I. N. Saksena

Vs

State of Madhya Pradesh

Civil Appeal No. 670 of 1965

(K. N. Wanchoo, V.Ramaswami-I JJ)

30.01.1967

JUDGMENT

WANCHOO, J. –

This is an appeal on a certificate granted by the High Court of Madhya Pradesh and arises in the following circumstances. The appellant was in the service of the State of Madhya Pradesh as a District and Sessions Judge. He was born on August 22, 1908 and would in the normal course have retired on completing the age of 55 years in August 1963. But on February 28, 1963, the Government of Madhya Pradesh issued a memorandum to all the Collectors in the State. Copy of this memorandum was also sent to the Registrar, High Court as well as the Finance Department and the Accountant General. The relevant part of this memorandum is as follows :-

> "The State Government have decided that the age of compulsory retirement of State Government's servants should be raised to 58 years subject to the following exceptions.....
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> #2. . . . . .3. . . . . .4. . . . . .##
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> 5. Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' notice without assigning any reasons..... the power will normally be exercised to weed out unsuitable employees after they have attained the age of 55 years. A Government servant may also after attaining the age of 55 years voluntarily retire after giving three months' notice to the appointing authority.
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> 6. These orders will have effect from the 1st March, 1963.
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> 7. Necessary amendments to the State Civil Service Regulations will be issued in due course."

In consequence of this memorandum, the appellant who, would have otherwise retired in August 1963, continued in service. On September 11, 1963 the Government sent an order to the appellant in the following terms :-

> "In pursuance of the orders contained in General Administration Department memorandum No. 433-258-I(iii) /63, dated the 28th February, 1963, the State Government have decided to retire you with effect from the afternoon of the 31st

December, 1963."

This order was obviously in terms of the fifth paragraph of the memorandum which said that "the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' notice without assigning any reason."

On November 29, 1963 a notification was issued by the Finance Department which was published in the Madhya Pradesh Gazette dated December 6, 1963 in the following terms :-

> "In exercise of the power conferred by the proviso to Article 309 of the Constitution, the Governor of Madhya Pradesh hereby directs that the following further amendments shall be made in the Fundamental Rules applicable to the State of Madhya Pradesh namely :-
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> "All Rules in Chapter IX of the said Rules regarding Compulsory Retirement shall be deleted and the following shall be inserted as a new Rule 56, namely :-
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> "F.R. 56 :- The date of compulsory retirement of a Government servant, other than a Class IV employee, is the date on which he attains the age of 58 years. Only Scientific and Technical personnel may be retained in service after the age of compulsory retirement with the sanction of the competent authority subject to their fitness and suitability for work, but they should not ordinarily be retained beyond the age of 60 years."
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> "The date of retirement of a Class IV Government servant is the date on which he attains the age of 60 years.
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> "The rule has come into effect from 1st March, 1963."

It will be seen that this amendment to the Rules did not include that part of the fifth paragraph which gave power to the appointing authority to require a Government servant to retire after he attains the age of 55 years on three months' notice without assigning any reason. Thereafter the appellant was retired. He then filed a writ petition on March 24, 1964 challenging the order retiring him. His contention was two-fold, namely - (i) that the rule as it stood after the amendment of November 29, 1963, published in the Gazette of December 6, 1963, contained no provision reserving power in Government to retire a Government servant after he attains the age of 55 years on three months' notice without assigning any reason, and therefore the appellant could not be retired on December 31, 1963 in the face of the rules, and (ii) that as the order of his retirement cast a stigma on him it amounted to his removal, and therefore action under Article 311 of the Constitution was necessary, and that was admittedly not complied with.

The application was opposed on behalf of the State Government, and their case was - (i) that the order in question cast no stigma on the appellant, and therefore no action under Article 311 was necessary, (ii) that the memorandum of February 28, 1963 was in itself a rule and therefore the appellant was rightly retired in view of paragraph 5 of that memorandum, (iii) that if the memorandum was not a rule the appellant must be deemed to have retired in August 1963 in view of the old rule which prescribed 55 years as the age of retirement, for he could not take advantage of the memorandum, and (iv) that in any case the appellant's case would be covered by the All India Services (Death-cum-Retirement Benefits) Rules, 1958, as amended in 1963 and the order retiring him on three months' notice after the age of 55 years was therefore valid.

