
(1988) 05 AHC CK 0042
In the Allahabad High Court
Case No : Writ Petition No. 8419 of 1986

Abdul Rehman

APPELLANT

Vs

National Textile Corporation & Others

RESPONDENT

Date of Decision : 20-05-1988

Acts Referred:

Citation : (1988) 05 AHC CK 0042

Hon'ble Judges : S.Saghir Ahmad, J and Rajeshwar Singh, J

Final Decision : Allowed

Judgement

S. Saghir Ahmad, J.—The petitioner, by means of this petition filed under Article 226 of the Constitution, has challenged the order dated 1121986 by which he has been retired from service on his attaining the age of 58 years. This order is contained in Annexure1 to the writ petition. He also challenges the order dated 2121986 (Annexure2) by which 12 day"s wages in lieu of the period of notice together with his salary upto December, 1986 have been sent to him by money order.

2. Vikram Cotton Mills (opposite party no. 2), where the petitioner is employed, was taken over by the Government of India under the Sick Textile Undertakings (Taking over of Management) Act, 1972. Whereafter the management and contral vested in the National Textile Corporation Limited. This Corporation, namely, National Textile Corporation Limited was established by the Government of India to manage and control the sick textile mills taken over under the aforesaid Act. The National Textile Corporation is said to be an instrumentality of the Government of India & consequently a "State" within the meaning of Article 12.

3. The petitioner was appointed as a Ring Fitter in Vikram Cotton Mills in 1973 in permanent capacity and worked as such without break till 30th November, 1986.

4. The employees of the Mills went on strike with effect from 1121986 and the petitioner could not also work on 1121986. On 3121986 he was served with the

orders contained in Annexures 1 and 2 dated 11286 and 2121986 respectively and the petitioner was retired from service with effect from 1121986 as he had attained the age of 58 years which was mentioned in the said letter as the age of superannuation. He was also informed by the other letter dated 21286 that he may collect wages for 12 days in lieu of notice, The principal ground on which the impugned orders are challenged is that since in the standing orders applicable to the petitioner the age of retirement has not been indicated and there is no provision in the standing orders that an employee belonging to the petitioner's category would retire from service on attaining the age of 58 years, he could not have been retired from service.

5. It has been pleaded in the alternative that if the notice of retirement is treated to be an order by which the petitioner's services have been terminated in exercise of the power contained in Clause 20 of the standing orders, the said order would still be bad as having been arbitrarily passed in pursuance of a provision which itself is void as it places arbitrary powers in the hands of the management to dispense with the services of a permanent employee by giving him 14 days notice or 12 days wages in lieu of notice at any time during the tenure of his service.

6. Opposite parties, who have filed a counteraffidavit, do not dispute the proposition that the National Textile Corporation is an instrumentality of the Government of India and it would, therefore, be a 'State' within the meaning of Article 12 of the Constitution. It is also not disputed that the Vikram Cotton Mills having been taken over by the National Textile Corporation Limited under the provision of the Textile Undertaking (Taking over of Management) Act, 1972 would also be a 'State' within the meaning of Article 12. Opposite parties do not dispute that there is no provision in the standing order regarding the age of superannuation or retirement. It is in this backdrop that the questions involved in this petition are to be considered and disposed of.

7. It will be useful to reproduce paras 6 to 9 of the petition in which it has been stated as under:

¶6. That it is respectfully submitted here that in the Vikrara Cotton Mills, Lucknow the standing orders of the Employers Association of Northern India are made applicable to its employees and there are different sets of standing orders certified under section 5 of the Industrial Employment (Standing Orders) Act, 1946 for operatives, clerks and of employees performing watch and ward duties. According to the definition of the term "Operative" as contained in subclause (i) of Clause 2 of the Standing Orders for operatives, the petitioner is covered by the said definition and as such the said standing orders are applicable to him.

7. That, however, in the entire standing orders applicable to the petitioner, there is no provision providing for a retirement age of the employees on whom the said standing orders are applicable. The said Standing Orders are absolutely silent as to the age of the retirement of the employees.

8. That it is a settled principles of law that a retirement age has to be provided for in either the Standing Orders or the contract of service entered into between the employer and the employee and if there is no such retirement age prescribed, no employees can be retired from service on the purported ground that he had attained the age of superannuation.

9. That in view of the aforesaid principles of law and in view of the fact that in the instant case, there is no prescribed age of retirement of the employees of the Vikram Cotton Mills, Lucknow and there being no contract of service entered into between the petitioner and the Vikram Cotton Mills, Lucknow providing for retirement age, the impugned orders retiring the petitioner from service with effect from 11286 are illegal and arbitrary.?

