

(2015) 01 DEL CK 0089
In the Delhi High Court
Case No : Writ Petition(C) No. 1927/1996

A.R. Abdul Gaffar

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 06-01-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 147 DRJ 503 : (2015) 1 SLJ 434

Hon'ble Judges : Valmiki J. Mehta, J.

Bench : Single Bench

Advocate : Rajinder Wali, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J. Mehta, J.—This writ petition under Article 226 of the Constitution of India is filed by the petitioner, erstwhile employee of National Book Trust, India (represented by respondent nos. 3 and 4 in the writ petition) impugning the order dated 15.4.1996 whereby the petitioner was prematurely/compulsorily retired in exercise of the powers under Rule 56(j) of Fundamental Rules and Supplementary Rules (FRSR). The provision of Rule 56(j) of FRSR is a provision entitling premature retirement in public interest by the employer. This Rule 56(j) of FRSR reads as under:-

"56(j) Notwithstanding anything contained in this rule, the Appropriate Authority shall, 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 Group "A" or Group "B" service or post in a substantive, quasi-permanent or temporary capacity and had entered Government service before attaining the age of 35 years, after he has attained the age of 50 years;

(ii) in any other case after he has attained the age of fifty-five years;

2. Before I turn to the facts of the present case, it is necessary to refer to the law under Rule 56(j) of FRSR inasmuch as the scope of hearing in a petition under Article 226 of the Constitution of India is only a very limited right to challenge the decision of premature retirement taken under Rule 56(j) of FRSR by the employer and which is that unless the order of premature /compulsory retirement suffers from malafides or that it is based on no evidence or it is completely arbitrary, courts do not interfere in the orders of compulsory retirement passed under Rule 56 (j) of FRSR. Supreme Court in its recent judgment in the case of Rajasthan State Road Transport Corporation and Others Vs. Babu Lal Jangir, , speaking through Hon"ble Mr. Justice A.K.Sikri, has referred to the chain of earlier judgments on the law of premature/compulsory retirement under Rule 56(j) of FRSR and has laid down the ratio that entire service record can be referred to take the decision of compulsory retirement and earlier adverse entries are not wiped out on account of the "washed-off theory". The relevant paragraphs of the judgment in Rajasthan State Road Transport Corporation and Others (supra) are paras 20 to 23 and 27 and which paras read as under:-

"20. This interpretation given in Badrinath Vs. Government of Tamil Nadu and Others, , which was the judgment rendered by two member Bench, has not been accepted by three-member Bench of this Court, subsequently, in Pyare Mohan Lal Vs. State of Jharkhand and Others, . After discussing various judgments, including the judgments referred to by us hitherto, the Court clarified and spelled out the circumstances in which the earlier adverse entries/record would be wiped off and the circumstances in which the said record, even of remote past would not lose its significance. It is lucidly conceptualised under the head "Washed-Off Theory" as follows: Pyare Mohan Lal Vs. State of Jharkhand and Others,

"Washed-off theory"

19. In The State of Punjab Vs. Dewan Chuni Lal, a two-Judge Bench of this Court held that adverse entries regarding the dishonesty and inefficiency of the government employee in his ACRs have to be ignored if, subsequent to recording of the same, he had been allowed to cross the efficiency bar, as it would mean that while permitting him to cross the efficiency bar such entries had been considered and were not found of serious nature for the purpose of crossing the efficiency bar.

20. Similarly, a two-Judge Bench of this Court in Baidyanath Mahapatra Vs. State of Orissa and Another, had taken a similar view on the issue observing that adverse entries awarded to the employee in the remote past lost significance in view of the fact that he had subsequently been promoted to the higher post, for the reason that while considering the case for promotion he had been found to possess eligibility and suitability and if such entry did not reflect deficiency in his work and conduct for the purpose of promotion, it would be difficult to comprehend how such an adverse entry could be pressed into service

for retiring him compulsorily. When a government servant is promoted to higher post on the basis of merit and selection, adverse entries if any contained in his service record lose their significance and remain on record as part of past history. This view has been adopted by this Court in *Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another*, .

21. However, a three-Judge Bench of this Court in *State of Orissa and others Vs. Ram Chandra Das*, had taken a different view as it had been held therein that such entries still remain part of the record for overall consideration to retire a government servant compulsorily. The object always is public interest. Therefore, such entries do not lose significance, even if the employee has subsequently been promoted. The Court held as under: (SCC pp. 333-34, para 7)

"7.Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that selfsame material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the government servant in service after he attained the required length of service or qualified period of service for pension."

