I. N. Saksena

Vs

State of Madhya Pradesh

R. D. Doongaji

Vs

State of Madhya Pradesh

Civil Appeal Nos. 131 of 1971 and 350 of 1971

(CJI A.N. Ray, M.H. Beg, R.S. Sarkaria, P.N. Shinghal JJ)

23.01.1976

JUDGMENT

SARKARIA, J.

1. This appeal on certificate is directed against a judgment of the Madhya Pradesh High Court dismissing the appellant's writ petition under Article 226 of the Constitution.

2. The appellant joined the service of the State Government as a Subordinate Judge in the year 1936. On promotion, he was confirmed as District and Sessions Judge with effect from December 2, 1957. The appellant attained the age of 55 years on August 22, 1963 which was the age of superannuation according to Fundamental Rule 56 (Chapter IX) governing the civil services of the State. But prior to that, on February 28, 1963, by a memorandum No. 433-259-1 (iii) /63, the State Government raised the age of compulsory retirement for government servants to 58 years subject to certain exceptions. The material part of the memorandum dated February 28, 1963, read as follows :

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 3 months' notice without assigning any reasons . . . .

A Government servant may also after attaining the age of 55 years voluntarily retire after giving 3 months' notice to the appointing authority.

6. These orders will have effect from the 1st March, 1963.

7. Necessary amendments to the State Civil Service Regulations will be issued in due course.

3. Thereafter, by government notification dated November 29, 1963, Fundamental Rule 56 was amended on December 6, 1963 in exercise of the power under the proviso to Article 309 of the constitution, raising the age of compulsory retirement of the State civil servants to 58 years with effect from March 1, 1963 by the clause in the aforesaid memorandum, empowering the Government to retire servants above the age of 55 years by giving them three months' notice was not incorporated in the rule.

4. In view of this memorandum, the appellant was allowed to continue in office after he had attained the age of 55 years.

5. On September 11, 1963, the respondent passed an order retiring the appellant from service with effect from December 31, 1963. To impugn this order, the appellant filed a writ petition in the High Court under Article 226 of the Constitution on the ground that Fundamental Rules 56 as it stood after the amendment of November 29, 1963, (published on December 6, 1963) did not contain any provision authorising the respondent to retire the appellant after the attainment of 55 years of age and that his retirement was contrary to Article 31(2) and Article 14 of the Constitution. The High Court dismissed the writ petition by its judgment dated April 30, 1964.

6. The appellant came up in appeal to this Court. During the Pendency of that appeal Saksena attained the age of 58 years. By its judgment dated January 30, 1967 (I. N. Saksena v. State of M.P., (1967) 2 SCR 496 : AIR 1967 SC 1264 : (1967) 2 LLJ 427), this Court quashed the impugned order of retirement holding that :

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.

7. Before the decision of that appeal (Civil Appeal No. 670 of 1965) however, the Governor had promulgated the Madhya Pradesh (Age of Compulsory Retirement) Rules, 1965 under Article 309 of the Constitution. These rules were published in the Government Gazette of July 17, 1965. By a deeming clause, these rules were made effective from March 1, 1963. The age of retirement was thereby raised to 58 years and under Rule 6 thereof, the appointing authority was empowered to retire a Government servant on his attaining the age of 55 years on 3 months' notice without assigning any reason. By Rule 8, the aforesaid memorandum, dated February 28, 1963, was cancelled, and it was provided that notwithstanding the cancellation of that memorandum anything done or any action taken in pursuance of the directions contained in that memorandum shall be and shall always be deemed to have been done or to have been taken under the relevant provisions of these rules.

8. At the hearing of the earlier appeal, these rule were not brought to the notice of this Court.

9. On February 10, 1967, after the judgment by this Court, the State promulgated an ordinance which was replaced on April 20, 1963 by the Madhya Pradesh Shaskiya Sevak Anivarya Sevanivitrika Vidhimanyatakaran Vidyayaktakeran Vidyoyak Adhiniyam, 1967 (Act 5 of 1967) validating the retirement of certain government servants, including that of the appellant, despite the judgment of this Court.

10. By virtue of this Act, the State is vested with a right not to pay the dues of the appellant from the date of his retirement (December 3, 1963) onwards.

11. Section 2 and 5 of the Act, which are material for our purpose, read as follows :

2. (1) The Madhya Pradesh (Age of Compulsory Retirement) Rules, 1965 replacing the provisions of the Government of Madhya Pradesh General Administration Department Memorandum No. 1433-258-1-(iii) /63, dated the 28th February, 1963 (hereinafter referred to as the Memorandum)

shall be deemed to have come into force with effect from the 1st March, 1963.

