SUPREME COURT OF INDIA

National Aviation Company of India Ltd

Vs.

S.M.K. Khan

C.A.No.1622 of 2009

(R.V. Raveendran and Markandey Katju JJ.)

24.03.2009

JUDGEMENT

R.V.Raveendran, J.

1. The appellant is the successor of Indian Airlines Ltd. (for short `IAL'). On 12.9.1966 the respondent joined IAL as a Security Assistant. His work was unsatisfactory and several warnings and minor punishments were given for insubordination, indiscipline, negligence, sleeping on duty etc. He was also chargesheeted in regard to the repeated acts of misconduct and was imposed the punishment of demotion to the post of Chowkidar on 26.5.1971. Even thereafter his service was unsatisfactory resulting in several reprimands and warnings. He was however again appointed as Security Assistant with effect from 17.8.1990, in the normal process of recruitmnent, under internal selection. He was also given the benefit of a time bound promotion on 6.7.1998. When he attained the age of 55 years his case was reviewed under Rule 12 of Indian Airlines Employees Service Regulations to consider whether he should be continued in service beyond the age of 55 years. In view of the unsatisfactory service record, on review, the Regional Director (South), IAL, who was the competent authority, issued a notice dated 11.5.1998 proposing to retire him from service with effect from 10.8.1998 under Regulation 12. The said letter referred to the poor performance and unauthorized absence in the years 1994 to 1997.

2. The respondent gave a representation dated 18.5.1998 admitting absenteeism but offered an explanation that it was on account of family reasons. He requested that he may be continued in service assuring satisfactory service in future. The competent authority was not satisfied with the explanation. Therefore by letter dated 15.7.1998 he communicated his decision to retire the respondent from service as at the close of work on 10.8.1998. Thereafter the respondent sought a personal interview with the competent authority and made a fervent appeal to reconsider his case assuring that he will not give room for any complaint in future. In view of it, the competent authority sent a letter dated 8.8.1998 stating that respondent will be continued in service for a specific period of one year, beyond 55 years, and that retention beyond one year would be subject to the outcome of review that will be carried out after monitoring his attendance and performance closely.

3. However, the respondent's service continued to be unsatisfactory and his unauthorized absences continued. A show-cause notice dated 27.5.1999 was issued by the competent authority proposing to retire him from service at the close of work on 26.8.1999. The show cause notice referred to the unsatisfactory service and unauthorised absence for 20 days during the extended period of service. Respondent sent a reply dated 14.6.1999 wherein he admitted his unauthorised absence from time to time and again gave the reason as advanced age and ill health of himself and his wife. He again assured that he will not give room for any complaint, if continued in service. After considering the same, the competent authority passed an order dated 22.6.1999 compulsorily retiring the respondent as at the close of work on 26.8.1999.

4. Feeling aggrieved the respondent approached the Industrial Tribunal cum Labour Court, Chennai in ID No.60/2000. The Tribunal by award dated 14.9.2001 held that the IAL management was justified in compulsorily retiring the respondent with effect from 26.8.1999 and respondent was not entitled to any relief. The respondent challenged the order of the Tribunal in W.P. No.23617/2001. A learned Single Judge of the Madras High Court by order dated 13.11.2003 set aside the award of the Tribunal and the order of compulsory retirement dated 22.6.1999. As the respondent had already reached the age of superannuation (58 years) on 10.5.2001, he directed the IAL to pay all terminal benefits including back wages by treating the respondent as having worked till attaining the age of superannuation in the normal course. An intra-court appeal filed by IAL was dismissed by a Division Bench of the High Court by judgment dated 19.7.2007. The Division Bench held that after the decision to continue the respondent in service beyond 55 years, the only complaint against the respondent was unauthorized absence; that on account of the inconsistency in the evidence as to the number of days of absence without permission, the period of unauthorized absence was uncertain; that the respondent was punished by way of compulsory retirement, for such unauthorized absence; and that in the absence of a charge with specific particulars of misconduct or an enquiry into such charge resulting in a definite finding in regard to the misconduct, the compulsory retirement was liable to be set aside.

5. The said judgment is challenged in this appeal by special leave. On the contentions urged the only question that arises for consideration is whether IAL was justified in compulsorily retiring the respondent with effect from 26.8.1999, that is 1 year and 3 months after taking a decision to continue him beyond 55 years.

