

(1955) 11 OHC CK 0007
In the Orissa High Court
Case No : O.J.C. No. 9 of 1954

Chakradhar Mahapatra

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 21-11-1955

Acts Referred:

Constitution of India, 1950 — Article 226, 229, 313
Government of India Act, 1935 — Section 241, 241(2), 242(4)
Orissa Service Code, 1939 — Rule 163, 71
Pension Rules — Rule 1(2)

Citation : (1956) 22 CLT 1

Hon'ble Judges : Narasimham, J; Mohapatra, J

Bench : Division Bench

Advocate : M.S. Rao, for the Appellant; Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, J.—This is a petition under Article 226 of the Constitution by a member of the ministerial staff of the Orissa High Court against the order of the Chief Justice dated 29-10-52 directing that he shall retire from service with effect from the forenoon of 4-2-53. Several consequential reliefs are also claimed in the petition.

2. The material facts are as follows: The Petitioner joined as an assistant in the Finance Department of the old Bihar and Orissa Secretariat at Patna on 28-9-1919 and was transferred as a Translator of the Cuttack Circuit Court of the Patna High Court on 20-10-1925. He continued to serve in that capacity till 25-7-1948 and after the creation of the Orissa High Court he was transferred to that Court as a Translator on 26-7-1948. He was appointed as Superintendent of the Judicial Department of the High Court on 15-5-1949. He completed his fifty-fifth year on 3-2-51. Under Rule 71(b) of the Orissa Service Code a ministerial officer may be required to retire at the age of fifty-five years; but he should ordinarily be retained in service if he continues efficient up to the age of sixty

years. The Government of Orissa in Finance Department letter No. 14215 (50) F (Annexure N) dated the 25th September, 1951 gave detailed instructions as to how the test of efficiency required by the said Pule should be applied whenever it was desired to give extension of service beyond the fifty-fifth year to a ministerial officer. According to those instructions an annual review of the work of the officer concerned should be made and extension of service granted for one year at a time if the competent authority was satisfied that the officer continued to maintain the same efficiency as before. On 31-7-51 (Annexure D) the Chief Justice was pleased to direct extension of service for the Petitioner for a period of one year with effect from 3-2-51. Again, on 22-1-52 a further extension of service for a period of one year was granted till the 3rd February 1953. Thus he was granted two years extension of service.

3. While the Petitioner was thus under extension of service the new Pension Rules made by the Government in their Resolution No. 13795-F. Pen. 2/51 dated the 19th September, 1951 (see page 116 of the Orissa Service Code, Vol. II) were made applicable to the staff of the Orissa High Court with the concurrence of the Chief Justice. Under these Rules the pensionary benefits were made more liberal than before and an option was given to the officer concerned to elect to come under the new Pension Rules. The Petitioner by his declaration dated the 13th September, 1952 (Annexure G) exercised his option to come over to the new Pension Rules. On 29-10-52, the Registrar acting under the instructions of the Chief Justice communicated the following order to the Petitioner.

No. 7987

Dated 29-10-52

Orissa High Court, Cuttack.

To

Shree Chakradhar Mohapatra Translator now working as Superintendent, Judicial Department, Orissa High Court, Cuttack (On leave)

Take notice that under Rule (2), Section I of the New Pension Rules, the Hon''ble the Chief Justice has been pleased to direct that you shall have to retire from service with effect from the forenoon of 4-2-1953.

By order

Sd. R. P. Misra, Registrar.

29-10-52.

4. The Petitioner''s main contention was that this order was invalid inasmuch as under Rule 71(b) of the Orissa Service Code the Petitioner was entitled to remain in service till the completion of his 60th year if he continued to remain efficient and that he could be compulsorily retired only if after due proceedings it was held that he did not continue to be efficient. It was further contended that Rule

1(2) of Section I of the new Pension Rules on which the Chief Justice's order was based could not take away the substantial right conferred on the Petitioner by Rule 71(b) of the Orissa Service Code.

5. To continue the narrative: Having thus directed the compulsory retirement of the Petitioner with effect from the forenoon of 4-2-53 the Chief Justice issued another notice on the Petitioner dated 31.10.52 (Annexure 0) to the following effect:

Memo No. 8053 Judicial,

Orissa High Court, Cuttack

The 31st October, 1952

To

Sree Chakradhar Mohapatra, Translator, now working as Superintendent, judicial Department.

Orissa High Court, Cuttack (on leave).

