

CALCUTTA HIGH COURT

Manindra Chandra Sen

Vs.

Union of India

A.F.O.O. No. 533 of 1972

(Sankar Prasad Mitra, C.J. and Sabyasachi Mukharji, J.)

13.12.1972

JUDGMENT

Sabyasachi Mukharji, J.

1. The petitioner was appointed as a temporary Markman against a vacancy in place of one Panchu Mohan Mukherjee in the erstwhile Eastern Bengal Railway on 5th July, 1937. On 1st September, 1938, the petitioner was promoted as a general clerk, Grade 'B' and on 8th June, 1940 was confirmed as a Markman with effect from 1st June, 1940. On 15th December, 1970, there was a Gazette notification indicating that the petitioner would retire on 1st November, 1971. The petitioner has challenged this notification issued by the Personnel Department of the Eastern Railway. The said notification stated that the petitioner would complete 58 years of age on the 1st November, 1971 and accordingly would retire from the service. Thereafter the petitioner on 20th August, 1971, made a representation to the Divisional Superintendent, Sealdah, to recall the notice on the alleged ground of premature retirement. He was informed on the 4th September, 1971, that he would not be eligible to be retained beyond 58 years as he was confirmed with effect from 1st June, 1940. Being aggrieved by these orders, the petitioner moved this Court under Article 226 of the Constitution and obtained a Rule Nisi. The Rule Nisi ultimately came up for hearing before Chittatosh Mookerjee, J. and by a judgment delivered on 18th May, 1972, the learned Judge has discharged the Rule Nisi and dismissed the application. Being aggrieved by the said order of the learned Judge, the petitioner has preferred this appeal.

2. When the petitioner was asked to retire, the relevant Rule 2046 read as follows :-

"2046 (F. R. 56 (a)) Except as otherwise provided in this rule, every railway servant shall retire on the day he attains the age of fifty eight years.

(b) A ministerial railway servant who entered Government service on or before the 31st March, 1938 and held on that date -

(i) a lien or a suspended lien on a permanent post, or (ii) a permanent post in a provisional substantive capacity under clause (d) of Rule 2008 and continued to hold the same without interruption until he was confirmed in that post, shall be retained in service till the

day he attains the age of sixty years.

Note :- For the purpose of this clause, the expression "Government Services" include service rendered in ex-company and ex-State Railways and in former provincial Government.

(c) A ministerial railway servant referred to in clause (b) may be granted extension of service under very special circumstances to be recorded in writing, after he attains the age of sixty with the sanction of the appropriate authority.

(d) A railway servant to whom clause (a) applies may be granted extension of service after he attains the age of fifty eight years with the sanction of the appropriate authority if such extension is in the public interest and the grounds therefore are recorded in writing :
Provided that no extension under this clause shall be granted beyond the age of sixty years except in very special circumstances.

(e) Railway Servants in Class IV service or post who prior to 1-12-62 were entitled to serve upto the age of sixty years including the new entrants to those categories shall continue to serve upto the age of sixty years.

(f)

(g)

Note

(h) Notwithstanding anything contained in this Rule, the appointing authority shall, if it is of the opinion that it is in the public interest to do so, have the absolute right to retire any railway servant on attainment of the age of fifty-five years or thereafter by giving him notice of not less than three months in writing.

(i) Any railway servant may be given notice of not less than three months in writing by the appointing authority to retire from service on attainment of the age of fifty-five years or thereafter :

Provided that it shall be open to the appointing authority to withhold permission to a railway servant under suspension who seeks to retire under this clause.

No. 1: "Appointing Authority" means the authority competent to make the first appointment to the grade which the Railway servant for the time being holds.

No. 2 : The three months notice referred to in clause (h) or clause (i) may be given before the Railway servant attains the age of fifty-five years, provided that the retirement takes place on his attaining that age."

