B. J. Shelat

Vs

State of Gujarat and Others

Civil Appeal No. 923 of 1977

(R. S. Sarkaria, P. N. Kailasam, N. L. Untwalia JJ)

28.03.1978

JUDGMENT

KAILASAM, J. -

1. This appeal is preferred by special leave against the judgment of the High Court of Gujarat dated August 13, 1976 dismissing a writ petition filed by the appellant against the order of dismissal passed by the Government on January 21, 1976.

2. The appellant B. J. Shelat was born on December 4, 1918. He joined as a Magistrate on January 5, 1950 in the pre-reorganized State of Bombay. On the bifurcation of the State of Bombay on May 1, 1960 he was allotted to the State of Gujarat as a Civil Judge and Judicial Magistrate, First Class. On November 4, 1961 the appellant was appointed by the Governor of Gujarat as a Magistrate for the City of Ahmedabad. On November 9, 1970 the appellant gave a notice of retirement to the Government of Gujarat through the Registrar of the High Court. He intimated that as he had completed 50 years on December 4, 1968 he intended to retire from May 10, 1971 if Rule 161 of the Bombay Civil Services Rules permitted him to do so. The Registrar of the High Court replied to this notice on January 11, 1972 informing the appellant that he may send a fresh application on the lines of his application dated November 9, 1970.

3. The appellant had delivered several judgment under the Prevention of Food Adulteration Act during the period January 24, 1972 to August 17, 1972. These judgments were taken on appeal to the High Court and in the High Court during the period June 19, 1973 to August 10, 1973 the accused in the various cases relating to food adulteration filed affidavits alleging that they had paid some moneys to the appellant. When these appeals were pending before the High Court on July 17, 1973 the appellant gave a second notice under Rule 161 intimating his intention to retire on reaching the age of 55 years i.e. on December 3, 1973. But before December 3, 1973, the date on which the appellant was due to retire, the Chief City Magistrate, Ahmedabad, informed the petitioner on November 23, 1973 under the directions of the Chief Justice and judges of the High Court of Gujarat calling upon him to submit his explanation as regards allegations made in the affidavits. The appellant submitted his explanation on November 26, 1973. On December 11, 1973 the High Court issued an order of suspension as the High Court was of the view that it was desirable to suspend the appellant pending finalisation of departmental proceedings against him which were under contemplation.

4. The appellant filed a writ petition challenging the jurisdiction of the Government to take disciplinary action against him after retirement. This petition was dismissed and a Letters Patent Appeal filed by the appellant was also dismissed on December 24, 1973. The appellant filed a

special leave petition in this Court on April 25, 1975 allowed the appellant to withdraw his petition reserving his right to agitate the question as to whether disciplinary action can be taken against him after retirement when final orders were passed in the disciplinary inquiry against him. In the meantime a charges-sheet was issued to the appellant by the High Court on January 18, 1974 and the Inquiry Officers submitted his report, on July 25, 1974 holding that the charges were not proved. But the High Court did not agree with the report of the Inquiry Officer and directed the appellant to show cause why a different view from that of the Inquiry Officer be not taken. On receipt of the appellant's reply the High Court recommended the punishment of dismissal to the Government and the impugned order was passed by the Government on January 21, 1976. The appellant preferred writ petition to the High Court and the High Court by its judgment dismissed it holding that there is evidence on which a reasonable inference of guilt could be drawn and therefore it could not interfere with the order of dismissal. Hence, the present appeal.

5. Mr. V. M. Tarkunde, the learned Counsel for the appellant, raised two contentions before us. He submitted that after the passing of the impugned order of dismissal by the Government on January 21, 1976 it has become necessary to question the jurisdiction of the authority to take disciplinary action against the appellant after his retirement, a question which was specifically reserved for the appellant by this Court. Secondly, he submitted that on the merits there is no evidence on which a court can come to the conclusion that the charge that were framed against the appellant had been established.

6. We will proceed to consider the question of the jurisdiction of the authority to take disciplinary action against the appellant after his retirement. It may be recalled that the appellant gave a notice intimating his intention to retire on July 17, 1973 stating that he intended to retire on reaching the age of 55 years on December 3, 1973. He attained the age of 55 years on December 3, 1973 and it is common ground that the notice of suspension was issued by the High Court only on December 11, 1973. But before December 3, 1973 it is admitted that a show-cause notice was issued on November 23, 1973 by the Chief City Magistrate on the directions of the High Court calling upon the petitioner to submit his explanation and the appellant submitted his explanation on November 26, 1973.

