
(1970) 04 AHC CK 0002
In the Allahabad High Court
Case No : Writ Petition No. 439 of 1968

B.P. Misra

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-04-1970

Acts Referred:

Constitution of India, 1950 — Article 11

Citation : AIR 1971 All 104 : (1971) 1 LLJ 115

Hon'ble Judges : G.S. Lal, J

Bench : Single Bench

Advocate : Akhilesh Sahai, for the Appellant; A.B. Nigam, for the Respondent

Final Decision : Allowed

Judgement

G.S. Lal, J.—This writ petition relates to a service matter. The petitioner V. P. Misra of the Ex-War personnel was absorbed in the Watch and Ward on a post of clerk on 23-7-1947 by the then Superintendent, Watch and Ward, Eastern Railway. He was later confirmed with effect from 1-4-1956. His date of birth is July 12, 1910. He received an order, which is annexure 5 to the writ petition and is dated 1-3-1967, to the effect that in terms of Chief Security Officer letter dated 9-12-1967 he would retire with effect from 11-7-1968, afternoon. In other words he was to retire on the attainment of the age of 58 years, The said communication purported to be from the Assistant Security Officer. Lucknow, though it was signed by the Head Clerk of the office for the Assistant Security Officer. The petitioner made a representation dated 4-3-1967 and also sent reminders on several subsequent dates, the 1st one being dated 15-12-1967, of which copy is annexure 6 to the writ petition. He got a reply (copy annexure 7 to the writ petition) dated 16-12-1967 "that the matter was under waiting and the final decision when arrived at will be intimated to him promptly."

He never received any communication about the final decision till the date 11-7-1968 arrived or even thereafter. On 21-5-1968, in view of the fact that the date of retirement was approaching he filed the present writ petition. He asked

for an interim relief for the suspension of the order of his retirement but the same was not given to him and so he has been under retirement from 12-7-1968.

2. The contention of the petitioner is that his age of compulsory retirement was 60 and not 58 and the order for his retirement before attaining the age of 60 could be passed only by a competent authority which was neither the Chief Security Officer nor the Assistant Security Officer or the Head Clerk who signed for the former. The order is further challenged as mala fide, being secured by opposite party No. 4 to the writ petition, namely, the Assistant Security Officer, who became displeased with the petitioner as certain representations made by him against the orders of opposite party No. 4 were allowed by higher authorities. The order is questioned as discriminatory and void, being violative of Articles 14 and 16 of the Constitution as others in the same position have been allowed to continue in service upto the age of 60 years. The failure to decide the representation is said to have caused violation of principles of natural justice and the order of retirement to be mala fide and illegal.

3. A counter affidavit has been filed by one Jasjit Singh Bal describing himself as opposite party No. 4. He has denied the allegations of mala fides against himself and has asserted that the age of retirement for the petitioner was 58 and the order of retirement was issued by the Chief Security Officer and only the communication to the petitioner was signed by the Head Clerk in the routine way. The case of discrimination was denied,

4. The petitioner filed a rejoinder affidavit reiterating his allegations denied in the counter affidavit and also referring to a particular name as a person who was retired at the age of 60 years.

5. At the outset it may be stated that the action of the opposite parties whosoever out of them were concerned with the decision of the representation made by the petitioner, in not deciding the representation before the retirement date of the petitioner arrived, is obnoxious as the opposite parties got more than a year to consider a simple representation. His case went by default and he had to fall back upon whatever legal grounds he could advance in his favour to secure a reversal of the order.