3. On behalf of the petitioner it was first submitted that in terms of Rule 2046 (b) of the Railway Establishment Code the petitioner was entitled to be retained in service till the completion of 60 years of age and, therefore, the orders and directions issued for retirement of the petitioner on completion of 58 years of age were illegal and without jurisdiction. According to the petitioner, he was a ministerial servant under the Railway Administration and had held a lien or at least a suspended lien on a permanent post on 31st March, 1938. It appears from the judgment of

Chittotosh Mookerjee, J., that the records were produced before the learned Judge wherein it appeared that the petitioner was posted in the vacancy of Panchu Mohan Mukherjee, a Markman, who was transferred. The appointment letter shows that the petitioner was appointed temporarily on the vacancy caused by the transfer of Panchu Mohan Mukherjee. Thereafter the petitioner was appointed as a Markman against the vacancy of the said Panchu Mohan Mukherjee and subsequently to the post of a Markman on the 1st June, 1940. Meanwhile he was temporarily promoted to the post of Clerk, 'B' Grade, in the scale of Rs. 30-2-40 with effect from 11th September, 1938. According to the respondents, the first appointment was a temporary appointment against the vacancy of Panchu Mohan Mukherjee who was transferred elsewhere to which he was confirmed only on 1st June, 1940. "Lien" has been defined under Rule 2003 (14) as "the title of a railway servant to hold substantively, either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he has been appointed substantively". In the instant case, Panchu Mohan Mukherjee did not hold any substantive appointment as a Markman on the date he was transferred. The petitioner was not substantively appointed against a permanent post. Panchu Mohan Mukherjee did not substantively hold any permanent post on the 31st March, 1938. It appears from the records of Panchu Mohan Mukherjee that he was not appointed to a tenure post or to a permanent post outside the cadre on which he was borne. He was not previously appointed to any post to which another railway servant had been holding a lien. It is not case of lien not being suspended. Therefore, the provisions of Rule 2008 did not apply in the matter of appointment of the petitioner as a Markman by the letter, Annexure 'B' to the petition. As Panchu Mohan Mukherjee did not hold any lien, there could not be any question of suspension of lien in the manner laid down in Rule 2008. From the service records of Panchu Mohan Mukherjee and the petitioner it is apparent, as has been found by the learned Judge, that the petitioner on or about 31st March, 1938, did not hold any lien or any suspended lien on a permanent post in terms of the relevant rules. The petitioner also did not hold any permanent post in a provisional or substantive capacity under clause (b) of Rule 2008. In the premises, clause (b) of Rule 2046 of the Railway Establishment Code cannot apply in the case of the petitioner and the petitioner would be bound by clause (a) of Rule 2046. If clause (a) of Rule 2046 applies, then in terms of the said rule the petitioner was liable to retire on attaining the age of 58 years. The petitioner did not belong to the class of ministerial servants who have been exempted from the application of the rule of retirement as contained in Rule 2046. Therefore, the first contention in support of this appeal must fail and it must be held that if Rule 2046 applies, the petitioner was due to retire, as was notified on the 1st November, 1971.

4. It was further contended that Rule 2046 as was introduced in 1967 as mentioned hereinbefore and under which the petitioner had been asked to retire was bad as being ultra vires Article 14 of the Constitution, because it made an arbitrary distinction between those ministerial servants who had entered Railway service on or before 31st March, 1938 and those Railway servants who had entered such service after 31st March, 1938. It was further contended that in any event among those who had entered Railway service on or before 31st March, 1938, the rule made a further distinction between those who held a lien or a suspended lien on a permanent post or a permanent post in a provisionally substantive capacity under clause (b) of Rule 2008 and those who did not hold such lien or suspended lien and there was no rational basis for such a classification between these two groups. It was urged that this classification was arbitrary and had no rational basis and as such unreasonable. It was contended that under Article 16 of the Constitution this would amount to interference with the conditions of employment and the

