

The State of Assam and Others

Vs

Premadhar Baruah and Others, Etc.

Civil Appeals Nos. 1334 to 1336 of 1969

(A. N. Ray, I. D. Dua JJ)

04.05.1970

JUDGMENT

RAY, J. -

1. These three appeals by certificate are against the judgment, dated March 28, 1969, passed by the High Court for the State of Assam and Nagaland holding by a majority judgment that the three main respondents in the three appeals, namely, Premadhar Baruah, Rashadhar Bora and Premadhar Dutta are deemed to have continued in service of the Government and the orders terminating extension of service after attaining the age of 55 on three months' notice pursuant to Paragraph 4 of the Memorandum, dated March 21, 1963, are bad in law.

2. On March 21, 1963, the Assam Government issued a memorandum which was contained in 7 paragraphs. In Paragraph 1 of the memorandum it was stated that it was decided that the age of compulsory retirement of State Government servants should be 58 years. In paragraph 2 of the memorandum it was stated that the decision would apply to all Government servants who would retire on or after December 1, 1962. Government servants who were on leave preparatory to retirement on December 1, 1962, would also be entitled to this benefit but government servants who were on refused leave from a date prior to December 1, 1962, would not be entitled to the benefit nor would be the benefit apply in case of Government servants who reached the age of superannuation on a date prior to December 1, 1962, having been allowed extension of service. In paragraph 3 of the memorandum it was stated that no Government servant would be entitled to the benefit of the increased age of compulsory retirement unless he had been permitted to continue in service after the age of 55 years after the appointing authority was satisfied that he was efficient and physically fit for Government service. In Paragraph 4 of the memorandum it was stated : "Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attained the age of 55 years on three months' notice without assigning any reason".

3. The respondent Premadhar Baruah was born on January 1, 1913. He was appointed as a typist in the employment of the Government on August 18, 1941. On May 6, 1946 he was confirmed as an Assistant Auditor. On April 1, 1950 he was confirmed as Auditor Local Accounts. Under Fundamental Rule 56(a) his date of retirement would be January 1, 1968 on attaining the age of 55 years. On December 21, 1967, there was an order asking respondent Premadhar Baruah to continue till further orders.

4. On April 2, 1968 the Government issued another memorandum which was contained in three paragraphs. In the first paragraph it was stated that the Government had decided that the age of

compulsory retirement of the State Government servants should be 55 years as laid down in Fundamental Rule 56(a) discontinuing the benefit of raising the age of superannuation to 58 years as laid down in the office memorandum, dated March 21, 1963. In the third paragraph it was said that this decision would apply to all Government servants who would retire on or after September 30, 1968 and Government servant who were already on extension beyond 55 years of age should be served with a three months' notice without assigning any reason as envisaged in the Government Order, dated March 21, 1963 to retire on September 30, 1968.

5. Thereafter on May 7, 1968 notice was given by the Government to respondent Premadhar Baruah. The notice was as follows :

"No. VI/1/68-69-13, dated Gauhati, the 7th May, 1968.

#To Sri Premadhar Baruah, Designation - Auditor, Local Accounts, Address - Gauhati. In pursuance of office memorandum No. AAP-217/62/15, dated 21-3-1963, read with O.M. No. AAP-126/67/64, dated 2-4-1968, you are hereby requested to take notice that you shall not be retained in service beyond 30-9-1968. This may be treated as a notice under Para 4 of O.M. No. AAP-217/62/15, dated 21-3-1963. (Sd.) J. Sarmah, Designation, Examiner of Local Account, Gauhati, Address - Gauhati.###

6. On these allegations respondent Premadhar Baruah asked for orders as to why the notice dated May 7, 1968 terminating the respondents services on September 30, 1968 should not be quashed.

7. The respondent Premadhar Baruah raised three contentions before the High Court. First, that under Paragraph 4 of the memorandum, dated March 21, 1963, three months' notice could be given only before an employee reached the age of 55 years and not thereafter. Secondly, that the compulsory retirement permitted by the fourth paragraph of the memorandum of March 21, 1963 amounted to removal contravening the provisions of Article 311 of the Constitution. Thirdly, compulsory retirement under the said fourth paragraph of the memorandum of 1963 by giving three months' notice without assigning any reason is violative of Article 14 of the Constitution. The High Court by majority decision upheld only the third contention of the respondent that an unfettered power was given to the appointing authority to retire Government servants after attaining the age of 55 years by giving three months' notice terminating their services.

8. It is necessary to keep the forefront Fundamental Rule 56(a) which is as follows :

"F.R. 56(a) - The date of compulsory retirement of a Government servant is the date on which he attains the age of 55 years. He may be retained in service after his age with the sanction of the State 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."