7. Rule 161 of the Bombay Civil Services Rules provides for the retirement of Government servants before attaining the age of superannuation. Rule 161(1)(a) provides -

> Nothwithstanding anything contained in clause (a) :
>
> (1) An appointing authority shall, if he is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant to whom clause (a) applies by giving him notice of not less than three months in writing or three months pay and allowance in lieu of such notice :
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> Sub-rule (2)(ii) is as follows :
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> Any Government servant to whom clause (a) applies may, by giving notice of not less than three months in writing to the Appointing Authority, retire from service .... and in any other case, after he has attained the age of 55 years.

There is no dispute that the Rule applicable is Rule 161(2) (ii) and the appellant in entitled to retire by giving a notice of not less than 3 months after he has attained the age of 55 years. Under Rule

161(1)(aa)(1) the appointing authority has an absolute right to retire any Government servant to whom clause (a) applies in public interest by giving him notice of not less than three moths in writing or three month's pay and allowances in lieu of such notice. But the Government servant has no such absolute right. A right is conferred on the Government servant under Rule 161(2)(ii) to retire by giving not less than three months' notice on his attaining the prescribed age. Such a right is subject to the proviso which is incorporated to the sub-section which reads as follows :

> Provided that it shall be open to the appointing authority to withhold permission to retire to a Government servant who is under suspension, or against whom departmental proceedings are pending or contemplated, and who seeks to retire under this sub-clause.

But for the proviso a Government servant would be at liberty to retire by giving not less than three month's notice in writing to the appointing authority on attaining the prescribed age. This position has been made clear by this Court in Dinesh Chandra Sangma v. State of Assam 1 ((1977) 4 SCC 441 : 1978 SCC (L&S) 7 : AIR 1978 SC 17 where the Court was considering the effect of the (Assam) Fundamental Rule 56(c) which confers right on the Government servant to voluntary retire. Rule 56(c) of the (Assam) Fundamental Rules runs as follows :

> (c) Any Government servant may, by giving notice of not less than three months in writing to the appropriate authority, retire from service after he has attained the age of fifty years or has completed 25 years of service, whichever is earlier.

On a construction of the Rule this Court held that the condition of service which is envisaged in Rule 56(c) giving an option in absolute terms to a Government servant to voluntarily retire with three months' previous notice, after he reaches 50 years of age or has completed 25 years of service, cannot be equated with a contract of employment as envisaged in Explanation 2 to Rule 119 of the Defence of India Rules and that Rule 56 is a statutory condition which operated in law without reference to a contract of employment and when once the conditions of Fundamental Rule 56(c) are fulfilled the Government servant must be held to have lawfully retired. But for the proviso to Rule 161(2)(ii) the decision of this Court in the case cited above would be applicable and the right would have been absolute. But the proviso has restricted the right conferred on the Government servant. Under the proviso it is open to the appointing authority to withhold permission to retire to a Government servant when (1) he is under suspension, or (2) against whom departmental proceedings are pending or contemplated. Thus the permission to retire can be withheld by the appointing authority either when the Government servant is under suspension or against whom departmental proceedings are pending or contemplated. It was submitted on behalf of the appellant that admittedly he was not under suspension on the date when he attained the age of 55 years and that no departmental proceedings were pending or contemplated against him as required under the proviso. No departmental proceeding was pending but on the facts one cannot say that a proceeding was not under contemplation.

8. Mr. Tarkunde, the learned Counsel for the appellant, further submitted that in any event the appointing authority had not chosen to withhold permission to retire before the date of superannuation. It was submitted on behalf of the respondent, the State of Gujarat, that a reading of Rule 161(2)(ii) would show that a Government servant cannot retire without the specific permission of the appointing authority and as in this case no permission was granted it should be held that the appointing authority withheld permission to the Government servant to retire according to the proviso. In support of this contention Mr. Patel, the learned Counsel for the State of Gujarat, relied