respondents were not entitled to impose arbitrary and discriminatory employment conditions among similarly situated railway employees. In support of this contention several decisions were cited before us. We will note the decisions but the principles of these decisions are well-established. Reliance was placed in the case of *General Manager, Southern Rly. v. Rangachari*¹, *Krishna Chander Nayar v. Chairman, Central Tractor Organisation*², *Mervyn Continho v. Collector of Customs, Bombay*³, *D. R. Nim v. Union of India*⁴, *Roshan Lal v. Union of India*⁵, *J. Pandurangarao v. Andhra Pradesh Public Service Commission, Hyderabad*⁶, *S. M. Pandit v. State of Gujarat*⁷, and *Railway Board v. A. Pitchumani*⁸, On behalf of the petitioner reliance was placed mainly, however, on the decision of the Allahabad High Court in the case of *B. P. Misra v. Union of India*⁹, The aforesaid decision was not concerned with Rule 2046 which came into force after 11th January, 1967. Furthermore, in the aforesaid case there was no decision as regards the validity of Clauses (a) and (b) of Rule 2046 in the form as they are today. It would be relevant to refer to the history of this rule. Prior to 1940 there was no separate rule for compulsory retirement under the Railway Establishment Code but there were some rules under Rule 56 of the Fundamental Rules. The F. R. 56 as it originally stood provided that a ministerial servant might be required to retire at the age of 55 but should ordinarily be retained in service if he continued to be efficient upto the age of 60 years; he was not to be retained after the age except in very special circumstances which should be recorded and with the sanction of the local government. Rule 56 (a) stipulated the age of retirement of a Government servant other than a ministerial servant, except otherwise provided in Rule 56. In 1934 Rule 56 was amended. It is not necessary to refer to clause (a) of Rule 56. By amendment of clause (b) of Rule 56 it was provided that a ministerial servant might be required to retire at any time after attaining the age of 55 years and might not in any case be retained in service after attaining the age of 60 years except in very special circumstances which must be recorded in writing and with the sanction of the local Government. In July, 1938 after amendments clauses (a) and (b) by the Government of India Rule 56 was in the following terms –

"FR-56,1 (a) Except as otherwise provided in the other clauses of this rule the date of compulsory retirement of a Government servant, other than a ministerial servant is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of the Local Government on public grounds which must be recorded in writing but he must not be retained after the age of 60 years except in any special circumstances.

(b) (i) A ministerial servant (who is not governed by sub-clause (ii)) may be required to retire at the age of 55 years, but should ordinarily be retained in service, if he continues efficient upto the age of 60 years. He must not be retained after that age except in very special circumstances, which must be recorded in writing and with the sanction of the Local Government.

(ii) A ministerial servant :

(1) Who enters Government service on or after the 1st April, 1938.

(2) Who being in government service on 31st March, 1938 did not hold a lien or a suspended lien or a permanent post on that date shall ordinarily be required to retire at the age of 55 years. He must not be retained after that age except on

¹ AIR 1962 SC 36

³ AIR 1967 SC 52

⁵ AIR 1967 SC 1889

² AIR 1962 SC 602

⁴ AIR 1967 SC 1301

⁶ AIR 1963 SC 268

⁷ AIR 1972 SC 252

⁹ AIR 1971 All 104

⁸ AIR 1972 SC 508

public grounds which must be recorded in writing and with the sanction of the local Government, he must not be retained after the age of 60 years except in very special circumstances."

1940 edition of State Railway Establishment Code, Vol. II provided as follows :

"2046 (F. R. 56 (1) (a)) Except as otherwise provided in the other clauses of this Rule the date of compulsory retirement of a Railway servant, other than a ministerial servant, is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of the local Government on public grounds, which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances.

2 (a) A ministerial servant, who is not governed by sub-clause (b) may be required to retire at the age of 55 years, but should ordinarily be retained in service, if he continues efficient, upto the age of 60 years. He must not be retained after that age except in very special circumstances, which must be recorded in writing and with the sanction of the local Government.

(b) A ministerial servant -

(i) who enters Government service on or after the 1st April, 1938, or

(ii) who being in Government service on the 31st March, 1938, did not hold a lien or a suspended lien on a permanent post on that date, shall ordinarily be required to retire at the age of 55 years. He must not be retained after that age except on public grounds which must be recorded in writing and with the sanction of the local government, he must not be retained after the age of 60 years except in very special circumstances.