9. The first question is whether the respondents can found any right on the order of March 21, 1963. Counsel for the respondent contended that the order, dated March 21, 1963, was acted upon in relation to respondent Premadhar Baruah and he had been given an extension up to the age of 58 years and therefore he could not be asked to retire before that age. The order, dated March 21, 1963 was an executive instruction. That order of March 21, 1963 has to be read not only in the light of the order, dated April 2, 1968, but also in relation to F.R. 56(a). The memorandum of April 2, 1968, definitely stated that the benefit of raising the age of superannuation to 58 years as laid down in the

office memorandum, dated March 21, 1963, had been decided to be discontinued by the memorandum, dated April 2, 1968. After the order, dated April 2, 1968, came into existence the order of March 21, 1963, is neither relevant nor effective.

10. Under F.R. 56(a) a Government servant may be retained in service after the age of 55 years and such retention shall not be made except in special circumstances. It, therefore, follows that even according to F.R. 56(a) no legal right can be said to exist in relation to any Government servant to continue in service after the age of 55 years. It is a discretion which the Government will exercise in some cases. F.R. 56(a) is in two parts. The first part is that the date of compulsory retirement of a Government servant is the date on which he attains the age of 55 years. The second part is that the retention of the Government servant in service after attaining the age of 55 years should not be made except in special circumstances. Such a rule cannot be said to found any right in any employee to continue in service after the age of 55 years.

11. The order, dated March 21, 1963, and the order, dated April 2, 1968, are both executive instructions and they are not rules under Articles 309 of the Constitution.

12. In *I. N. Saksena v. State of Madhya Pradesh* ((1967) 2 SCR 496) the Government of Madhya Pradesh issued a memorandum on February 28, 1963, raising the age of retirement from 55 to 58 years. Clause 5 of the memorandum there said that the appointing authority might require a Government servant to retire after he had attained the age of 55 years without assigning any reason. The appellant in that case was given an extension beyond the age of 55 years. He had attained the age of 55 years in the month of August, 1963. Thereafter, in the month of September, 1963, it was communicated to him that he was to retire on December 31, 1963. On November 29, 1963, a notification was issued by the Madhya Pradesh Government which was published in the Gazette on December 6, 1963, whereby under Article 309, F.R. 56, in place of the old one was amended to the effect that the date of compulsory retirement of a Government servant, other than a Class IV employee, was the date on which he attained the age of 58 years. Only Scientific and Technical personnel might 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. The date of retirement of a Class IV Government servant was the date on which he attained the age of 60 years. The new rule came into effect from March 1, 1963.

13. The most noticeable feature in the Madhya Pradesh case was that the amended F.R. 56 did not contain any power of the appointing authority to retire a Government servant to retire compulsory after the age of 55 years without assigning any reason though such a power was to be found in the order, dated February 28, 1963. On this ratio it was held in *Saksena's case* (supra) that F.R. 56 published on December 6, 1963 was the only rule applicable to *Saksena* and therefore the notice which had been given in the month of September to retire him with effect from the afternoon of December 31, 1963 could not be upheld. The implication of the Madhya Pradesh decision is that there could be an order extending the services of the Government servant by general order and if an order contained a power to retire a person after the age of 55 years without assigning any reasons such a power was valid and defensible.

14. In *Bishun Narain v. State of Uttar Pradesh and Others* ((1965) 1 SCR 693) it was held that there was no provision to prevent the Government from taking away the power of the Government to increase or reduce the age of superannuation and such termination of service because of the reduction of age of superannuation could not be said to amount to removal within the meaning of

Article 311. As to challenging the rule on the ground of discrimination it was held that the rule treated alike those who are between the age of 55 and 58 years. Those who were retired on December 31, 1961 were in different ages but that was so because their services were retained for different periods beyond the age of 55 years. Wanchoo, J., speaking for the Court said : "It cannot be urged that if Government decides to retain the service of some public servants after the age of retirement it must retain every public servant for the same length of time. The retention of public servants after the period of retirement depends upon their efficiency and the exigencies of public service."

15. In *Moti Ram Deka, etc. v. General Manager, N.E.F. Railway, Maligaon Pandu, etc.* ((1964) 5 SCR 683) the services of railway servants were terminated under Rules 148(3) and 149(3) of the Indian Railway Establishment Code. Broadly stated, Rules 148(3) and 149(3) provided that the service of non-pensionable railway servants under Rule 148(3) and of other railway servants under Rule 149(3) was liable to termination on notice on either side for the period shown in the Rules but no notice was required in case of dismissal or removal as a disciplinary measure after compliance with Article 311(2) of the Constitution and retirement on attaining the age of superannuation and termination of service due to mental or physical incapacity. The majority decision was given by Gajendragadkar, J. Two separate opinions were given by Subba Rao and Das Gupta, JJ. Shah J., gave a dissenting opinion.

