Union of India and Another

Vs

K. S. Subramanian

Civil Appeal No. 212 (NCS) of 1975

(G. L. Oza, K. Jagannatha Shetty, B. C. Ray JJ)

15.12.1988

JUDGMENT

JAGANNATH SHETTY, J. –

1. This appeal by special leave is against a judgment and decree of a Division Bench of the High Court of Kerala.

2. Short factual background is this :

> The respondent was appointed on October 15, 1951 as an ordinary industrial labourer at Naval Base, Cochin. He was promoted as a welder Gr. II on September 18, 1956. He was confirmed in that post. He was thus a permanent civilian industrial employee. On October 25, 1968, his services, however, were terminated under Article 310 of the Constitution. No reason was assigned. He instituted a suit in forma pauperis for declaration that the termination of his service was illegal and void ab initio. In the alternative, he claimed damages or compensation of Rs. 75,000 for illegal termination. The trial court awarded him Rs. 25,000 as damages together with interest at 6 percent per annum for the illegal termination of his services. That decree was confirmed by the High Court of Kerala. This appeal is directed against that judgment of the High Court. On July 30, 1976, a bench of this Court dismissed the appeal on merits. But upon review, that judgment was set aside and the appeal was ordered to be listed for fresh disposal. So the matter has come up before us.

3. There is no dispute on the material facts. There is no challenge that the respondents was a permanent and confirmed civilian worker in the Defence Department. In fact, it is an admitted position between the parties. He had a right to continue till he attained the age 60 years. Article 459(b) of the Civil Service Regulations provides for that. It reads :

> (b) A workman who is governed by these Regulations shall be retained in service till the day he attains the age of sixty years.

Note.-In this clause, "a workman" means a highly skilled, skilled, semi-skilled or unskilled artisan employed on a monthly rate of pay in an industrial or a work charged establishment.

4. The courts below have proceeded on the basis that Article 311(2) of the Constitution was not applicable to the respondents, but the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (for short "1965 Rules") were, however, applicable.

5. Mr. Mahajan for the appellants contends that the reasoning of the courts below is untenable and uncalled for. We think that the counsel is on terra firma. There cannot be any dispute as to the non-applicability of Article 311(2) to the case of respondent. A civilian employee in Defence Service who is paid salary out of the estimates of the Ministry of Defence does not enjoy the protection of Article 311(2). In L. R. Khurana v. Union of India, this Court observed : (SCC p. 783, para 4)

The question whether the case of the appellant was governed by Article 311 of the Constitution stands concluded by two decisions of this Court. In Jagatrai Mahinchand Ajwani v. Union of India it was held that an Engineer in the Military Service who was drawing his salary from the Defence Estimates could not claim the protection of Article 311(2) of the Constitution. In that case also the appellant was found to have held a post connected with Defence as in the present case. This decision was followed in S. P. Behl v. Union of India. Both these decision fully cover the case of the appellant so far as the applicability of Article 311 is concerned.

6. Now the only question is whether the 1965 Rules framed under the proviso to Article 309 of the Constitution propio vigore apply to the respondents or become inoperative in view of Article 310 of the Constitution? Article 310(1) deals with the tenure of persons serving the Union or the State. It provides :

> Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

7. Article 310(2) deals with cases of persons appointed under contract. The doctrine of pleasure of the President is thus embodied under Article 310(1). The scope of this article coupled with Article 309 has been explained in M. Ramanatha Pillai v. State of Kerala, where this Court observed : (SCC p. 655, para 17)

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. Therefore, Acts in respect of terms and conditions of service of persons are contemplated. Such Act of legislature must however be subject to the provisions of the Constitution. This attracts Article 310(1). The proviso to Article 309 makes it competent to the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union and for the Governor of a State 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 under the Union and the State. These Rules and the exercise of power conferred on the delegate must be subject to Article 310. The result is that Article 309 cannot impair or affect the pleasure of the President or the Governor therein specified. Article 309 is, therefore, to be read subject to Article 310.

