

**(1972) 11 DEL CK 0012**

**In the Delhi High Court**

**Case No : Civil Writ Appeal No. 284 of 1972**

D.D. Suri

APPELLANT

Vs

Government of India and Another

RESPONDENT

**Date of Decision : 16-11-1972**

**Acts Referred:**

**Citation : (1973) ILR Delhi 700**

**Hon'ble Judges : V.S. Deshpande, J**

**Bench : Single Bench**

**Advocate : B.R. Iyengar, A. Subba Rao, F.S. Nariman and R.L. Tandon, for the Appellant;**

## Judgement

V.S. Deshpande, J.

(1) Petitioner Shri D.D. Suri was a member of the Indian Administrative Service allotted to the cadre of the State of Orissa. By a notification dated 13th August, 1962 issued u/s 4(I)(s) of the Code of Criminal procedure, 1898, the Government of Orissa declared the offices of Superintendents of police, Vigilance, at Cuttack, Sambalpur and Berhampur to be police stations for purposes of certain offences including those punishable under the Prevention of Corruption Act, 1947. On 24.11.1967 police case No. 23 was registered in the Sambalpur Police Station. Vigilance, against the petitioner. On 24.11.1967, the police applied to the A.D.M., Cuttack, for the issue of a search warrant against the petitioner after stating the information received by the police of the petitioner having allegedly committed offences punishable u/s 5(2) of the Prevention of Corruption Act. A search warrant was issued on the same date. As the search was being carried out on 28.11.1967 the Government of Orissa passed an order under rule 7(3) of the All India Services (Discipline and Appeal) Rules, 1955 placing the petitioner under suspension until the termination of the investigation relating to a criminal charge then proceeding against the petitioner. After the completion of the police investigation against the petitioner, the Government of Orissa requested the Government of India in 1968 to accord sanction for launching a prosecution

against the petitioner for offences punishable u/s 5(2) of the prevention of Corruption Act. The sanction was, however, never accorded by the Government of India. On 18.2.1971, however, the Government of India prematurely retired the petitioner under rule 16(3) of the All India Services (Death-c?m-Retirement Benefits) Rules, 1958 [hereinafter called the AIS(DCRB) Rules] in public interest on the expiry of three months from the date of the service of the said order on the petitioner. It is understood that a prosecution against the petitioner u/s 5(2) of the prevention of [Corruption Act has been launched by the Government of Orissa after the retirement of petitioner without any sanction from the Government of India.

(2) In a writ petition (O.J.C. No. 82 of 1968) filed in January 1968 by the petitioner against the State of Orissa, the concerned officers of the Government of Orissa and the Union of India, the petitioner prayed that the police investigation against him and the order of suspension passed by the Government of Orissa against him should be quashed. This writ petition was at first dismissed in limine by the Orissa High Court but the said order of dismissal was set aside by the Supreme Court who directed the Orissa High Court to decide the writ petition on merits. On 25th April, 1972, however, a Division Bench of the Orissa High Court dismissed the said writ petition on the ground that it had become infructuous on the retirement from service of the petitioner on 9.6.1971.

(3) The present writ petition was filed by Shri-Suri on 30.3.1972 praying that the order of suspension dated 28.11.1967 passed by the Government of Orissa and the order of retirement dated 18.2.1971 passed by the Government of India be set aside.

(4) The pleadings in this writ petition attacking the order of retirement aver it to be void on the following grounds:-

(1) The order of retirement under rule 16(3) of the AIS(DCRB) Rules was null and void without prior revocation of the order of suspension; (2) From the manner in which the Government of India has dealt with the petitioner's case, it is clear that there is not mere incompetence and inability to deal with service matters expeditiously but established mala fide intentions. Not only the order of retirement was mala fide but the actions subsequently taken have also been mala fide. The Accountant General, Orissa, informed the petitioner on 19-8-1971 that he had taken up the matter with the State Government and pending its reply proposed to calculate his pension under rule 6(2) of the AIS (DCRB) Rules though correctly speaking the petitioner's pension and gratuity have to be calculated under rule 17 of the said Rules; (3) The order of retirement during the period of suspension resulted in punishment of the petitioner and denies him pecuniary dues like pension and gratuity upto the point of his retirement, and (4) Under rule 16(3), the petitioner could be retired on attaining the age of 50 years or on completion of 30 years of service. He could not be retired after he had attained the age of 56 years.. This contention was, however, not pressed by the petitioner in view of the Division Bench decision of this Court in N. M.. Mittal

v. Union of India (Civil writ 38 of 1972 decided on. 20-1-1972), reported in 2nd (1972) Delhi 671.0

(5) The order of suspension was attacked on the following grounds :-

(1) It was initiated before the commencement of judicial proceedings against the petitioner and was, Therefore, ab initio illegal as being clearly outside the ambit of rule 7(3) of the Ais (D&A) Rules, 1955: and (2) It was the result of the enmity of the Orissa Government and its officers with the petitioner and was, Therefore, mala fide. For details of the enmity and the mala fides, the petitioner relied on the allegation made by him in the writ petition which had been already filed by him in the High Court of Orissa.

