A. L. Ahuja

Vs

Union of India

Writ Petition No. 7338 of 1981

(Ranganath Misra, M. M. Dutt, M. H. Kania JJ)

24.07.1987

JUDGMENT

RANGANATH MISRA, J. -

1. The petitioner of this application under Article 32 of the Constitution is an engineer who was employed in the Central Public Works Department under the Ministry of Works and Housing in Government of India and was compulsorily retired by order dated August 3, 1976 with effect from November 5, 1976 made under Rule 56(j) of the Fundamental Rules. He has assailed that order for retirement and has claimed payment of remuneration which he would have been entitled to draw up to the normal date of superannuation.

2. The short facts are these. The petitioner was born on February 10, 1922 and secured his first appointment as a Section Officer under the named employer on October 22, 1947. He was promoted as officiating Assistant Engineer in Class II service with effect from May 25, 1954, and came to be confirmed as Section officer by an order dated October 8, 1955. On July 3, 1961, he was further promoted as officiating 'Executive Engineer in Class I service but on September 4, 1965, he was reverted to the post of Assistant Engineer in officiating position and was continuing in that post when he was compulsorily retired.

3. The vires of Rule 56(j) of the Fundamental Rules as also the power to compulsorily retire a public servant have been upheld by this Court and do not require to be re-examined. The basis of attack to the impugned order is as specified in ground No. A and is to the following effect :

The impugned order is contrary to the judgment delivered by this Hon'ble Court on February 26, 1980, copy at Annexure C hereto. (Union of India v. K. R. Tahiliani ((1980) 3 SCC 309 : 1980 SCC (L&S) 374 : 1980 Lab IC 594)). According to the said judgment FR 56(j)(i) has no application to officiating government servants, hence can have no application to the petitioner since the petitioner was an officiating government servant.

4. The impugned notice ran thus :

> # No. 32/452/66-EC. III Government of India Central Public Works Department New Delhi, August 3, 1976##

Order

Whereas the Engineer-in-Chief is of opinion that it is in public interest to do so :

> Now, therefore, in exercise of the powers conferred by clause (j) of Rule 56 of the Fundamental Rules, the Engineer-in-Chief hereby gives notice to Shri A. L. Ahuja, Assistant Engineer (Civil), at present under suspension, that he, having already attained the age of fifty years on February 10, 1972, shall retire from service with effect from the forenoon of November 3, 1976, or, from the date of expiry of three month computed from the date of issue of the service of this notice on him, whichever is later.
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> # Sd/- (V. R. Vaish) Engineer-in-ChiefTo Shri A. L. Ahuja, Assistant Engineer (Civil), (Under Suspension), All/85, Lajpat Nagar, New Delhi-110024.##

5. It is clear from it that the petitioner attained the age of 50 years on February 10, 1972 and, therefore, on the date of the order he had completed the age of 54 years. Admittedly, he was holding a Class II post when the impugned order was served on him. Fundamental Rule 56(j) under which notice was given provides :

> (j) Notwithstanding anything contained in this rule, the appropriate authority shall, if it is of the opinion that it is in the public interest so to do, have the absolute right to retire any government servant by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice :
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> (i) if he is in Class I or Class II service or post (and had entered government service before attaining the age of thirty-five years), after he has attained the age of fifty years :
>
> (ii) in any other case after he has attained the age of fifty-five years;
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> # * * *##

The appropriate authority is entitled to exercise power under clause (j) in the case of a government servant in Class I or Class II service or post where he entered into service before attaining the age of 35 years after the said servant attained the age of 50 years; and in other cases after he has attained the age of 55 years. In the instant case, the petitioner was promoted as officiating Assistant Engineer which is a Class II post on May 25, 1954 and continued to hold that post when the order of compulsory retirement was passed. By May 25, 1954 the petitioner had not attained the age of 35 years.

6. As already indicated above he had crossed the age of 50 years but had not attained the age of 55 years by the date of the impugned order. Therefore, sub-clause (1) was not contravened when the order was made. It has been argued before us that as the petitioner was holding an officiating appointment in Class II, he could not have been compulsorily retired under sub-clause (i).

7. Support is claimed from the observations in the Tahiliani case ((1980) 3 SCC 309 : 1980 SCC (L&S) 374 : 1980 Lab IC 594). The sole question that fell therein for decision before this Court was whether a government servant officiating in Class I or Class II service or post could be retired compulsorily by exercising the power under Rule 56(j)(i) after he has attained the age of 50 years. The two Judge Bench which decided the case held : [SCC p. 311, SCC (L&S) p. 376, para 5]

An officiating hand has no right to the post and is perhaps a fleeting bird who may have to go back to the substantive post from which he has been promoted on an officiating basis. What is more to

the point, a person who has been appointed de novo may begin his service on an officiating basis or on a temporary basis and it is obvious that he has no right to the post and cannot be strictly said to be in that service or post as a member of that service. In short, an officiating government servant does not really belong to Class I or Class II service until he acquires a right thereon. Even viewed closely and meticulously, the structure of the clause, namely, "if he is in Class I or Class II service or post", emphasises the nature of the service or post vis-a-vis the government servant concerned. We need not go into the semantic shapes, lexical niceties or linguistic nuances but only go through the meaning and purpose of the provision. When a government servant belonging to a class I or Class II service or post on regular basis has to be retired compulsorily Rule 56(j)(i) comes to the rescue of the government. But if he is only a temporary hand, he has no right to the post and can always be reverted to the post, if any, on which he has a lien. Similar is the position of an officiating hand. Thus, we have reached an inevitable conclusion that Rule 56(j)(i) is meant to cover only those who are in a post on a regular basis, i.e. in a substantive capacity, and not on an officiating basis only.