On review of your work as Superintendent, Judicial Department, during the first six months commencing from the 23rd January, 1952, it is reported by the Deputy Registrar that your work as Superintendent, Judicial Department is not satisfactory inasmuch as you have not got the capacity to supervise the work of the Assistants placed under you and that you are ignorant of the office work and procedure.

You are, therefore, called upon to show cause by 4-30 P.M. of Monday, the 3rd November, 1952 at the latest why such report of the Deputy Registrar shall not be accepted.

The Petitioner showed cause in his explanation dated 3-11-52 (Annexure P) challenging the correctness of the report of the Deputy Registrar against the quality of his work. It does not appear that any final order was passed on his explanation.

By order

Sd. R.P. Misra, Registrar.

31.10-52.

6. In the meantime, however, the Petitioner in his successive applications to the Registrar proceeded on the assumption that he would retire from service with effect from the forenoon of 4-2-53. Thus on the 31st October, 1952 he requested the Registrar to grant him leave preparatory to retirement from 12-11-52 to 3-2-53 asking for leave on full average pay relying on the special provision for Vacation Departments contained in Rule 163(c) of the Orissa Service Code. On the 3rd November, 1952 he was informed that leave on full average pay

preparatory to retirement could not be granted. Then, on the 6th November, 1952 he submitted another application which was to the following effect:

To The Registrar, Orissa High Court, Cuttack. (Through Deputy Registrar)

Sir,

I beg respectfully to state that I am due to retire from service with effect from 4-2-1953. As I have not yet been able to shake off weakness and am not keeping well on account of my recent ailment, I am desirous of taking rest for the remaining portion of my service, i.e., from 6-11-52 to 3-2-53.

In view of the long period of my service for more than 33 years, I request you to be kind enough to grant me leave preparatory to retirement on half average pay from 6-11-52 to 3-2-53, for which act of kindness, I shall remain ever grateful.

Yours faithfully, Sd. C.M. Superintendent,

Judicial Department (on leave).

Cuttack The 6th November. 1952.

The prayer contained in this application was accepted and he was given leave on half average pay from 6-11-52 to 3-2-53. Subsequently, also he applied for final withdrawal of his accumulations from the Provident Fund on the assumption that he was retiring from service after 3-2-53. This was also permitted.

7. Having thus retired from service on 4-2-53 he filed a memorial before the Chief Justice on 30-3-53 challenging the validity of the order dated 29-10-52 compulsorily retiring him from service and asking for other consequential reliefs. The Chief Justice rejected this prayer and then the Petitioner came up with the present petition.

8. Before discussing the merits of the petition may briefly refer to the Constitutional position regarding the applicability to the staff of the High Court of the rules and, instructions made by the Government regulating the conditions of service of their officers. These rules and instructions cannot obviously apply proprio vigore to the staff of the High Court. u/s 242(4) of the old Government of India Act, 1935 the power to frame rules regulating the conditions of service of the staff of a High Court was conferred exclusively on the Chief Justice of the Court subject of course to the approval of the Governor in respect of those rules dealing with salaries, allowances, leave or pensions, of the staff. In the Constitution also the same provision has been made in Article 229. It was frankly conceded before us by the learned Government Advocate who appeared for the other side, that till now no rule has been made by the Chief Justice of the Orissa High Court under Article 229 of the Constitution regulating the conditions of service of the staff of the High Court. But he relied on the following order made by the Chief Justice of the Patna High Court with the approval of the Government of Bihar, in exercise of the powers conferred by Section 241(2)(b) read with Section 242(4) of the Government of India Act, 1935.

In exercise of the powers conferred by clause (b) of sub-section (2) of Section 241 read with sub-section (4) of Section 242 of the Government of India Act, 1935, the Chief Justice of the High Court of Judicature at Patna is pleased to make the following rules:

1. All enactments and all rules and orders, whether made under any enactment or otherwise, which regulate the conditions of service of persons serving His Majesty in a civil capacity in connection with the affairs of the province of Bihar and which were in force on the 31st March, 1937, shall continue to apply to the persons attached to the High Court until further provision is made by the Chief Justice to regulate their conditions of service.

2. The Registrar may, for good and sufficient cause, punish any member of the ministerial and permanent menial staff (Jamadars, peons etc.). Anyone so punished shall have a right of appeal to the Chief Justice against the Registrar's order:

Provided that no order of dismissal shall be made final against any member of the permanent staff of the High Court except under the orders of the Chief Justice.

Letter No. 3418 dated the Patna, addressed to the Department, Patna.

Subject:-Framing of rules under the Government of India Act, 1935.