(2) Anything done or any action taken in pursuance of the directions contained in the memorandum shall be and shall always be deemed to have been done or taken under corresponding provisions of the aforesaid rules as if the aforesaid rules were in force on the date on which such thing was done or action was taken and shall not be called into question in any court on the ground that the provisions of the memorandum were not issued in the form of rules made by the Governor of Madhya Pradesh under Article 309 of the Constitution and could not therefore regulate the conditions of service of Government servants serving in connection with the affairs of the state.

5. Notwithstanding any judgment, decree or order of any Court, all Government servants serving in connection with the affairs of the State who were compulsory retired or purported to have been compulsorily retired in accordance with the memorandum as replaced by the Madhya Pradesh (Age of Compulsory Retirement) Rules, 1965 referred to in Section 2 during the period beginning with 1st March, 1965 and ending on 15th July, 1965 shall be always be deemed to have been validly retired in accordance with the condition of service applicable to them at the relevant time as if the provisions of Sections 2 and 3 had been in force at all material time when such retirement was ordered, as accordingly -

(a) all notices served on such Government servants after their completion of age of 55 years shall be deemed to be and to have been issued in accordance with the rules governing their conditions of service;

(b) no suit or other proceedings shall be maintained as or continued in any Court for any amount whatsoever as a payment towards salary for the period beginning with the date on which a Government servant had been compulsory retired and ending on the date of his attainment of age of 58 years;

(c) no court shall enforce any decree or order directing the payment of any such amount referred to in clause (b) above.

12. In substance, and effect, this Act had made provisions of the Compulsory Retirement Rules, 1965 applicable from March 1, 1963.

13. On November 10, 1967, the appellant again moved the High Court by a writ petition out of which the present appeal has arisen, challenging the validity of this Act, particularly of Sections 2 and 5 extracted above.

14. Four contentions were raised by him before the High Court : (1) that the Act has been passed to overrule the decision of the Supreme Court which the legislature has no power to do; (2) that the statement of objects and reasons attached to the bill when it was introduced, indicates that its main object was to avoid financial burden which would fall on the State on account of its having to pay arrears of pension etc. to a large number of officers who had been retired under the said memorandum which was treated to be a rule and which the Supreme Court held was not an effective rule but merely an executive instruction; (3) that the matter having once been decided by the Supreme Court, was barred by the principle of res judicata and (4) that the rules give naked power to the authorities to retire any employee after he has attained the age of 55 years by giving him three months' notice, and provide no guidelines for the exercise of this power.

15. The High Court negatived these contention, dismissed the writ petition but granted a certificated

under Articles 132 (1) and 133(1)(a) to (c) of the Constitution.

16. Hence this appeal.

17. The contentions advanced before the High Court have been repeated before us with amplification and addition.

18. It is argued on behalf of the appellant : (i) that a right of property, being a judgment-debt, protected by Article 19 (1)(f) of the Constitution, had been created by this Court's decree dated January 30, 1967 in favour of the appellant and against the State. Since the impugned Act in effect, seeks to expropriate the appellant of that right without providing for any compensation, it is ultra vires Article 31(2) of the Constitution, (ii) the impugned Act is ultra vires the Constitution inasmuch as it seeks to validate the retirement of the appellant and others like him, by changing their service conditions with retrospective effect. In so doing, the State legislature has overstepped the limits of legislative powers conferred on it by Article 309 of the Constitution. Reliance has been placed on the decision of this Court in State of Mysore v. Padmanabhacharya ((1966) 1 SCR 994 : AIR 1966 SC 602 : (1966) 2 LLJ 147), (iii) the impugned Act encroaches upon the judicial field inasmuch as it overrules and makes unenforceable the decision, dated January 30, 1967, of this Court in Civil Appeal No. 670 of 1963 and in so doing it offends Articles 141, 142 and 144 of the Constitution; (iv) even if the impugned Act is valid, clauses (b) and (c) of Section 5 of the Act, on a proper construction, do not vacate the decree of this Court, requiring the respondent to pay to the appellant the pecuniary benefits resulting from the success of his earlier appeal (C.A. No. 670 of 1963) in this Court. Clause (b) of Section 5 merely bars the maintenance or continuation of any proceeding for any amounts as a payment toward salary. The appellant is not seeking to maintain or continue any execution proceeding in court, for the recovery of any amount towards salary, the decree being a declaratory one.