Opposite parties in the counteraffidavit say as under:

?It is most humbly submitted that before the amendment in the payment of Gratuity Act, age of superannuation was provided as 58 years but subsequently the same was amended & it was provided that the age of superannuation shall be as contracted or as given in the standing orders applicable to the establishment, In the instant case neither in the service contract nor in the standing orders, applicable to the establishment, age of superannuation is provided but it is also settled principle that every appointment included superannuation, because there is no such office in the public employment in which the incumbent could continue till his death after the appointment, every where the age of superannuation is provided for which is generally 58 years with extension, which may be given from one year to two years. In any case as per the Government policy, Central and State, the age of superannuation is uniformly 58 years. Hence it is absolutely misconceived to state that as age of superannuation is not provided the petitioner cannot be retired from service. Superannuation is nothing but other side of a coin in which one side is appointment. A coin having both the sides as heads is beyond conception, therefore, petitioner's assertion that appointment will not come to an end by superannuation is absolutely misconceived.?

9. The opposite parties further say that in the Mill in question there has been a practice to retire the employees and the workmen at the age of 58 years. They have set out the names of 25 workmen who have been retired at the age of 58 years since 1983.

10. It is contended by the counsel for the opposite parties that the petitioner being a workman was admittedly entitled to receive gratuity under the Payment of Gratuity Act, 1972 under which the age of superannuation has been specified as 58 years in Section 4 (1) (a) read with the definition of ?Superannuation? contained in Clause (r) of section 2 of the Act and therefore, if the petitioner has been superannuated on his attaining the age of 58 years, the opposite parties cannot be said to have acted in violation of any statutory or constitutional provision.

?Superannuation? has been defined in section 2(r) of the Act and the definition, in its original form, is reproduced below:

?2(r) "Superannuation" in relation to an employee means,

(i) the attainment by the employee of such age as is fixed in the contract or conditions of service as the age on the attainment of which the employee shall vacate the employment; and

(ii) in any other case the attainment by the employee of the age of fiftyeight years.?

11. The term ?Superannuation? has also been used in Section 4 of the Act and the relevant portion of the said section is reproduced below:

?4. Payment of Gratuity.

(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years.

(a) on his superannuation, or

(b) ??????????.

(c)

12, It was on the basis of the above definition of ?superannuation? that this court held in M/s Shrivaidya Nath Aurvedic Bhawan v. Lalta Prasad and others (1979 (38) Indian Factories and Labour Reports 455) that even though the age of superannuation is not prescribed in the standing orders, an employee can still be retired from service on his attaining the age of 58 years as the age of 58 years is prescribed under the payment of Gratuity Act, under which gratuity is to be paid to a workman on his attaining the age of superannuation which, according to the definition, contained in Section 2 (2), means the age of 58 years.

13. The decision in Shri Vaidyanath Ayurvedic Bhawan (supra) would not be of any avail now as the definition of superannuation has undergone a change by the payment of Gratuity (Amendment) Act, 1984. The amended definition reads as under:

? (r) ?Superannuation?, in relation to an employee, means the attainment by the employee of such age as is fixed , in the contract or conditions of service as the age on the attainment of which the employee shall vacate the employment.?

14. A perusal of the amended definition would indicate that the definition of ? superannuation? has undergone a material change inasmuch as subclause (ii) of clause (r) of section 2, which was the basis of the decision in Shri Vaidya Nath Ayurvedic Bhawan (supra) has been deleted. It was in this subclause (c) that it was provided that the age of superannuation of an employee would be the age of 58 years. Subclause (I), however, has been retained in its original form. According to the amended definition an employee would retire on his attaining

such age as is fixed in the contract of service or as is prescribed in the conditions of service. The age of retirement has, therefore, to be prescribed either in the contract of service or under the conditions of service.

15. In the instant case it has been clearly set out by the petitioner that there was no written contract between him and the management and, therefore, there was no occasion to mention the age of superannuation. It has also been clearly set out in the petition that in the standing orders applicable to the petitioner the age of superannuation has not been prescribed. Both the facts have not been denied in the counteraffidavit filed on behalf of the opposite parties, who, however, say that there being a practice to retire an employee on his attaining the age of 58 years, the petitioner has been validly retired on his becoming 58 years of age.