This judgment has been approved and followed by this Court in *State of Gujarat Vs. Umedbhai M. Patel*, , emphasising that the "entire record" of the government servant is to be examined.

22. In *State of Uttar Pradesh and Others Vs. Vijay Kumar Jain*, , this Court held that the vigour or sting of an entry does not get wiped out, particularly, while considering the case of employee for giving him compulsory retirement, as it requires the examination of the entire service records, including character rolls and confidential reports. "Vigour or sting of an adverse entry is not wiped out" merely it relates to the remote past. There may be a single adverse entry of integrity which may be sufficient to compulsorily retire the government servant."

21. Stating that the judgment of larger Bench would be binding, the washed off theory is summed up by the Court in the following manner: *Pyare Mohan Lal Vs. State of Jharkhand and Others*,

"24. In view of the above, the law can be summarised to state that in case there is a conflict between two or more judgments of this Court, the judgment of the larger Bench is to be followed. More so, the washed off theory does not have universal application. It may have relevance while considering the case of government servant for further promotion but not in a case where the employee is being assessed by the Reviewing Authority to determine whether he is fit to be retained in service or requires to be given compulsory retirement, as the

Committee is to assess his suitability taking into consideration his "entire service record."

22. It clearly follows from the above that the clarification given by two Bench judgment in *Badrinath Vs. Government of Tamil Nadu and Others*, is not correct and the observations of this Court in *The State of Punjab Vs. Gurdas Singh*, to the effect that the adverse entries prior to the promotion or crossing of efficiency bar or picking up higher rank are not wiped off and can be taken into account while considering the overall performance of the employee when it comes to the consideration of case of that employee for premature retirement.

23. The principle of law which is clarified and stands crystallized after the judgment in *Pyare Mohan Lal Vs. State of Jharkhand and Others*, is that after the promotion of an employee the adverse entries prior thereto would have no relevance and can be treated as wiped off when the case of the government employee is to be considered for further promotion. However, this "washed-off theory" will have no application when case of an employee is being assessed to determine whether he is fit to be retained in service or requires to be given compulsory retirement. The rationale given is that since such an assessment is based on "entire service record", there is no question of not taking into consideration an earlier old adverse entries or record of the old period. We may hasten to add that while such a record can be taken into consideration, at the same time, the service record of the immediate past period will have to be given due credence and weightage. For example, as against some very old adverse entries where the immediate past record shows exemplary performance, ignoring such a record of recent past and acting only on the basis of old adverse entries, to retire a person will be a clear example of arbitrary exercise of power. However, if old record pertains to integrity of a person then that may be sufficient to justify the order of premature retirement of the government servant.

xxxxx xxxxx

27. It hardly needs to be emphasized that the order of compulsory retirement is neither punitive nor stigmatic. It is based on subjective satisfaction of the employer and a very limited scope of judicial review is available in such cases. Interference is permissible only on the ground of non application of mind, mala fide, perverse, or arbitrary or if there is noncompliance of statutory duty by the statutory authority. Power to retire compulsorily, the government servant in terms of service rule is absolute, provided the authority concerned forms a bonafide opinion that compulsory retirement is in public interest. : (See *Posts and Telegraphs Board and others Vs. C.S.N. Murthy*,

(underlining added)

3. This Court therefore has to see that whether there was sufficient material as available from the service record to prematurely retire the petitioner in exercise of powers under Rule 56(j) of FRSR. This court will also have to examine that as to whether there exists any malafides or arbitrariness in the decision to

compulsorily retire the petitioner.

4. At this stage, therefore let us refer to the service record and the Annual Confidential Reports (ACRs) of the petitioner for a period of five years prior to passing of the order of compulsory retirement, and which facts inter alia, were in the opinion of the employer/respondent nos. 3 and 4 sufficient to compulsorily retire the petitioner. These remarks in the ACRs of the petitioner for the years 1989 to 1994-95 read as under:-

"1989: General comments of Shri Jyotish Dutta Gupta, Joint Director (Development) , Reviewing Officer on the results achieved and the quality of performance and application of knowledge, delegated authority and conceptual and professional skills on the job "Below the Average". :

"I think Shri Gaffar needs professional counselling to get over some of his complexes."-Shri Anand Sarup, Chairman (Accepting Authority).