19. None of these contentions appears to be tenable.

20. A perusal of this Court's decree, dated 30, 1967 (extracted above) would show that it is not a money decree, raising a judgment-debt. It is a declaratory decree, declaring that the respondents'order dated September 11, 1963, compulsorily retiring the appellant was invalid, and consequently the appellant would be deemed to have continued in service till he attained the age of 58 years. The further declaration that "he will be entitled to such benefits as may accrue to him by virtue of the success of the writ petition" was only incidental or ancillary to the main relief and will fall or stand with the same. This being the position, the decree did not create an indefeasible right of property in favour of the appellant. We therefore do not find any substance in the argument that the impugned Act seeks to acquire without payment of compensation property vesting in the appellant and is consequently unconstitutional.

21. The distinction between a "legislative" act and a "judicial" act is well known, though in some specific instances the line which separates one category from the other may not be easily discernible. Adjudication of the rights of the parties according to law enacted by the legislature is a judicial function. In the performance of this function, the court interprets and gives effect to the intent and mandate of the legislature as embodied in the stature. On the other hand, it is for the legislature to lay down the law, prescribing norms of conduct which will govern parties and transaction and to require the court to give effect to that law.

22. While, in view of this distinction between legislative and judicial functions, the legislature

cannot by a bare declaration, without more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. As pointed out by Ray, C.J. in Indira Nehru Gandhi v. Raj Narain ((1975) Supp SCC 1), the rendering ineffective of judgments or orders of competent courts and tribunals by changing their basis by legislative enactment is a well known pattern of all validating Acts. Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power.

23. In Hari Singh v. Military Estate Officer ((1973) 1 SCR 516 : (1972) 2 SCC 239), a Bench of seven learned Judges of this Court, laid down that the validity of a validating law is to be judged by two tests. Firstly, whether the legislature possesses competence over the subject-matter, and, secondly, whether by validation the legislature has removed the defect which the courts had found in the previous law. To these we may add a third; whether it is consistent with the provisions of Part III of the Constitution.

24. We have noticed already, that the impugned provisions do not offend Articles 19 and 31 or anything else in Part III of the Constitution.

25. We may now see whether the provisions in question satisfy the first two tests.

26. Mr. Sanghi's argument is that by virtue of the power conferred by Article 309, the State legislature is not competent to pass a law validating retrospectively an invalid order of retirement of a State civil servant, made by the State Government, or render ineffective a decree of this Court declaring invalid such an order. The point sought to be made out is that the legislature power conferred on the State legislature by Article 309, is confined to regulating the recruitment and conditions of service of the persons appointed to public services of the State, and the impugned provisions not being such regulatory provision, are ultra vires Article 309.

27. In Padmanabhacharya's case (supra) which is the sheet-anchor of this contention, the Court was considering the scope of Article 309 in the context of Rule 294(a) Note 4, of the Mysore Service Regulations. There, the respondent was a teacher in a government school. He was ordered to be retired from service with effect from February 3, 1958 on attaining the age of 55 years. He challenged the validity of the order by a writ petition under Article 226 in the High Court and contended that Rule 294(a) having been amended in April 1955, the normal age of superannuation was fixed at 58 years, instead of 55 years. On behalf of the State, it was canvassed that a notification of the Governor under Article 309 of the Constitution, issued on March 25, 1959 had validated the action taken in retiring the respondent and others upon their attaining the age of 55 years.

28. Wanchoo, J. (as he then was) speaking for this Court held that such a rule cannot be made under the proviso of Article 309 of the Constitution, but was cautious enough to add :

We are expressing no opinion to the power of the legislature to make a retrospective provision under Article 309 of the Constitution wherein the appropriate legislature has been given the power to regulate the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union or of any State by passing Acts under Article 309 of the Constitution read with item 70 of List I of the Seventh Schedule or item 41 of List II of the Seventh Schedule. The present rule had been made by the Governor under the proviso to Article 309. That

proviso lays down that it shall be competent for the Governor or such person as he may direct in the case of services and posts in connection with the affairs of the State to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act by the appropriate legislature. Under the proviso the Governor has the power to make rules regulating the recruitment and conditions of services of persons appointed to such services and posts in connection with the affairs of the State. The question is whether the notification of March 25, 1959 can be said to be such a rule. We are of opinion that this notification cannot be said to be a rule regulating the recruitment and conditions of service of persons appointed to the services and posts in connection with the affairs of the State.

29. From what has been quoted above, it is clear that this Court advisedly did not express any opinion about the competency of the appropriate legislature to enact validating provisions of this type concerning the public servants serving in connection with the affairs of the State or the Central Government, as the case may be.

