

(2000) 02 GAU CK 0010
In the Gauhati High Court
Case No : Writ Petition (C) No. 3382 of 1999

Bishnu Baishya

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 25-02-2000

Acts Referred:

Assam (Temporarily Settled Areas) Tenancy Rules, 1972 — Order 59(2)
Constitution of India, 1950 — Article 311(2)

Citation : (2000) 2 GLT 196

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : G. Uzir and S.K. Medhi, for the Appellant; B.K. Talukdar and D. Mazumdar, for the Respondent

Final Decision : Allowed

Judgement

D. Biswas, J.—The Petitioner while posted as Assistant Director, Central Veterinary Store was compulsorily retired from service with three months' gross salary by the notification dated 6.7.1994 (Annexure-A) under F.R. 56(b). The Petitioner preferred a representation on 29.5.98 (Annexure-B) before the Commissioner and Secretary in the Animal Husbandry and Veterinary Department. On consideration of his representation, the State of Assam by notification dated 6.7.98 (Annexure-C) reinstated the Petitioner in service on condition that the Petitioner will be entitled to pay and allowances for the period he was out of service. On reinstatement, the Petitioner joined the post of Assistant Director on 6.7.98. The Petitioner again submitted a representation dated 19.8.98 (Annexure-E) before the Governor of Assam for back wages. The State Government on consideration of his representation decided to treat the period between 6.7.94 to 6.7.98 as a period spent on duty for all purposes except for payment of salary. This decision was communicated to the Petitioner vide notification dated 8.10.98 (Annexure-F). Thereafter, by the notification dated 2.1.99 (Annexure-G), the State Government further decided to release the back wages for the aforesaid period. By this time, other officers junior to the

Petitioner were promoted to the next higher posts of Deputy Director. A Special Selection Committee was also constituted for consideration of the Petitioner's case for promotion and the said Committee in its meeting dated 15.2.99 recommended the Petitioner for promotion to the post of Deputy Director with effect from the date of joining of the junior officers. This decision was communicated to the State Government on 4.3.99. It is averred that despite the above developments, the Petitioner has not been paid his back wages, no order of regularisation of services for the period of compulsory retirement has been passed and that he has not been promoted. The Petitioner submitted a representation on 5.5.99 with two subsequent reminders on 25.5.99 and 18.6.99. But the Respondent authority did not dispose of the said representations. It is specifically averred that Shri Harish Sonowal, the then Commissioner and Secretary in the Animal Husbandry and Veterinary Department was instrumental in stalling the benefits decided to be given by the State Government. There are other allegations made against Shri Harish Sonowal regarding manipulation of records. As nothing favourable was expected to come, the Petitioner filed this writ petition for redress of his grievances as indicated above.

2. During the pendency of the writ petition, the Respondent State issued a notification dated 10th September, 1999 cancelling the reinstatement order dated 6th July, 1998 on the ground that it was passed erroneously under mistaken conception. By the order dated 14.7.99 this Court directed the Respondents not to take any action for cancellation of the order dated 6.7.98. Apparently this has been ignored. Shri Harish Sonowal, Respondent No. 4, sworn in two separate affidavits on behalf of the Respondent No. 2 and on his own behalf pleading that the Petitioner was retired compulsorily in public interest under the provision of FR 56(b) and, as such, the order of reinstatement was erroneous. It is further stated that other similarly situated persons were also reinstated under mistaken conception. Regarding claim of back wages, it has been pleaded that the Petitioner is not entitled to any payment as he did not render any service during that period. With regard to the recommendations of the Special Committee for promotion, it is simply averred that the minutes of the Committee is a secret document and, as such, the Petitioner had no access to it. There is, however, no denial to the assertion that the Petitioner was recommended by the Special Committee for promotion to the next higher grade. In Para-9 of the affidavit (dated 7th September, 1998), it has been pleaded that the Petitioner was sent on compulsory retirement not for his complicity with LOC scam, but in public interest. Denying the allegations made against the Commissioner (Respondent No. 4), it has been averred that the Commissioner corrected the mistake committed earlier who reinstating the Petitioner.

3. From the pleadings above, the question that arises for consideration is whether an order of compulsory retirement could be reviewed by the State Government on consideration of a representation filed by the concerned officer.