8. Strong reliance was placed by counsel for the petitioner on the reasons extracted above.

9. It is clear that sub-clause (ii) is the general rule applicable to all government servants and sub-clause (i) carves out a class of government servants into a category and makes a special provision. We have already indicated that sub-clause (ii) did not apply to the facts of this case as the petitioner had not attained the age of 55 years by the date of the order. The observations made in Tahiliani case ((1980) 3 SCC 309 : 1980 SCC (L&S) 374 : 1980 Lab IC 594) indisputably support the petitioner. But the correctness thereof is disputed by learned Additional Solicitor General appearing for the Union of India and that is why this writ petition was directed to be heard by a larger bench.

10. There is no reference to officiating service in sub-clause (i). The relevant words used in sub-clause (i) are "if he is in Class I or Class II service or post". A person can be in class I or class II service or post even when he holds a post of either class substantively or temporarily or on officiating basis. Instances are abundant where officers are promoted to Class I or Class II service or post of such class on officiating basis and such officiation lasts for a number of years. Officiating promotion certainly does not confer a right to the post and at any time the government servant may be sent back to his substantive post. There is, however, no reason why sub-clause (i) should be confined to service or post held on substantive basis. Learned counsel for the petitioner does not dispute the position that a person who is in Class I or Class II service or post is in such service or post as covered by sub-clause (i). The possibility of such incumbent being sent back to the substantive post is not at all relevant in the matter of exercising powers of compulsory retirement. If the officiation is not brought to an end by reverting the government servant to his substantive post before the power of compulsory retirement is exercised, the government servant concerned must be taken to be in Class I or Class II service or post at the relevant time and would come within the ambit of sub-clause (i). There is no warrant for the conclusion that officiating government servants in Class I or Class II service or post are outside the purview of sub-clause (i). The possibility of a reversion to the substantive post is not germane to the exercise of power contained in F.R. 56. The purpose of Fundamental Rule 56(j) is to confer power on the appropriate authority to compulsorily retire government servant in the public interest and the classification of government servants into two categories covered by sub-clauses (i) and (ii) has a purpose behind it. If the condition indicated in sub-clause (i) is satisfied, namely, the government servant is in Class I or Class II service or post and he had entered into service before attaining the age of 35 years, and has attained the age of 50, the further condition that he must substantively belong to the two classes of service or post cannot be introduced into the scheme. The purpose of the sub-clauses is to classify government servants

into two categories and sub-clause (i) takes within its sweep those government servants who at the relevant time are in Class I or Class II service or post, whether substantively, temporarily or on officiating basis.

11. We would accordingly hold that the ratio of the decision in Tahiliani case ((1980) 3 SCC 309 : 1980 SCC (L&S) 374 : 1980 Lab IC 594) is not correct and sub-clause (i) of Rule 56 (j) applies to government servants in Class I or Class II service or post on substantive, temporary or officiating basis.

12. On this conclusion the writ petition is liable to be dismissed. It has been represented to us by counsel for the petitioner that the similarly placed parsons had gone before the Delhi High Court challenging the orders of compulsory retirement and the Delhi High Court relying upon Tahiliani case ((1980) 3 SCC 309 : 1980 SCC (L&S) 374 : 1980 Lab IC 594) gave them relief. Such judgments have become final and Union of India has given effect to the decisions of the Delhi High Court. When this was put to learned Additional Solicitor General he agreed that the Union of India will have no objection to treat the petitioner alike and would be prepared to give the same relief to the petitioner.

13. The petitioner would have superannuated from service on February 29, 1980 if he had not been compulsorily retired with effect from November 5, 1976. Even if the writ petition is allowed and the order of compulsory retirement is set aside the petitioner cannot go back to service. But he would be entitled to pecuniary benefit of salary and allowances admissible under the rules. Accordingly, we allow the writ petition and direct the respondent to pay to the petitioner the salary and other allowances which would have been payable for the period between November 5, 1976 and February 29, 1980. Such payment be made within two months from today. There will be no order for costs.

Writ Petition Nos. 6251 and 8189 of 1981

14. Each of the petitioners in these two writ applications under Article 32 of the Constitution was employed in the Central Public Works Department in the Ministry of Works and Housing of Government of India and has been compulsorily retired under Fundamental Rule 56(j). The facts of each of these applications are more or less similar to those in Writ Petition No. 7338 of 1981 which we have disposed of today. For the reasons given therein we allow each of the writ petitions and quash the order of compulsory retirement made against each of the petitioners. By now both the petitioners would have retired from service and, therefore, they cannot be restored in service. They would, however, be entitled to salary and other service allowances payable to them from the date of compulsory retirement till the date of their normal superannuation. There will be no order for costs.

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