

N. C. Dalwadi

Vs

State of Gujarat

Civil Appeal No. 1939 (N) of 1972

(A. P. Sen, B. C. Ray JJ)

24.07.1987

JUDGMENT

SEN, J. -

1. The only question involved in this appeal by special leave from the judgment and order of the High Court of Gujarat dated January 24, 1972 is whether the appellant who was officiating as Superintending Engineer in the Gujarat Service of Engineers, Class I could be retired by the State Government on the date on which he attained the age of 55 years on the ground that he was merely officiating in that post and had not "attained to the rank of a Superintending Engineer" within the meaning of Rule 161(1)(c)(ii)(1) of the Bombay Civil Services Rules, 1959 as applicable to the State of Gujarat.

2. The facts giving rise to the case are as follows. The appellant was an officer of the Bombay Service of Engineers, Class I in the erstwhile State of Bombay and was promoted to the post of Executive Engineer. In July 1965 when the post of Superintending Engineer fell vacant the State Government promoted him to officiate as Superintending Engineer in the Gujarat Service of Engineers, Class I until further orders. On account of his meritorious service as Superintending Engineer the appellant was put in charge of the Minor Irrigation Project Circle. The work undoubtedly is of a highly specialised and skilled nature and officers of merit and proven ability, skill and competence are usually posted there. The appellant did excellent record of service without any blemish and earned encomiums for his meritorious service in his new capacity. In 1966 the Chief Engineer, Public Works Department addressed a letter to the appellant communicating the State Government's appreciation of the valuable work which the appellant and the officers and staff under him had put up during the scarcity relief operations in that year. However, the State Government all of a sudden on September 13, 1967 purported to compulsorily retire him under the first proviso to Rule 161(1)(a) w.e.f. December 15, 1967 after giving him three months' notice he having attained the age of 55 years on November 12, 1967. Normally, the appellant would have as Superintending Engineer retired on November 12, 1970, the date on which he attained the age of 58 years. He had been then put in 29 years of service and there was no adverse entry in any of his confidential reports questioning his integrity or his efficiency or ability for retention in service. The appellant accordingly assailed the order of compulsory retirement by a petition in the High Court under Article 226 of the Constitution.

3. In contesting his claim, the State Government in its return pleaded that the case of the appellant was governed by Rule 161(1)(c)(ii)(1) of the Rules and not by Rule 161(1)(a) and reference to a wrong provision would not necessarily invalidate the order, that the appellant had not substantively attained to the rank of Superintending Engineer before he reached the age of 50 years and therefore

the Government could compulsorily retire him at any time after he reached that age. It was asserted that the government entitled to reviews the cases of government servants who were to attain the age of 55 years as per the terms of the circular issued by the government in the General Administrative Department dated October 25, 1963, as amended from time to time, and that in accordance with the procedure laid down the case of the appellant was reviewed before he attained the age of 55 years and it was decided that it was not desirable in the public interest to continue him in government service and that he should be compulsorily retired by giving three months notice. Even otherwise, it was contended that by virtue of the power vested in the government under the first proviso to Rule 161(1)(a) the government could direct the compulsory retirement even of a person who had attained the rank of Superintending Engineer before reaching the age of 50 years and that power was not excluded by reason of Rule 161(1)(c)(ii)(1).

