B. Venkateswararao Naidu

Vs

Union of India

Civil Appeal No. 1300 of 1967

(C.A. Vaidialingam, H.R. Khanna, Y.V. Chandrachud JJ)

09.01.1973

JUDGMENT

CHANDRACHUD, J. -

1. Born on July 16, 1910 appellant attained the age of 55 on the corresponding date in 1965. He hoped to continue in the service of the respondent - Union of India - until attaining the age of 58, but on July 23, 1965 while he was holding the post of Assistant Inspecting Commissioner Income-tax, Cuttack, he received a notice, dated July 15, 1965 compulsorily retiring him from service with effect from October 21, 1965. He filed in the High Court of Orissa a writ petition challenging that notice but failed. The High Court however, granted him leave to appeal to this Court.

2. First, we will notice the provisions on which the appellant bases his challenge to the order of compulsory retirement.

3. Originally, Rule 58 of the Fundamental Rules reads thus : "Except as otherwise provided in the other clauses of this Rule the date of compulsory retirement of a Government servant, other than a ministerial servant, is the date on which he attains the age of 55 years". On November 30, 1962 the Government of India, Ministry of Home Affairs, issued an Office memorandum under which the age of compulsory retirement of Central Government servants was raised from 55 to 58 years, subject to the three exceptions mentioned in Paragraph 2 thereof. Paragraph 6 of the Memorandum provided :

> "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. This will be in addition to the provisions already contained in Rule 2(2) of the Liberalised Pension Rules, 1950 to retire an officer who has completed 30 years' qualifying service and will normally be exercised to weed out unsuitable employees after they have attain the age of 55 years. The Government servant also may, after attaining the age of 55 years, voluntarily retire after giving three months' notice to the appointing authority."

The Memorandum was to take effect from December 1, 1962.

4. On July 21, 1965 Fundamental Rule 56 was amended by the Sixth Amendment so as to incorporate, with modifications, the provisions of the aforesaid Office Memorandum. Rule 56(a) of the Fundamental (Sixth Amendment) Rule, 1965 say : "Except as otherwise provided in this rule, every Government servant shall retire on the day he attains the age of fifty eight years". A number

of exceptions are engrafted on this rule, relevant amongst them being the one contained in sub-rule (i). That exception reads thus :

> "Notwithstanding anything contained in this Rule the appropriate authority shall, if it is of the opinion that it is in the public interest to do so, have the absolute right to retire any Government servant after he has attained the age of fifty-five years by giving him notice of note less than three months in writing."

5. In the High Court the order of compulsory retirement was challenged on two ground : one of them being that the Office Memorandum and the Sixth Amendment to Fundamental Rules were void as being violative of the guarantee contained in Article 311(2) of the Constitution. The High Court rejected that contention by a common judgment, dated September 19, 1966, governing the case of the petitioner and of one Batahari Jena. The contention of the latter in his petition was that a Resolution, dated May 21, 1963, and a notification, dated February 6, 1964, of the Government of Orissa, on the basis of which he was retired compulsorily were void as offending Article 311(2). In an appeal filed by Batahari Jena ((1971) 2 SCC 232) this Court upheld the validity of the Resolution and the notification. As the Office Memorandum, dated November 30, 1962 and Rule 56(a) of the Fundamental (Sixth Amendment) Rules, 1965 are in terms similar to the resolution and the notification impugned in Batahari Jena's case (supra) learned counsel for the appellant did not, rightly, challenge the constitutional validity thereof.