The High Court held that the order in question retiring the appellant cast no stigma on him. It further held that the memorandum of February 28, 1963 was in itself a rule under Article 309 and therefore the appellant was rightly retired under that rule. The High Court also held that if the memorandum was not a rule, the appellant could not have continued in service after August 1963 in view of the old rule and could not therefore get the benefit of the new rule raising the age of retirement to 58 years. In this view the High Court did not consider the question whether the All India Services (Death-cum-Retirement Benefits) Rules, 1958 would apply in the present case or not. In the result, the High Court dismissed the petition, but granted a certificate to the appellant as prayed by him, and that is how the matter has come before us.

The first point that the appellant has raised is that the order in question requiring him to retire cast a stigma on him and therefore it amounted to removing him from service and action under Article 311 was required. In this connection reliance has been placed on Jagdish Mitter v. the Union of India. (A.I.R. 1964 S.C. 449) In that case the order was in these terms :-

> "Shri Jagdish Mitter, a temporary 2nd Division Clerk of this office having been found undesirable to be retained in Government service is hereby served with a month's notice of discharge with effect from November 1, 1949."

It was held that when the order referred to the fact that Jagdish Mitter was fond undesirable to be retained in Government Service, it expressly cast a stigma on him, and in that sense must be held to be an order of dismissal and not a mere order of discharge. This case has been recently followed in the State of U.P. v. M. M. Nagar. ([1967] 2 S.C.R. 333) There also the order in express terms contained words which cast a stigma on the Government servant who was compulsorily retired and it was held in those circumstances that the order was in fact an order of removal from service. This Court has consistently held that where the order directing compulsory retirement expressly contains words which cast a stigma on a Government servant, the order is equivalent to an order of removal and action under Article 311 is necessary. But we asked learned counsel for the appellant to point out any case of this Court where in the absence of any express words in the order itself casting stigma on a Government servant, this court has held that the order of compulsory retirement amounts to removal. Learned counsel was unable to refer to any such case. But what he argues is that though the order in question in this case contains no words from which any stigma can be inferred to have been cast on the appellant, we should look to the memorandum, which is referred to in the order and then infer that a stigma was cast on the appellant because the memorandum at the end of paragraph 5 says that the power to retire will normally be exercised to weed out unsuitable employees after they attain the age of 55 years. It is urged that we should read those words in the order retiring the appellant from December 31, 1963.

We are not prepared to extend the decisions of this Court on this aspect of the matter in the manner contended for by the appellant. Where an order requiring a Government servant to retire compulsorily contains express words from which a stigma can be inferred, that order will amount to removal within the meaning of Article 311. But where there are no express words in the order itself which would throw any stigma on the Government servant, we cannot delve into Secretariat files to discover whether some kind of stigma can be inferred on such research. Besides, para 5 of the memorandum is obviously in two parts. The first part lays down that "notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' notice without assigning any reason." There is no stigma here. The second part to which the appellant refers is nothing more than a direction from Government to the appointing authority that it will not use the above power except to

weed out unsuitable employees after they have attained the age of 55 years. When, therefore, the order in question refers to the memorandum it really refers to the first part of paragraph 5 wherein power is given to the appointing authority to retire a Government servant after he attains the age of 55 years on three months' notice without assigning any reason. It may be mentioned that the order assigns reason. In the circumstances we hold that as the order does not expressly contain any words from which any stigma can be inferred it cannot amount an order of removal. What the appellant wants us to hold is that the mere fact that a Government servant is compulsorily retired before he reaches the age of superannuation is in itself a stigma. But this is against the consistent view of the Court that if the order of compulsory retirement before the age of superannuation contains no words of stigma it cannot be held to be a removal requiring action under Article 311.