on the decision in Lewis & Allenby (1909) Limited v. Pegge ((1914) 1 Ch D 782). In that case a limited company demised a residential flat for a term of years and the lessee covenanted not to assign or underlet the premises without the consent of the company, such consent not to be withheld in the case of a respectable or responsible person. On April 3, 1913 the lessee applied to the Secretary of the company for leave to sub-let to Higham a respectable and responsible person and asked to know by April 14 as Higham wanted possession on that date. The Secretary forgot to communicate with his directors. On April 14 the lessee not having received a reply sub-let to Higham and gave him possession. In an action by the company to recover possession for breach of the covenant the Court held that as consent is not to be withheld in the case of a respectable and responsible person, if the lessee applies for such consent and within a reasonable time that consent is not granted, then within the meaning of the covenant it is withheld and the lessee will not lose his property if he assigns to the person whose name he has given to the landlord. On the circumstances of the case the Court was of the view that the period between April 3 and April 14 was a reasonable time and inasmuch as no intimation was made to him either way in the interval there has been no breach of the covenant and the sub-lease to higham was good. We fail to understand how this decision advances the contention of Mr. Patel. As no communication was received the Court held that the granting of the permission was a mere formality and that it had to be taken that the consent was granted. In the case before us it is incumbent on the appointing authority to withhold permission to retire on one of the conditions mentioned in the proviso. We are of the view that the proviso contemplates a positive action by the appointing authority. The words "It shall be open to the appointing authority to withhold permission" would indicate that the appointing authority has got an option to withhold permission and that could be exercised by communicating its intention to withhold permission to the Government servant. The appointing authority may have considered the question and might not have taken a decision either way or after considering the facts of the case might have come to the conclusion that it is better to allow the Government servant to retire than take any action against him. For the proviso to become operative it is necessary that the Government should not only take a decision but communicate it to the Government servant. It is not necessary that the communication should reach the Government servant. As held by this Court in State of Punjab v. Khemi Ram ((1970) 2 SCR 657 : (1969) 2 SCC 28) it will be sufficient if such an order is sent out and goes out of control of the appointing authority before the relevant date. After referring to the earlier decisions, the Court held that the actual knowledge by the Government servant of an order of dismissal may perhaps become necessary because of the consequences which the decision in the State of Punjab v. Amar Singh Harika (AIR 1966 SC 1313 : (1966) 2 LLJ 188 : (1965-66) 28 FJR 464) contemplated but an order of suspension when once issued and sent out to the concerned Government servant must be held to have been communicated no matter when he actually received it. The question as to when the order should be deemed to have been communicated is not relevant in this case as admittedly the order of suspension was not communicated before the date of superannuation.

9. Mr. Patel next referred us to meaning of the word "withhold in Webster's Third New International Dictionary which is given as "hold back" and submitted that the permission should be deemed to have been withheld if it is not communicated. We are not able to read the meaning of the word "withhold" as indicating that in the absence of a communication it must be understood as the permission having been withheld.

10. It will be useful to refer to the analogous provision in the Fundamental Rules issued by the Government of India applicable to the Central Government servants. Fundamental Rule 56(a) provides that except as otherwise provided in this Rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-either years.

Fundamental Rule 56(j) is similar to Rule 161(aa)(1) of the Bombay Civil Services Rules conferring an absolute right on the appropriate authority to retire a Government servant by giving not less than three months' notice. Under Fundamental Rule 56(k) the Government servant is entitled to retire from service after he has attained the age of fifty-five years by giving notice of not less than three months in writing to the appropriate authority on attaining the age specified. But proviso (b) to sub-rule 56(k) states that it is open to the appropriate authority to withhold permission to a Government servant under suspension who seeks to retire under this clause. Thus under the Fundamental Rules issued by the Government of India also the right of the Government servant to retire is not an absolute right but is subject to the proviso whereunder the appropriate authority may withhold permission to a Government servant to under suspension. On a consideration of Rule 161(2)(ii) and the proviso, we are satisfied that it is incumbent on the Government to communicate to the Government servant its decision to withhold permission to retire on one of the grounds, specified in the proviso.

11. In the view we have taken that the appointing authority has no jurisdiction to take disciplinary proceedings against a Government servant who had effectively retired, the question as to whether the High Court was right in holding that the disciplinary authority had sufficient grounds for dismissing the appellant does not arise. The Inquiry Officers held that the charges had not been established as the witnesses who made allegations against the appellant in their affidavits failed to appear before him. The High Court on the administrative side came to a different conclusion on examining the record relating to three criminal cases where the accused pleaded guilty but the appellant did not pronounce his judgment and postponed it to some months thereafter. In one case the accused pleaded guilty on December 16, 1971 but the judgment was pronounced on March 21, 1972. In the second case the accused pleaded guilty on December 23, 1971 and the judgment was pronounced on January 24, 1972 and in the third case the plea of guilty was on June 26, 1972 and the judgment was pronounced on August 17, 1972. The High Court observed : "While exercising our jurisdiction under Article 226, we are not concerned with the adequacy of evidence. All that we have to see is, whether there is evidence on which a reasonable inference could be draws". In the circumstances of the case, the High Court was of the view that it was not called upon to interfere. As already stated, as we have come to the conclusion that the disciplinary action cannot be taken after the date of his retirement, we refrain from expressing any opinion on the correctness of the decision taken by the appointing authority.

12. In the result the appeal is allowed and the impugned order and the judgment of the High Court are set aside. There will be no order as to costs.

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