6. The first of the three points urged before us is that the notice retiring the appellant compulsorily is invalid as the Office Memorandum on the strength of which it was issued, did not have the force of a rule made under Article 309 of the Constitution. This contention is based on Paragraph 8 of the Memorandum which provided that "The amendment of the relevant rules covering the All India Services so as the make these orders applicable to the members of those services is being undertaken in consultation with the State Governments". We see no merit in the contention. Article 309 provides that subject to the provisions of the Constitution, Acts of the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. In regard to services and posts in connection with the affairs of the Union, the proviso to Article 309 empowers the President to make rules regulating the recruitment and conditions of servants appointed to such services and posts until provision in that behalf is made under an Act of the appropriate Legislature. The rules so made by the President are effective subject to the provisions of any such Act. Paragraph 2 of the Office Memorandum in terms recites that "the President is pleased to direct that the age of compulsory retirement of Central Government servants should be 58 years", subject to certain exceptions. Paragraph 8 of the Memorandum merely re-states with particularity the true legal position which obtains under the proviso to Article 309. Nothing stated in that paragraph is capable of the construction that the Office Memorandum was not to be effective until Fundamental Rules were consequently amended. In fact, by Paragraph 7 the provisions of the Memorandum were given express effect from December 1, 1962.

7. It is then contended that as the appellant was lawfully in service when the amended Fundamental Rules came into force, he would be governed by these rules and so he could not be asked to retire by a notice founded on the provisions of the Office Memorandum. Now, it is true that the notice of compulsory retirement was served on the appellant on July 22, 1965, while the Fundamental (Sixth Amendment) Rules came into force a day prior thereto viz., on July 2, 1965. But the crucial date is the date on which the notice was issued viz., July 15, 1965 for, a right which is validly determined cannot, without move, stand revived by a later amendment enlarging the scope of that right.

Therefore, the notice having been valid when it was issued, cannot become invalid by reason of the fact that the Rule on which it was founded had undergone an amendment before it was received by the appellant.

8. In support of the argument that the amendment of Fundamental Rules prior to the receipt of the notice by the appellant would render the notice invalid, reliance was placed on a decision of this Court in State of Punjab v. Amar Singh Harika, (AIR 1966 Sc 1313 : (1966) 2 SCJ 777 : (1966) 2 Lab LJ 188) in which it was held that the mere passing of an order of dismissal is not effective unless it is published and communicated to the officer concerned. This decision has no bearing because there the question was not one of the initial validity of the order but of the time from which it would take effect. An order of dismissal was passed on June 3, 1949 but it was not until May 28, 1951 that the officer concerned came to know about it. In that context it was held that an order of dismissal passed by an authority but kept on its file without communicating it to the officer concerned can only take effect after it is communicated or is otherwise published. It was observed that in the interregnum, the authority could well change its mind and modify the order and several other complications would arise as for example whether the officer lawfully drew his salary for the intervening period. No such considerations arise in the instant case.

9. Besides, under the unamended Fundamental Rule 56, the appellant would have retired on attaining the age of 55, that is on July 14, 1965. He continued in service thereafter, though for a short period, solely by reason of the provision contained in Paragraph 2 of the Office Memorandum, by which the age of retirement was raised to 58. Having obtained the benefit of that provision, the appellant cannot repudiate the exception thereto, contained in Paragraph 6 of the Memorandum. The benefit of an instrument carries with it the obligation to be subject to the burden which it imposes.

10. Finally, it was contended that the order of compulsory retirement is bad because it does not purport to have been issued in "the public interest". This argument assumes that the amended Fundamental Rules would govern the conditions of the appellant's service, which is a wrong assumption to make. Under the Office Memorandum, the Government was entitled to retire the appellant compulsorily without assigning any reason. The concept of "public interest" was introduced by sub-rule (i) of Rule 56(a) of the Fundamental (Sixth Amendment) Rules, 1965. The appellant's service having been validly determined by a notice which was issued prior to the date when the amended rules came into force it was not necessary for the authority to satisfy itself that it was in public interest to retire the appellant compulsorily.

11. The miscellaneous petition filed by the appellant contending that he should have been heard before the order of compulsory retirement was passed has no substance in view of the decision in Union of India v. Col. J. N. Sinha and Another. ((1970) 2 SCC 458 : 1 SCR 791) It was held therein that compulsory retirement does not involve civil consequences and therefore it is not necessary to afford to a Government servant an opportunity to show cause against his compulsory retirement.

12. For these reasons we dismiss the appeal but in the circumstances there will be no order as to costs.

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