16. Elaborating his argument on the question of 'practice' learned counsel for the opposite parties contended, on the basis of averments contained in para 9 of the counteraffidavit, that although in the instant case there was neither any provision in the contract of service nor in the standing orders for the age of superannuation, the petitioner could have been retired from service and has, in fact, been validly retired from service, on the basis of the practice prevalent in the establishment where 25 employees have been retired from service on their attaining the age of 58 years since 1983. This practice was in consonance with the policies of the Central and State Governments where also the employees are retired at the age of 58 years. This argument, in our opinion, cannot be allowed to prevail.

17. Once it is provided in the Payment of Gratuity Act by amendment that the age of superannuation would be such as is fixed either in the contract of service or in the conditions of service, one would have necessary to look to the contract or conditions of service to find out the age of superannuation. The conditions of service are contained in the standing orders. Admittedly, the standing orders applicable to the instant case are silent as to the age of retirement and there is no age of superannuation, admittedly also, provided in the contract of service. The result is that a workman belonging to the petitioner's category regarding whom the age of superannuation has neither been indicated in the contract of service nor has it been provided in the standing orders, will continue in service so long as he is mentally and physically fit to discharge the duties assigned to him without loss of efficiency or till the standing orders suitably amended by the Opposite parties. The practice of retiring an employee on his attaining the age of 58 years as is claimed to be prevalent in the Mill, where the petitioner was employed, cannot be treated to be a substitute either for the contract of service or for the conditions of service.

18. Learned counsel for the opposite parties has referred to us a decision of the Delhi High Court in *Mange Ram v. National and Grindlays Bank Ltd.* (1987 Labour and Industrial cases 1560 wherein it was laid down that if the age of retirement was not fixed either in the contract of service or the service rules, the employee would continue so long his services are not terminated by dismissal or retirement

or by mere termination of contract of service. It would be noticed that in the Delhi case the claim put forward was for salary between the actual age of retirement and the age of 65 years, which was claimed to be the age upto which the petitioner was entitled to work. It was observed by the Delhi High Court as under:

?In our view, there is no proof at all that there is a retirement age fixed under the terms of appointment or by any service rules. So, the plaintiff has failed to establish that he is entitled to the sum claimed as salary between the age of 61 and the age of 65.?

The Delhi High Court further observed as under :

?The very fact that this is a contract of employment means that this can be terminated unless there is some contract to the contrary. There may be a case in which a person is employed for his life. Or, there may be a case in which a person is employed till a specific age of retirement, say, 60, or there may be a case where a person may be employed for a given number of years, say, 30. Or, there may be a fixed age of retirement.

Normally, if there is no term fixing the age of retirement or fixing the term of service, it would follow from the nature of the contract that it can be terminated at anytime. It can either be terminated by dismissal or retirement, or by mere termination of the contract of service.?

19. The decision of the Delhi High Court is distinguishable on facts but, in any view, we are not prepared to subscribe to the view that if there is no age of retirement fixed either in the contract or conditions of service, the employee can still be retired at the age of 58 years.

20. In the absence of any provision in the contract or conditions of service, we are clearly of the opinion that so long as artisans, or skilled and highly skilled workman or labourers who, during their tenure, have acquired the expertise in various trades, are physically and mentally fit and capable of working on the machines or in their trades, they have to continue in service.

21. In view of the fact that we have held that the petitioner would continue in service so long as he is mentally and physically fit, we need not look into the vires of clause 20 (a) of the standing orders under which the service of a permanent employee can be dispensed with at any time by giving him 14 days notice or 12 days wages in lieu of such notice. It may be pointed out that the vires of this provision was questioned on the basis of the decisions of the Supreme Court in West Bengal Electricity Board v. Desh Bandhu Ghosh (AIR 1985 SC 722) and Central Inland Water Transport Corporation v. Brojo Nath Gongoli (AIR 1986 SC 1571). Since the opposite parties in para 16 of the counteraffidavit have clearly stated that ?the instant case pertains to superannuation of the petitioner and his services have certainly not been dispensed with under the referred clause of the standing orders, that is, clause

20 (a) of the standing orders, we need not adjudicate upon the question relating to the validity of clause 20(a) of the standing orders. It is another matter that the services of such an employee are dispensed with as a result of disciplinary proceedings and he is retrenched after complying with the provisions of the Industrial Disputes Act.

22. For the reasons stated above the petition is allowed and the impugned orders dated 1.12.1986 and 2.12.1986 contained in Annexure I and 2 respectively are hereby quashed with all consequential benefit. There will be no order as to costs.

23. Judgment pronounced under Chapter VII R (1) (2) of the Rules of Court.

(Petition allowed)