

Union of India

Vs

P.S. Dhillon

Civil Appeal No. 3806 of 1992

(S.C. Agarwal, G.T. Nanavati JJ)

12.04.1996

JUDGEMENT

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S. C. AGRAWAL, J. :-

1. This appeal by special leave is directed against the judgment of the Central Administrative Tribunal, Chandigarh Branch, (hereinafter referred to as 'the Tribunal') dated January 31, 1992 in O. A. No. 668 P. B./1987 filed by the respondent wherein he had challenged the validity of the order of compulsory retirement dated January 28, 1987, passed under Fundamental Rule 56(j). The said order of compulsory retirement has been quashed by the Tribunal by the impugned judgment.

2. The respondent was practising as an advocate in the High Court of Punjab and Haryana. He was appointed on probation as a Judicial Member of the Income-tax Appellate Tribunal (for short 'ITAT') by order dated February 25, 1978. The period of probation was two years. The said period of probation was, however, extended from time to time and the respondent continued on probation till March 31, 1985. By order dated May 24, 1985, the respondent was deemed to have completed his period of probation satisfactorily on March 31, 1985. By order dated June 3, 1985, he was confirmed in the post of Member, ITAT with effect from April 1, 1985. As member of the ITAT the respondent was posted at Allahabad, Bombay, Madras, Ahmedabad and Amritsar. Even since his appointment as a member of the ITAT complaints were being received against the respondent from his colleagues, staff of the ITAT and members of the Bar. There was an adverse entry in the Annual Confidential Report (for short 'ACR') of the respondent for the year 1983. The respondent submitted a representation against the said adverse remarks which came up for consideration before the Appointments Committee of the Cabinet (for short 'ACC'). While rejecting the said representation the ACC observed that the respondent had completed the age of 55 years and that this was a fit case for the competent authority to consider whether action for his premature retirement from service should be initiated. Before, initiating further action against him the respondent was called for a hearing by the Minister for Law and Justice on November 5, 1986. In the meanwhile, a complaint was received from the wife of the respondent about his having deserted her and his openly living with another lady. In the ACR for the year ending December 31, 1985, there were adverse remarks by the Reporting Officer with which the Reviewing Officer had agreed. When he met the Law Minister, the respondent admitted that he was living with a lady and stated that she was cooking for him and that he had to live with her and his wife and children had left him. Since the Ministry of Law and Justice was the cadre controlling authority, the Law Secretary to the Government of India, vide his note dated December 22, 1986, submitted his recommendation to the Cabinet Secretary for the compulsory retirement of the respondent. The Cabinet Secretary placed the matter before the

ACC with his recommendation and the ACC approved the premature retirement of the respondent under FR 56 (j) and thereupon the order dated January 28, 1987, was passed whereby the respondent was compulsorily retired from service. The respondent filed an application before the Tribunal challenging the said order of compulsory retirement. The said application was allowed by the Tribunal by the impugned judgment and the order of compulsory retirement has been quashed. Hence this appeal.