(c)

3 (a)"

Thereafter in December, 1962 Rule 2046 was amended and it was again amended on 11th January, 1967 and is in terms mentioned hereinbefore. It appears from the different sets of rules, that either under the rules as introduced in 2046 in 1940 or the fundamental rules as they were amended after 1938, ministerial servants who entered Railway service on or before 31st March, 1938 and who held any lien or a suspended lien on a permanent post in provisionally substantive capacity on or before 31st March, 1938, have all along been treated differently from those who had entered railway service after 31st March, 1938 and did not hold such lien or suspended lien or occupy permanent post in the provisionally substantive capacity on that date. The reason for such distinction may be found in the judgment of the Allahabad High Court in the case of *Binda Lal v. Union of India*¹⁰, There the learned Judge had to deal with Rule 2046 after it was amended in January, 1967. On behalf of the Railway supplementary affidavit had been filed before the learned Judge from where it appeared that a Committee known as Sapru Committee made recommendations that rule regarding the age of retirement should be vigorously enforced and chance should be given to the young men and no extension should be granted after an employee

had completed 55 years of age. It further appears that Government of India considered the recommendations in 1938 and accepted the same in principle but it was

¹⁰1972 Lab IC 1462 (All)

accepted that the recommendations should not be applied in such a manner that would be unfair to the existing ministerial servants. There are certain observations to this effect in the note of the then Home Minister which have also been set out in the aforesaid judgment of Allahabad High Court. It is apparent, therefore, that the objects were when the rule was introduced, to create more employment and for that purpose to treat those who had entered railway service before March, 1938 and had certain substantial rights to those posts differently from those who had entered subsequently. The reason was that it was more or less in 1938 that the rule was adopted and it was considered desirable not to adversely affect those who had some kind of right to those posts at the time of first introduction. It is apparent, therefore, that with the object of creating more job and employment since 1940 persons who had been appointed prior to 1938 had certain substantial rights and those who had been appointed subsequent to March, 1938, had been treated differently in the fundamental rules as well as in Rule 2046 of the Railway Establishment Code. It is clear, therefore, that these two groups of persons formed separate classes and different ages from time to time have been laid down for their retirement. The said basis has a rational connection with the object sought to be intended to be achieved, that is to say, to create job and employment by introduction of a new system of retirement. So far as the argument that in making the distinction between those who had lien or suspended lien on a permanent post or who had been substantively appointed or appointed in a permanent post in provisionally substantive capacity before 1938 and those who had been not so appointed, it appears that the former group had certain kind of legal rights to the post in which they had been appointed but those who had not been so appointed and who did not have any such lien or suspended lien to a permanent post or were not appointed in provisionally substantive capacity did not have any such right. Reliance may be placed on the observations of the Supreme Court in the case of *P. L. Dhingra v. Union of India*¹¹, Counsel for the appellant relied on a decision of the Madhya Pradesh High Court in the case of *S. M. A. Rizvi v. State of M. P. Bhopal*¹², and he drew our attention to the observations appearing in paragraph 10 of the said judgment wherein certain observations of Hegde, J. in the unreported decision of the Supreme Court in Civil Appeal No. 1832 of 1968 were referred to. There the Supreme Court was concerned with Rule 30 regarding the District and Sessions Judges' scale of pay. The object of that rule, as it appears from the judgment, was to preserve certain scales of pay for persons who had entered the service prior to 4th July, 1931. In that background the Supreme Court observed that it was not understandable why there should be any difference between those who were confirmed as Civil and Sessions Judges before December 31, 1950 and those who were confirmed thereafter. But in the instant case, the object is to create more job and employment. Furthermore, this Rule was introduced for the first time after 1938 and the recommendations were made in 1938. Therefore, the object was to introduce the rule prospectively to affect only those who did not have any right to the posts prior to 31st March, 1938. In view of the history, this provision is not arbitrary and 1938 is not an accidental date. Looked at from that point of view, the instant case is different from the decision in 1972 Lab IC 1385 (Madh Pra) as well as the case of *Ramchandra Kotasthane v. State of Madhya Pradesh*¹³, In the aforesaid view of the matter, it is clear that these two different groups form separate classes and there was rational nexus between the classification made with the object intended to be served by the classification.

¹¹1958 SCA 37 at pp. 49 and 50 : (AIR 1958 SC 36)

¹³ AIR 1968 Mad Pra77

¹²1972 Lab IC 1385 (Madh Pra)

5. In the aforesaid view this notification issued to the petitioner directing him to retire on 1st November, 1971, cannot be challenged.

6. In the premises, this appeal fails and is accordingly dismissed. There will be no order as to costs.

Sankar Prasad Mitra, C. J.

1. I agree.

Appeal dismissed.