6. Coming to the merits, the first point which arises for consideration is whether the age of compulsory retirement in the case of the petitioner was 60 or 58 years. The relevant provision is to be found in Rule 2046, Sub-rule (2), of the Indian Railway Establishment Code, Volume II, but the quest for what is the correct shape of Sub-rule (2) has brought out strange and unfortunate revelations. Learned counsel for the petitioner possessed a copy of the 1966 edition of the Indian Railway Establishment Code Volume II and at first addressed the Court on the basis of the rule contained therein. It was found however that the Code published in 1966 contained Rules corrected upto July 1962 only., This necessitated the quest for the rule in force in 1968. Learned counsel (Sri A. B. Nigam) appearing for the Railway Administration who was

expected to possess an upto date authentic version of the rule however stated on enquiry that he had not even been supplied with the 1966 edition of the Indian Railway Establishment Code and was being guided by the 1950 edition thereof which too however did not contain the correction slips upto date. He disclosed that he had written a number of times for an up-to-date copy of the Code but without any result, He was given time and directed to produce an authentic up-to-date version of the rule but even though there is located at Lucknow itself the Divisional Office of the Northern Railway and though the opportunity available was plenty to secure a copy of the up-to-date rule even from the General Manager of the Northern Railway or the Railway Board, the learned counsel expressed his utter helplessness by giving out that in spite of his writing for the same he had not been supplied a copy by any of the authorities.

The offices of the Railway Administration may or may not be possessing upto date rules but one thing is clear that they prefer to keep their counsel appearing to defend cases on their behalf in the High Court (Lucknow Bench) in the position of Rip Van Winkle and have ignored all his effort to provide himself with a copy of up-to-date rules. Such disregard of their own interest on the part of the Railway Administration is indeed strange. Learned counsel for the petitioner gave out that there had been subsequent amendments of which he was not in a position to secure authentic copies, but he referred to the Supreme Court decision. *Union of India v. R. V. Sada Siva Murthy*, reported in 1969 Volume of "The Unreported Judgment (SC) 100" from page 490 which showed that there had been a very major change in the rule by substitution on January 11, 1967 and a minor one on December 23, 1967.

In this situation I produce the Sub-rule as it was quoted in the aforesaid judgment of the Supreme Court on the presumption that that was the rule in the amended form as in force from December, 1907 upto 15-7-1969, the date of the judgment :--

(a) Except as otherwise provided in this rule every railway servant shall retire on the day he attains the age of fifty eight years.

(b) A ministerial railway servant, who entered Government service on or before the 31st March, 1938 and held on that date-

(i) a lien or a suspended lien on a permanent post, or

(ii) a permanent post in a provisional substantive capacity under Clause (d) of Rule 2008 and continued to hold the same without interruption until he was confirmed in that post,

shall be retained in service till the date he attains the age of sixty years.

Note: -- For the purpose of this clause the expression "Government service" includes service rendered in a former Provincial Government and in ex-Company and ex-State Railway, if the rules of the Company or the State had a provision similar to Clause (b) above."

7. It will not be out of place to reproduce the considerably different Rule 2046 (2) contained in 1966 edition of the Indian Railway Establishment Code on the footing of which arguments had been originally addressed before learned counsel for the petitioner was able to bring before the Court through the aforesaid Supreme Court judgment, the form of the rule as it was brought in force with the amendment made on January 11, 1967 with a substitution of the "Note" below the rule on December 23, 1967 to change it slightly :--

"(2) (a) A ministerial servant, who is not governed by Sub-clause (b), may be required to retire at the age of 55 years, but should ordinarily be retained in service, if he continues efficient up to age of 60 years, He must not be retained after that age except in very special circumstances, which must be recorded in writing and with the sanction of the competent authority.

(b) A ministerial servant -

(i) who has entered Government service on or after the 1st April, 1938. Or

(ii) Who being in Government service on the 31st March, 1938 did not hold a lien or a suspended lien on a permanent post on that date,

shall ordinarily be required to retire at the age of 55 years. He must not be retained after that age except on Public grounds which must be recorded in writing, and with the sanction of the competent authority and he must not be retained after the age of 60 years except in very special circumstances."

8. The retirement of the petitioner was ordered from 11-7 1968 which was the date much after the date on which Sub-rule (2) of Rule 2046 as extracted from the said Supreme Court judgment came into effect and it is with reference to the changed rule that the question of validity of the order of the retirement of the petitioner is to be answered.