16. In *Moti Ram Deka's case* (supra) Rule 148(3) was alleged to violate Article 14 on the grounds that the rule gave no guidance to the authorities who would take action on it as regards the principle to be followed in exercising power and secondly that the rule discriminated between railway servants and other public servants. Das Gupta, J., was of the view that the rule did not lay down any principle or policy for guiding the exercise of discretion by the authority who would terminate the service in the matter of selection or classification. It was said that arbitrary and uncontrolled power was left with the authority to select at its will any person against whom action would be taken and therefore the authority could discriminate between two railway servants to both of whom Rule 148(3) equally applied by taking action in one case and not taking it in the other. Shah, J., on the other hand said that if for the purpose of ensuring the interests and safety to the public and the State, power was reserved to the Railway Administration to terminate the employment under the Railways it could not be said that the railway servants were singled out for a special or discriminatory treatment. The classification could be founded on an intelligible differentia distinguishing railway servants from others and such differentia had a rational relation to the objects to be achieved. With regard to the position of railway servants inter se Shah, J., said that if the employment was for a period defined or if the employment was till superannuation the rules contemplated termination of service by a notice in both cases. The Rule would therefore not deny equal protection because there was no discrimination between them and the same law which protected other servants in the same group protected the appellants in that case and also provided for a determination of their employment. Shah, J., further said that the possibility or assumption of mala fide exercise of a power of determination of employment under Rule 148(3) could not be correct method of testing the constitutionality of the rule.

17. In the present appeals, the High Court by its majority decision held that Paragraph 4 of the memorandum of March 21, 1963, offended Article 14 of the Constitution because a person who was physically fit and efficient was allowed to continue in service till he was 58 years of age whereas any other person who would satisfy the conditions of physical fitness and efficiency could be asked to retire on three months' notice. It has to be appreciated first that a Government servant has no right to continue in service beyond the age of superannuation. A Government servant is retained beyond

the age of superannuation when the Government in the exigencies of public service or on public grounds exercises its discretion to retain a Government servant in service after the age of superannuation. The scope for the exercise of this discretion is embodied in F.R. 56(a) as well as in Paragraph 4 of March 21, 1963, memorandum which was challenged in the High Court to be an infraction of Article 14.

18. In the present case after March 31, 1963, memorandum was superseded and abrogated by April 2, 1968, memorandum the respondents could not draw any sustenance from March 21, 1963, memorandum. April 2, 1968, memorandum reduced the age of superannuation and withdraw the benefits which had been conferred by March 21, 1963, memorandum. This was again done in the interest of the Government servants to prevent unemployment as a result of increase of age of superannuation. This Court in Bishun Narain Mishra's case (supra) in dealing with a notification directing all those who were between the age of 55 and 58 and had been retained in service could be retired on December 31, 1961, said that the rule treated alike all those who were between the age 55 and 58 years. In the present appeals, the 1963 notification treated all Government servants alike, namely, that they could be retained beyond the age of superannuation, but such retention depended upon the exigencies of the public service and the consideration of physical fitness and efficiency. Therefore, it could not be said that the memorandum of 1963 infringed Article 14.

19. The High Court fell into the error of overlooking that March 21, 1963, memorandum no longer occupied the field after the supersession of that memorandum by the memorandum, dated April 2, 1968. Furthermore, if the order, dated March 21, 1963, was found to be bad, the entire order was to be struck down for the obvious reason that if the instrument was within the vice of Article 14 of the Constitution, the entire notification would perish.

20. We are of opinion that the High Court was in error in overlooking Paragraph 4 of the memorandum, dated March 21, 1963. Paragraph 4 was as follows :

"Notwithstanding anything contained in the foregoing paragraphs the appointing authority may require a Government servant to retire after he attained the age of 55 years on three months' notice without assigning any reason."

As we have already indicated Paragraph 4 of the memorandum flowed from F.R. 56(a), the Government could retain a Government servant beyond the age of superannuation. The Government has also the discretion to withdraw such retention in service because the retention does not confer any right on the Government servant.

21. Civil Appeal No. 1335 of 1969 relates to the case of Rasodhar Bora and Civil Appeal No. 1336 of 1969 is that of Premadhar Dutta.

22. Rasodhar Bora was born on January 1, 1913 and would have retired on January 1, 1968, on completion of the age of 55 years. He was found to be physically fit and efficient by the competent authorities and he was allowed to continue in service after the age of 55 years. Thereafter by a notice, dated July 1, 1968 there was a termination of his service on September 30, 1968.

23. In Civil Appeal No. 1336 of 1969 Premadhar Dutta was born on May 15, 1911 and he was due to retire on May 15, 1966. He continued in service after reaching the age of 55 years. His service was terminated on May 30, 1968, by a notice, dated May 28, 1968.

24. The contention of both the respondents were similar to that of Premadhar Baruah.

25. For these reasons, the appeals are accepted. The majority judgment is set aside. In the fact and circumstances of the case we direct that the parties will pay and bear their own costs.

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