(1977) 07 SHI CK 0005

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 296 of 1976

Banwari Lal APPELLANT

Vs

The State of Himachal Pradesh RESPONDENT

Date of Decision : 29-07-1977

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 11, 14, 15(4)
Constitution of India, 1950 — Article 16, 311, 311(2)

Citation : (1977) 6 ILR HP 589

Hon'ble Judges : C.R. Thakur, J

Bench : Single Bench

Advocate : Inder Singh, for the Appellant; H.S. Thakur, General and H.K. Paul, for the Respondent

Final Decision : Allowed

Judgement

C.R. Thakur, J.—The Petitioner who was working as Assistant Excise and Taxation Officer, Una, filed this Writ petition alleging that the Respondent is taking action of pre-maturely retiring him on the basis of a departmental enquiry which has been instituted and which is still pending. According to him the order or retirement is not in the public interest but it is as a matter of punishment arising out of the departmental proceeding which is the foundation of passing an order of pre-mature retirement. Further that this order or pre-mature retirement is based upon non-existent and extraneous grounds. He has, therefore, prayed that the order of the Respondent retiring him pre-maturely may be quashed.

2. The Petitioner had joined the Excise Department in the former State of Punjab. He was promoted as Assistant Excise and Taxation Officer on November 16, 1963. He was allocated to Himachal Pradesh on the reorganisation of the State of Punjab with effect from 1-11-1966. According to him, he has maintained a good record of efficiency and integrity. During the course of his service he has earned certificates of commendation of his superior officers who had the occasion to deal

with him and to appreciate and judge his work. Besides this he was also granted a commendation certificate by the Chief Minister of Himachal Pradesh. He is to attain the age of superannuation, that is the age of 58 years on 28th April, 1979, but the Respondent is threatening to retire him pre-maturely in exercise of the powers under Rule 3(1) of the Himachal Pradesh Civil Service (Pre-mature Retirement) Rules, 1976, (Shortly called the Rules) and that this action is in violation of the provisions of Article 16 of the constitution. The action is arbitrary, capricious and without any material. The Respondent has to form the opinion which has to be honest and legal opinion under Rule 3(1) of the Rules.

3. The Respondent pleaded that the Petitioner had been retired from the Government service in pursuance of Rule 3(1)(i) of the Rules after completing 30 years qualifying service. He has completed 55 years of age and Government is fully competent to retire him in public interest under the provisions of the aforesaid rule. He has got no right to maintain the writ petition. He could file an application for review to the Government. His retirement is in public interest and in accordance with the rules and not as a measure of penalty. It was further averred that the Petitioner was not found fit to be continued in service not being an officer of a desired standard of integrity. The competent authority was satisfied after applying its mind fully that it was in the public interest to retire the Petitioner.

4. The Petitioner in his rejoinder contended that the order of pre-mature retirement has been solely passed on the basis of the departmental enquiry, without waiting for the result of the enquiry and the order of retirement is the foundation of his retirement. The learned Counsel has also challenged the vires of Rule 3 of the Rules but later on he had made a statement in the Court giving up his challenge to the vires of this rule. He also pleaded that there was no question of filing any application for review, because no such power has been given under the Rules to the authority to review its orders. Further, it has been pleaded that the authority has not applied its mind and it appears that the opinion was formed by a committee who has got no legal authority to consider the case of the Petitioner and form any opinion. He controverted the allegation that he was not possessing the desired standard of integrity. According to him, the order of pre-mature retirement has been passed, against him because of a case relating to Life Insurance Corporation of India regarding which departmental proceedings are pending and the Petitioner has every reason to believe that the Respondent failed to prove the case of departmental proceedings against him. The case of Life Insurance Corporation of India is still pending before the Inquiry Officer and the Petitioner has got a right to be heard and that unless all the requirements of law are gone into he cannot be bundled off from the Government service, to which he has got a fundamental right. The order is by way of punishment and thereby Article 311 of the Constitution has been infringed.