(6) Before the Legality of the order of suspension was canvassed by Shri B. R. L. lyengar on behalf of the petitioner, Shri F.S. Nariman, Additional Solicitor General for the Union of India, took a preliminary objection. He stated that the order of suspension was passed in 1967. The present writ petition filed by the petitioner in 1972 was undoubtedly delayed and was liable to be dismissed on that ground alone. Further the issue as to the legality of the order of suspension was already raised between the same parties in the writ petition filed in the Orissa High Court. It cannot be raised again in the present writ petition. Lastly, the order of suspension was passed by the Government of Orissa. The allegations regarding the hostility and mala fides of that Government against the petitioner were extensively made in the writ petition filed in the Orissa High Court. Either the Division Bench decision of the Orissa High Court dated 25-4-1972 that the validity of the suspension order cannot be canvassed after the order of retirement was passed. is res judicata between the parties or if the said decision is challenged by the petitioner in the Supreme Court then the petitioner would be well advised in getting the point decided in that writ petition. Shri lyengar at first argued that the order of suspension could not be passed by the Government of Orissa merely because allegations of the commission of offences by the petitioner were made by the police in starting the investigation against the petitioner and in obtaining a search warrant against him. He tried to make a distinction between a mere allegation and a criminal charge. He argued that a criminal charge could be said to exist against the petitioner only after a prima facie case against him was made out and the mind of the Central Government was applied to it. As against this, it was pointed out by Shri Nariman that the words "criminal charge" were used in all the three subrules 7 of the AIS (D&A) Rules, 1955. The first sub-rule related only to disciplinary proceedings. The second sub-rule authorised the suspension of a member of the Service even if he was detained in official custody whether on a criminal charge or otherwise for longer than forty-eight hours. The third sub-rule contemplated the pendency of an investigation, inquiry or trial relating a criminal charge. An investigation could be said to spend as soon as a criminal case of a cognizable offence was registered for the purpose of collection of evidence. In the early stage of the investigation, there may not be sufficient material to make out a prima facie case against the accused. Nevertheless, the

Government had discretion to suspend the accused. This would show that the word--, "criminal charge" are not used in the sense that formal charges were formulated as in the case of a criminal trial. The investigation has only to relate to a criminal charge. That is to say, the object of the investigation is only the collection of the evidence towards the proof of a criminal charge. The petitioner also realised that it is the prior writ petition which had been filed in the Orissa High Court in which he would be better placed to prove the mala fides of the Government of Orissa rather than the present writ petition. Shri B. R. L. Iyengar, Therefore, after consulting the petitioner and Shri A. Subba Rao advocate who assisted Shri Iyengar. stated at the bar that this Court need not give any decision regarding the order of suspension. No observation in the present order is, Therefore, to be taken to decide any thing about the order of suspension.

(7) The only question for decision Therefore, is whether the order of retirement was invalid. The only real ground of attack on it was that on a proper construction of rule 16(3) of the Ais (DCRB) Rules the Government could not retire the petitioner during the suspension.

(8) It was necessary for the Government of India to set the order of suspension revoked by the Government of Orissa before taking action to retire the petitioner under rule 16(3). The argument was as follows: The order of suspension had the affect of suspending the contract of service between the petitioner on the one hand and the Governments of Orissa and India on the other hand. The petitioner was not bound lo work for these Governments and they were not bound to pay him. The Government of India had, Therefore, no right to terminate the servces of the petitioner during his suspension. Reliance was placed on the decisions of the Supreme Court in V.P. Gidroniya Vs. The State of Madhya Pradesh and Another, and various other Supreme Court decisions referred to therein. A perusal cf all those decisions show that the position is as follows. There arc two kinds of suspension. Firstly, there is a purported suspension by the employer of the employee even though the employer has no inherent right to suspend the employee and neither the contract of service nor rules governing the. service give him any such right .Such a suspension merely amounts to a prohibition by the employer preventing the employee from doing any work for the employer .But the contract of servics was not suspended. The mutual rights and obligations of the employer and employee including the obligation of the ;employer to pay wages to the employs- continued. In such a case, the contract of employment is in operation. Therefore, both the employer and. the employes can terminate the contiact of employment in accordance with the conditions of the ;contract and/or the rules governing the emoloyment. It is clear that the suspension of title petitioner is not of this kind. For, rule 7(3) clearly authorised the Government of Orissa to suspend the petitioner during the pendency of the investigation relating to a criminal charge against him.