4. Before I delve deep into the question, it would be appropriate to recapitulate the views of the Supreme Court on compulsory retirement under provision of FR-56(b). In *Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another*, it has been held that an order of compulsory retirement has to be passed on forming an opinion based on subjective satisfaction that it is in public interest necessary to retire a Government servant compulsorily. The entire record of service shall have to be considered attaching importance to records of and performance of the officer concerned. The records to be considered would include the entries in the confidential record and character roll, both favourable and adverse, including uncommunicated adverse remarks. In *Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another*, the Supreme Court held that when a public servant was ordered to be retired permanently in public interest and the relevant records of the public servant do not reveal that the order was passed in public interest, the order was held to be bad. It had been further held that an administrative order which is based on reasons or fact which do not exist must be held to be infected with an abuse of power. In *Brij Mohan Singh Chopra Vs. State of Punjab*, it has been held that while considering the question of premature retirement it may be desirable to make an overall assessment of the service record with reference to confidential report pertaining to the years immediately proceeding such consideration, *hi Union of India (UOI) Vs. Col. J.N. Sinha and Another*, it has been observed that the powers of compulsory retirement must be on the opinion that it is in public interest necessary to retire an officer. If the authority bonafide forms that opinion, correctness of that opinion cannot be challenged before the Court, but it is Open to the aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that it is an arbitrary decision. Similarly in *Ram Ekbal Sharma Vs. State of Bihar and another*, while dealing with the question of compulsory retirement the Supreme Court observed that the Court has the power, in appropriate case, to lift the veil to find out whether the order is based on any misconduct or the order has been made bonafide and not with any oblique or extraneous purpose. Likewise in *K. Kandaswamy Vs. Union of India*, the Supreme Court concluded that if the appropriate authority bonafide forms an opinion, the correctness thereof may be challenged on the ground that requisite opinion is based on no evidence or has not been formed or decision is based on collateral ground or that it is an arbitrary decision.

5. It would appear from the above decisions of the Supreme Court that an aggrieved civil servant may challenge an order of compulsory retirement on the ground that the requisite opinion has not been formed; or that the decision is based on collateral ground; or that it is an arbitrary decision. If an aggrieved Civil servant succeeds in establishing that the order of compulsory retirement suffers from any of the above infirmities, the Court has the jurisdiction to quash the same. This view is available in the decision of the Supreme Court rendered in *C.D. Ailawadi Vs. Union of India and others*, as well. Keeping in mind the observations of the Supreme Court as reproduced above, I would now like to

deal with the controversy at hand.

6. The order of compulsory retirement dated 6th July, 1994 (Annexure-A) read as follows:

No. VFV 174/94/Pt/13:- In exercise of the powers conferred under FR 56(b), the Governor of Assam hereby requires Dr. Bishnu Baishya, Asstt. Director, Central Veterinary Store, Chenikuthi, Guwahati-3, a member of the Assam Animal Husbandry, Veterinary and Dairying Service, who has already attained the age of 50 (fifty) years, to retire from service with immediate effect in public interest.

A banker's cheque bearing No. MBC/28-18.448 dated 6.7.94 for sum of Rs. 21,087 (Rupees Twenty one thousand eighty seven) only being 3 (three) month's gross salary which is admissible to Dr. Bishnu Baishya is enclosed.

7. It would appear from the above that it is an innocuous order without any imputation against the writ Petitioner. Therefore, this order cannot be treated as an order of punishment so as to bring it within the fold of Article 311(2) of the Constitution. But on receipt of this order, the Petitioner filed a representation dated 29.5.1998 praying for reinstatement in service wherein it has been specifically mentioned that neither the Central Bureau of Investigation nor the Department of Animal Husbandry and Veterinary have issued any charge sheet to the Petitioner and, therefore, his case should be considered for reinstatement as has been done in case of Anr. officer. Thereafter, the State Government vide notification dated 6th July, 1998 (Annexure-C) reinstated the Petitioner in service. The said notification reads as follows:

No. VFV.257/92/62 : Dr Bishnu Baishya, Asstt. Director, Central Vety. Store, Guwahati-3 was retired compulsorily from service under Rule 56(b) of the F/R and S/R vide Govt. order No. VFV. 173/94/pt/13 dt. 6.7.94 in view of the Government.

Now after careful consideration of all available records the Governor of Assam is pleased to rescind and cancel the Govt. order No. VFV. 173/94/pt/13 dt. 6.7.94 and to reinstate of Dr Bishnu Baishya in service with immediate effect. As Dr Baishya did not render any service to the Govt. from the date of compulsory retirement till the date of reinstatement, he shall not be entitled to the salary for that period.