6. Regulation 12, under which the respondent was compulsorily retired, as it stood at the relevant point of time, is extracted below :-

> "An employee shall retire from the service of the Corporation on attaining the age of 58 years provided that the competent authority may ask an employee to retire after he attains the age of 55 years on giving three months' notice without assigning any reason.

An employee, (a) on attaining the age of 55 years; or (b) on the completion of 25 years of continuous service, may, by giving three months notice, voluntarily retire from service.

Provided that the voluntary retirement under clause (b) shall be subject to approval of the competent authority."

[emphasis supplied] An order of compulsory retirement in pursuance of a rule/regulation which enables the competent authority to prematurely retire an employee, on the formation of a bona fide opinion that continuation of the employee in service will not benefit the institution or be in the interest of the institution (or will not be in public interest where the employee is a government servant), on review of the performance/service record of the employee, on the employee attaining the specified age or completing the specified period of service, is valid and not open to challenge. It is neither a punishment nor considered to be stigmatic. Where the compulsory retirement, is not by way of punishment for a misconduct, but is an action taken in pursuance of a valid condition of service enabling the employer to prepone the retirement, the action need not be preceded by any enquiry and the principles of natural justice have no application. The unsatisfactory service of the employee which may include any persistent misconduct or inefficiency furnishes the background for taking a decision that the employee has become a dead wood and that he should be retired compulsorily. Such `compulsory retirement' is different and distinct from imposition of a punishment of compulsory retirement (or dismissal/removal) on a specific charge of misconduct, where the misconduct is the basis for the punishment. The difference is on account of two factors : Firstly, the employee on account of completing a particular age or number of years of service falls within the zone where his performance calls for assessment as to whether he is of continued utility to the employer or has become a deadwood or liability for the employer. Secondly, the record of service, which may include poor performance, unsatisfactory service or incidentally any recent conduct (which if separately considered may constitute a misconduct subject to punishment) when considered as a whole, leads the Reviewing Authority to the conclusion that the employee in question is not fit to be continued in service and not of utility to the employer. Therefore, any incidental reference to unsatisfactory service, or any remarks in the context of explaining the reason for compulsory retirement under the relevant rule, in the letter of compulsory retirement will not be considered as stigmatic, even though read out of context, they may be capable of being construed as allegations of misconduct. Any order of compulsory retirement in terms of the rule/regulation providing for such compulsory retirement is not open to interference unless shown to be malafide or arbitrary or not based on any background material at all relating unsatisfactory service justifying the premature retirement. When an order of compulsory retirement purports to be one under the rule/regulation providing for such premature retirement, the proper approach of the court would be to consider whether the order is sustainable with reference to the requirements of the relevant rule, rather than examining whether the order could also be construed as a punishment for misconduct -- vide *Baikuntha Nath Das v. Chief*

District Medical Officer[1]*, Allahabad Bank Officers' Association v. Allahabad Bank*[2]*, I.K.Mishra v. Union of India*[3]*, State of Uttar Pradesh v. Lalsa Ram*[4] *and M. L. Binjolkar vs. State of Madhya Pradesh*[5]."

7. When the compulsory retirement of respondent is examined in the context of the aforesaid tests and principles, the inescapable conclusion is that it is valid and not open to challenge.

8. The respondent contended that once on review of performance, an employee is allowed to continue beyond 55 years, such employee is entitled to continue in service until he attains the age of 58 years and the employer cannot compulsorily retire him before 58 years, except by way of punishment for a proved misconduct. In support of the said contention, he relied upon the decisions of this Court in *State of Uttar Pradesh v. Chandra Mohan Nigam*[6] where this court held that once a review committee considered the case of a government servant, and the government, on the report of the committee, decides not to take any prejudicial action against the government servant, there is no warrant for a second review committee under the provisions relating to premature retirement, to reassess his case on the same material, unless the exceptional circumstances emerge in the meantime or the next stage for review arrives.

"In particular, the respondent relied on the following observations in that case:

"Once a review has taken place and no decision to retire on that review has been ordered by the Central Government, the officer gets a lease in the case of 50 years upto the next barrier at 55 and if he is again cleared at that point, he is free and untrammeled upto 58 which is his usual span of the service career. This is the normal rule subject always to exceptional circumstances such as disclosure of fresh objectionable grounds with regard to integrity or some other reasonably weighty reason."

