
(1973) 11 RAJ CK 0003

In the Rajasthan High Court

Case No : Civil Regular Second Appeal No. 626 of 1966

Chandi Ram

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 19-11-1973

Acts Referred:

Citation : (1974) RLW 20 : (1973) 6 WLN 853

Hon'ble Judges : C.M. Lodha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

C.M. Lodha, J.—This is a second appeal by the plaintiff who has lost his case in both the lower courts. He was employed as a clerk on the North-Western Railway on 22nd Sept., 1925. He gave his date of birth at the time of his appointment as 3rd March, 1901. On the formation of Pakistan the plaintiff was absorbed in the then B.B & C.I Railway (succeeded by the Western Railway) and on 26th November, 1947, while furnishing the necessary particulars regarding his service he gave out his date of birth as 20th July, 1904 instead of 3rd March, 1901, though it is the common case of the parties that the latter is the correct date of his birth. According to the correct date of birth, i.e., 3rd March, 1901, the plaintiff attained the Superannuation age, i.e. 55 years on 3rd March, 1956 but on the basis of the date of birth given by the plaintiff on his absorption in the B. B & C. I Railway i.e. 20th July, 1904 he was allowed to continue in service even after that date, presumably because of the alleged fraud on the part of the plaintiff in giving an incorrect date of birth which was not detected. The fact about the correct date was, however, discovered by the authorities on 22nd December, 1956. The plaintiff was charge-sheeted for having given a wrong date of birth.

2. The plaintiff's case is that he prayed for extension of his period of service upto the age of 60 years in accordance with the rules of the Railway and in the alternative, prayed for the benefit of leave preparatory to retirement. But his plea was overruled and not only he was not granted extension of service but he was

also deprived of the benefit of leave preparatory to retirement and the special contribution to Provident Fund to the extent of 33-1/3 was with-held by way of punishment. Consequently after serving the necessary notice on the Railway he instituted the present suit in the court of the Munsif, Ajmer (West), on 3rd July, 1962 for grant of declaration that the order of his retirement with effect from 22nd December, 1956 was null and void and also that he was entitled to leave preparatory to retirement. He further prayed that a decree for Rs. 767/- deducted from special Contribution to the Provident Fund may be granted in his favour with interest at the rate of 6% from the date of the suit till realisation. The suit was resisted by the Railway on a number of grounds. The learned Munsif, by his judgment dated 31st August, 1964 dismissed the plaintiff's suit. On appeal by the plaintiff the learned Civil Judge, Ajmer affirmed the judgment and decree by the trial court and hence this appeal.

3. Two points have been canvassed before me on behalf of the appellant. It has been argued in the first instance that the plaintiff was entitled to get leave preparatory to retirement. The other point is that in any case the order with holding 33 1/3 percent of the special contribution from the Provident Fund was illegal and must be set aside.

4. I shall first take up the question regarding leave preparatory to retirement. It is beyond dispute that the plaintiff had attained the superannuation age of 55 years on 3rd March, 1956 and yet on account of the mistake having not been detected he continued in service till 22nd December, 1956. Learned Counsel for the appellant has, however, urged that the decision of retiring the plaintiff at the age of 55 years was, not communicated to the plaintiff so as to enable him to take the benefit of leave preparatory to retirement. In this connection he has invited my attention to the Gazette notification Ex. 8 wherein it is mentioned that a Ministerial Government servant may be required to retire at the age of 55 years, but should ordinarily be retained in service if he continues to be efficient upto the age of 60 and that the decision whether or not a Ministerial employee governed by F.R. 56(b)(1) (2046.20(a) R-II) is to be retained in service after attaining the age of 55 should, therefore, be taken in each individual case well in advance and communicated to the employee if it is not proposed to retain him beyond 55, and further that this will permit the employee to avail himself of the full leave due and admissible to him where the decision is not to retain him. My attention has further been drawn to copy of letter dated 25th September, 1954 from the Director, Establishment, Railway Board, New Delhi to the General Managers, All Indian Railways, Chittaranjan Locomotive Works, marked Ex 4/30 wherein it is mentioned that all those who are required to retire at the age of 55 years should be informed before reasonable time, so that they can avail of such leave preparatory to retirement as they may apply for and can be sanctioned. Then, on the basis of Ex. A/11, a letter from the plaintiff to the District Controller of Stores, Western Railway, Ajmer dated 27th December, 1958 It is urged that after making a request for extension of his service, the plaintiff had prayed in the alternative that he may be granted leave preparatory to retirement as admissible

under the orders of the Railway Board and yet by Ex:A/12 dated 25th February, 1957 the Railway had wrongly ordered that the plaintiff be considered as having retired from railway service with effect from 22nd December, 1956. In this connection it has been further pressed upon me that by the letter dated 22nd December, 1956 marked Ex.7, the railway authority concerned had itself allowed the plaintiff to proceed on leave preparatory to retirement with effect from 22nd December, 1956 and therefore it does not lie in the mouth of the railway to take a stand" contrary to Ex.7.