5. The order of retirement is Annexure RA and it reads as under:

GOVERNMENT OF HIMAGHAL PRADELH EXCISE & TAXATION DEPARTMENT

ORDER Dated, 25th April, 1976

No. 19-31/71-E&T(Sectt.)---Whereas the Governor, Himachal Pradesh, is of the opinion that it is in the public interest to do so;

2. Now, Therefore, in exercise of the powers conferred by Rule 3(1)(a) of the Himachal Pnidesh Services (Premature Retirement) Rules, 1976, the Governor, Himachal Pradesh hereby orders that Shri Banwari Lai, Assistant Excise & Taxation Officer, Una, having already completed 30 years qualifying service, shall retire from Government service with effect from the date of service of this order on him.

3. Shri Banwari Lai, shall be paid three months pay and allowance in lieu of three months notice as required under the rules.

Anang Pal, Secretary to the Government of Himachal Pradesh.

The order purports to have been made in exercise of the powers conferred by Rule 3(1)(a) of the rules. Rule 3(1) reads as under:

3. Pre-mature retirement.--(1) The appropriate authority shall, if it is of the opinion that it is in public interest to do so, 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:

(a) on completion of 30 years of qualifying service; or

(b) on attaining the age of-

(i) 50 years in respect of Class I and Class II officers who have entered Government service before attaining the age of thirty five years;

(ii) 55 years in case of all other Class I and Class-II officers and all the Class III employees; and

(iii) 55 years in case of such Class IV employees who entered Government service after 23rd July, 1966 : Provided that where at least three months'' notice is not given or notice for a period less than three months is given, the employee shall be entitled to claim a sum equivalent to the amount of his pay and allowances at the same rates at which he was drawing them immediately before the date of retirement, for a period of three months or, as the case may be, for the period by which such notice falls short of three months; provided further that the appropriate authority may at any time before the expiry of the notice period substitute for the whole or part of the unexpired period of notice, pay in lieu thereof and retire the Government servant forthwith on making such payment.

Therefore, from the perusal of the rule it would appear that on completion of 30 years of qualifying service or on attaining the age of 55 years by a Government servant of Class III post the appropriate authority if it is of the opinion that it is in the public interest to do so have the absolute right to retire any Government servant by giving him a notice of not less than three months in writing or three months pay and allowances in lieu of such notice.

6. The order Annexure RA, states that the Petitioner had already completed 30 years qualifying service and had also attained the age of 55 years. So in the event of any one of the conditions having been fulfilled the appropriate authority has got the absolulte right to retire any Government servant if it is of the opinion that it is in public interest to do so, and, before doing so the authority is to give a notice of not less than three months in writing or three months pay and allowances in lieu of such notice. In the instant case from the order Annexure RA it appears and also it has not been disputed that Shri Banwari Lai had put in 30 years qualifying service. Now the submission made by the learned Counsel for the Petitioner is that this order though on the face of it appears to be a simple order of pre-mature retirement but the foundation for passing the same is the enquiry in the L.I.C. case against him in which the Respondent had ordered an enquiry, a full scale enquiry had been conducted and a report has been submitted, but in order to obviate the necessity of a notice as contemplated under Article 311(2) of the-Constitution or of the service Rules the Respondent have taken recourse to a more easy and convenient mode by retiring him pre-maturely in exercise of the powers under Rule 3(1)(A) of the Rules. But, this order according to him, has been passed by way of punishment. Further, it has been contended that this order is bad, in as much as there was no material before the competent authority on which it could form any opinion for passing this order nor any opinion according to the learned Counsel has been formed by the competent authority before passing this order. The submission made by the learned Advocate-General is that this is a simple order of premature retirement without casting any stigma. The Petitioner has no right to continue in service after having put in 30 years qualifying service or on attaining the age of 55 years. The Petitioner, according to him, had a right of review against the order and that before taking recourse to that alternative remedy he had no right to come in a writ petition before this Court.

7. No doubt the order on the face of it appears to be quite inncocuous and a simple order of retirement of the Petitioner from service on completion of 30 years of qualifying service and having attained the age of 55 years, but the learned Counsel for the Petitioner submits that the order though it appears to be quite innocous but, if fact, the very foundation of the order is the enquiry into this conduct in respect of the L.I.C. matter and the Court in order to come to a finding that the order is by way of punishment or it is a simple order of retirement has to look to the attendant circumstances and that it was apparent from the record that the retirement was made because of the L.I.C. enquiry instituted against him.

