Shri P. B. Borah, superintendent (under suspension) of the Office of the Commissioner of Excise, Assam, Shillong is extended for a further period of 3 (three) months with effect from the 1st April, 1961 or till the disposal of the departmental proceedings, whichever is earlier."

On May 23, 1961 the respondent moved the High Court of Assam by means of a petition under Arts. 226 and 227 of the Constitution. In this petition the respondent impugned the two orders passed by the appellant on January 6, 1961 and May 9, 1961 as being orders which were without jurisdiction. The claim off the respondent was that he ceased to be an employee of the appellant with effect from January, 1961 and was not amenable to any departmental proceedings thereafter. The respondent further pleaded that the appellant had no authority to extend the period of his service retrospectively after his retirement had already taken effect. Fundamental Rule 56 made by the Governor of Assam in exercise of the powers conferred on him under sub-s. (2) of S. 241 of the Government of India Act, 1935 lays down that the date of compulsory retirement of a government servant is the date on which he attains the age of 55 years. The rule, however, states that a government servant may be retained in service after this age with the sanction of the State Government on public grounds which must be recorded in writing. The case of the respondent was that there was no public ground for retaining him in service after the age of 55, On the aforesaid pleas, the respondent prayed for an order from the High Court quashing the impugned orders of January 6, 1961 and May 9, 1961.

2. The High Court considered Fundamental Rule 56 as applicable to services and posts under the rule-making control of the Secretary of State, though what was applicable to the respondent was Fundamental Rule 56 as was made by the Governor of Assam. Be that as it may, the High Court came to the conclusion that on the facts of the case before it the appellant had no jurisdiction to extend the period of service of the respondent when no proceedings were pending against him on the date of retirement and even on the dates when the impugned notifications were issued Basing itself on certain observations made by Mr. Justice P. B. Mukharji in a decision of the Calcutta High Court reported in Nripendra Nath v. Chief Secretary, Govt. of West Bengal, AIR 1961 Cal 1 (SB) at pp. 9 and 10 the High Court further held that:

"on the mere possibility of the continuance of the disciplinary proceedings the extension of service of the respondent could not be regarded as on public grounds within the meaning of rule 56."

The High Court also said that no previous sanction was taken from the State Government and no proposals were put up before the Government asking for its sanction for the retention in service of the respondent. The High Court accordingly allowed the writ petition and directed the appellant - Government not to give effect to the order dated May 9, 1961.

3. The appellant moved this court for special leave and having obtained such leave has preferred this appeal from the decision of the High Court dated July 13, 1961 by which it allowed the writ petition.

4. We must first read Fundamental Rule 56 made by the Governor of Assam under S. 241 (2) (b) of the Government of India Act, 1935 as it stood at the relevant time, because admittedly the case of the respondent is governed by that rule:-

"The date of compulsory retirement of Government servant is the date on which he attains the age of 55 years. He may be retained in service after this age with the sanction of the Provincial

Government on public grounds which must be recorded in writing, and proposals for the retention of a Government servant in service after this age should not be made except in very special circumstances."

5. Learned counsel for the appellant has strongly contended before us that the High Court was wrong in holding that the retirement of the respondent automatically took effect on his attaining the age of 55. He has argued that on a proper construction of Fundamental Rule 56, the rule did not confer upon the government servant concerned any right to retire at the age of 55, as it was open to the State Government to retain him in service even after he had attained the age of 55. Secondly, he has contended that the High Court was equally wrong in holding that the completion of departmental proceedings against the respondent could not be treated as a "public ground" for retaining him in service within the meaning of the rule. He has argued that the observations made by Mr. Justice P. B. Mukharji in AIR 1961 Cal 1 (SB) do not correctly interpret the rule and proceed on A wrong assumption that to be "in service" can only mean that the Government servant concerned must be doing or performing the duties of his office. It is pointed out that the order of suspension passed on December 22, 1960 itself connotes that the respondent was to continue in service till departmental proceedings to be drawn up against him were finalised. The order of suspension, it is argued, means continuance in service though the incumbent who is under suspension may not perform any of the duties of his office.

6. These contentions of learned counsel for the appellant appear to us to be not without some force. But in the view which we have taken of this case, it is unnecessary to pronounce finally upon these contentions, because the appellant is faced with another difficulty to which we shall presently refer even on the contentions urged on its behalf.

7. Let us proceed on the footing, as urged by learned counsel for the appellant, that the order dated December 22, 1960 itself amounts to an order retaining the respondent in service till departmental proceedings to be drawn up against him are finalised. We shall also assume that the finalisation of the departmental proceedings mentioned in the order is a public ground on which the respondent could be retained in service. As the order was passed by the State Government itself, no question of taking its sanction arises and we think that the High Court was wrong in holding that the absence of sanction from the state Government made the order bad. Therefore, the effect of the order dated December 22, 1960 was two-fold: firstly, it placed the respondent under suspension and secondly, it retained the respondent in service all departmental proceedings against him were finalised. We treat the order as an order under Fundamental Rule 56 which order having been made before January 1, 1961, the date of respondent's retirement, cannot be bad on the ground of retrospectivity. Then, we come to the order dated January 6, 1961. That order obviously modified the earlier order of December 22, 1960 inasmuch as it fixed a period of three months from January 1, 1961 or till the disposal of the departmental proceedings, whichever is earlier, for retaining the respondent in service. The period of three months fixed by this order expired on March 31, 1961. Thus the effect of the order of January 6, 1961 was that the service of the respondent would come to an end on March 31, 1961 unless the departmental proceedings were disposed of at a date earlier than March 31, 1961. It is admitted that the departmental proceedings were not concluded before March 31, 1961. The clear effect of the order of January 6, 1961 therefore was that the service of the respondent came to an end on March 31, 1961. This was so not because retirement was automatic but because the State Government had itself fixed the date up to which the service of the respondent would be retained. The State Government made no further order before March 31, 1961, but about a month on so after passed an order on May 9, 1961 extending the service of the respondent for a further period of three months with effect from April 1, 1961. We do not think that the State

Government had any jurisdiction to pass such an order on May 9, 1961. According to the earlier order of the State Government itself, the service of the respondent had come to an end on March 31, 1961. The State Government could not by unilateral action create a fresh contract of service to take effect from April 1, 1961. If the State Government wished to continue the service of the respondent for a further period, the State Government should have issued a notification before March 31, 1961. In R. T. Rangachari v. Secretary of State 64 Ind App 40: (AIR 1937 PC 27) their Lord- ships of the Privy Council were dealing with a case in which a Sub-Inspector of Police was charged with certain irregular and improper conduct in the execution of his duties. After the Sub-Inspector had retired on invalid pension and his pension had been paid for three months, the matter was re-opened and an order was made removing the Sub-Inspector from service as from the date on which he was invalided. Lord Roche speaking for the Board said:

"It seems to require no demonstration that an order purporting to remove the appellant from the service at a time when, as their Lordships hold, he had for some months duly and properly ceased to be in the service, was a mere nullity and cannot be sustained."

The position is the same here. The respondent had ceased to be in service on March 31, 1961 by the very order of the State Government. Art order of retention in service passed more than a month thereafter, was a mere nullity and cannot be sustained.

8. Therefore, the order of the High Court allowing the writ petition was justified, though not for the reasons given by it. We would accordingly dismiss this appeal, but in the circumstances there will be no order for costs.

Appeal dismissed.

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