With reference to your letter No 800J/E-2/36 dated 15-2-36, on the subject noted above, I am directed to say that the Hon'ble the Chief Justice in exercise of the powers conferred on him by sub-section (2) of Section 241 read with sub-section (4) of Section 242 of the Government of India Act 1935 has 1st August 1938 from the Registrar, High Court, Secretary to the Government of Bihar, Judicial been pleased to frame the accompanying rules with respect to the staff attached to the High Court and to request that His Excellency the Governor of Bihar may be pleased to accord his approval under clause (b) of sub-section (4) of Section 242 of the Government of India Act, 1935 to the first paragraph of the rule so far as it relates to salaries, allowances, leave or pensions of the staff of the High Court.

Copy of letter No. 3386 J/ E-2/ 36 dated 12th December, 1939, from the Government of Bihar; Judicial Department, Patna addressed to the Registrar of the High Court of Judicature at Patna.

Subject:-Framing of rules under the Government of India Act, 1935.

In reply to your letter No. 3418 dated the 1st August, 1938 I am directed to say that the Governor of Bihar has been pleased to accord his approval under clause (b) of sub-section (4) of Section 242 of the Government of India Act, 1935 to the first paragraph of the rule so far as it relates to salaries, allowances, leave or pensions of the staff of the High Court forwarded with your letter under reply. The Government Advocate further urged- that in the absence of any new rule

under Article 229 of the Constitution the above order passed u/s 242(4) of the Government of India Act, 1935 would continue to regulate the conditions of service of the staff of the High Court by virtue of the transitional provisions of Article 313 of the Constitution. For the disposal of this petition this argument may be taken as correct and it may be held that all the provisions contained in the Bihar & Orissa Service Code would apply *mutatis mutandis* to the staff of the Orissa High Court also in the absence of any rule to the contrary made by the Chief Justice in exercise of the power conferred by Article 229 of the Constitution.

9. There is another preliminary point which, may also be disposed of at this stage. The Petitioner is admittedly an "old entrant" having joined the Circuit Court staff at Cuttack prior to the separation of Orissa from Bihar in 1936. One of the reliefs claimed by him is that as an old entrant he is entitled to have his pay fixed under the old Bihar & Orissa scale and not under the new Orissa scale. In support of this argument he has relied on Rule 6 of the Governor General-in-Council's Protection Rules made by the Governor-General in exercise of the powers conferred by the Government of India (Constitution of Orissa) Order, 1936 while making consequential and ancillary provisions at the time of separation of Orissa from Bihar. *Prima facie*, however, his reliance on the aforesaid Rules appears to be misconceived inasmuch as those Rules were made as consequential to the separation of Orissa from Bihar in 1936. They cannot have any application to the present case which deals with the consequences following from the separation of the High Court of Orissa from the High court of Patna which till July, 1948 had jurisdiction over both Bihar and Orissa. It is, however, unnecessary, to decide this point in the present petition. If really the Petitioner felt any grievance on this score he should have moved the appropriate authority as soon as he was absorbed in the staff of the Orissa High Court by the order of the Special Officer dated 23-7-1948 (Annexure A). Again, when his lien in the Patna High Court was suspended he should have immediately applied for fixation of his pay in accordance with the Bihar and Orissa scale if he felt any grievance. It is also not clear from the Petitioner's affidavit as to whether he had applied to the Chief Justice for fixation of his pay according to the old Bihar and Orissa scale of pay and, if so, what final order was passed by the Chief Justice on that application. The question of applying Article 226 for giving relief in respect of this matter would arise only if all other remedies have been exhausted. In any case, after the lapse of more than seven years from the constitution of the Orissa High Court and more than two years after his retirement we are not inclined to examine the question as to whether during his service in the Orissa High Court he was entitled to the old Bihar and Orissa scale of pay. This prayer must, therefore, be rejected whatever view we may take on the main question which arises for consideration in the present petition, namely, whether the order of his retirement was valid or not.

10. As already pointed out, the new Pension Rules were issued by the Finance Department of the Government of Orissa on the 19th September, 1951 and they were brought into force retrospectively with effect from the 20th June, 1950. The

preamble to those Rules expressly says that the Hon"ble the Chief Justice of the Orissa High Court was consulted before the Rules were made applicable to the staff of the High Court. The Rules were made expressly for the purpose of liberalising the pensionary benefits of public servants and those public servants who were in service prior- to the commencement of the Rules were given the option of electing to come either under those Rules or to continue to remain under the old Pension Rules. Rule 1(2) of Section I of the said Rules which is material for the present purpose is as follows:

A Government servant may retire from service any time after completing 30 years" qualifying service provided that he shall give in his behalf, a notice in writing to the appropriate authority, at least three months before the date on which he wishes to retire. Government may also require an officer to retire any time after he has completed 30 years" qualifying service provided that the appropriate authority shall give in this behalf, a notice in writing to the Government servant at least three months before the date on which he is required to retire.