8. On the contrary, the learned Advocate-General has argued that the pendency of the departmental proceedings against the Petitioner did not change the character and nature of the impugned order and the order does not amount to punishment or removal or dismissal from service. The order does not cast any

stigma on the Petitioner and, therefore, it is not permissible to the court to go behind the order. A number of authorities were cited by the learned Counsel for the parties in support of their respective contentions.

9. Before I go into the question whether this Court can look into the attendant circumstances in order to find out that the very foundation of the order is the enquiry into his conduct in respect of the L.I.C. matter or that it is a simple order of compulsory retirement, it shall have to be seen whether there was any such enquiry pending against him.

10. The Petitioner has placed Annexure''X'' on the record of this Court, which reads as under:

Article I.

That the said Shri Banwari Lai while functioning as Assistant Excise & Taxation Officer, Simla, during the year 1969-70, failed to maintain absolute integrity and devotion to duty, inasmuch as that he obtained an agency from L.I.C. of India in the name of his minor son Shri Vishwajit in the clandertime manner and business to the tune of Rs. 1,60,000/-was booked in the name of this agency from the persons who were sale-tax assessees of Shri Banwari Lai and three bonus/ commission cheques were deposited by him in the S/F account of his son by forging the endorsement and signatures of Shri Vishawajit on the back of these cheques and that he did not inform his department that an insurance agency has been secured in the name of his son dependant upon him.

Hence it is obvious that an enquiry was instituted against the Petitioner and according to the Petitioner, as averred in para 7 the enquiry is still pending. The Respondents have denied this allegation in their reply filed on 4th June, 1976, but during the course of arguments the learned Advocate-General has admitted that there is a departmental enquiry which is still pending and in which further proceedings shall be taken only after the compulsory retirement of the Petitioner. Therefore, this averment appears to be correct that there is a departmental enquiry instituted. In his supplementary affidavit filed on 19th June, 1976, the Petitioner has made it clear in sub-paras (2) and (3) of para 6 that the basis of the order of pre-mature retirement is the case relating to the Life Insurance Corporation of India regarding which departmental proceedings are pending. According to the Petitioner he has got every reason to believe that the Respondents have failed to prove the case of departmental proceedings against him and further that Respondents have taken that the departmental case has been proved against the Petitioner and taking that the case is proved the order of premature retriement has been passed and that is the sole cause and reason for passing the same. The Petitioner maintains that there is absolutley no other material on the basis of which this order could be passed. Hence this averment remains uncontroverted that there is an enquiry instituted by the department and which enquiry is still pending against the Petitioner.

11. Now the question is whether it is the enquiry instituted against him into the

L.I.C. affairs which is made the very basis or foundation for the passing of this impugned order and whether this order, therefore, in the aforesaid circumstances would amount to removal from services and that Article 311 applies to the case. The learned Counsel argues that when Government initiates disciplinary proceedings in some matters of delinquency with the intention of punishing him and ultimately an order affecting the Government servant is passed and that in order to find out the real cause whether the order is made a motive or the very foundation for passing the order the court has to examine facts and circumstances to ascertain the true character of the order of compulsory retirement or the other circumstances which can lead to the conclusion that the order has been passed byway of punishment. This can be done only by going behind the order examining the circumstances which may have preceded or followed the issue of the order.

