SUPREME COURT OF INDIA

State of Mysore

Vs.

H.K.Keshava Murthy

C.A.Nos.236 to 240 of 1964

(P. B. Gajendragadkar, C.J.I., K. N. Wanchoo, M. Hidayatullah, J. C. Shah and S. M. Sikri, JJ.)

24.08.1965

JUDGEMENT

WANCHOO, J.:

1. These appeals by special leave raise common questions and will be dealt with together. We shall take the facts of one appeal (No. C. A. 237) in order to understand the questions in dispute and it will be unnecessary to refer to the facts in other cases for they are admittedly similar

2. Nanjappa, respondent in C. A. No. 237of 1964, was a trained teacher and was headmaster of a Government Boys' Middle School. He completed the age of 55 years on February 3, 1958 and was ordered to be retired from service from that date on the ground of supreannuation. Thereupon he filed a writ petition in the High Court of Mysore and the main contention raised on his behalf was that R. 294 (a) of the Mysore Service Regulations (hereinafter referred to as the Regulations), which prescribed the age of retirement of Government servants, had been amended with respect to trained teachers from April 29, 1955, and in the case of such teachers the normal age of superannuation was fixed at 58 years instead of 55 years. Consequently, the respondent could not be retired on

completion of the age of 55 years and the order by which he was retired at that age as if he was superannuated was illegal on the ground that it was against the rule applicable to trained teachers.

3. This contention was traversed on behalf of the State, which is the appellant before us. It was admitted that there was some change in the rule relating to superannuation. Even so it was contended that the age of superannuation in the case of trained teachers remained the same, namely 55 years and it was open to the State to retire trained teachers at the age of 55 years, though they could be retained upto the age of 58 years if they were found fit and efficient. Besides reliance was also placed on behalf of the State on a notification of the Governor issued on March 25, 1959 and it was urged that that notification issued under Art. 309 of the Constitution validated the action taken in retiring Nanjappa, and other like him, on completion of the age of 55 years. It was not disputed on behalf of the State that the sole reason for retiring Nanjappa and others like him was that they had attained the age of 55 years and that there was nothing against their fitness or efficiency to justify the order of retirement.

4. Two principal points were thus raised before the High Court. The first was with respect to the interpretation of R. 294 (a) with particular reference to the amendment which was made on April 29, 1955. The second was with respect to the effect of the Governor's notification, dated March 25, 1959. On the first point, the High Court held that the change made in R. 294 on April 29, 1955 clearly provided that in the case of trained teachers the normal age of retirement would be 58 years, though the Government would have the right to retire them earlier if they were neither fit nor efficient. On the second point, the High Court held that the notification of March 25, 1959 could not be a rule within the meaning of Art. 309 of the Constitution and could not have the effect of validating what had been done earlier with respect to trained teachers in contravention of the rule as to retirement. The appellant-State then applied for leave to appeal to this Court which was refused. It then came to this Court and was granted special leave; and that is how the matter has come up before us.

5. We are of opinion that the High Court is right on both the points urged before it. Rule 294 (a) of the Regulations which was in force before the change was made on April 29, 1955, was in these terms :-

"294 (a), A Government servant in superior or inferior service, who was required to retire, unless Government considers him efficient, and permits him to remain in the service. But as the premature retirement of an efficient Government servant imposes a needless charge on the State, this rule should be worked with discretion. And in cases in which the rule is enforced, a statement of the reasons for enforcing it shall be placed on record."

There is no doubt that this rule, as it was before April 29, 1955 provided that normal age of retirement was 55 years but it gave discretion to Government to extend the service of efficient

Government servants beyond the age of 55 years.

6. In August 1954, however, the Government issued a notification which applied to trained teachers in the Education Department. In this notification it was directed that in the Education Department the age of retirement of trained teachers would generally be 58 years. With regard to teachers who were not trained and who were otherwise efficient, the age of retirement would also be 58 years. Teachers trained and untrained who had got a good record of service and who were not upto the mark would be retired at 55 years. The relaxation regarding the age of retirement would be in force only till such time a sufficient number of trained teachers became available for employment. The order also contained a direction that a suitable note would be added to R. 294 (a) of the Regulations. In consequence of this order, necessary additions were made to the Regulations by the then Rajpramukh of Mysore and Note 4 was added to R. 294 (a) in these terms :-

"The age of retirement of trained teachers in the Education Department may generally be fifty-eight years, and in the case of teachers who are not trained but who are otherwise efficient the age of retirement may also be fifty-eight years.

"The Direction of Public Instruction in Mysore is empowered to order the retirement of teachers, trained and untrained in the non-gazetted cadre who have not got a good record of service and who are not upto the mark, at the age fifty-five years, and in the case of gazetted servants, with the concurrence of Government in each case.

"The above provision shall be deemed to have come into force with effect from the 20th August, 1954."