The Petitioner had intimated to the Registrar of the High Court on the 13th September, 1952 that he elected to come under the new Pension Rules. It appears that the Chief Justice thought that the latter portion of sub-rule (2) quoted above would apply and that the said sub-rule conferred on the competent authority a special power to compulsorily retire a ministerial officer from service after he had put in 30 years" service. The impugned order dated 29-10-52 (already quoted) expressly says that it was made under the said Sub-rule (2).

The Petitioner's contention, however, is that the said provision in the new Pension Rules is merely introductory and the main statutory provision regulating the conditions of service under which a ministerial officer may be required to retire is to be found in Rule 71(b) of the Orissa Service Code. He further contended that the Pension Rules were not statutory but were administrative and were meant to supplement the provisions of the Service Code and that they could not therefore override the express provisions of Rule 71 (b) of the Service Code. In other words, it is urged that a ministerial officer has a valuable right to continue in service till his 60th year if he continues to be efficient and the competent authority has no power to compulsorily retire him before the attainment of his 60th year unless it was found that he did not continue to be efficient. This argument gains support from the following observation of the Supreme Court in *Jai Ram Vs. Union of India (UOI)*, :

We think that it is a possible view to take upon the language of this rule that a ministerial servant coming within its purview has normally the right to be retained in service till he reaches the age of 60. This is conditional undoubtedly upon his continuing to be efficient. We may assume, therefore, for purposes of this case that the Plaintiff had the right to continue in service till 60 and could not be retired before that except on the ground of inefficiency.

I am inclined to accept the Petitioner's contention that the provisions of the Pension Rules should be taken as supplementary to the provisions of the Orissa Service Code and that if there is a conflict between any provision of the Service Code and any provision of the said Rules the former would prevail. The preamble to the Pension Rules does not say that the Rules were made in exercise of any statutory power. Moreover, it expressly says that the Rules were made for the purpose of liberalising the retirement benefits. The age of superannuation, the circumstances under which a public servant may either exercise his right to retire or may be compelled to retire are all matters dealt with by the Orissa Service Code which has statutory force having been made u/s 241 of the Government of India Act, 1935 and continued in force by the Article 313 of the Constitution. The material rule for our purpose is Rule 71(b) which regulates the circumstances under which a ministerial officer may be required to retire between the ages of 55 and 60 years. I would, therefore, hold that sub-rule (2) of Rule 1 of Section I of the new Pension Rules should be taken as supplementary to Rule 71(b) and that the competent authority's right to compulsorily retire a ministerial officer between his 55th and 60th year is controlled by the provisions of Rule 71(b). That is to say, a ministerial officer cannot be asked to retire unless (i) the officer has expressed willingness to retire or (ii) it is found that he ceased to continue to be efficient and consequently was not entitled to any further extension of service.

11. The Government also appear to have taken the same view in para 2 of the Government of Orissa, Finance Department letter No. 10787 F./ Pen. 62/53 dated the 28th April 1955 which is as follows:

Since the New Pension Rules do not purport to regulate the age of superannuation, a Government servant, who was previously governed by the provisions of Rule 71(b) Ori SC Vol. I (or F. Rule 56(b)(i), continues to be governed by those provisions for retirement notwithstanding his option to be governed by the New Pension Rules in their entirety. On the other hand, the New Pension Rules do contain a specific provision regarding optional retirement in paragraph 1 (2) of Section I thereof and that provision should be deemed to have superseded Article 465-A of C.S.R. or Rule 71(d) of the Orissa Service Code, Volume I in relation to this category of officers only.

Doubtless, the Government's interpretation of the statutory provision will not be binding on this Court. But there is no reason why the Government may not be held to be bound by their own interpretation of a statutory provision made in favour of a public servant. It will not therefore be open to the Government Advocate to contend in the present petition, in view of the above letter of the Government, that notwithstanding the provisions of Rule 71(b) of the Orissa Service Code the competent authority has an unfettered discretion under sub-rule (2) of Rule 1 of section I of the new Pension Rules to compulsorily retire a ministerial officer before he attains his 60th year.

