State of Orissa

Vs

Dr. (Miss) Binapani Dei and Ors

Civil Appeal No. 499 of 1965

(G. K. Mitter, J. C. Shah JJ)

07.02.1967

JUDGMENT

SHAH, J. –

The first respondent who holds the degree of M.B.B.S. of the Punjab University, the Diploma in Gynaecology and Obstetrics from the Madras University and the Diploma in Obsterics from the Royal College of Obstetricians and Gynaecologist of London was appointed on June 12, 1938, an Assistant Surgeon in the Orissa Medical Service. At the time of her appointment by the Orissa Government, the first respondent declared that her date of birth was April 10, 1910. The first respondent claims that her claim was supported by documentary evidence tendered by her father which was verified and accepted and the birth date was recorded in the Civil List and in the history of Service of Gazetted Officers of the Government of Orissa maintained by the Accountant General of the State. In the normal course the first respondent would have been due for superannuation on April 10, 1965, after completing the age of 55 years. But in consequence of a notification of the State of Orissa dated May 21, 1963, the age of superannuation was raised from 55 to 58 years in respect of all Government Servants who were to retire after December 1, 1962.

Some anonymous letters were addressed to the Accountant General that the first respondent had mis-stated her age when she was admitted to service of the State. After an inquiry the first respondent was required to show cause why her date of birth should not be accepted as April 4, 1907. The first respondent submitted that her date of birth was correctly recorded and that certain school record relied upon by the State "was erased, altered or overwritten". By letter dated June 27, 1963, the Government of Orissa determined the date of birth of the first respondent as April 16, 1907, and declared that she should be deemed to have retired on April 16, 1962, subject however to extension of service granted from April 16, 1962 till the afternoon of July 15, 1963. By this order the first respondent who should have on her case retired on April 10, 1968, was deemed to have retired on July 15, 1963.

The first respondent then applied to the High Court of Orissa for a writ declaring that the order of retirement passed by the State Government was contrary to law and against the Constitution and principles of natural justice, and that in any event the order was passed maliciously by the Government to the prejudice of the first respondent, and for a writ of mandamus or certiorari quashing the order passed on June 27, 1963, and declaring the respondent to be entitled to continue in service till April 10, 1968. The first respondent claimed that the order made by the State amounted to an order of compulsory retirement contrary to the rules governing her service and was violative of the principles of natural justice, that the same was arbitrary and mala fide, that the order of retirement amounted to punishment involving consequences such as loss of pay, status and

deprivation of service and since it was not made in consonance with Article 311 of the Constitution, the order was liable to be quashed as invalid.

The High Court held that the order declaring the first respondent to be superannuated on April 16, 1962 on the footing that her date of birth was April 16, 1907, amounted to compulsory retirement before she attained the age of Superannuation and was contrary to the rules governing her service conditions and amounted to removal within the meaning of Article 311 of the Constitution, and since the first respondent was not given a reasonable opportunity of showing cause against the action proposed to be taken in regard to her the order was invalid. The High Court did not express any opinion on the plea of mala fides as it raised questions of fact which could not in the view of the Court appropriately be determined in a petition under Article 226 of the Constitution. With certificate granted by the High Court this appeal has been preferred by the State of Orissa.

Counsel for the State raised two contentions in support of this appeal:

> (1) that the petition raised disputed questions of fact and the High Court should not have decided those questions in a writ petition; and
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> (2) that the order refixing the age of the first respondent was an administrative order and the High Court had no power to sit in appeal over the decision of the State authorities refixing the age of the first respondent.

In our view these contentions are without substance.

It was the case of the first respondent in her petition before the High Court that the State had arbitrarily fixed her date of birth as April 16, 1907, and on that basis had declared her superannuated before she attained the age of 58 years. On behalf of the State it was denied that the true date of birth of the first respondent was April 10, 1910, and that the authorities of the State had arbitrarily and maliciously chosen to refix her date of birth. Under Article 226 of the Constitution the High Court is not precluded from entering upon a decision on questions of fact raised by the petition. Where an enquiry into complicated questions of fact arises in a petition under Article 226 of the Constitution before the right of an aggrieved party to obtain relief claimed may be determined, the High Court may in appropriate cases decline to enter upon that enquiry and may refer the party claiming relief to a suit. But the question is one of discretion and not of jurisdiction of the Court. In the present case the question in dispute was about the regularity of the enquiry and the High Court was apparently of the view that the question whether the State acted arbitrarily did not raise any question of investigation into complicated issues of fact. No interference with the exercise of the discretion of the High Court is therefore called for.

It is common ground between the parties that no enquiry in accordance with the provisions of Article 311 was made by the State Government. It was the plea of the State in the High Court that Article 311 has no application to the case of the first respondent because she has not been dismissed or removed from service. The State contended that the true date of birth of the first respondent was April 16, 1907, and she had been properly declared superannuated in consonance with the finding arrived at in an enquiry held for that purpose by the State.