4. The learned Single Judge (A. D. Desai, J.) relying upon the decision of a Division Bench in *Ishwarlal Kasanji Naik v. State of Gujarat* ((1963) 4 Guj LR 945) held that since the appellant had not attained the substantive rank of a Superintending Engineer, he could be made to retire at any time under Rule 161(1)(c)(ii)(1) i.e. on the date he attained the age of 55 years or thereafter. He observed that the decision in *Ishwarlal Kasanji Naik case* ((1963) 4 Guj LR 945) being that of a Division Bench, the construction placed by the learned judges on Rule 161(1)(c)(ii)(1) was clearly binding on him and that since the appellant was merely holding the post in an officiating capacity he could not be held, according to the view expressed in *Ishwarlal Kasanji Naik case* ((1963) 4 Guj LR 945), to have attained the rank of Superintending Engineer, in order to have the benefit of the normal age of superannuation of 58 years. It has been laid down by a Division Bench in *Ishwarlal Kasanji Naik case* ((1963) 4 Guj LR 945) that the benefit of exemption from Rule 161(1)(c)(ii)(1) could be had only by government servants in the Bombay Service of Engineers, Class I who were in the posts of Superintending Engineers i.e. held the rank of a Superintending Engineer on a regular basis, in a substantive capacity and not in an officiating capacity. The decision is reflected in a laconic sentence :

In order to get the benefit of exemption from the rule [Rule 161(1)(c)(ii)(1)] it is necessary that he should have substantively attained the post or the rank of a Superintending Engineer.

We are unable to subscribe to the view expressed by the learned judges in *Ishwarlal Kasanji Naik case* ((1963) 4 Guj LR 945). The word 'substantive' does not find place in Rule 161(1)(c)(ii)(1) of the Rules.

5. In assailing the correctness of the judgment of the High Court learned counsel for the appellant contends that the post of Superintending Engineer is a selection post and the appellant was promoted as such in a clear vacancy, and though he was working as a Superintending Engineer in an officiating capacity, he was given the benefit of the revised pay scale for post of Superintending Engineer and also given two yearly increments. According to him, the word 'rank' in Rule 161(1)(c)(ii)(1) must in the collocation of the words being preceded by the word 'attained' mean the status or the grade. It is pointed out that the word 'rank' is not qualified by the word 'substantive' as erroneously assumed in *Ishwarlal Kasanji Naik case* ((1963) 4 Guj LR 945). He places reliance on the recent judgment of this Court in *S. C Jain v. State of Haryana* ((1985) 4 SCC 645 : 1986 SCC (L&S) 145) where an identical provision Rule 3.26 (c)(1) of the Punjab Civil Services Rules was treated to be a special rule conferring immunity on an engineer who has attained the rank of Superintending Engineer in the Public Works Department (Buildings and Roads Branch) on the ground that premature retirement of Executive Engineers promoted to the rank of Superintending

Engineer because of their merit and proven ability and competence was clearly not in the public interest and therefore they must get protection from premature retirement under Rule 3.26 (c)(1). It is pointed out that even though the appellant was working as a Superintending Engineer, his pension has been fixed by the government on the basis of the pay scale of Superintending Engineer presumably because he had been promoted to the post in an officiating capacity but in a clear vacancy i.e. had acquired the status or rank of a Superintending Engineer.

6. The contention to the contrary by learned counsel for the respondents based upon an earlier decision of this Court in *Union of India v. K. R. Tahiliani* ((1980) 2 SCR 1092 : (1980) 3 SCC 309 : 1980 SCC (L&S) 374 : 1980 Lab IC 594) is that the appellant was only officiating as Superintending Engineer and had no right to the post. Our attention is drawn to the following observations made by the court : [SCC p. 311, SCC (L&S) p. 376, para 5]

When a government servant belonging to a Class I or Class II service or post on a 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.

The submission therefore is that the benefit of the exemption under Rule 161(1)(c)(ii)(1) can be had only by a government servant holding the post of Superintending Engineer on a regular basis i.e. in a substantive capacity. The subsequent decision in *S. C Jain* case ((1985) 4 SCC 645 : 1986 SCC (L&S) 145) is sought to be distinguished on the ground that the court there was dealing with the case of a person holding the post of a Superintending Engineer on a regular basis.

7. In order to appreciate the rival contentions, it is necessary to refer to some of the provisions of Rule 161(1) which deals with the age of superannuation, insofar as material :

161(1)(a) Except as otherwise provided in the other clauses of this rule, the date of compulsory retirement of a government servant other than a Class IV servant is the date on which he attains the age of 58 years.

