

Union of India

Vs

Shri Mool Chand Dasumal Pardasani

Civil Appeal No. 2201 Of 1970

(CJI S.M. Sikri, A.N. Ray, D.G. Palekar JJ)

03.09.1971

JUDGMENT

RAY, J. -

1. This appeal by certificate is against the judgment, dated May 2/3, 1969 and June 16, 1969, of the High Court of Gujarat quashing the order, dated December 18, 1963, passed by the Collector, Central Excise, Baroda and further ordering that the respondent will be deemed to have been continued in the service of the Government until he attained the age of 60 years.

2. The order impeached by the respondent was as follows :

"Central Excise Collectorate, Baroda, Establishment Order No. 286 of 1963. Shri Mulchand Pardasani, Upper Division Clerk, Head Quarter Office, Baroda, who attains the age of 55 years on March 14, 1964, is hereby informed that the Collectorate Departmental Promotion Committee, 1963, has not considered him suitable for further retention in service beyond the age of 55 years. He has the option to retire with effect from March 14, 1964, forenoon or proceed on leave as may be admissible and granted to him preparatory to retirement.

#{(Sd.) Illegible.for Collector, December 18, 1963"}.##

3. The respondent filed this suit for a decree that the order of retirement of the respondent passed by the Collector Central Excise, Baroda and all acts done in the course of the said order are illegal and that the respondent continued to be in service in the post he was holding on March 14, 1964, and for other consequential reliefs. The respondent's contention was that the order was in contravention of his right to continue in service until he attained the age of 60 years, that the order cast a stigma on the respondent, that three months' notice was required to be given to the Government servant to retire on his attaining the age of 55 years, the order of the Collector was against the orders issued under the authority of the President of India raising the age of superannuation to 58 years.

4. The contention of the Government on the other hand was that prior to November 30, 1962, Fundamental Rule 56(b)(i) stated the age of compulsory retirement of a pre-April, 1938 ministerial servant to be 55 years. He might be retained in service after the age of 55 years if he continued efficient but it was not a right. The other contention of the Government was that the orders regarding the respondent raising the age of superannuation to 58 years and further that three months' notice was required to be given to a Government servant to retire him on his attaining the age of 55 years were contained in memoranda, dated November 30, 1962 and December 31, 1963, and the

said memoranda did not have the force of statutory rule and were mere executive instructions. It was also contended that even if the memorandum was held to have the force of the statutory rule, the right of the respondent to continue in service till the age of retirement was subject to the absolute right of the Government to retire a Government servant on three months' notice.

5. There is no dispute that the respondent was a ministerial Government servant who had entered into the Central Government service prior to April, 1938 and that he would have attained the age of 55 on March 14, 1964.

6. Fundamental Rule 56 as it stood prior to November 30, 1962, in clause (b) thereof dealt with ministerial servants. Clause (b)(i) provided that a pre-1938 ministerial servant who was not governed by sub-clause (ii) thereof might be required to retire at the age of 55 years, but should ordinarily be retained in service, if he continued efficient up to the age of 60 years. After the age of 60 years he could not be retained except in very special circumstances to be recorded in writing and with the sanction of the Local Government. Fundamental Rule 56(b)(ii) dealt with ministerial servants who entered Government service on or after April 1, 1938, or who being in Government service on March 31, 1938, did not hold a lien or a suspended lien on a permanent post on that date and stated that such ministerial servants would ordinarily be required to retire at the age of 55 years and must not be retained after that age except on public grounds to be recorded in writing, and with the sanction of the Local Government. Such ministerial servants in clause (b)(ii) would not be retained in service after the age of 60 years except in very special circumstances.

7. The respondent was governed by Fundamental Rule 56(b)(i) as it stood prior to November 30, 1962, with the result that he might be required to retire at the age of 55 years and that he should be ordinarily retained in service up to the age of 60 years, if he continued to be efficient and after the age of 60 years he could not be retained in service except under special circumstances.

8. This Court in *Kailash Chandra v. The Union of India*, ((1962) 1 SCR 374 : AIR 1961 SC 1346) considered Rule 2046(2)(a) of the Indian Railway Establishment Code. Rule 2046(2)(a) is totidem verbis as Fundamental Rule 56(b)(i). This Court held that the ministerial servant falling within the said clause might be compulsorily retired on attaining the age of 55, but when the servant is between the age of 55 and 60, the authority will have the option to continue him in service subject to the condition that the servant continues to be efficient. Therefore, there would be no right to continue in service beyond the age of 55.