The date of birth disclosed by the first respondent as the time when she entered service was accepted by the State. She claims that a statement was made by her father on that occasion relying on which the date of her birth was determined and entered in the service register, and thereafter the State

sought arbitrarily to re-fix the date of her birth. In considering that plea the relevant Service Rules regarding superannuation may be noticed in the first instance. Rule 13 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962, sets out the penalties which may be imposed "for good and sufficient reasons" on a Government servant and the seventh penalty is "compulsory retirement". But the Explanation to the rule states that "compulsory retirement" of a Government servant in accordance with the provisions relating to his superannuation or retirement is not a penalty within the meaning of the rule. Rule 459(b) of the Civil Service Regulations provides that officers, other than ministerial, who have attained the age of 55, should ordinarily be required to retire on completion of that age. By notification dated May 21, 1963, the age of superannuation was fixed at 58 in respect of all public servants who were to retire after December 1, 1962.

The first respondent held office in the Medical Department of the Orissa Government. She as holder of that office, had a right to continue in service according to the rules framed under Article 309 and she could not be removed from office before superannuation except "for good and sufficient reasons." The State was undoubtedly not precluded, merely because of the acceptance of the date of birth of the first respondent in the service register, from holding an enquiry if there existed sufficient grounds for holding such enquiry and for re-fixing her date of birth. But the decision of the State could be based upon the result of an enquiry in manner consonant with the basic concept of justice. An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fair play. The deciding authority, it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is however under a duty to give the person against whom an enquiry is held an opportunity to set up his version or defence and an opportunity to correct or to controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice. For that purpose the person against whom an enquiry is held must be informed of the case he is called upon to meet, and the evidence in support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed; it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.

The State has undoubtedly authority to compulsorily retire a public servant who is superannuated. But when that person disputes the claim he must be informed of the case of the State and the evidence in support thereof and he must have a fair opportunity of meeting that case before a decision adverse to him is taken.

In this background, the facts of the case may be reviewed. In 1957 anonymous letters were received by the Director of Health Services that the first respondent had mis-stated her age, but no steps were taken immediately to hold an enquiry. In 1961 some investigation was undertaken through the Vigilance Department. The Secretary to the Government in the Health Department on August 23, 1961 informed the first respondent that the Government of Orissa had information that when she was admitted into Class X in the Ravenshaw Girl's School, her date of birth was 15 years, and when she was admitted into the First Year Class on July 9, 1924, her age was 17 years and 2 months, and

she was required to show cause why May 9, 1907, should not be accepted as her date of birth on the basis of the entry in the Admission Register of the First Year Class. The first respondent submitted her explanation stating that she did not recollect if she had ever attended the Ravenshaw Girl's School. After some correspondence the Admission Register was examined by the first respondent in the presence of the Director of Health Services and the officers of the Vigilance Department; and thereafter on March 19, 1962, she wrote a letter pointing out the irregularities in the entries relating to age in Ravenshaw Girls' School Admission Register. The Additional Director of Family Planning Dr. S. Mitra was then asked to make a report. In his report Dr. S. Mitra largely relied upon a letter written by the Principal, Lady Hardinge Medical College, Delhi, that the birth date of the first respondent was April 4, 1908. In the course of the enquiry before Dr. S. Mitra the letter was shown to the first respondent but she declined "to make any comments thereon." Thereafter on September 28, 1962 there was a notice from the Secretary in the Department of Health stating that according to the school Admission Register her date of birth was August 22, 1906, and according to the First Year Class Admission Register it was April 1907, and it was intended to treat the latter date as the date of her birth, and the first respondent was called upon to show cause why that date should not be accepted. The report which Dr. S. Mitra had submitted to the State was not disclosed to the first respondent. It may be recalled that there were four different dates before the State authorities : (1) the entry in the Ravenshaw Girls' School Admission Register showing the date of birth as August 22, 1906; (2) the entry in the Admission Register of the First Year Class showing the date of birth as some date in April, 1907; (3) the report of the Principal, Lady Hardinge Medical College, Delhi, showing the date of birth as April 4, 1908, as recorded in the Medical College Admission Register; and (4) the first respondent's statement supported by her father's statement at the time when she joined the service in 1938 giving her date of birth as April 10, 1910. If an enquiry was intended to be made, the State authorities should have placed all the materials before the first respondent and called upon her to explain the discrepancies and to give her explanation in respect of those discrepancies and to tender evidence about her date of birth.

It is true that some preliminary enquiry was made by Dr. S. Mitra. But the report of that Enquiry Officer was never disclosed to the first respondent. Thereafter the first respondent was required to show cause why April 16, 1907, should not be accepted as the date of birth and without recording any evidence the order was passed. We think that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value. It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of nature justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken; the High Court was, in our judgment, right in setting aside the order of the State.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

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