This brings us to the next question, viz., whether the memorandum itself amounts to a rule under Article 309 of the Constitution as held by the High Court. The High Court seems to have relied in this connection on the judgment of this Court in Shyam Lal v. The State of U.P. ([1965] 1 S.C.R. 26) where a Resolution of November 15, 1919 was held to be a rule by this Court, though later that Resolution was incorporated in the Civil Service Regulations in June 1920. It is however clear that facts in that case with respect to the Resolution of November 15, 1919 were very different. In the first place the Resolution was published in the Gazette of India while in the present case the memorandum which has been treated by the High Court as amounting to rules made under Article 309, has never been published in the Gazette. As already indicated, it is only in the form of a letter to the Collectors with copies to the High Court, the Finance Department and the Accountant General. Secondly, the Resolution of November 15, 1919 in terms said that it was announcing certain new rules relating to retiring pensions of certain officers in the services specified therein. The present memorandum is not in the form of rules. Further it is said definitely in paragraph 7 of the memorandum that necessary amendments to the State Civil Service Regulations would be issued in due course. It is one thing to issue rules and thereafter incorporate them in the Civil Service Regulations, it is quite another thing to issue a memorandum of this nature which is merely a letter from Government to all the Collectors with the specific direction that necessary amendments to the State Civil Service Regulations will be issued in due course. It is true that the letter says that the order will have effect from March 1, 1963, but that does not make the memorandum of the State Government a rule issued under Article 309, when it is said in the memorandum itself that necessary amendments to the State Civil Service Regulations will be issued in due course. We have already set out the relevant parts of the memorandum and the very first sentence shows that the memorandum is merely an executive direction and not a rule, for we cannot understand how a rule could be in the following words, namely - "The State Government have decided that the age of compulsory retirement of State Government's servants should be raised to 58 years." The very form of these words shows that it is conveying an executive decision of the State Government to Collectors to be followed by them and is not a rule issued under Article 309 of the Constitution. The form in which a rule is issued under Article 309 is clear from what happened on November 29, 1963 when the amendment was actually made. We have set out that already, and the contrast in the language would show that the latter was a rule while the former was merely an executive instruction by Government to its Collectors with a copy to the High Court, the Finance Department and the Accountant General.

It is however urged that when the rule was framed in November 1963 it stated that it had come into effect from March 1, 1963, and that shows that the memorandum must amount to a rule. It is true that the rule said so. It is not necessary for us to decide whether a rule of this kind which was notified on December 6, 1963 could be made retrospectively. If it could be made retrospectively, the notification of December 6, 1963 itself would make it retrospective and one need not go to the

memorandum for that purpose. If it could not be made retrospectively, the fact that the notification of December 6, 1963 said that the rule had come into force from March 1, 1963 would still not make the memorandum a rule. As we shall show later the memorandum could be legitimately justified as an executive order of Government in view of F.R. 56 as it was up to February 28, 1963. We therefore see no reason to hold that this memorandum of February 28, 1963, which was never published in the Gazette, which was in the form of a letter addressed to Collectors with a copy to the High Court, the Finance Department and the Accountant General and which itself said that necessary amendment to the State Civil Service Regulations will be issued in due course, was anything more than a mere executive instruction of Government. If there was any doubt about the matter, it is in our opinion removed by what happened when the amendment to F.R. 56 was made and published on December 6, 1963. That amendment was been set out by us above. It says nothing about what is contained in paragraph 5 of the memorandum. If it was the intention of Government that the first part of para 5 of the memorandum should also form a part of the rule, we fail to see why that was not inserted as a note, proviso or explanation to F.R. 56 when it was in terms amended on November 29, 1963 and the amendment was published in the Gazette of December 6, 1963. The omission of the first part of paragraph 5 from the notification is itself an indication that the memorandum of February 28, 1963 contained mere executive instructions. It may be that later Government decided not to include the first part of paragraph 5 in the rule and therefore it did not find place in the amendment of November 29. The analogy that the High Court has drawn between the Resolution of November 15, 1919 which was discussed in Shyamlal's case ([1955] 1 S.C.R. 26) does not therefore apply and we are of opinion that the memorandum of February 28, 1963 contained merely executive instructions.

The rule framed on the basis of these executive instructions does not contain the first part of paragraph 5. Apparently the Government dropped the idea of retiring compulsorily Government servant after they had attained the age of 55 years on three months' notice; otherwise we do not see why this was not included in the amendment when it was published on December 6, 1963. We may note in contrast that the contents of para 3 of the memorandum were incorporated in the rule. We therefore hold that the memorandum of February 28, 1963 does not amount to rules under Article 309; it contains merely executive instructions, and the only rule which the Government has made on the question of superannuation is by the notification of December 6, 1963. That rule would apply to the appellant and it does not empower the Government to retire Government servants over the age of 55 years on three months' notice without assigning any reason. As this rule would apply to the appellant from the date it came into force, the notice which had been served retiring him from December 31, 1963 must fall in the face of the rule published on December 6, 1963.

