

Baidyanath Mahapatra

Vs

State of Orissa and Another

Civil Appeal No. 3050 of 1989

(K. N. Saikia, M. H. Kania JJ)

10.08.1989

JUDGMENT

SINGH, J.-

1. Leave granted.

2. This appeal is directed against the judgment of the Orissa Administrative Tribunal, Bhubaneswar dated December 21, 1987 dismissing the appellant's suit challenging his premature retirement from service.

3. The appellant, a qualified Electrical Engineer with training in West Germany, joined service of Orissa Government as an Assistant Engineer (Electrical) in 1955. In 1961 he was promoted to the rank of Executive Engineer (Electrical) and deputed to the Orissa State Electricity Board. In March 1976 he was promoted to the post of Superintending Engineer (Electrical) on the basis of merit. In 1979 while working on the post of Superintending Engineer (Electrical) he was allowed to cross the efficiency bar with effect from January 1, 1979. He also officiated in the post of Chief Engineer (Electrical) in Orissa State Electricity Board. Since he had completed 50 years of age a Review Committee constitute by the Government of Orissa considered his service record in October 1983 for determining his suitability for retention in service in accordance with the first proviso to Rule 71(a) of the Orissa Service Code. On the recommendation of the Review Committee the State Government by its order dated November 10, 1983 prematurely retired the appellant from service. He filed a civil suit before the Subordinate Judge, Bhubaneswar challenging the validity of his premature retirement on a number of grounds. On the constitution of the Orissa Administrative Tribunal the suit was transferred to the Administrative Tribunal, Bhubaneswar, under section 29 of the Administrative Tribunals Act. The Tribunal by its order dated December 21, 1987 dismissed the suit and upheld the validity of appellant's premature retirement. Hence this appeal.

4. The Tribunal held that the Review Committee on an assessment of the overall performance of the appellant's conduct had bona fide made recommendations to the State Government that the appellant's retention in service was not in public interest, and in pursuance thereof the State Government retired the appellant prematurely. The Tribunal further held that the order of premature retirement does not suffer from any legal infirmity. Learned counsel for the appellant urged that the Tribunal committed serious error in upholding the order of premature retirement as the recommendation of the Review Committee was vitiated as it was founded on irrelevant and inadmissible material. In this connection, he urged that the Review Committee had considered a number of adverse remarks contained in the appellant's service record for the remote past years which had no relevance and it had further considered adverse entire relating to the recent years

although those adverse entries had not become final as the representations against those adverse entries had not been considered of by the State Government. He urges that while considering overall performance of the appellant the Review Committee was influenced by the entries of remote past, which had lost their significance as in spite of those entries the appellant had been promoted to higher post on merit and he had also been permitted to cross efficiency bar. Before we consider these submissions it would be pertinent to refer to the recommendations of the Review Committee which are as under :

"From the year 1969-70 to 1982-83, Shri Baidyanath Mahapatra has got adverse remarks for the years 1969-70, 1970-71, 1972-73, 1975-76, 1976-77, 1981-82 and 1982-83. Although he was an intelligent officer, he did not apply his mind and did not bestow adequate zeal in his work. He did neither assume responsibility nor did he work hard for which the Chief Engineer had to deal with his Executive Engineers and Assistant Engineers directly. He was found to be too cursory in dealing with the problems and adept in putting the responsibilities for deficiencies on others. His performance during most of the years was found to be of average standard. The Committee, considering his overall performance, was of the view that his continuance in service is not desirable in public interest and that he be retired prematurely. This officer would have retired on superannuation on September 30, 1989."

5. No exception can be taken to the government's opinion in retiring the appellant prematurely on the basis of the aforesaid recommendation of the Review Committee as it clearly indicated that the appellant's retention in service was not in public interest. The purpose of the rule conferring power on the government to retire government servants prematurely is to energise its machinery by "chopping of the deadwood" as held by this court in *Union of India v. J. N. Sinha* ((1970) 2 SCC 458 : (1971) 1 SCR 791). The question which falls for consideration is whether the Review Committee was justified in making its recommendations on the basis of adverse entries awarded to the appellant in remote past especially when the appellant had been promoted to the post of Superintending Engineer in 1976 and he had further been permitted to cross efficiency bar in 1979. The adverse entries relating to the years 1969-70, 1970-71, 1972-73 and 1975-76 had lost all significance, because in spite of those entries the appellant was considered to be an intelligent and efficient officer and in that view he was promoted to the post of Superintending Engineer. If those entries did not reflect deficiency in appellant's work and conduct for the purpose of promotion, it is difficult to comprehend as to how those adverse entries could be pressed into service for retiring him prematurely. When a government servant is promoted to a higher post on the basis of merit and selection, adverse entries if any contained in his service record lose their significance and those remain on record as part of past history. It would be unjust to curtail the service career of government servant on the basis of those entries in the absence of any significant fall in his performance after his promotion.