5. I have carefully considered the contention raised on behalf of the appellant and have come to the conclusion that it is devoid of substance. It may be recalled that the retention of the plaintiff in service after 3rd March, 1956 was on account of the wrong perpetrated by him in giving a wrong date of his birth at the time of his absorption in the B.B. & C I, Railway. It cannot be gainsaid that the Railway had full authority to retain him or not to retain him after attaining the age of 55 years. Thus, the delay in communicating the order on the part of the Railway was not due to any act of omission on its part but it was due to plaintiff's own suspicious conduct and he cannot take advantage of his own wrong. Once it is held that the order of his retirement at the age of 55 years was correct and justified, nothing is left in the plaintiff's case for getting the benefit of leave preparatory to retirement. The stage for getting leave preparatory to retirement has already passed. It is true that in Ex.7 it has been mentioned that even though the plaintiff had already completed the age of 55 years on 3rd, March, 1956 he may still be allowed to proceed on leave preparatory to retirement with effect from 22nd December, 1956. This order is obviously contrary to and not in accordance with the rules. I am clearly of the opinion that no rule of estoppel can operate against the railway on the basis of Ex 7, inasmuch as what is fundamentally wrong and not permissible cannot become right by issue of a patently erroneous direction. In this view of the matter I am unable to accept the first content on raised on behalf of the appellant.

6. This brings me to the second point regarding the validity of the order withholding 33-1/3 of the special contribution to the Provident Fund. The finding of the courts below in this respect has been assailed and not without force that having retired the plaintiff from 22nd December, 1956 the employer thereafter had no jurisdiction to hold Disciplinary Enquiry against the plaintiff and punish him. The dates of the show cause notice pertaining to the charge made against the plaintiff and the reply submitted by the plaintiff to the charge-sheet as well as the order passed thereon withholding 33-1/3 percent of the special contribution make it abundantly clear that the charge sheet was served after the date of retirement (vide Ex 4 dated 22nd December, 1956). The impugned order Ex 6 was passed on 11th July 1958. In this connection reference may be made to *State of Assam and Others Vs. Padma Ram Borah*, and *The State of West Bengal Vs. Nripendra Nath Bagchi*, In *State of Assam and Others Vs. Padma Ram Borah*, supra it was held that the State Government had no jurisdiction to pass an order extending the service of the servant after the termination of his service as it

could not by unilateral action create a fresh contract of service and that such an order passed after the termination of service was a nullity and could not be sustained. So also in *The State of West Bengal Vs. Nripendra Nath Bagchi*, supra it was observed that retention of service for the purpose of conducting a departmental enquiry is not proper and extension of service beyond date of compulsory retirement for this purpose is illegal.

7. Learned Counsel for the respondent also did not attempt to justify the impugned order on the ground that it could have been passed by way of punishment under Rule 1702 of the Indian Railway Establishment Code. His contention, however, is that the order was passed in exercise of the powers under Rule 1314(4) under which it is submitted, that the amount of special contribution calculated in accordance with Sub rule (3) may in any particular case be withheld or reduced by the controlling officer. It is urged that a specific objection was taken in the written statement filed by the defendant vide para 10, that the action of the General Manager in withholding the special contribution to the extent of 33-1/3 % was under Rule 1314 of the State Railway Provident Fund Rules (Indian Railway Establishment Code Vol. I). He has further invited my attention to Ex. A/15, copy of D.C.O.S.'s letter dated 29th May 1957 to the C.O.S.(E)C.C.G, wherein it has been mentioned that a charge sheet was issued to the plaintiff for removal from service but no further disciplinary action could be instituted against him as he had already been allowed to retire with effect from 22nd December, 1956. It was further proposed to withhold 33-1/3% amount of his special contribution to Provident Fund and the C.O.S. was requested to obtain General Manager's sanction in this respect. Learned Counsel has further placed reliance on Ex. A/18, a letter from the General Manager to the D.C.O.S., Ajmer whereby the General Manager approved withholding 33-1/3 percent of special contribution of the plaintiff and further directed that a Show-Cause Notice be issued to the plaintiff to submit his defence. It is urged that these documents would clearly go to show that the special contribution was withheld by the General Manager in exercise of his powers under Rule 1314(4). On the other hand, it has been urged on behalf of the appellant that the notice Ex. 3 dated 20th December, 1957 was admittedly issued after the letter from the General Manager dated 14th December, 1957 had been issued and it leaves no manner of doubt that the special contribution was withheld by way of penalty and not in exercise of powers under Rule 1314.

8. After having carefully examined the relevant rules bearing on the issue and the respective contentions raised by the learned Counsel I have come to the conclusion that the impugned order withholding the special contribution can be justified under Rule 1314(4) of the Indian Railway Establishment Code; Vol. I. A bare reference to Ex 15 and Ex. 18 leads one to believe that it was not the intention of the department to proceed with the enquiry in pursuance of the charge-sheet served on the plaintiff and to impose any penalty upon him. It is true that the language used in the notice Ex 2 does give an impression that the authority concerned wanted to impose a penalty upon the plaintiff but the order

withholding the special contribution appears to be innocuous. Moreover, the department's stand is that the order was not by way of penalty but in exercise of its administrative powers Under Rule 1314(4) When the order can be justified as being one in accordance with Rule 1314, it would not be proper to say that the department imposed penalty under Rule 1702. The respondent had disclosed this defence at the earliest, yet the plaintiff has put nothing on record to show that no such order could have been passed under Rule 1314(4) of the Indian Railway Establishment Code. In fact, the learned trial court upheld this order on the basis of Rule 1314(4) but no argument appears to have been advanced before the learned Civil Judge challenging the finding of the trial court in this respect. Taking all the circumstances into consideration I am inclined to accept the contention on behalf of the Railway that the impugned order was not sought to be passed by way of imposing a penalty under Rule 1702 but was so passed in exercise of the powers under Rule 1314(4) of the Code.

9. The result is that I do not see any force in this appeal and hereby dismiss it But in the circumstances of the case I leave the parties to bear their own costs.