(9) The second kind of suspension is the suspension of the contract of service itself by the emp!oyer. This can be do.ne only when either the contract or the

rules authorised the employer to suspend the contract of service. Thus, interim suspension of an employee pending disciplinary action or criminal prosecution against him authorised by the rules also falls into this class. As the contract of service is suspended, the mutual rights and obligations of the parties are also suspended. None of the parties, therefore, acting merely under the contract of service can terminate it. This common law position is, however, subject to the statutory rules governing such suspension. It is well known that in view of Article 310 of the Constitution the position of the President and a civil servant holding a post under the Union of India is not one of equality. The civil servant holds office during the pleasure of the President. Therefore, the proviso to rule 16(2) of the Ais (DCRB) Rules provides that a member of the Service who is under suspension shall not retire from service except with the specific approval of the State Government concerned. The result is that though the contract of service is suspended, the civil servant cannot retire except with the permission of the State Government. It was argued by Shri Iyengar for the petitioner that by the same token the Government of India also should not have the power to retire the petitioner from service during the period of suspension. Rule 16(3), however, expressly authorises the Government of India to retire a member of the Service who has completed either 30 years of service or who has attained the age of 50 years in public interest. It is an elementary principle of interpretation that a condition which is not stipulated in the statutory rule cannot be inserted there by the Court. The requirements of rule 16(3) are only the following :-

(1) The employee should be member of the All India Services, namely, the Indian Administrative Service in the present case; (2) He should have attained the age of 50 years or should have served for 30 years; (3) The retirement should be in public interest; and (4) It should be preceded by at least three months notice. For the application of the rule it is immaterial whether such a person is in active service or is on leave or is on deputation or is under suspension. In support of this view it may be pointed out that rules 12(1)(iii) and 6(2) expressly contemplate the retirement of a member of Service while under suspension. The rules have to be read as a whole. Rules 6 and 12 lend colour to rule 16. No doubt is, therefore, left that the retirement of the petitioner under rule 16(3) was legally competent.

(10) As to the bona fides of the Government of India in retiring the petitioner, Shri Iyengar tried to argue that the Government of Orissa brought pressure on the Government of India to retire the petitioner so that the Government of Orissa may be able to prosecute the petitioner without obtaining a sanction from the Government of India. Firstly, there is no pleading to this effect by the petitioner. Paragraph 45 of the writ petition is as follows :-

"the order of retirement of the petitioner also enables the State Government (Respondent No. 2) to circumvent the statutory requirement of law to obtain the permission of the Central Government, which was not granted, before prosecuting the petitioner, which action is highly illegal and irresponsible".

(11) It merely states the effect of the retirement by the Government of India on the petitioner. It does not say that the Government of India intended to help the Government of Orissa thereby. Secondly, if the Government of India did not oblige the Government of Orissa in granting sanction to prosecute the petitioner, it is not understandable how it could oblige the Government of Orissa by retiring the petitioner. It is well established that a petitioner who wants to successfully challenge an order of the Government on the ground of mala fides must make a proper and specific pleading about the facts constituting the mala fide. In the present writ petition, the petitioner has stated at length that the Government of India was sympathetic to him and helped him as much as possible to escape from ill-treatment by the Government of Orissa. This is why the Government of India did not grant sanction to the Government of Orissa in prosecuting the petitioner. Far from being actuated by mala fides, therefore, the Government of India was greatly sympathetic to the petitioner and went out of their way to protect him from hostile action by the Government of Orissa. It is merely because the Government of India retired the petitioner that the petitioner commented in paragraph 34 of the writ petition that "from the manner in which the Government of India has dealt with the petitioner's case, it is clear that there is not mere incompetence and inability to deal with service matters expeditiously but established mala fide intentions". The only fact pleaded to prove the mala fides is the stand taken by the Accountant General, Orissa, that the pension of the petitioner would be dealt with under the rule 6(2) of the Ais (DCRB) Rules. The Accountant General, Orissa, who took this stand was in no way concerned with the retirement of the petitioner by the Government of India acting at New Delhi. Not a single fact is, therefore, mentioned by the petitioner to support the allegation of mala fides in the whole of the writ petition against the Government of India. What is more remarkable is that the petitioner has not averred in the writ petition that his retirement by the Government of India under rule 16(3) of the Ais (DCRB) Rules was not in public interest. If the petitioner wanted to say so, it was his duty to make such an averment in the writ petition. For, the petitioner knew that the existence of "public interest" was an essential requirement of rule 16(3). In the absence of any denial of public interest by the petitioner in the writ petition, the Government of India was not bound even to plead that the petitioner was retired in public interest. For the presumption of regularity of official acts attaches to the order of retirement ( Ishwarlal Girdharlal Joshi etc. Vs. State of Gujarat and Another, ).