Then it is urged that if the memorandum of February 28, 1963 does not amount to rules under Article 309, the appellant would have to retire in August 1963 and therefore could not take advantage of the rule published on December 6, 1963 fixing the age of retirement at 58. We are of opinion that there is no force in this contention. Fundamental Rule 56, as it existed before March 1, 1963, provided 55 years as the age of retirement. It further provided that a Government servant might be retained in service after that date with the sanction of the local Government on public grounds which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances. It is clear therefore that it was open to Government to extend the date of retirement of a Government servant under F.R. 56 (a) or 56 (aa), if it so desired. It is true that the extension contemplated by this rule was generally for individuals and an individual order is passed in such a case. But we see nothing illegal if the Government came to the conclusion generally that services of all Government servants should be retained till the age of 58 in public interest. In such a case a general order would be enough and no individual orders need be passed.

We are of opinion that the memorandum of February, 28, 1963 is merely in the nature of such a general order of extension of service by Government under F.R. 56 as it existed on that date. It seems that the Government thought it proper in the public interest to retain all Government servants up to the age of 58 under F.R. 56 and these executive instructions must be taken to provide such retention till a proper rule, as envisaged in the memorandum, came to be made. As we have indicated already, we see nothing in F.R. 56 as it was which would in any way bar the Government from passing such a general order retaining the services of all Government servants up to the age of 58, though ordinarily one would expect an individual order in each individual case under that rule. Even so, if the Government comes to the conclusion generally that services of all Government servants should be retained up to the age of 58 years, we cannot see why the Government cannot pass a general order in anticipation of the relevant rule being amended raising the age of retirement in the public interest. We therefore read the executive instructions contained in the memorandum as amounting to an order of Government retaining the services of all Government servants up to the age of 58 years subject to the conditions prescribed in the memorandum till an appropriate rule as to age of superannuation is framed. Therefore, the appellant would continue in service after he attained the age of 55 years in August 1963. But when actually the rule came to be framed on November 29, 1963 it dropped the conditions mentioned in the memorandum; thereafter it is that rule which would apply to him after it was published on December 6, 1963, and as that rule contained no reservation of any power in Government to retire a Government servant on three months' notice without assigning any reason after the age of 55 years, the notice issued to the appellant must fall.

Lastly, it is urged that the appellant could be retired under the All India Services (Death-cum-Retirement Benefits) Rules, 1958. It is urged that those rules apply to District Judges in view of the Madhya Pradesh Judicial Service (Classification, Recruitment and Conditions of Service) Rules, 1955. Rule 7(2) thereof provides that "the Rules and other provisions relating to pension and gratuity which apply to officers holding superior posts in the cadre of the Indian Administrative Service shall apply mutatis mutandis to District Judges also." We are of opinion that this provision can only take in the rules which applied to officers holding superior posts in the cadre of the Indian Administrative Service on the date it came into force in 1956. The rule does not say that all future amendments to the Rules relating to officers holding superior posts in the cadre of the Indian Administrative Service shall also apply to District Judges appointed under the Madhya Pradesh Judicial Service (Classification, Recruitment and Conditions of Service) Rules, 1955. In these circumstances the respondent cannot take advantage of the All India Services (Death-cum-Retirement Benefits) Rules, 1958, particularly of a rule which came into force in 1963.

Our attention has also been drawn to the Madhya Pradesh New Pension Rules, 1951. But those rules do not apply to District Judges. Further in any case the provision with respect to retiring at the age of 55 years on three months' notice was introduced in those rules in August-September 1964, and the Government could not therefore take advantage of that rule at the time when the appellant was retired.

We therefore allow the appeal, set aside the order of the High Court and quash the order of retirement passed in this case. The appellant will be deemed to have continued in the service of the Government in spite of that order. As however the appellant attained the age of 58 years in August 1966, it is not possible now to direct that he should be put back in service. But he will be entitled to such benefits as may accrue now to him by virtue of the success of the writ petition. The appellant will get his costs from the State throughout.

Appeal allowed.

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