1990: "Professional skill of the job is good but quality of performance is average"-Shri Ramesh Chandra, Deputy Director (Subsidy) , Reporting Officer.

"He has no commitment to the tasks assigned to him and no regard for his duties. An unwilling worker. His records of 20 years service in the Trust shows that he always shirks the work for one reason or the other.

"A soft spoken indeed, but his thinking towards his colleagues, subordinates and superior officers is negative. No measures can remove his shortcoming. The only remedy for him and the Trust is that he may be asked to take voluntary retirement."-Shri Jyotish Dutta Gupta, Joint Director (Development) , Reviewing Officer. :

"Every time I have run into Shri Abdul Gaffar, he has made a complaint about somebody or the other. He has very little work and yet even this he cannot handle with competence."-Shri Anand Sarup, Chairman, Accepting Authority.

1991: "Creativity and innovative qualities are average.

"Whenever any warning or counselling is given he reached politely"--Shri Ramesh Chandra, Reporting Officer.

"Overall grading: Average"--Shri Jyotish Dutta Gupta, Joint Director (Development) , Reviewing Officer.

1993-94: "Grading: Average"--Shri P Sircar, Joint Director (Development) , Reporting Officer.

1994-95: "During the period under review, Shri Gaffar had about a dozen books in hand, which he was expected to bring out. Because of practically no progress, three books were transferred to other officers of the Production section, while a couple of them were dropped. Out of the remaining Shri Gaffar could not bring out any.

"Out of 584 titles published by the Trust during 1994-95, Shri Gaffar has not brought out a single book.

"Shri Gaffar is neither prompt nor accurate in disposal of work.

"His thoughts and expression are deceptive.

"It is difficult to trust him with a manuscript for a new book, where proficiency in marking up, composing, design and layout might be involved in a time-bound job.

"He is likely to make mistakes while preparing cost estimates.

"During 1994-95, as far as it is known, no paper was supplied to any press by Shri Gaffar for the printing of his jobs.

"On some occasions, had undertaken physical verification of paper and stock of Subsidy books. Took unduly long in conducting and preparing the report for the physical verification of films.

"Although he is keen for a promotion to a higher post, his output in terms of number of books published has been nil, during the period under review.

"Lacks commitment to the tasks assigned.

"During the period under review he has not published anything under normal situations, what is mention of unforeseen situations.

"No positive results have been yielded during 1994-95 despite public dealings with printers.

"Reliability with reference to work; sense of responsibility; dedication and motivation; and willing-ness to learn and systematize his work; Lowest in the section.

"In performance, Shri Gaffar has proved himself to be the lowest in the Production Section. Even the newly recruited Production Assistants and Assistant Directors have performed excellently in all spheres of work assigned to them in comparison with Shri Gaffar.

"Grading: Below Average."

--Shri P Sircar, Joint Director (Development) , Reporting Officer."

(underlining added)

5. Besides the aforesaid notings in the ACRs which have become final because the representations of the petitioner against the same have been rejected, and also challenge to the same cannot be accepted by this Court on account of the petitioner failing in making out any case whatsoever to set aside the entries made in the ACRs. At this stage, it is also relevant to note that it is not necessary that there must be an adverse entry or adverse entries in the ACRs of a person for him to be prematurely retired under Rule 56(j) of FRSR, and it is enough if

the performance of an employee is found to be average or below average so that action is taken to prematurely retire him.

6. It is relevant to note that the ACRs of the petitioner since 1971 have been recorded by six different officers and all of whom have found the petitioner to be inefficient and ineffective. The names of the relevant officers are given in the following para at internal pages 8 and 9 of the counter-affidavit of the respondents no. 3 and 4/employer, and which reads as under:-

"It would be relevant to point out that the petitioner's ACRs since 1971 have been recorded by six different Reporting Officers, namely, Shri U K Mallya, then Deputy Director (Production). Shri U Prabhakar Rao, Joint Director (Development) ; Shri Jyotish Dutta Gupta, Joint Director (Development) ; Shri Ramesh Chandra, Deputy Director (Subsidy) ; Shri Arvind Kumar, Director, for one year when there was no Joint Director (Production) ; and Shri P Sircar, the present Joint Director (Production). All have been unanimous in their observations on the petitioner's performance, which generally has been unsatisfactory. The petitioner's output in terms of the number of books published has been the lowest and, to cover up for his inefficiency, he has invariably taken cover under the garb of "administrative hurdles". His premature retirement is the result of his xxx inefficiency and ineffectiveness."