(12) However, in the counter-affidavit the Government stated that "it was after a careful consideration of the petitioner's record of service that the Central Government decided to retire the petitioner in the public interest after he had attained the age of 55 years". It was also pleaded by the Government of India that "the Review Committee which recommended, after due consideration, that the records of service of the petitioner were not satisfactory to allow him to continue in service beyond his 55th year of age met on 2.8.1969". It was on their report that Government of India retired the petitioner Even after this

specific pleading was made by the Government of India, the petitioner did not make any pleading in his rejoinder against the validity of the good faith of the Review Committee which met in August 1969 to assess the work of the petitioner. The basis of the action of the Government to retire the petitioner was thus not challenged by the petitioner even in the rejoinder after having known that the Government acted on that basis. All that the petitioner said in paragraph 12 of the rejoinder was the following:-

"the petitioner's record of service also is not such as to make him unfit for further retention in service".

(13) This was merely an expression of the personal opinion of the petitioner about his own record of service. It could not amount to a pleading either against the reliability of the report of the Review Committee or of the good faith of the Government of India.

(14) In *A.K.K. Nambiar Vs. Union of India (UOI) and Another*, the petitioner was also suspended under rule 7(3) of the Ais (D&A) Rules, 1955. He had made allegations against the Chief Minister of Andhra Pradesh and other persons some of whose names were disclosed. But none of the persons against whom mala fides were alleged was a party to the writ petition. In the present case the petitioner has not only not alleged mala fides against any particular officer of the Government of India but has also not joined any of them as a party to the writ petition in such circumstances, the allegations of mala fides were held not to have been substantiated in *A. K.K. Nambiar's* (4) case by the Supreme Court. In *Messrs Laxmi & Co v. Dr. Anant R. Deshpande* (Civil Appeal No. 1036 of 1967 decided on 12th September 1972)(s).the respondent was an occupant of the premises from which he was being evicted by the appellant. The possession of the respondent would have been protected u/s 42A of the Presidency Small Cause Courts Act 1882 incorporated by Maharashtra Amendment Act, 1963. Before the Small Cause Court, the respondent pleaded that he was a lawful tenant. The Bombay High Court held that on this pleading the Small Cause Court was bound to frame a preliminary issue and decide it as required by section 42A before evicting the respondent. In an appeal by special leave however the Supreme Court reversed the decision of the Bombay High Court inter alia, on the ground that "the pleadings will have an important bearing on the question as to whether the occupant contests the right of the applicant to possession. That contest has to be based on his tenancy within the meaning of 1947 Act (Bombay Rents, Hotel and Lodging House Rates Control Act, 1947). In the present case, the occupant respondent Deshpande stated in his defense that he was a lawful tenant. The words "lawful tenant" by themselves do not explain as to how the occupant is a "lawful tenant". The pleading by the petitioner in the present case in the rejoinder that his record of service was not such as to make him unfit for further retention in service is by the same token, Therefore, not sufficient to raise an issue whether the retirement of the petitioner was or was not in public interest.

(15) In *Union of India (UOI) Vs. Col. J.N. Sinha and Another*, , the Supreme

Court held that the Government had wide powers to retire an employee in public interest. In that case also the order of retirement was not attacked on the ground that the required opinion was not formed or the opinion formed was an arbitrary one. In the present case also there is no attack on the formation of the opinion by the Government. The Supreme Court observed at pages 795-796 of the report as follows:-

"VARIOUS considerations may weigh with the appropriate authority while exercising the power conferred under the rule. In some cases, the government may feel that a particular post may be more usefully held in public interest by an officer more competent than the one who is holding. It may be that the officer who is holding the post is not inefficient but the appropriate authority may prefer to have a more efficient officer. It may further be that in certain key posts public interest may require that a person of undoubted ability and integrity should be there. There is no denying the fact that in all organisations and more so in government organisations, there is good deal of dead weed. It is in public interest to chop off the same".