9. It will appear that ministerial railway servants have been divided into two categories. Those not covered by Clause (b) of the sub rule are required to retire at the aye of 58 years whereas those covered by Clause (b) are to be retained in service till the attainment of the age of 60 years. Learned counsel for the petitioner has contended that the classification is arbitrary and therefore discriminatory. The petitioner's further contention is that he has been discriminated against as some servants placed in position similar to himself were retained in service even after completing the age of 58 years. The name of one particular employee only however was mentioned but from the supplementary counter affidavit dated 18-2-1970 it has been shown on behalf of the opposite parties that the said employee's case was covered by Clause (b). An attempt has also been made on the petitioner's side to bring his case within Clause (b) by asserting that he entered Government service in the Defence Department before 31-3-1938. The material on the record however fails to make out any such thing. The petitioner himself has not indicated anywhere in his writ petition as to when he joined Government service, nor even if he was in Government service on

31-3-1938. There is no dispute on the point that he was in service in the Defence Department at some time, Annexure M to the counter affidavit itself shows that and he was taken in the Railway service on account of his war services. Annexure 11 shows that he was granted some benefit by reason of war service rendered from 11-11-1942 to 5-12-1945 during Great War II. But there is nothing to show that he was in service in the Defence Department before 11-11-1942 nor that he continued in service till he was absorbed in Railway service.

In this state of evidence and keeping in mind the fact that the employment of the petitioner in the Watch and Ward Department took place only on 23-7-1947 he cannot come under Clause (b) of sub-para (2) of paragraph 2046 quoted, above and his case must be treated as coming under Clause (a). In that case, the retirement of the petitioner at the age of 58 years was compulsory unless he is able to make out the plea of Clause (b) in Sub-rule (2) being discriminatory and therefore void because of ministerial servants working in the same conditions having been discriminated against by those entering service before 1-4-1938 being given the benefit of continuing in service upto the age of 60 years while those entering service on or after 1-4-1938 having been permitted to continue in service upto the age of 58 years only.

10. Coming to the said plea of discriminatory nature of Sub-rule (2) of Rule 2046 it will be seen that ministerial railway servants have been classified into two categories, (1) those who entered Government service on or after 1-4-1938 and (2) those who entered Government service on or before 31-3-1938 and held on that date a lien or a suspended lien on a permanent post or permanent post in a provisional substantive capacity. The rule of equality under law laid down in Article 14 of the Constitution admits of reasonable discrimination but it is settled law that reasonability of classification or the basis of classification for discrimination is to be relevant to the purpose and cannot be arbitrary. If 31-3-1938 is only an arbitrarily selected date for dividing ministerial railway servants into two classes for the purposes of the age of superannuation, then separate retirement ages for the two classes will be hit by Article 14. Learned counsel for the Railway Administration was given repeated opportunities to find out the basis for classifying ministerial Government servants into two classes on the basis of their having entered Government service on or before 31-3-1938 and on or after April 1, 1938, but he could not show the basis on which this classification was made.

Even though it was plainly suggested to me that one possibility was that before 1-4-1938 the age of retirement for railway servants was 60 years but was reduced to 55 years from 1-4-1948 and the benefit of retirement at the age 60 years might have been retained for those who were already in permanent service before the new rule of retirement at the age of 55 years was introduced. Even with this clue he could not give any assistance in finding out if the said possibility was an actual fact. It was for the opposite parties to justify the discrimination contained in Sub-rule (2) of Rule 2046. They having failed to do so, Sub-rule (2)

of Rule 2046 must be struck down as discriminatory and the retirement of the petitioner at the age of 58 years as invalid,

11. In the result the writ petition is allowed with costs and the orders of retirement, Annexures 5 and 10 to the writ petition are quashed on the ground that the petitioner's date of superannuation must be treated to be 11-7-1970 and not 11-7-1968.