12. Reliance placed by the learned Counsel for the Petitioner that the Court has to look to the attendant circumstances is firstly on J.R. Jain v. Union of India and Ors. 1973 (2) S.L.R. 309, In this case the Petitioner had been compulsorily retired in exercise of the powers under Rule 56(j) of the Fundamental Rules and before retirement he was served with a notice intimating that he shall retire from service on the expiry of three months computed from the date of the service of the notice. He challenged that order contending that opinion had not been formed and that the decision was based on arbitrary decision and that he was entitled to a show cause notice before retirement. It was held by the Delhi High Court in this case that when a contention is raised that the order is arbitrary, the Court has to examine the material placed before it and decide whether the decision to retire the Government servant compulsorily was arbitrary or not. In Purshotam Sarup Johari v. State of U.P. and Ors. 1976 Lab.I.C. 61 it has been held by the Allahabad High Court that for the validity of an order of compulsory retirement mere absence of any a stigma or indication of being by way of punishment is not sufficient. When such an order is challenged circumstances leading to it must be investigated to determine its true nature. In Harchand Singh Vs. The State of Punjab and Others, also a similar rule was laid down. It has been held in S.R. Tewari Vs. District Board Agra and Another, that it is settled law that the form of the order under which the employment of a servant is determined is not conclusive of the true mature of the order. The form may be merely to camouflage an order of dismissal for misconduct, and it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form merely of determination of employment is in reality a cloak for an order of-dismissal as a matter of punishment, the Court would not be debarred merely because of the form the order in giving effect to the rights conferred by statutory rules upon the employee. Under these circumstances it is quite clear that the Court in order to investigate the cause and to find out the true nature of the order can look into the attendant circumstances of the case. There is no doubt that it was a case of dismissal from service but it would be evident that

compulsory retirement in case it is challenged on the ground that it was as a measure of punishment then for that matter it is immaterial whether it is a case of dismissal or compulsory retirement and the Court has got the right to look into the attendant circumstances.

13. The learned Advocate-General has cited Mayongbam Radhamohan Singh Vs. The Chief Commissioner (Administrator), Manipur and Others, to show that the Court cannot go into the attendant circumstances in the case of an order of compulsory retirement. But this case is distinguishable inasmuch as the Petitioner in that case was sought to be retired in pursuance of a direction of the President of India, under Decision No. 23. noted below Fundamental Rules 56. This decision was intended to retire an officer who had completed 30 years qualifying service and also to weed out unsuitable employees after they attained the age of 30 years. But, in the instant case the submission made by the Petitioner is that the order was merely a camouflage whereas the foundation of the order was the departmental enquiry instituted against him. Therefore-, this authority has got no applicability.

14. The other authority cited by the learned Advocate General is The The State of U.P. Vs. Sri Shyam Lal Sharma, This authority says that if the order of compulsory retirement does not contain any stigma, resort cannot be had to Government files to discover any remark amounting to stigma. But, it may be stated that in this case there was no departmental proceeding pending against the Government servant. There the retirement was made on the ground that the Petitioner had put in 26 years of service and had lost his utility to the department. He was considered to be a bad lot incorrigible and no longer useful. It was in these circumstances that the compulsory retirement order was made. Therefore, this authority also will have no relevancy in the present case in which a departmental enquiry is admittedly pending. The Allahabad High Court in G.S. Sial v. The Union of India and Anr. 1977 Lab. I.C. 378 also has reiterated the same principle as laid down in S.R. Tewari''s Tewari''s case (Supra) and the other cases referred to above cited by the learned Counsel for the Petitioner.

15. The lerned Advocate-General has further cited Nepal Singh v. State of Uttar Pradesh and Ors. 1974 (1) S.L.R. 826, This authority is also distinguishable on facts and has got no applicability to the case in hand. The further authority is B.B. Dutta v. The Union of India and Ors. 1973 Lab. I.C. 276, In this case although there was also an enquiry pending but the inquiry officer had not submitted his report and, therefore, keeping in view the circumstances of that case it was held that the President, therefore, when he was passing order of compulsory retirement could not possibly be held to be acting in pursuance of findings recorded in the departmental enquiry because at that point of time it was not even known what the findings of the departmental enquiry would be. Hence the Court took the view that there was no other circumstance shown which would in any manner suggest that the order was as a measure of punishment and would, therefore, attract the provisions of Article 311(2) of the

Constitution.

16. The other case cited is Basistha Narain Chaudhary Vs. Commissioner of Income Tax and Others, In this case also the enquiry had not been completed rather it was at the preliminary stage when the impugned order of compulsory retirement of the Petitioner was passed and it was in these circumstances that it was held that the order would not amount to punishment.