Provided :

(i) An appointing authority may after giving three months previous notice in writing require a government servant to retire from the service on the date on which he attains the age of 55 years or on any date thereafter to be specified in the notice.

161(1)(c) The following rules are applicable to particular service :

(ii) (1) Except as otherwise provided in this sub-clause, government servants in the Bombay Service of Engineers, Class I, Must retire on reaching the age of 58 years, and may be required by government to retire on reaching the age of 50 years if they have not attained to the rank of Superintending Engineer.

8. Age of superannuation is an incident of government service; it is for the benefit of the employee who earns a well-earned rest with or without pensionary benefits for the rest of his life. It is common to all permanent civil servants; it depends on an event that inevitably happens by passage of time unless the employee dies earlier or resigns from the post. We must give to the different

clauses of Rule 161(1) which find place in Chapter IX headed "Compulsory Retirement" their plain ordinary meaning in furtherance of the object and purpose with which they have been framed. Under Rule 161(1)(a) compulsory retirement of all government servants is at the age of 58 years which is the general provision. But the same cannot be said of the compulsory retirement before the age of superannuation. It is not an incident of the tenure; it is not conceived in the interests of the employee; it is a mode of terminating his employment at the discretion of the appointing authority. The words 'except as otherwise provided in the other clauses of this rule' appearing in Rule 161 (1)(a) make the general rule of superannuation at the age of 58 years subject to other clauses of that rule. This is to say, the government is empowered to provide for different ages of compulsory retirement for different classes of government servants. Proviso to Rule 161(1)(a) however is the absolute power of the government to direct the premature retirement of a government servant on the date on which he attains the age of 55 years or at any time thereafter. Rule 161(1)(c) is the special rule framed for that purpose. To illustrate, Rule 161(1)(c)(i)(1) says that except as otherwise provided in that sub-clause, holders of posts of the Chief Judge of the Court of Small Causes, Bombay and the Administrator General and Official Trustee, Bombay whether they are recruited directly or are promoted from subordinate posts should ordinarily be retained in service till the age of 60 years, if they continue efficiently up to that age, otherwise they may be required to retire at the age of 55 years or at any point thereafter. This clearly brings out that there are two ages of superannuation depending upon efficiency, integrity and ability for further retention in service. Similarly, Rule 161(1)(c)(ii)(1) deals with another class of officers, namely, government servants in the Bombay Service of Engineers, Class I and similarly provides for two ages of superannuation. The first part of sub-clause (1) adopts the general rule contained in Rule 161 (1)(a), namely, that they shall retire on the date on which they attain the age of 58 years. The second part however confers power on the government to retire any such officer on his reaching the age of 50 years. Such power of the government to direct premature compulsory retirement of these officers is subject to a qualification. The words "if they have not attained to the rank" of Superintending Engineer read in conjunction with the opening words 'except as otherwise provided in this sub-clause' clearly carve out an exception in the case of persons holding the posts of Superintending Engineers. The words 'if they have not attained to the rank' of Superintending Engineer in Rule 161 (1)(c)(ii)(1) are plainly bad English and must be read as 'if they have not attained the rank' of Superintending Engineer. The word used in that rule is 'rank' and not 'substantive rank' and there is no reason why it should not be understood according to its ordinary sense as meaning grade or status, particularly when it is preceded by the words 'have not attained the rank'. The word 'attained' means acquired or reached. The word 'rank' has both a narrow as well as a wider meaning.