8. The operation of rules made under the proviso to Article 309 on the pleasure doctrine embodied under Article 310(1) has been considered by this Court in Union of India v. Tulsiram where it was observed : (SCC pp. 483-84, para 106)

The opening words of Article 309 make that article expressly "Subject to the provisions of this Constitution". Rules made under the proviso to Article 309 or under Acts referable to that article must, therefore, be made subject to the provisions of the Constitution if they are to be valid. Article 310(1) which embodies the pleasure doctrine is a provision contained in the Constitution. Therefore, rules made under the proviso to Article 309 or under Acts referable to that article are subject to Article 310(1). By the opening words of Article 310(1) the pleasure doctrine contained therein operates "Except as expressly provided by this Constitution". Article 311 is an express provision of the Constitution. Therefore, rules made under the proviso to Article 309 or under Acts referable to Article 309 would be subject both to Article 310(1) and Article 311. This position was pointed out by Subba Rao, J., as he then was, in his separate but concurring judgment in Moti Ram Deka case, namely, that rules under Article 309 are subject to the pleasure doctrine and the pleasure doctrine is itself subject to the two limitations imposed thereon by Article 311.

9. In Tulsiram case, the decision in Challappan case which had taken a contrary view, has been expressly overruled on the ground that "rules cannot do what the second proviso to Article 311(2) denies".

10. By virtue of Article 311(2), no civil servant can be dismissed, removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of the charges. Article 311(2) thus imposes a fetter on the power of the President or the Governor to determine the tenure of a civil servant by the exercise of pleasure. Tulsiram case was concerned with the exclusion of Article 311(2) by reason of second proviso thereunder. We are also concerned with the exclusion of Article 31(2), if not by second proviso but by the nature of post held by the respondents. We have earlier said that the respondent is not entitled to protection of Article 311(2), since he occupied the post drawing his salary from the Defence Estimates. That being the position, the exclusionary effect of Article 311(2) deprives him the protection which he is otherwise entitled to. In other words, there is no fetter in the exercise of the pleasure of the President or the Governor.

11. It was, however, argued for the respondent that 1965 Rules are applicable to the respondent, first, on the ground that Rule 3(1) thereof itself provides that it would be applicable, and second, that the Rules were framed by the President to control his own pleasure doctrine, and therefore, cannot be excluded. This contention, in our opinion, is basically faulty. The 1965 Rules among others, provide procedure for imposing the three major penalties that are set out under Article 311(2). When Article 311(2) itself stands excluded and the protection thereunder is withdrawn there is little that one could do under the 1965 Rules in favour of the respondent. The said Rules cannot independently play any part since the rule making power under Article 309 is subject to Article 311. This would be the legal and logical conclusion.

12. The next contention urged for the respondent depends upon the admission made by the appellants before the High Court. The appellants seem to have admitted before the High Court that the 1965 Rules would be applicable to the respondent. Relying on this admission, it was argued before us that the decree under appeal should not be set aside. The poverty of the respondent and the long drawn litigation by which the respondent has suffered immeasurably were also highlighted.

13. We gave our anxious consideration to this part of the submission. It is true that the parties appear to have proceeded before the High Court, that the 1965 Rules would be attracted to the case of respondents. It might be on a wrong assumption of law. The appellants cannot be stopped to contend to the contrary. They are not bound by such wrong assumption of law. Nor it could be taken

advantage of by the respondent. But the submission made before us about the poverty of the respondent and the long drawn litigation seems to be appealing. It is a plus point in his favour under equity. This Court, while granting special leave has imposed a condition on the appellants that they will bear the cost of the respondent in any event. That was evidently because of the need to have the law clarified and inability of the respondent to come up to this Court. There cannot be any dispute about the poverty surrounding him. He has instituted the suit as an indigent person. There is yet another aspect. When the respondent commenced the litigation and continued up to the High Court, the law on the question was nebulous. It was only thereafter an authoritative pronouncement was made by this Court with regard to the impact of Rules made under the proviso to Article 309 on the pleasure doctrine under Article 310(1). These facts and circumstances therefore call for a sympathetic consideration of the case of respondent. This Court will not deny any equitable relief in deserving cases. The case on hand cannot be an exception to that rule and indeed, it is eminently a fit case. We therefore, accept the submission made for the respondent and decline to disturb the decree under appeal.

14. In the result, the appellants succeed on the question of law, but the respondent retains the decree in his favour purely on compassionate grounds. The appellants also must pay the costs to the respondent as already bound.

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