30. It is noteworthy that in enacting the impugned Act, the State legislature derives its competence not only from Article 309, but also from Entry 41 of List II of the Seventh Schedule. Indeed, within its allotted sphere, that is, with respect to any of the matters enumerated in List II of the Seventh Schedule the State legislature has, by virtue of Article 246(3), exclusive, plenary powers of legislation.

31. Entry 41, List II, reads as under :

"41. State public services; State Public Service Commission."

32. It is well settled that the entries in these legislative lists in Schedule VII are to be construed in their widest possible amplitude, and each general word used in such entries must be held to comprehend ancillary or subsidiary matters. Thus considered, it is clear that the scope of Entry 41 is wider that the matter of regulating the recruitment and conditions of service of public servants under Article 309. The area of legislative competence defined by Entry 41 is far more comprehensive than that covered by the proviso to Article 309. By virtue of Article 246, 309 read with Entry 41, List II, therefore, the State legislature had legislative competence not only to change the service conditions of State civil servants with retrospective effect but also to validate with retroactive force invalid executive orders retiring the servants, because such validating legislation must be regarded as subsidiary or ancillary to the power of legislation on the subject covered by Entry 41.

33. Thus the impugned provisions satisfy the first test. This takes us to the second test, whether the impugned legislation removes or cures the defect which this Court had found in the memorandum which was the basis of the impugned orders of retirement. For reasons that follow, the answer to this question also must be in the affirmative.

34. The basis of this Court's decision dated January 30, 1967 in Civil Appeal No. 670 of 1965 was that the government memorandum dated February 28, 1963, in pursuance of which the impugned order of retirement of I. N. Saksena had been passed on September 11, 1963, had not attained the status of a statutory rule framed under the proviso to Article 309 of the Constitution, but was merely an administrative instruction. This provision in the memorandum empowering the Government to retire a servant on his attaining the age of 55 years, after three months's notice, was not incorporated in the statutory rules. On the other hand the amendment made with effect from March 1963 in Fundamental Rule 56, in exercise of its powers under Article 309 by the Government under

notification dated December 6, 1963, had raised the age of retirement for Statement servants from 55 to 58 years. I. N. Saksena had therefore, by virtue of this amended statutory rule a right to remain in service upto the age of 58 years. This right could not be taken away by mere executive instructions embodied in the memorandum.

35. Madhya Pradesh Act 5 of the 1963 given the said memorandum the statutory status with effect from its very inception. By introducing a legal fiction the Act effective cures the defect from which this memorandum and the orders of retirement made thereunder were suffering.

36. Thus the second test was also satisfied. The conclusion is therefore inescapable that the impugned provisions were valid. Hence, the order, dated September 11, 1963, of Saksena's compulsory retirement became valid as the basis of this Court's judgment dated January 30, 1967 was removed.

37. There is no force in the fourth contention of Mr. Sanghi. Section 5, particularly clauses (b) and (c), effectively vacate the previous decree of this Court in favour of Saksena. For removing doubts, these clauses declare that this Court's decree will not be enforceable by initiating proceedings in any court thereon, in future.

38. In the light of the above discussion, it is abundantly clear that in enacting the impugned provisions, the legislature has not exceeded the limits of its legislative powers nor encroached on the judicial field. We will close the discussion by noticing only one decision out of the many that have been cited at the bar.

39. In Piare Dusadh v. King Emperor ((1944) FCR 61 : AIR 1944 FC 1), the Governor-General by ordinance repealed the Special Criminal Courts Ordinance II of 1942. There was a provision in the repealing ordinance for confirmation and continuance of sentences of special courts and retrial of pending case. The appellant therein had been convicted and sentenced by special criminal court which was held to have no jurisdiction to try the case by an order of a court. Section 3(1) of the Special Criminal Courts (Repeal) Ordinance, 1943, conferred validity and full effectiveness on sentences passed by special criminal courts by conferring jurisdiction on them with retrospective effect. The Federal Court held that by promulgating the validating and repealing ordinance of 1943, the legislative authority had not attempted to do indirectly what it could not do directly or to exercise judicial power in the guise of legislation. It was further held that the ordinance was not invalid on the ground that the legislative authority had validated by retrospective legislation proceedings held in courts which were void for want of jurisdiction as there was nothing in the Indian Constitution which precluded the legislature from doing so.

40. The ratio of the above decision applied with greater force to the present case.

41. For all the foregoing reasons, we negative all the contentions canvassed by Mr. Sanghi and dismiss this appeal leaving the parties to bear their own costs.

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42. For the reasons recorded in Civil Appeal No. 131 of 1971 entitled I. N. Saksena v. State of Madhya Pradesh, this appeal fails and is dismissed without any order as to costs.

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