12. But the Petitioner's own, conduct shows clearly that he expressed his willingness to retire from service after 3-2-53 independent of the notice given to

him by the Chief Justice on 29-10-52. Ever since he attained the age of superannuation in February 1951 he had always a right to retire from service. His right to remain in service by getting extensions year after year till his sixtieth year under Rule 71(b) of the Orissa Service Code was always subject to his willingness to continue in service throughout that period. Thus, if after attaining his fifty-fifth year he did not want to continue in service and did not ask for extension the question as to whether he continued to be efficient for the purpose of applying Rule 71(b) of the Orissa Service Code would not arise at all. The 31st October, 1952 the Petitioner asked for leave on full average pay preparatory to retirement from 12-11-52 to 3-2-1953. In that application he did not state that his prayer was made because the Chief Justice directed his compulsory retirement from service by the order dated 29-10-52. When his prayer for leave on full average pay was rejected by the order dated 3-11-52 he in his subsequent application dated 6-11-52 asked for leave on half average pay for the same period. In that application he made the following significant statement:

As I have not yet been able to shake off weakness and am not keeping well on account of my recent ailment I am desirous of taking rest for the remaining portion of my service, i.e., from 6-11-52 to 3-2-53.

This statement makes it absolutely clear that he was retiring from service not because he was compelled to retire by the order of the Chief Justice but because he, of his own accord, thought that in view of his weak state of health he required rest. He knew fully well that in the order of the Registrar dated 22-1-52 he was granted extension of service till the 3rd February 1953. The question of granting him further extension of service would arise only if he expressed his willingness to serve for a further period. But in view of his two applications asking for leave preparatory to retirement there was no question of considering whether he was fit to be granted extension of service beyond 3-2-53. His subsequent conduct in applying for withdrawal of his accumulations from the Provident Fund also indicates that he had decided to retire from service with effect from 3-2-53. It was only after he had retired that in March 1953 he filed a Memorial to the Chief Justice challenging the validity of the order of retirement dated 29-10-52.

13. It was, however, contended by Mr. Rao on behalf of the Petitioner that the applications of the Petitioner for leave preparatory to retirement dated 31-10-52 and 6-11-52 were all based on the order of the Chief Justice dated 29-10-52 compulsorily retiring him and that if that order be held to be invalid no adverse inference could be drawn against the Petitioner from his subsequent conduct asking for leave preparatory to retirement. This argument, however, does not appeal to me. Even if it be assumed that the order dated 29-10-52 was irregular the Registrar had informed him on 31-10-52 by another notice (Annexure. 0) about the unsatisfactory nature of his work as reported by the Deputy Registrar and called upon him to show cause why the Deputy Registrar's report should not be accepted. The Petitioner submitted his explanation on 3.11-52 (Annexure. P).

But three days after the submission of his explanation he applied for leave on half average pay in his application dated 6-11-52. By that time he knew fully well that his superior officer had passed adverse remarks as regards the quality of his work during his tenure of service and those remarks were under the consideration of the Chief Justice.

It seems, therefore, a fair inference that his decision as given in his application dated the 6th November, 1952 to retire from service with effect from the forenoon of 4-2-53 was based not on the order of the Chief Justice dated 29-10-52 but on his apprehension that in view of the adverse remarks passed against him by the Deputy Registrar as regards the quality of his work he may not be granted extension beyond 3-2-53 and that it would be in his own interest to voluntarily retire from service instead of getting an adverse remark passed against him. The effect of the notice of the Registrar dated 29-10-52 was practically nullified by the subsequent notice dated 31-10-52 issued by the Registrar to the Petitioner regarding the adverse remarks made by the Deputy Registrar about his work. In the present case, therefore, I am not prepared to hold, on the facts admitted by the Petitioner himself that his retirement was brought about compulsorily by the order of the Chief Justice dated 29-10-52. It appears to be a case of his agreeing to retire from service of his own accord after 3.2.53 in view of his weak state of health as stated by him and also in view of the adverse remarks passed by his immediate superior, namely, the Deputy Registrar regarding the quality of his work.

14. This finding of fact is sufficient for the disposal of this petition. Once it is held that the retirement of the Petitioner was voluntary, there can be no question of contravention of Rule 71(b) of the Orissa Service Code. As the Petitioner had completed the requisite age for the purpose of earning pension he had always the right to retire and he has exercised that right:

1. The petition is therefore rejected; but in the circumstances of this case we would not direct the Petitioner to pay costs to the opposite party.

Mohapatra, J.

15. I agree.

16. Petition rejected.