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**(2007) 03 AHC CK 0179**  
**In the Allahabad High Court**

Bhagwan Das

APPELLANT

Vs

State of U.P. and The Enquiry Officer/Tehsildar

RESPONDENT

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**Date of Decision :** 01-03-2007

**Acts Referred:**

Constitution of India, 1950 — Article 311

**Citation :** (2007) 4 ADJ 377 : (2007) 3 AWC 2632 : (2007) 3 UPLBEC 114

**Hon'ble Judges :** Sudhir Agarwal, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

Sudhir Agarwal, J.—Heard Sri K.K. Dubey learned Counsel for the petitioner and learned Standing Counsel.

2. Since the petitioner has raised a legal issue, though the respondents have not filed any counter affidavit despite opportunity, learned Counsel for the parties agrees for final disposal of the matter at this stage under the Rules of the Court.

3. A chargesheet was issued to the petitioner and after holding departmental inquiry, the punishment order was passed on 17.2.2005 by the Sub Divisional Magistrate, Jhansi, holding charges No. 1,2,4,5 and 6 wholly proved and charge No. 3 partly proved and on the basis thereof punishment of compulsory retirement was imposed on the petitioner. Sri Dubey, learned Counsel for the petitioner submitted that once the charges are proved, the punishment provided under the Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "1999 Rules") can only be awarded and the compulsory retirement is not one of the punishments provided in the said Rules. He further submitted that compulsory retirement based on the result of inquiry where the charges are found proved, is penal in nature and therefore, the order of compulsory retirement as a punishment is permissible only if it is so permissible under the Rules and not otherwise, hence the impugned order is wholly without jurisdiction. He further submitted that the petitioner in fact was appointed by the Collector in

the year 1975 but the order impugned in the writ petition has been passed by the Sub Divisional Magistrate and, therefore also it is void ab initio, having not been passed by the authority who appointed him. In other words, his argument is that though the order impugned in the writ petition is that of compulsory retirement, it amounts to removal from service, hence, could not have been passed by the authority subordinate to one which actually appointed him being violative of Article 311(1) of the Constitution of India.

4. Per contra, learned Standing Counsel submits that a departmental inquiry was held against the petitioner wherein charges leveled against him were found proved but instead of imposing any major penalty under 1999 Rules, the competent authority found it appropriate to compulsorily retire the petitioner since he had already completed 50 years of age and under Fundamental Rule 56(hereinafter referred to as "FR 56") a Government Servant can be compulsorily retired after attaining the age of 50 years if on assessment his work and performance is found to be dead wood.

5. Having heard the aforesaid submissions and perusing the record, I propose to deal with the first issue as to whether the impugned order of compulsory retirement is valid and permissible under Rules. It is not disputed that the disciplinary matters in respect to the petitioner are governed by 1999 Rules. Rule 3 thereof provides various penalties which may be imposed upon a Government Servant which reads as under;

3. Penalties.-The following penalties may, for good and sufficient reason and is hereinafter provided, be imposed upon the Government Servants:-Minor penalties:

(i) Censure.

(ii) Withholding of increments for a specified period;

(iii) Stoppage at an efficiency bar;

(iv) Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of orders;

(v) Fine in case of persons holding Group "D" posts;

Provided that the amount of such fine shall in no case exceed twenty five per cent of the months pay in which the fine is imposed.

Major Penalties:

(i) Withholding of increments with cumulative effect;

(ii) Reduction to a lower post or grade or time scale or to a lower stage in a time scale;

(iii) Removal from the service which does not disqualify from future employment;

(iv) Dismissal from the service which disqualifies from future employment.

Explanation:-The following shall not amount to penalty within the meaning of this rule, namely:

(i) Withholding of increment of a Government Servant for failure to pass a departmental examination or for failure to fulfil any other condition in accordance with the rules or orders governing the service;

(ii) Stoppage at the efficiency bar in the time scale of pay on account of ones not being found fit to cross the efficiency bar.

(iii) Reversion of a person appointed on probation to the service during or at the end of the period of probation in accordance with the terms of appointment or the rules and orders governing such probation.

(iv) Termination of the service of a person appointed on probation during or at the end of the period of probation in accordance with the terms of the service or the rules and orders governing such probation.

6. A perusal of Rule 3 clearly shows that compulsory retirement is not one of the punishment provided therein either as a minor penalty or as a major penalty. In respect to Government servant in the State of U.P. the power of compulsory retirement has been conferred on the appointing authority under FR 56 and the relevant FR 56(a) for the purpose of present case is reproduced as under:

56.(a) Except as otherwise provided in other clauses of this rule, the date of compulsory retirement of a Government servant, other than a Government servant in inferior service, is the date on which he attains the age of 58 years. He may be retained in service after the date of compulsory retirement with the sanction of the 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.