9. A question may arise as to the purport and effect of these rules. The effect of Rule 161 (1)(a) which is the general rule dealing with all government servants except with respect to the enumerated categories and of Rule 161 (1)(c)(ii)(1) which is a special rule dealing with government servants belonging to Bombay Service of Engineers, Class I is the same; the difference is only superficial which lies more in clever drafting than in their content. The government may terminate the services of a permanent government servant under the first proviso to Rule 161 (1)(a) at any time on or after he attains the age of 55 years after giving three months notice i.e. before the normal age of superannuation, by way of compulsory retirement. It will be noticed that the power of the government under the first proviso to direct premature retirement does not exist on its satisfaction that it is necessary to do so in the public interest. It is unlike FR 56(j) to that extent. The government may terminate the services of a government servant belonging to the Bombay Service of Engineers, Class I under Rule 161 (1)(c)(ii)(1) at the age of 50 years without giving him any

notice. Arbitrariness is writ large in both the rules but (sic as) the rules enable the government to deprive a permanent civil servant of his office without enquiry. The power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be real cause for taking action. Both violate Article 311(2) of the Constitution. Prima facie it appears to us that the first proviso to Rule 161 (1)(a) was on lines of FR 56(j) and could be sustained on the strength of the decision in *Union of India v. Col. J. N. Sinha* ((1971) 1 SCR 791 : (1970) 2 SCC 458 : AIR 1971 SC 40) being based on the ground that the compulsory retirement of a particular government servant was in the public interest but the words 'in the public interest' are not there in Rule 161 (1)(c). In *Col. J. N. Sinha case* ((1971) 1 SCR 791 : (1970) 2 SCC 458 : AIR 1971 SC 40) it was laid down that the appropriate authority has the absolute right to retire a government servant if it is of the opinion that it is in the public interest to do so. The right conferred on the appropriate authority is an absolute one. That power can be exercised subject to the conditions mentioned in the rules, one of which is that the concerned authority must be of the opinion that it is in the public interest to do so. If that authority bona fide forms that opinion, the correctness of that opinion cannot be challenged before courts. It is however open to an aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that it is an arbitrary decision. Compulsory retirement involves no civil consequences. The aforementioned FR 56(j) is not intended for taking any penal action against government servants. That rule merely embodies one of the facets of the "pleasure doctrine" embodied in Article 310 of the Constitution. It was said : (SCC p. 461, para 9)

There is no denying the fact that in all organisations and more so in government organisations, there is good deal of dead wood. It is in the public interest to chop off the same. Fundamental Rule 56(j) holds the balance between the rights of the individual government servant and the interests of the public. While a minimum service is guaranteed to the government servant, the government is given power to energize its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest.

These considerations do not arise either under the first proviso to Rule 161 (1)(a) or under sub-clause (1) to Rule 161 (1)(c)(ii) because the concept of public interest is not there.

10. It seems to us that on a proper construction of Rule 161 (1)(c)(ii)(1) which is identical to Rule 3.26 (c)(1) of the Punjab Civil Services Rules, the word 'rank' in the collocation of the words 'if they have not attained to the rank of Superintending Engineer' in Rule 161 (1)(c)(ii)(1) must in its context and setting be construed in its wider sense as meaning status or grade, and if so regarded, the second part of that rule must be treated as an exception to the special rule empowering the government to direct superannuation of such officers on the date they attain the age of 50 years. This has been the view expressed by the Court in *S. C. Jain case* ((1985) 4 SCC 645 : 1986 SCC (L&S) 145) but we find it difficult to support the conclusion that the words 'if they have not attained to the rank of Superintending Engineer' in Rule 161 (1)(c)(ii)(1) confer an immunity on Superintending Engineers from being compulsorily retired at any age below the normal age of superannuation at 58 years. Under the scheme of the Rules, the benefit which the Superintending Engineers enjoy under the second part of Rule 161 (1)(c)(ii)(1) is necessarily subject to the absolute power of the government to direct compulsory retirement of such officers on the date they attain the age of 55 years under the first proviso to Rule 161 (1)(a) or under FR (j)(1) on which it is based. Although the words 'in the public interest' are not there but such power to direct premature compulsory retirement at the age of 55 years can be exercised subject to the conditions indicated in *Col. J. N. Sinha case* ((1971) 1 SCR 791 : (1970) 2 SCC 458 : AIR 1971 SC 40), one of which is that the concerned authority must be of the opinion that it is in the public interest to do so.