3. One of the contentions urged before the Tribunal on behalf of the respondent was that FR 56(j) was not applicable to members of the ITAT in view of Rule 11 of the Income-tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963, (hereinafter referred to as 'the rules') whereby the age of retirement of a member of the ITAT has been fixed at 62 years and it is further provided that the date of compulsory retirement of a member would be the date of his attaining the age of 62 years and not the last date of the month as in the case of other Government servants. It was submitted that since a specific provision has been made in Rule 11 of the Rules with regard to retirement of the members of the ITAT and no express provision is contained in the Rules for premature retirement, the respondent could not be retired prior to his attaining the age of 62 years under FR 56(j). The Tribunal has rejected the said contention of the respondent in view of Rule 13 of the Rules wherein it is provided that conditions of service of a member in respect of matters for which no provision is made in the Rules shall be the same as may, for the time being, be applicable to other employees of the Government of India of a corresponding status. The Tribunal has held that Rule 11, whereby the age of retirement is prescribed at 62 years, only provides an exception to the general rule and could not be construed to mean that it completely substitutes or supersedes the provisions of FR 56. The Tribunal has also rejected the contention urged on behalf of the respondent that the impugned order of compulsory retirement was penal in nature since the respondent has been retired before he completed 10 years of qualifying service which would have enabled him to draw pensionary benefits. The Tribunal has held that in the matter of pensionary benefits after retirement the position has to be adjudged as per the existing rules on the subject on the relevant date of retirement/premature retirement and that the respondent having put in nearly nine years of service on the date of his premature retirement has been paid service gratuity as admissible to him. The Tribunal has set aside the order of compulsory retirement for the reason that the adverse material against the respondent prior to April 1, 1985, the date with effect from which he was confirmed on the post of member of the ITAT, has to be disregarded and after excluding the same, there was only one adverse entry relating to the year 1985, against which the respondent had submitted a representation. The Tribunal was also of the view that the respondent had submitted his explanation vide his letter dated January 20, 1987, to the complaint sent by his wife and that the services of the respondent were terminated by order dated January 28, 1987, before this explanation reached the concerned quarters or was taken into consideration. The Tribunal has also held that in the matter of passing the order of compulsory retirement safeguards contained in the guidelines laid down in O. M. dated January 5, 1978, were not followed inasmuch as the proposal was initiated by the Law Minister, on whose direction a note was submitted by the Law Secretary to the Cabinet Secretary and that the Cabinet Secretary had not made the recommendation direct to the ACC. The Tribunal further held that there was non compliance with the said guidelines also in the matter of consideration of representation submitted by the respondent against the order of compulsory retirement inasmuch as under the guidelines the representation was required to be considered by the Senior Selection Board and it is required to make its recommendations to the ACC for taking final decision and that, in the present case, the representation submitted by the respondent was examined only in the Ministry of Law and Justice and the matter was submitted directly to the ACC without it being considered by the Senior Selection Board.

4. FR 56(j), as it stood at the relevant time, provided as follows :-

"FR 56(j) : Notwithstanding anything contained in this rule, the appropriate authority shall be, 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.

(i) if he is in Class I or Class I 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;

Provided that nothing in this clause shall apply to a Government servant referred to in clause (a) who entered Government service on or before 23rd July, 1966."

5. The respondent was appointed as member of the ITAT after he had attained the age of thirty five years. Action for his compulsory retirement under FR 56(j) could be taken on his attaining the age of fifty five years. The date of birth of the respondent being June 8, 1931, he had attained the age of 55 years on June 8, 1986. The order for his compulsory retirement was passed on January 28, 1987, after he had attained the age of fifty five years.

6. By O. M. dated January 5, 1978, instructions have been issued for guidance of the authorities concerned with regard to exercise of power to retire a Government employee prematurely under FR 56(j). The said instructions envisage review of the case of the employee covered by FR 56(j) by a Review Committee and the appropriate authority takes further action on the recommendation of the Review Committee. The said instructions also provide for submission of a representation by the government employee who has been served with a notice/order of premature retirement and consideration of the said representation by a committee. The provisions with regard to composition of the Review Committee and the Representation Committee are contained in Appendix II to the said office memorandum. In respect of various categories of officers holding Gazetted posts initial appointment to which is referable to the ACC, the following provision is made with regard to the composition of the Review Committee :

"The Senior Selection Board in respect of officers in the rank of Joint Secretary or equivalent or the Central Establishment Board in respect of officers above the rank of Under Secretary, but below the rank of Joint Secretary or equivalent as the case may be, will make its recommendations which will be placed before the Appointments Committee of the Cabinet for orders. In respect of officers of the rank of Additional Secretary, Special Secretary and Secretary to the Government of India, Cabinet Secretary will make his recommendation directly to the Appointments Committee of the Cabinet for orders.

X X X X X"

7. A member of the ITAT is an officer of the rank of Additional Secretary and in his case the Cabinet Secretary is required to make his recommendation directly to the ACC for orders.

8. In the present case, the proposal for premature retirement of the respondent was initiated in the Ministry of Law and Justice, the concerned ministry, and before initiating the proposal the

respondent was given a hearing by the Law Minister on November 5, 1986, as regards the various complaints that had been received against the respondent with regard to his performance as a member of the ITAT as well as the complaint sent by his wife. Thereafter, the recommendation for compulsory retirement of the respondent was sent by the Law Secretary to the Cabinet Secretary and the Cabinet Secretary placed the matter for consideration before the ACC with his recommendation. The proposal was accepted by the ACC and thereafter the order for compulsory retirement of the respondent was passed. We are unable to hold that there was non compliance with the guidelines laid down in O. M. dated January 5, 1978, inasmuch as the proposal was initiated by the Ministry of Law and Justice and not by the Cabinet Secretary. Since the respondent was functioning under the Ministry of Law and Justice and his record of service was kept in that ministry it was the said ministry alone that could initiate the proposal for premature retirement of the respondent. The matter could reach the Cabinet Secretary only after the proposal was initiated by the Ministry of Law and Justice. It is difficult to appreciate how the Cabinet Secretary in the absence of the proposal from the Ministry of Law and Justice could have sent his recommendation to the ACC. It cannot, therefore, be said that there was non-compliance with the instructions laid down in the O. M. dated January 5, 1978, in the matter of submission of recommendations for the compulsory retirement of the respondent before ACC and the order of compulsory retirement cannot be held to be vitiated on that account.