7. Compulsory retirement under FR 56(a), as held, is not a punishment attracting Article 311 of the Constitution or the Rules pertaining to disciplinary matters. In *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, it was held that the order of compulsory retirement under FR 56 is neither dismissal nor removal and hence, is not a punishment attracting Article 311 of the Constitution. The same view was reiterated in *Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another*, and relying the same the apex Court in *State of Gujarat Vs. Umedbhai M. Patel*, laid down certain principles and amongst others the three principles relevant for our purpose are as under:

(i) When the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a

punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead-wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

8. Thus an order of compulsory retirement is passed in exercise of FR 56 after assessing the work and performance of a Government servant on the ground that he has outlived his utility and has rendered a dead wood. The same as such cannot be said to be punishment and neither Article 311 is attracted in such case nor Rules pertaining to disciplinary matters are attracted. "However, where after holding a departmental inquiry an order of compulsory retirement is passed by recording a finding that the charges are proved, the situation would be different. A similar issue came up for consideration in *State of U.P. and Anr. v. Abhay Kishore Masta* (1995) 1 SCC 366 where it was held that as a matter of law or as an invariable rule it cannot be said that any and every order of compulsory retirement made under FR 56 or other corresponding provision thereto during the pendency of disciplinary proceedings is necessarily penal. It is a matter to be decided by verification of relevant record or material on which the order is passed. The Court reiterated its view by referring to its earlier decision in *The State of Uttar Pradesh Vs. Madan Mohan Nagar*, where a Constitution bench held that the test to be applied in such matters is "does an order of compulsory retirement cast an aspersion or attach stigma to the officer when it purports to retire him compulsorily". In para 9 of the judgment in *Abhay Kumar Masta* (supra) the Court also held that merely because the order of compulsory retirement is couched in innocuous language without making imputation against the government servant, the Court need not to conclude that it is not penal in nature and the tests as are applicable in the matter of termination of temporary employee may be adopted in the case of compulsory retirement also. In order to judge as to when an order of compulsory retirement may be said to be penal, the law laid down in para 8 of *Abhay Kumar Masta* (supra) is reproduced as under:

...if the charge or imputation against the officer is made the condition of the exercise of the power it must be held to be by way of punishment-otherwise not. In other words if it is found that the authority has adopted an easier course of retiring the employee under Rule 56(j) instead of proceeding with and concluding the enquiry or where it is found that the main reason for compulsorily retiring the employee is the pendency of the disciplinary proceeding or the levelling of the charges, as the case may be, it would be a case for holding it to be penal. But there may also be a case where the order of compulsory retirement is not really or mainly based upon the charges or the pendency of disciplinary enquiry. As a matter of fact, in many cases, it may happen that the authority competent to retire compulsorily under Rule 56(j) and authority competent to impose the punishment in the disciplinary enquiry are different. It may also be that the charges communicated or the pendency of the disciplinary enquiry is only one of the several circumstances taken into consideration. In such cases it cannot be

said that merely because the order of compulsory retirement is made after the charges are communicated or during the pendency of disciplinary enquiry, it is penal in nature. (para 8)

9. Considering in the light of the aforesaid exposition of law, in the case in hand, I have no hesitation to hold that the order of compulsory retirement passed in this case is penal in nature and in fact has been passed as a punishment and not under FR 56. Respondent No. 3 after receiving the inquiry report discussed all the charges and held the same except charge No. 3, proved, and charge No. 3 was held partially proved. Thereafter though it has said that the petitioner has completed 50 years of age and recovery in the preceding year was not satisfactory but thereafter it has passed the order of compulsory retirement by directing that the petitioner shall be paid salary for the period of suspension. However, the order nowhere says that the compulsory retirement is in public interest and the ingredients referred to under FR 56 have been made to satisfy. Ex facie, the order dated 17th February 2005 is an order of punishment compulsorily retiring the petitioner by way of penalty.

10. Having recorded the aforesaid finding now I come to the next question as to whether it was permissible for respondent No. 3 to pass such an order under 1999 Rules particularly when the charges are proved. The kinds of penalty which can be inflicted upon a government servant are provided in the statute. Rule 3 of the 1999 Rules as referred above does not provide any penalty like "compulsory retirement" and where disciplinary proceedings are governed by statutory rules, the punishing authority cannot impose punishment which is not provided under Rules and, therefore, in my view, the order of compulsory retirement impugned in this writ petition having been passed as a punishment is illegal being in the teeth of statutory rule and cannot be sustained.

11. The next submission of the learned Counsel for the petitioner that the respondent No. 3 has no authority to pass an order of compulsory retirement against the petitioner since he was appointed by the Collector, need not be gone into since on the basis of my findings on the first issue itself, this writ petition deserves to be allowed and, therefore, I am leaving the said question open to be decided later on in some appropriate case.

12. In view of the aforesaid this writ petition is allowed. The impugned order dated 17th February 2005 passed by respondent No. 3 is hereby quashed. The petitioner shall be entitled to all consequential benefits. However, the competent authority is at liberty to pass a fresh order in accordance with law and this order shall not preclude him from passing appropriate order under the Rules.

13. There shall be no order as to costs.