11. We are not oblivious of the fact that the construction that we put on the word 'rank' in Rule 161 (1)(c)(ii)(1) does not accord with the view expressed by the Court in Tahiliani case ((1980) 2 SCR 1092 : (1980) 3 SCC 309 : 1980 SCC (L&S) 374 : 1980 Lab IC 594) that FR 56(j) 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. It proceeds to the principle that the constitutional provision under Article 311(2) protecting a government servant from reduction in rank without hearing refers only to a person who is occupying a higher post in a substantive capacity, for which he alone has a legal right to occupy the post. The court laid down while interpreting FR 56(j) that a person who is occupying a higher post in an officiating capacity has no such right and can be deprived of his post by the competent authority. The facts are not clear from the judgment in Tahiliani case ((1980) 2 SCR 1092 : (1980) 3 SCC 309 : 1980 SCC (L&S) 374 : 1980 Lab IC 594). From the passage extracted above, it is clear that the court laid down that when a government servant belonging to a Class I or Class II service or post on a regular basis has to be retired compulsorily, the government can fall back on FR 56(j). It however held that FR 56(j) 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. If that be so, then we are at a loss to understand why a person who has not attained the rank of Superintending Engineer i.e. is merely officiating as Superintending Engineer cannot be compulsorily retired from his substantive post of Executive Engineer if the other requirements of FR 56(j) are fulfilled. We need not dilate on this aspect further inasmuch as the State Government in the return filed before the High Court stated that it only intended and meant to act under the first proviso to Rule 161 (1)(a) and not under Rule 161 (1)(c)(ii)(1). It is averred in the return that the case of the appellant reviewed and it was decided to compulsorily retire him on his attaining the age of 55 years. There is no material placed to show that such compulsory retirement was necessary in the public interest. The appellant has had an unblemished record and there was nothing against him to doubt his integrity, fitness and competence. In somewhat similar circumstances this Court in H. C. Gargi v. State of Haryana ((1986) 4 SCC 158 : 1986 SCC (L&S) 738 : (1986) 1 ATC 356) struck down the order of compulsory retirement under Rule 3.25(d) of the Punjab Civil Services Rules, observing : [SCC p. 160, SCC (L&S) p. 739, ATC p. 357, para 2]

The power of compulsory retirement under Rule 3.25(d) of the Rule can be exercised subject to the conditions mentioned in the rule, one of which is that the concerned authority must be of the opinion that it is in public interest to do so. The test in such cases is public interest as laid down by this Court in Union of India v. col. J. N. Sinha ((1971) 1 SCR 791 : (1970) 2 SCC 458 : AIR 1971 SC 40) It does not appear that there was any material on the basis of which the State Government could have formed an opinion that it was in public interest to compulsorily retire the appellant at the age of 57 years. There was really no justification for his compulsory retirement in public interest.

There is no reason for us to take a different view in the facts and circumstances of the present case. The impugned order of compulsory retirement of the appellant purporting to be under the first proviso to Rule 161 (1)(a) of the Rules must therefore be struck down as arbitrary.

12. In the result, the appeal succeeds and is allowed. The impugned order passed by the State Government dated September 13, 1967 for compulsory retirement of the appellant made under the first proviso to Rule 161 (1)(a) of the Bombay Civil Services Rules, 1959 is quashed and he shall be deemed to have retired from service on attaining his normal age of superannuation of 58 years on November 12, 1970. We understand that the pension of the appellant has already been fixed on the pay scale of Superintending Engineer and the effect of this order is confined to payment of the difference between salary and pension for three years and to the benefit of the revised pay scale of Superintending Engineer in the matter of computation of pension.

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