9. In the present case there came into existence two memoranda. The first was, dated November 30, 1962. The second was, dated December 31, 1963. The December, 1963 memorandum was in partial modification of the memorandum, dated November 30, 1962. Under the December, 1963 memorandum it is stated that the President of India is pleased to decide that subject to the right of Government to retire any officer on three months' notice after he had attained the age of 55 years, the pre-1938 ministerial officers governed by Fundamental Rule 56(b)(i) should be continued in service like all other Government servants (except those whose age of retirement is 60) upto the age of 58 years without an annual order sanctioning their retention. After the age of 58 years and till they attain the age of 60 years, however, such an annual order would be necessary. It was also provided in the memorandum that there will be a review in the case of all employees to assess their suitability for retention beyond the age of 55 years. It is not necessary to refer to the other parts of the memorandum for the purposes of the present appeal.

10. Paragraph 6 of November 30, 1962, memorandum which stated that notwithstanding anything

contained there the appointing authority might require to retire a Government servant after he attained the age of 55 years on three months' notice without assigning any reason was not modified by December 31, 1963, memorandum. The decision of the Government to continue a pre-1938 ministerial servant up to the age of 58 years without annual order sanctioning the retention was of course on a review to assess the suitability for retention beyond 55. If the Government wanted to retain a pre-1938 ministerial servant after the age of 55 as a result of the November, 1962 and December, 1963 memoranda he would be continued up to the age of 58 years without annual orders sanctioning retention and thereafter up to the age of 60 years with annual orders sanctioning retention.

11. The respondent contended that on December 28, 1963, the date of the impeached order the respondent had not attained the age of 55 and he would have attained the age of 55 years on March 14, 1964. That is not disputed. Therefore, as a result of the changes introduced by the memorandum to Fundamental Rule 56 the respondent who was a pre-April, 1938 ministerial Government servant would be entitled to the benefit of the increased age of compulsory retirement subject to the right of the Government to review his case for retention beyond the age of 55 and the right of the Government to retire him on three months' notice. This Court in *I. N. Saksena v. State of Madhya Pradesh*, ((1967) 2 SCR 496 : AIR 1967 SC 1264) in dealing with the effect of orders issued by the Government of Madhya Pradesh that the age of compulsory retirement of a ministerial Government servant would be raised to 58 years held that it was merely an executive direction and not a rule. The respondent contended that there were distinguishing features in the memoranda in the present case and the memoranda would be considered as a rule. It was particularly emphasised by the respondent that the memorandum was under the direction of the President and the memorandum itself stated that action was being taken to make necessary amendments in the Fundamental Rules as well as Supplementary Rules and Civil Service Rules and therefore the memorandum amounted to a rule and all that remained to be done was to make formal amendments in the Fundamental Rules. The High Court held that the memorandum in the present case was not in the nature of executive or administrative instruction.

12. Counsel for the Government stated that the memorandum was given effect to in relation to ministerial servants at all relevant times subsequent to December 31, 1963. The Government acted on the memorandum. The ministerial servants were also treated as governed by the memorandum. The age of superannuation subsequent to December 31, 1963, became 58 as a result of the memorandum. Ministerial servants continued to be in service up to 58 and thereafter up to 60 in accordance with the tenor and terms of the memorandum. In this view of the matter to deny the respondent operation of the memorandum will be an infraction of Article 14 of the Constitution. There is nothing in the record to indicate that the respondent was not efficient. On the contrary, the order of the present case gave the respondent an option to retire with effect from March 14, 1964, when he would have attained the age of 55 years. The same order gave the respondent option to retire with effect from March 14, 1964, or to proceed on leave as might be admissible or granted to him preparatory to retirement. The stand taken by the Government in the present case in all the courts was that the respondent was on preparatory leave extending up to 28 months after March 14, 1964. In fact, the records show that the respondent was paid the salary that was admissible to him for this leave period for 28 months. Therefore, for 28 months after March 14, 1964, he continued to be a Government servant. Taking into consideration these features it is clear that the respondent was thus entitled to the benefit of the increased age of retirement, viz., 58 years and thereafter up to 60 years in accordance with the memorandum. The memorandum became a part of the Fundamental Rules as a result of the Fundamental (Sixth) Amendment Rules, 1965.

13. The order challenged by the respondent in the present case is not legal and it cannot be sustained in view of the fact that the respondent would be entitled to the benefit of the memorandum as all other Government servants were at the relevant time.

14. It is not necessary for us to express any view on the question as to whether the memorandum would be a mere executive and administrative instruction or have the force of the statutory rules. We rest the decision in the present case on the consideration that the order complained against suffers from the vice of violation of Article 14 of the Constitution. The order of the High Court that the respondent would be deemed to be in Government service until he attained the age of 60 years on March 14, 1969, is upheld.

15. For these reasons, the appeal fails and is dismissed. The appellant will pay costs to the respondent.

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