(16) The mere belief of the petitioner that his own record of service is not so bad did not, therefore, amount to a pleading that the public interest justifying his retirement did not exist. I did not, therefore, think it necessary to ask the Government to disclose the opinion of the Review Committee of August 1969 which constituted the grounds of public interest leading to the retirement of the petitioner. Unless and until the petitioner properly pleads that the grounds of public interest did not exist, it is not a rule of thumb that the Government should be required to disclose the confidential records constituting the grounds of public interest.

(17) To support the plea that retirement during the period of suspension amounted to punishment of the petitioner, Shri Iyengar relied on two decisions, namely:- (1) *Union of India v. Dakshinamurthy*. Air 1962 Mad 3760 ; and (2) *VedParkashVohra v. State of Punjab*. Air 1965 Punjab 28 But these decisions are clearly distinguishable. The authority terminating the services of the civil servant in those cases was also the authority who had instituted proceedings against the civil servant. Action to terminate the services of the civil servant before the end of the proceedings against him would naturally be suspected. Whether it would amount to punishment would, however, depend on the satisfaction of the various criteria laid down by the Supreme Court in *State of Punjab and Another Vs. Shri Sukh Raj Bahadur*, , and by a Division bench of this Court in *R.C. Roy Vs. Union of India and Others*, The test laid down by the Supreme Court in *Purushottam Lal Dhingra v. Union of India*, 1958 Scr 828, as to whether an order of termination of services would amount to punishment rested on the deprivation of the concerned civil servant of benefits which had already been earned by him and which were lost by the order of termination of services.

(18) In the present case, the order of suspension was passed by the Government of Orissa because a police investigation was pending against the petitioner. The

order of retirement was passed by the Government of India. The investigation, was made by the police in exercise of their statutory power under the Code of Criminal procedure. It was not in the power either of the State Government or of the Central Government to prevent the police from carrying out the investigation. This was established by the Privy Council decision in AIR 1945 18 (Privy Council). The decision of the Central Government to retire the petitioner has not been shown to be motivated by any extraneous considerations. It was taken strictly in public interest. The order of retirement on the face of it does not show that the petitioner was being punished. On retirement, the petitioner would be entitled to full pension and gratuity as might have been earned by him under rule 17 of the Ais (DCRB) Rules subject to the provisions of other rules which may be applicable. The applicability of rule 6 of the Ais (DCRB) Rules has to be decided by the Government in the light of the facts attending the claim which may be made by petitioner. Similarly, Fundamental Rule 54 or any corresponding rule which may be applicable to the petitioner would also have to be considered by the appropriate authority in granting pension, etc in deciding whether the suspension of petitioner was justified or not. That decision would itself depend on the decision of the criminal case pending against the petitioner. The petitioner may or may not eventually lose a part of the pension and gratuity benefits. But this would not be the result of the order of retirement. On the other hand, the cause for such a result would be the criminal prosecution of the petitioner for which the Government is not at all responsible. It cannot be said, Therefore, that any pecuniary or other loss is caused to the petitioner by the order of retirement as such. The order of retirement does not, Therefore, amount to punishment, as was also admitted by the petitioner on 21-7-1971 at page 35 of the paperbook.

(19) Whether rule 6 of the Ais (DCRB) Rules applies to the grant of pension of the petitioner would depend on whether the prosecution was launched against the petitioner in respect of a cause of action which arose within four years of the institution of the prosecution. There is absolutely nothing on record to show whether the prosecution launched on a cause of action which arose or an event which took place within four years of the launching of the prosecution. This question cannot, Therefore, be decided in the present case. In an order passed on 25-4-1972 during the pendency of this writ petition, this Court has already asked the petitioner to put up all his claim to which he is entitled on retirement along with necessary particulars and the Government would thereupon finalise his claim within two months from the date the claim is preferred. It is then that the Government will decide whether rule 6 or rule 17 of the Ais (DCRB) Rules applies to the case of the petitioner. If the petitioner is dissatisfied with the decision of the Government, he would be free to seek his remedies against such a decision in an appropriate proceeding.

(20) For the above reasons, the writ petition is dismissed but without any order as to costs.