7. Besides the remarks in the ACRs of the petitioner as stated above, it is relevant to note that the petitioner has always been found to be very average in his work, delaying the work, delaying the payments of the bills to persons whose dues were held up and could only be cleared when a substitute officer was appointed, not doing sufficient work with the fact that changing of his department also did not help the petitioner to do additional work or improve his work performance. In fact the case of the petitioner for his grievances was got examined by the employer by an independent officer as per the request of the petitioner and this independent officer also gave the enquiry report against the petitioner that the petitioner is basically a moaner, one who always kept on complaining for one reason or the other and who never showed necessary drive for completing even limited work which was delegated to him. Some of the relevant averments in this regard made in the counter-affidavit of the respondent nos. 3 and 4/employer read as under:-

" As will be evident from his service record, a gist of which is given below, since his appointment in the National Book Trust, the petitioner has not shown evidence of his interest either in work or in studies.

A perusal of the petitioner's ACRs for the years 1971 to 1989 reveals that, except for a brief spell, from 1976 to 1978, in which there was slight improvement in his output, and the year 1986 where the adverse remarks were toned down, the petitioner's performance has ranged between Below Average and Average. He was found to be a slow and unwilling worker. In his ACR for 1989 it has been recorded that professionally he was about average and was

inclined to find alibis for lack of performance. A perpetual moaner, always complaining about someone or the other and about the thing or another, in the process losing all credibility and sympathy, the petitioner was known to be one of the few officers who had failed to respond to the efforts made to activate the organisation.

The petitioner had been submitting representations, either directly or through politicians or religious leaders, on matters relating to the extension of his probation period; confirmation; promotion and adverse entries contained in his ACRs etc. and against various officials of the NBT. The number of such representations being numerous, their copies are not being produced here. However, on an appeal received by the Chairman, vide letter dated 6 August 1992 from the petitioner, alleging victimization for inaction of other officers, a retired Under Secretary of the Department of Education was entrusted with a fact-finding inquiry. A gist of findings of the inquiry is given below:

a) In his representation Shri Gaffar has alleged that Shri H.C.Seth did not hand over the files relating to the production work of Malayalam at the time of his transfer to Bangalore in May 1984. Investigation has revealed that, except for a few files, all files were lying either with Shri C.N.Rao or with Shri Dhruv Bhargava. Even after Shri Gaffar's transfer to Bangalore, Shri Seth took up the matter with the Director to get back the relevant files.

b) Shri Gaffar did not show the desired sense of responsibility to take the actionable files relating to his charge to Bangalore. Even after reaching Bangalore, he did not take suitable steps to get the files transferred.

c) There have been instances of inordinate delay in the payment of bills relating to the production of south Indian languages. This delay, for obvious reasons, antagonised the reputed printers who refused to undertake further printing work from the Trust; consequently the production work of the Trust suffered considerably. The reasons for the delays in the payment of bills could not attributed to many factors. It is not possible to fix the responsibility on any particular officer.

d) Delays in the payment of bills were not confined to Malayalam production work only. Even the bills relating to the production work of other languages got delayed. Although Shri Gaffar has thrown the blame for the delays on other officers, it is distressing to find out that the delays could partly be attributed to him. He did not take any concerted measures to clear the pending bills.

e) Lack lustre performance on the part of Shri Gaffar led to the tarnishing of his image. He failed to rise to the occasion when he was transferred to SRO Bangalore as Officer-in-Charge in June 1984. On the contrary, he showed poor sense of responsibility when he left SRO, Bangalore without intimation or prior permission of the Officer-in-Charge. He further failed to acquit himself creditably and show any encouraging results when he was specifically called to the Headquarters in August, 1988 to clear the pending bills."

(underlining added)

8. Besides the aforesaid aspects a reading of the counter-affidavit filed by the employer shows that the petitioner was unnecessarily seeking names of officers, who had given remarks in his ACRs although the same was not required to be legally done. Petitioner was also found to have tried inasmuch as 24 times during his 23 years service period with the respondent nos. 3 and 4 to take employment with other employers, but the petitioner was not successful.