6. The adverse entries for the years 1969-70, 1970-71, 1972-73 and 1975-76 were communicated in a letter to the appellant in 1978, although under the instructions issued by the State Government the adverse entries must be communicated by December of each year. The purpose of communicating adverse entries to the government servant is to inform him regarding his deficiency in work and conduct and to afford him an opportunity to make, amend, and improve his work and further if the entries are not justified the communication affords him an opportunity to make representation. If the adverse remarks awarded to a government servant are communicated to him after several years, the object of communicating entries is defeated. It is therefore imperative that the adverse entries

awarded to a government servant must be communicated to him within a reasonable period to afford him opportunity to improve his work and conduct and also to make representation in the event of the entry being unjustified. In the instant case, adverse entries relating to a number of years were communicated to the appellant in one lot under a letter dated February 27, 1978 contrary to the instructions issued by the State Government as contained in circular No. 29 dated February 19, 1953. Belated communications of the entries resulted in denial of reasonable opportunity to the appellant to improve his performance. Further since adverse remarks for several years were communicated with inordinate delay it was impossible for the appellant to make an effective representation against the same. The appellant's representation against the aforesaid entries was rejected on March 12, 1981 on the ground that the representation was barred by time. Since the communication of the adverse entries was itself highly belated the representation against those adverse remarks should have been considered on merits and the same could not be rejected on the alleged ground of delay as the government itself was guilty of inordinate delay in communicating the adverse remarks to the appellant.

7. Adverse remarks relating to the years 1981-82 and 1982-83 were taken into account by the Review Committee in formulating its opinion against the appellant's retention in service. The appellant's representation against those entries had not been considered, yet the Review Committee placed reliance on those entries. In fact, the adverse remarks for the year 1981-82 were communicated to the appellant under the letter dated June 21, 1983 which was received by him on July 5, 1983, and as regards the adverse remarks for the year 1982-83 these were communicated to the appellant under the letter dated July 29, 1983 which was received by him on August 9, 1983. He made representation to the government against the aforesaid adverse remarks on November 1, 1983 but before the represent actions could be considered by the government the impugned order of premature retirement was made on November 19, 1983. These facts make it amply clear that the appellant's representation against the aforesaid adverse remarks for the years 1981-82 and 1982-83 was pending and the same had not been considered or disposed of on the date the impugned order was issued. It is settled view that it is not permissible to prematurely retire a government servant on the basis of adverse entries, representations against which are not considered and disposed of. See *Brij Mohan Singh Chopra v. State of Punjab* ((1987) 2 SCC 188 : (1987) 3 ATC 496 : (1987) 2 SCR 583). When this aspect was pressed before the Tribunal, it took a peculiar view in holding that since the representation had not been made before the date on which the Review Committee had considered the appellant's case, the Committee need not have waited for the disposal of the appellant's representation and it was free to take into account the adverse remarks awarded to the appellant in the years 1981-82 and 1982-83. The appellant placed reliance on the decision of this Court in *Brij Mohan Chopra case* ((1987) 2 SCC 188 : (1987) 3 ATC 496 : (1987) 2 SCR 583) but the tribunal by some involved logic avoided giving effect to the law laid down by this Court. It is not disputed that the in the State of Orissa a government servant has right to make representation within six months from the date of communication of the adverse remarks. The appellant had right to make representation against the adverse entries within six months period, therefore, the adverse entries awarded to him in the years 1981-82 and 1982-83 could not be taken into account either by the Review Committee or by the State Government in forming the requisite opinion as contemplated by Rule 71(1)(a) of the Orissa Service Code, before the expiry of the period of six months. Since the period prescribed for making representation against the adverse remarked for the years 1981-82 and 1982-83 had not expired, the proper course for the Review Committee should have been not to consider those entries or in the alternative, the Review Committee should have waited for the decision of the government on the appellant's representation. The view take by the Tribunal is not sustainable in law.

8. There is a disturbing feature of this case which vitiates Tribunal's order. Shri Gian Chand, Chairman of the Tribunal, ex-Chief Secretary of the State of Orissa, was member of the Review Committee which made recommendation against the appellant for his premature retirement, and in pursuance thereof the State Government had issued the impugned order. It appears that Shri Gian Chand, had later been appointed as Chairman of the Administrative Tribunal. Shri Gian Chand, participated in the proceedings of the Tribunal, and he is party to the decision of the Tribunal. These facts show that Mr. Gain Chand, who had administratively taken a decision against the appellant, considered the matter judicially as a Chairman of the Tribunal, thereby he acted as a judge of his own cause. While it is true that there is no allegations of personal bias against Shri Gian Chand, he may have acted bona fide, nonetheless, the principle of natural justice, fair play, and judicial discipline required that he should have abstained from hearing the appellant's case. While considering the appellant's case the Tribunal exercised judicial powers and it was required to act judicially, as the jurisdiction of the civil Court and High Court have been excluded and vested in the Administrative Tribunal. The members of the Tribunal must follow rules of natural justice in administering justice; like judges, they should not sit in judgment on their won decisions. Shri Gian Chand was disqualified to hear the appellant's case. The order of the Tribunal is vitiated on this ground but as the appellant had not raised any objection before the Tribunal against the participation of Shri Gian Chand, we do not consider it necessary to grant relief to the appellant on this ground.

9. For the aforesaid reasons we hold that the order of premature retirement is vitiated and the Tribunal committed error in upholding the same. We accordingly allow the appeal, set aside the order of the Tribunal dated December 21, 1987 and also the order of the State Government dated November 10, 1983. The appellant is entitled to reinstatement with all consequential benefits of service in addition to the costs.

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