(emphasis laid)

8. By notification dated 6th July, 1998 (Annexure-D), the Petitioner was posted as Assistant Director (Monitoring) in the Head Office of the said Department. From the order dated 6th July, 1998, it would appear that after careful consideration of all available records the Governor of Assam was pleased to rescind and cancel the Government order dated 6th July. 1994 and reinstated the Petitioner in service. This shows that the opinion formed while compulsorily retiring the Petitioner from service by the notification dated 6th July. 1994 was found to be non-existent and. as such the State Government reviewed its earlier

decision and recalled the said order. It otherwise shows that the decision to send the Petitioner on compulsory retirement under FR 56(b) was based on no evidence or on consideration of matters not relevant for the purpose. Therefore, the Government action is reinstating the Petitioner in service on review of its earlier decision cannot be said to be bad in law. Atleast this decision to reinstate him in service indicates that the earlier order was passed on an opinion formed erroneously. In my considered opinion, the principle of natural justice in no manner estop the appropriate authority from reviewing its decision to retire a Government Servant compulsorily the said order was passed without sufficient reasons. The learned Counsel for the Respondents, however, vehemently argued that a person once retired in public interest cannot be recalled by the State. In support of his submission the learned Counsel relied on the following decision:

- (i) State of Rajasthan and Others Vs. D.R. Laxmi and Others,
- (ii) Dinesh Chandra Sangma Vs. State of Assam and Others,
- (iii) Major Chandra Bhan Singh Vs. Latafat Ullah Khan and Others,
- (iv) On the death of Fazal Haque His Legal Hier: Shri Shahjamal A.H. and Ors. (1994) 2 GLR 30.

9. In Dr. Laxmi and Ors. (supra), the Supreme Court in Para-10 held that the order or action, if ultra vires the power, becomes void and it does not confer any right. But the action need not necessarily be set at naught in all events. It is further held that though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner and the Court may in appropriate case decline to grant the relief.

10. The above decision relied upon by the learned Counsel for the Respondent, in my opinion, cannot be invoked because this decision was rendered in the context of an acquisition proceeding and the order passed by the appellate Court became final. In the instant case the situation is completely different. The initial order of compulsory retirement was revoked by the Government on reconsideration and the Petitioner was reinstated in service. The order of reinstatement was carried out and the Petitioner joined the post on the very day the order of revocation was passed. The ratio laid down in this case does not in any way help the Respondents.

11. In Dinesh Chandra Sangma (supra), in Para-8 the Supreme Court upheld the constitutional validity of the provision of FR 56(b) on the ground that it does not amount to removal/dismissal by way of punishment. In the said judgment it has been further held that FR 56 is one of the statutory rules which binds the Government as well as the Government servant. Nowhere in the judgment it has been laid by the Supreme Court that an order of compulsory retirement under FR 56(b) cannot be recalled by the appropriate authority if on reconsideration it is

found that its order retiring the civil servant was erroneous.

12. In Major Chandra Bhan Singh (supra), in para-13, it has been held that review is a creature of statute and cannot be entertained in the absence of a provision therefor. In the case before the Supreme Court a review petition wrongly filed was allowed by the competent officer contrary to the provisions of law. This decision was rendered for want of a provision for review of an order under the Administration of Evacuee Property Act, 1950. In the instant case, there is no express bar in FR-56 that an order under 56(b) retiring a Civil Servant compulsorily cannot be reviewed. In Fazal Haque (supra), a Division Bench of this Court also held that an order under Order 59(2) of Assam (Temporarily Settled Areas) Tenancy Act, 1971 cannot be reviewed as there is no express provision to that effect in the said Act.

13. This decision relied upon by the learned Counsel for the Respondents, as referred to above, shows that when an order passed under a statute attains finality, in the absence of an express provision, the said order cannot be subjected to review. But this ratio is applicable to valid orders passed under the statute. Even the ratio in Dr Laxmi (supra) does not expressly bar review of void order. The decisions cited on behalf of the Petitioner and discussed in paragraph-4 are specific and clear enough to indicate that an order of compulsory retirement may be challenged on the ground that the requisite opinion has not been formed or it has been formed on no evidence or the decision is based on collateral ground or that it is an arbitrary decision. This is the law laid down by the Supreme Court on FR 56(b).