17. In the light of the above circumstances, it would appear that the court can enquire into the attendant circumstances to ascertain whether the order was by way of punishment. The record which has been produced before the Court, particularly para 8 of the office notice, makes it clear that the departmental enquiry-has been completed and the disciplinary authority has provisionally come to the con elusion that any of the major penalities as enumerated under Rule 11, including compulsory retirement, of the C.C.S. (C.C.A) Rules, 1965 should be imposed on Shri Banwari Lal, and a show cause notice under Rule 15(4)(i) of the rules will have to be given to ;him with a copy of the enquiry report asking him to make representation, if any, against the proposed penalty on the basis of the evidence adduced during the enquiry already held under Rule 14. bid within 15 days time. From para 11 of the note also it appears that the vigilance Department had advised that major penalty may be imposed and further it is written that Shri Banwari Lal has completed 54 years age on 28-4-1975 and has put in 34 years service and that keeping in view his age and length of service, Government may pass orders as to which of the major penalty mentioned at note 7 may be imposed upon him. The final order made by the Chief Minister is as contained in para 23 of the note. From this note it would be apparent that the necessary action to impose the penalty has been kept pending, as the Screening Committee has recommended his premature retirement. Therefore, what follows from the above is that the very foundation for the order was the departmental enquiry which had been completed and in which the punishment, etc. had been proposed, but in order to avoid the lengthy procedure involving issue of show cause notice, appeal, etc. and the consultation with the Public Service Commission as would be evident from the note 17 of the file No. 19-46/71(E&T) Sectt-Volume. II the action in the departmental enquiry was ordered to pend till action for compulsory retirement was made. Hence in view of the fact that there was a full scale enquiry, which had been completed and in which action had been proposed except that show cause notice against the proposed penalty was not issued to the Petitioner it follows conclusively that the order of compulsory retirement of the Petitioner is because of the departmental proceeding and the result of the same and which is the very basis for his retirement and not that the order was merely a motive to retire him because of the fact that he had lost his utility to the department after he had put in 30 years qualifying service and completed 55 years of age, in which case the Government has the absolute right to retire a Government servant. If there had been no departmental proceedings instituted against the Petitioner the case would have been [different, then the order could not be challenged. But the fact remains that it was not because that

he had attained the age of 155 years and put in 30 years qualifying service that he was sought to be retired in exercise of the power under Rule 3(1) of the Rules. The retirement is by way of punishment because of the fact that he was found guilty in the departmental proceedings. The enquiry had been completed, the punishment had been (proposed and the only requirement that was to be gone into was that a show cause notice was to be issued to the Petitioner regarding which they thought that it would involve a very lengthy and cumbersome procedure. So, in order to avoid the lengthy procedure the Respondent took a short cut by curtailing his right to show cause notice and show that he was quite innocent and that he could not be penalised. Therefore, in these circumstances it is clear that the enquiry is the very foundation and order is hit by Article 311(2), inasmuch as no notice for compulsory retirement, which amounts punishment, was issued to him.

18. The learned Counsel for the Petitioner also canvassed that the Government had no material nor had any been placed before the Court to enable it to form an opinion that it was in the public interest to compulsorily retire the Petitioner. The Petitioner had placed a number of commendation certificates and letters from his superior officers and other authorities to show that his work was above reproach and that his work had been appreciated by one and all. He possessed high integrity and there was no adverse entry in his character roll nor was any communicated to him. Only there was a complaint into the L.I.C. matter, whereupon the department ordered an enquiry, which had been completed and in which action was also proposed. However, no show cause notice was issued. In these circumstances, according to him, this order is totally invalid and it was wrong to say that the order was made in public interest. He also showed a number of authorities as to when an order can be passed in public interest and whether it is necessary for the authorities concerned to form an opinion before an order of compulsory retirement can be made.

19. In my opinion, the Petitioner is entitled to relief on the basis that the order is by way of punishment and is in contravention of Article 311(2) of the Constitution and, therefore, it is not necessary to record any finding on this question that there was no material to show that the order was made in public interest nor any opinion was formed by the competent authority before passing the order.

20. In the aforesaid circumstances, I, therefore, accept the petition and quash the impugned order Annexure RA, dated 28th April, 1976. However, I leave the parties to bear their own costs.