It is the effect of this addition to R. 294 (a) which falls to be considered before us. We shall in the present appeals confine ourselves to the case of trained teachers for the respondents before us are admittedly all trained teachers. What we say here will not necessarily apply to teachers who are not trained. So far as trained teachers are concerned there is no doubt that Note 4 carved out an exception to R. 294 (a) which provides that the normal age of retirement is 55 years and it is for the Government to decided whether to grant extensions to persons after they completed 55 years and this grant of extension was on the basis of such persons remaining efficient in the opinion of Government after the age of 55 years. But Note 4 made a change in that position so far as trained teachers were concerned. That change was that in the case of trained teachers the normal age of retirement was to be 58 years. The latter part of the note, however, gave power to the Director of Public Instruction to retire even trained teachers in the non-gazetted cadre provided they had not a good record of service and were not upto the mark. In such a case the Director had the power to retire them at the age of 55 years if he was of the view that they had not a good record of service and were not upto the mark. Thus under R. 294 (a) as it was before April 29, 1955 the normal age of retirement was 55 years for all including trained teachers and it was for the Government to give extension on the ground of fitness. But after Note 4 was added to R. 294 (a), the position with respect to trained teachers was changed and trained teachers were normally entitled to continue in

service till the age of 58 years unless the Director or the Government as the case may be, was of the opinion that they had not a good record of service and were not upto the mark. Therefore, after the change made on April 29, 1955, trained teachers could only be retired at the age of 55 years if the Director of Public Instruction or the Government, as the case may be, came to the conclusion that they had not a good record of service and were not upto the mark. Therefore, before the respondents in the present appeals could be retired at the age of 55 years, the Director of Public Instruction or the Government, as the case may be, had to come to the conclusion that they had not a good record of service and were not upto the mark. If such a conclusion was not arrived at, they would be entitled under Note 4 to continue in service upto the age of 58 years. It is not disputed on behalf of the appellant that no such decision, namely, that the respondents had not a good record of service and were not upto the mark, was taken.

7. Stress is laid on the word "generally" appearing in the first part of Note 4. The presence of that word does not mean that the normal age of retirement is still 55 years. The reason why the word "generally" is used in the earlier part of Note 4 is to be found in the latter part of the same note where power has been given to the Director of Public Instruction to retire trained teachers at the age of 55 years if they have not a good record of service and are not upto the mark. Because of that power it was necessary to use the word "generally" in the earlier part of the note, as otherwise there would be an indefeasible right in trained teachers to continue in service upto the age of 58 years, even if they did not have a good record of service and were not upto the mark.

8. In the circumstances, the respondents would be entitled to continue in service upto the age of 58 years and could not be retired at the age of 55 years in view of the exception carved out by Note 4 in the general provision contained in R. 294 (a). The contention of the appellant in this connection must, therefore, be rejected.

9. We now come to the notification, dated March 25, 1959. That notification reads thus:-

"In exercise of the powers conferred by the proviso to Art. 309 of the Constitution of India and with the approval of the Central Government under the proviso to sub s. (7) of the States Reorganisation Act, 1956 (Central Act 37 of 1956), the Governor of Mysore is pleased to make the following rule, namely :-

"Notwithstanding anything contained in Note 4 to Art. 294 of the Mysore Service Regulation (Eighth Edition), Government Servants who have been retired from service on the attainment of the age of fifty-five, during the period between 7th day of June 1957 and the 28th day of October 1958 shall be deemed to have been validly retired from service on superannuation."

We are of opinion that such a rule cannot be made under the proviso to Art. 309 of the Constitution. We are expressing no opinion as to the power of the legislature to make a retrospective provision under Art. 309 of the Constitution wherein the appropriate legislature has been given the power to regulate the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union or of any State by passing Acts under Art. 309 of the Constitution read with Item 70 of List I of the Seventh Schedule or Item 41 of List II of the Seventh Schedule. The present rule has been made by the Governor under the proviso to Art. 309. That proviso lays down that it shall be competent for the Government or such person as he may direct in the case of services and posts in connection with the affairs of the State to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act by the appropriate legislature. Under the proviso the Governor has the power to make rules regulating the recruitment and conditions of service of person appointed to such services and posts in connection with the affairs of the State. The question is whether the notification of March 25, 1959 can be said to be such a rule. We are of opinion that this notification cannot be said to be a rule regulating the recruitment and conditions of service of persons appointed to the services and posts in connection with the affairs of the State. All that the rule does is to say in so many words that certain persons who had been, in view of our decision on the first point, invalidly retired should be deemed to have been validly retired from service on superannuating. It would if given effect contravene Art. 311 of the Constitution. Such a rule in our opinion is not a rule contemplated under the proviso to Art. 309. Under the proviso the Governor can make rules regulating the recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the State. But all that this notification or rule does is to say that certain persons who had been wrongly retired must be treated to have been rightly retired. This power of validating an order which was invalid when it was made does not in our opinion flow from the power conferred on the Governor to make rules regulating recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the State. It is certainly not a rule regulating recruitment of such persons; nor can it be said to be a rule regulating conditions of services of such persons. The rules relating to recruitment and conditions of service contemplated by the proviso to Art. 309 are general in operation, though they may be applied to a particular class of Government servants. But what this notification or rule does is to select certain Government servants who had been illegally required to retire and to say that even if the retirement had been illegal, that retirement should be deemed to have been illegal, that retirement should be deemed to have been properly and lawfully made. We are of opinion that such a declaration made by the Governor - and that is all that the notification or the rule does - cannot in any sense be regarded as a rule made under the proviso to Art. 309 governing the conditions of service of persons appointed to services and posts in connection with the affairs of the State. In this view of the matter, it is not necessary to decide whether a rule of this kind which is purely retrospective could be made as a rule governing conditions of service of persons appointed in connection with the affairs of the State.

10. The appeals, therefore, fail and are hereby dismissed. The respondents will get their costs from the appellant. There will be one bearing fee.

Appeals dismissed.