14. The provision of FR-56(b) reads as follows:

FR-56(b) - Notwithstanding anything contained in these rules the appropriate authority may, if he is of the opinion that it is in the public interest to do so, retire a 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 after he has attained fifty years of age or has completed 25 years of service, whichever is earlier.

The above provision which has been invoked in the instant case shows that the appropriate authority is required to form an opinion that it is necessary in the public interest to retire a person compulsorily. Therefore, formation of an opinion is the sine qua non for the purpose of exercise of the powers under FR 56(b) and this has been reflected in the various judgments relied upon by the learned Counsel for the writ Petitioner.

15. It would appear that the State Government initially retired the writ Petitioner under FR-56(b) on the ground that his service was no longer required in public interest. Thereafter, the Petitioner filed a representation and the State Government on consideration of all available materials ordered his reinstatement. This may be construed as an admission that the earlier order passed retiring the writ Petitioner in public interest was not based on sufficient reasons. The

recommendation of the Special Selection Committee for promotion of the writ Petitioner also indicate that there was nothing wrong with the service record. This being the position, the State Government in all fairness decided to revoke the said erroneous order. The stand taken by the State Government in their affidavit also does not show that the decision to retire the Petitioner was taken on consideration of the ACRs and the Service Record. It does not even indicate that overall performance of the officer was assessed before the decision was taken. The materials which imbued the State Government to take a decision to retire the writ Petitioner is in fact not available in this case. The writ Petitioner in his representation stated that neither the Central Bureau of Investigation nor the Departmental Authority filed any charge-sheet against him. The statement made in the affidavit-in-opposition shows that the State Government decided to reinstate the writ Petitioner on consideration of his representation. The decision to reinstate the writ Petitioner, therefore, has a close proximity with the grounds taken in his representation: Therefore, it is clear that extraneous considerations prevailed upon the State to pass the initial order of compulsory retirement. That being the position, the decisions rendered in J.N. Sinha (supra) and C.D. Ailawadi (supra) and other decisions discussed in Para-4 come to his aid. It is clear from the judgments relied upon by the writ Petitioner that in a situation where the Petitioner is able to prove that the decision to retire him was taken on collateral ground, this Court has the powers to quash the same.

16. There cannot be any dispute, in view of the discussion above, that this Court has the powers to quash an order of compulsory retirement on one of the grounds mentioned hereinbefore. Since this Court has the power to quash an order of compulsory retirement, there cannot be any reason to deprive the appropriate authority which had passed the order to review its own decision to set at right the wrong committed by it. The fundamental aspects of the legal policy is that law should be just and the interpretation thereof should be in aid of justice. Law does not permit violation of its tenants. Where there is violation and the law is silent or remedy, the legal policy, equity and fairness will supply the omission of the Legislature. The observation of the principles of natural justice being implicit in every State action, whether administrative or judicial, the Court with all ingenuity will have to salvage the cause of justice. Therefore, the decision of the Government to recall the writ Petitioner back to service in cancellation of its earlier order of compulsory retirement cannot be denounced as unsustainable in law for the simple reason that there is no express provision for review in F.R. 56.

17. The discussions above shows that the notification dated September 10, 1999 whereby the reinstatement order was cancelled on the ground that the State has no power to review its" decision taken under F.R. 56(b) has no leg to stand. This order annexed with the Miscellaneous Petition No. 1114 of 1999 also nowhere reflect that the earlier decision to retire him under FR-56(b) was made after forming an opinion on consideration of ACRs and Service Record of the writ Petitioner. That apart, it has been brought to the notice of this Court that this

order dated 10th September, 1999 cancelling the reinstatement order was passed without any notice to the writ Petitioner. This has been done obviously in gross violation of the principles of natural justice and for this reason as well this notification has to go.

18. In the Miscellaneous Petition the writ Petitioner expressed his apprehension that the order of reinstatement was likely to be cancelled. His apprehension was not baseless as the Respondents issued the notification dated September 10, 1999 during the pendency of the writ petition. This Court has the power to mould reliefs in order to render complete justice. "Accordingly, I propose to set aside the order dated September 10, 1999 and direct the Respondents to make payment of back wages to the writ Petitioner forthwith and to implement the recommendation of the Special Selection Committee for promotion with consequential financial benefits.

19. The writ petition is according allowed.

No order as to costs