The said decision will not assist the respondent. The principle laid down therein is that after a review of the service of an employee for purposes of extension of service beyond 55 years, if it is decided that he is fit and suitable for continuation, there is no question of a re-appraisal of the same material, for taking a different decision in the absence of exceptional circumstances. That principle will apply, where on review, the competent authority is satisfied that the service of the employee is satisfactory and there is no ground to compulsorily retire the employee. But in this case, the employee's service was not found to be satisfactory on review of performance at the end of 55 years, nor was the employee cleared for retention in service till 58 years. In this case, on review, the competent authority decided that the employee was not fit and suitable for retention and that he should be compulsorily retired from service with effect from 10.8.1998. But because of the extreme hardship pleaded by the employee and assurance of improvement in performance, the respondent's service was continued as a special case, for only a period of one year beyond 55 years making it clear that retention of service beyond one year, that is, 10.5.1999, will be subject to the outcome of review that will be carried out after monitoring his attendance and performance during that period. Thus the continuation of respondent beyond 55 years

was not because his service was satisfactory, but out of leniency, for a specific period somewhat on the lines of probation. During the extension period of one year, his performance was watched and it was found to be unsatisfactory. Therefore after giving due opportunity to him to explain the unsatisfactory service, a decision was taken by the competent authority not to continue him in service and consequently he was compulsorily retired from service with effect from 26.8.1999. Thus the compulsory retirement with effect from 26.8.1999 was merely a postponement of the compulsory retirement which was to take place on 10.5.1998 and not on account of a second-appraisal of the service performance upto 55 years."

9. The learned counsel for the respondent next submitted that recourse to `compulsory retirement' should be only in `public interest'; and that in this case, as neither the regulations nor the order of compulsory retirement referred to public interest, the compulsory retirement was vitiated. This contention has no merit. "Public interest" is used in the context of compulsory retirement of government servants while considering service under the state. The concept of public interest would get replaced by `institutional interest' or `utility to the employer' where the employer is a statutory authority or a government company and not the government.

> "When the performance of an employee is inefficient or his service is unsatisfactory, it is prejudicial or detrimental to the interest of the institution and is of no utility to the employer. Therefore compulsory retirement can be resorted to (on a review of the service on completion of specified years of service or reaching a specified age) in terms of relevant rules or regulations, where retention is not in the interests of the institution or of utility to the employer. It is however not necessary to use the words `not in the interests of the institution' or `service not of utility to the employer' in the order of compulsory retirement as the regulation provides that no reason need be assigned."

10. The respondent next drew our attention to the finding of the High Court that there was some discrepancy in regard to the number of days of unauthorized absence during the period of one year after 55 years and such unauthorized absence could not be a ground for compulsory retirement without an enquiry. It is true that the High Court has referred to the evidence of MW-1 and the entries in the muster rolls, to point out the discrepancy. MW1 had stated before the tribunal the period of unauthorized absence was 27 days whereas the entries in the muster rolls showed such absence was 32 days and that there was also an admission that out of the said 32 days, 6 days was availed as sick leave. But that cannot be a ground to conclude that the order of compulsory retirement was bad. The Tribunal and the High Court were not examining `unauthorized absence' as a misconduct which was subject matter of a charge. When the show cause notice dated 27.5.1999 referred to the absence for 20 days during the period of one year beyond 55 years, the respondent did not deny the same in his reply dated 14.6.1999. On the other hand, he admitted such absence and tried to explain it as being on account of advanced age and ill health of himself and wife. The fact that the unauthorized absence was more than 20 days during a period of one year was never disputed. The discrepancy in the oral evidence of MW1 and the muster rolls in regard to the

total number of unauthorized absence, even if true, was not material, as the respondent was not being punished for any specific unauthorized absence. The unauthorized absence was only the background material to reach the decision that respondent's service was unsatisfactory.

11. The High Court also erred in treating the show cause notice dated 27.5.1999 as a charge memo and finding fault with it on the ground that it did not contain necessary particulars in regard to the charge of unauthorized absence, and consequently holding that in the absence of any inquiry, principles of natural justice were violated. The letter dated 27.5.1999 was not a charge memo but only a notice giving opportunity to the employee before compulsorily retiring him under Regulation 12. In fact even without such a notice he could have been compulsorily retired.

12. In view of the above we allow this appeal, set aside the orders of the learned Single Judge and Division Bench and restore the award of the Industrial Tribunal.

[1]*[1992 (2) SCC 299]*
[2]*[1996 (4) SCC 504]*
[3]*[1997 (6) SCC 228]*
[4]*[2001 (3) SCC 389]*
[5]*[2005 (6) SCC 224]*
[6]*[AIR 1977 SC 2411]*