9. As regards the composition of the Representation Committee, the following provision is made in Appendix II to O. M. dated January 5, 1978 :

"The Senior Selection Board shall make its recommendations to the Appointments Committee of the Cabinet for orders. For this purpose, the representations of the officers concerned may be sent by the Cadre Controlling Authority or the Administrative Ministry/Department to the Office of the Establishment Officer in the Department of Personnel B. A. R."

10. In view of the said provision, the Tribunal has held that it was necessary that the representation should have been considered by the Senior Selection Board and the said Board should have sent the same to the ACC with its recommendations. In taking this view the Tribunal has failed to note that the Senior Selection Board has no role to play at the stage of review in respect of officers of the rank of Additional Secretary, Special Secretary and Secretary to the Government of India and in respect of these officers it is the Cabinet Secretary who has been constituted as the Review Committee and who makes his recommendation directly to ACC. It would be anomalous that though at the stage of review it is the Cabinet Secretary who has to consider and make his recommendation directly to the ACC he should be excluded at the stage of consideration of the representation and the Senior Selection Board which had no role to play at the stage of review should be entrusted with consideration of representation in respect of officers of the rank of Additional Secretary, Special Secretary and Secretary to the Government. This anomaly would be avoided if the provision regarding composition of Representation Committee contained in Appendix II to O. M. dated January 5, 1978, is construed as applicable in respect of officers up to the rank of Joint Secretary to the Government and in respect of officers of the rank of Additional Secretary, Special Secretary and Secretary to the Government, the authority competent to deal with the representation and to make the recommendation to the ACC is the Cabinet Secretary who had considered the matter of compulsory retirement at the stage of review. On that view of the matter the representation of the respondent against the order for his compulsory retirement was required to be dealt with by the ACC on the basis of the recommendation of the Cabinet Secretary and it was not necessary to refer the representation to the Senior Selection Board. This was done in the instant

case inasmuch as the representation submitted by the respondent was forwarded to the ACC by the Cabinet Secretary with his recommendations. There was, therefore, no infirmity in the consideration of the representation submitted by the respondent against the order for his compulsory retirement.

11. Assailing the finding of the Tribunal regarding sufficiency of material to justify the passing of the order of compulsory retirement, Shri V. R. Reddy, the learned Additional Solicitor General, has pointed out that ever since the appointment of the respondent as Judicial Member of the ITAT there were complaints against him on account of which he was transferred to various places but in spite of transfer the complaints continued. It was submitted that although his performance was not found satisfactory but a lenient view was taken and his probation period was extended from time to time and, at the same time, he was advised to improve his behaviour and that after granting six extensions in the period of probation the respondent was ultimately confirmed on the post of member of the ITAT with effect from April 1, 1985, by order dated June 3, 1985. The learned Additional Solicitor General has submitted that while issuing the order of confirmation, a separate letter of admonition dated May 29, 1985, was addressed by the Law Secretary to the Government of India to the respondent which reads as under :

"Dear Shri Dhillon,

I am glad to inform you that the competent authority has decided to confirm you as Judicial Member of the Income-tax Appellate Tribunal with effect from 1-4-1985, and a copy of the order in this regard is enclosed. However, the competent authority has also decided that you should be confirmed with proper admonition. I have been directed to convey that you are warned that strict disciplinary action will be taken against you in case you do not function judiciously with your colleagues or Members of the Bar.

2. Please acknowledge receipt.

With regards,

Yours sincerely,

Sd/-

(B. S. Sekhon)"

The letter contained the following note by way of post script :

"P. S. I have marked this communication as personal to you so as to avoid any likely embarrassment if it were to be sent through the usual official channel."

12. The representation submitted by the respondent against the said letter of admonition was rejected vide communication dated January 13, 1986.