9. Besides the aforesaid relevant aspects some further aspects which are noted against the petitioner relating to his premature retirement are contained in para 21 of the counter-affidavit and which para reads as under:-

"21. Contents of para 21 are admitted to the extent that the petitioner submitted a request dated 5 March 1990 for the basis on which the adverse entries had been made with adequate examples. Vide Memorandum dated 28 June 1990 the petitioner was informed that the adverse remarks were based on his performance during the year 1989 and that, in case he wished to make any representation against the remarks, he could do so within six weeks of the receipt of the Memorandum. Vide representation dated 31 July 1990 the petitioner again requested for the basis of the adverse remarks. Vide Memorandum dated 10 May 1991 (Annexure P-16) (wrongly mentioned as 19 May 1991 by the petitioner) the petitioner was informed as follows:

a) As per the Annual Report for the year 1988-89, out of 488 titles published during the financial year, only two were published in two of the four South Indian languages.

b) Shri Abdul Gaffar was looking after the Tamil titles ever since he joined the Trust. He failed to process many bills pertaining to Tamil titles and kept them pending with him. He also failed to clear bills of many presses in South India. Shri Gaffar was called from Bangalore to Delhi by the Director vide Office Order no. F.4-8/71/Est/685 dated 26 August 1988 to clear pending work in South Indian languages including settlement of pending bills. Shri Gaffar could not clear all the bills even till May-June 1989 and bills of two titles had to be cleared by another Assistant Director (Production) who had subsequently taken over from Shri Gaffar.

c) Most of the cases under the Subsidy Scheme, which were under his charge, remained unattended due to unwillingness to work or his inability to work without an "Assistant".

d) Director asked Shri Gaffar in the beginning of the year 1989 to get some Malayalam titles reprinted before the end of the financial year 1988-89. Shri Gaffar initially gave some lame excuses but finally agreed to get the books reprinted. However, he failed to assign even a single title for printing till the end of the financial year.

From the above it will be seen that the grounds supplied to the petitioner vide

Memorandum dated 10 May 1991 (Annexure P-16) are not vague but are specific. The conclusion drawn by the petitioner from the Memorandum are perverse and are based on his ipse-dixit.

It is correct that the petitioner submitted a note dated 18 June 1991, regarding adverse entries in his ACR for 1989. Vide Memorandum dated 19 July 1991 the petitioner was informed that, though he had failed to submit a fresh representation against the adverse remarks, as advised vide Memorandum dated 10 May 1991, he was being given yet another opportunity to submit a proper representation on the adverse remarks within a period of one month, failing which, he was specifically informed, it would be presumed that he did not wish to represent and therefore no further request in this regard would be entertained."

(underlining added)

10. In view of the above position of the service record of the petitioner, I do not find that there is lack of material for this Court to hold that the decision of compulsorily/prematurely retiring the petitioner is in any manner illegal or arbitrary or malafide for this Court to interfere with the impugned order in exercise of its discretionary powers under Article 226 of the Constitution of India. Though the petitioner has alleged malafides, but he has failed to substantiate the same. Since the consistent service record of the petitioner showed him to be a very average or a below average worker, the employer in my opinion was hence justified in prematurely/compulsorily retiring the petitioner under Rule 56(j) of FRSR.

11. Petitioner, who appeared in person argued that the petitioner's services under Rule 56(j) of FRSR could not have been terminated without following the procedure for imposing of penalty as given under the regulations/bye-laws of the National Book Trust, India, however, the argument of the petitioner carries no substance because passing of an order under Rule 56(j) of FRSR of compulsory/premature retirement is not in the nature of a penalty and therefore there is no requirement of following the principles of natural justice. That there is no requirement of following the principles of natural justice has been held by the Supreme Court in various judgments which have been referred to in the case of Rajasthan State Road Transport Corporation and Others (supra) and one such case that no principles of natural justice have to be followed before passing of an order under Rule 56(j) of FRSR is the judgment of the Supreme Court in the case of Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, . Reference in this regard can be made to paras 13 and 15 of the judgment in the case of Rajasthan State Road Transport Corporation and Others (supra). The argument therefore urged on behalf of the petitioner that principles of natural justice have to be followed before passing an order under Rule 56(j) of FRSR is a misconceived argument and is therefore rejected.

12. In view of the above, there is no merit in the petition and the same is therefore dismissed, leaving the parties to bear their own costs.