13. After his confirmation as member of the ITAT, the following remarks were made by the Reporting Officer in the ACR for the year ending on December 31, 1985 :-

"While his relations with the senior colleague Shri P. K. Mehta, seemed to be satisfactory, the members of the Bar and the Authorised representatives of the

Department are not very happy....."

"I consider that Shri Dhillion has shown some improvement, though he continues to exhibit rigid attitude at times both as regards judicial and administrative work."

"Quality of orders average."

14. The Reviewing Officer agreed with the said assessment made by the Reporting Officer.

15. The wife of the respondent made a complaint about the character and conduct of the respondent and his living with another lady without marriage. The respondent was given a personal hearing by the Law Minister and he did not deny the fact that he was living with another lady.

16. Keeping in view the circumstances attendant of his confirmation as member of the ITAT with effect from April 1, 1985, we are unable to agree with the Tribunal that after such confirmation the adverse material on the record for the period prior to April 1, 1985, should be disregarded. In our opinion, the entire service record of the respondent including the record for the period prior to April 1, 1985, had to be taken into consideration by the appropriate authority. The service record of the respondent shows :

(i) There were complaints about his behaviour from the members of the Bar and his colleagues and the staff in the ITAT and his confirmation as member was delayed till April 1, 1985, and he was given six extensions in the period of probation.

(ii) The remarks in the ACR of the year ending December 31, 1985, show that there was no improvement in his behaviour as well as his performance.

(iii) There was complaint about his conduct by his wife that he was living with another lady which fact was not disputed by him when he was given a hearing by the Law Minister on November 5, 1986.

17. Having regard to these circumstances, it is not possible to say that there was no sufficient material for the appropriate authority to form the requisite opinion that further retention of the respondent in service was not in public interest.

18. Shri Ujagar Singh, the learned senior counsel appearing for the respondent, has submitted that since the respondent was compulsorily retired before he completed 10 years of qualifying service, the order of compulsory retirement should be held to be an order of punishment. We are unable to agree. Under FR 56(j) an officer could be compulsorily retired on attaining the age of 50 years if he was appointed before he completed the age of 35 years and an officer who was appointed after attaining the age of 35 could be retired on completing the age of 55 years. The respondent was appointed as a member of the ITAT after he had attained the age of 35 years and in his case the power of compulsory retirement could be invoked after he had attained the age of 55 years. Admittedly the respondent had attained the age of 55 years when the order dated January 28, 1987, with regard to his compulsory retirement was passed. The decision *Gurdev Singh Sidhu v. State of Punjab*, (1964) 7 SCR 587 : (AIR 1964 SC 1585), on which reliance has been placed by Shri Ujagar Singh has no application in the present case because in *Gurdev Singh Sidhu* (supra) this Court has struck down Article 9, 1 of the Pepsu Services Regulation which provided for compulsory retirement of a Government servant after he completed 10 years of qualifying service on the view that termination of the service of a permanent public servant under such a rule, though called

compulsory retirement, was, in substance, removal under Article 311 (2) of the Constitution. The provision contained in FR 55(j) cannot be equated with aforementioned provision in Article 9. 1 of the Pepsu Services Regulation because it provides for compulsory retirement at the age of 50 or 55 years and it cannot be said that it does not provide for a reasonable long period of service. Merely because the period of service rendered by the respondent was less than 10 years, which is the period of qualifying service required for grant of pensionary benefits, it cannot be said that the order dated January 28, 1986, was an order of removal of service and not an order of compulsory retirement.

19. For the reasons aforementioned, we are unable to uphold the judgment of the Tribunal quashing the order dated January 28, 1987, regarding compulsory retirement of the respondent and the appeal has to be allowed.

20. By order dated September 14, 1992, this Court, while staying the operation of the impugned order of the Tribunal, directed the appellant to deposit the salary including the arrears due to respondent in the Tribunal within four weeks from the date of the said order and it was further directed that the respondent would be at liberty to withdraw the same on his giving personal undertaking to return the same when called upon to do so and further giving sufficient security to the satisfaction of the Registrar of the Tribunal. It is directed that in case the respondent has withdrawn the amount as per the directions contained in the order dated September 14, 1992, he would return the same as per his personal undertaking in terms of the said order.

21. In the result, the appeal is allowed, the impugned judgment of the Tribunal dated January 31, 1992, is set aside and O. A. No. 668 PB/1987, filed by the respondent is dismissed. But in the circumstances there is no order as to costs. Appeal allowed.