
(2001) 03 GAU CK 0041

In the Gauhati High Court

Case No : WP (C) No. 1247 of 2000 and Miscellaneous Case No. 352 of 2001

Dhireswar Barthakur and Others

APPELLANT

Vs

State of Assam and Another

RESPONDENT

Date of Decision : 27-03-2001

Acts Referred:

Constitution of India, 1950 — Article 15, 16, 209, 309, 372(1)

Citation : (2001) 1 GLT 445

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : N. Dutta, I. Choudhury and R.S. Chowdhury, for the Appellant; B.C. Das, for the Respondent

Final Decision : Dismissed

Judgement

1. This petition has been filed by the writ petitioners who are working in the Public Works department. Government of Assam for a direction to allow them to continue in service till 31.3.2001 as per provisions of FR 56(a) which provides for superannuation (compulsory retirement) of a Government Servant from the afternoon of the last day of the month on which he attains the age of 58 years.

2. While issuing Rule, this court vide order dated 1.3.2001 passed the following order:-

"Keeping in view of the earlier order passed by this Court in the connected/ analogous matters and also considering the existing facts and circumstances of the case, particularly, the date of birth of the petitioners on 1.3.1943, I make the following interim order:-

The service conditions and status of the writ petitioners 5 in number as on today shall not be disturbed by the official respondents till 31.3.2001 if they are still continuing their services under the respondents-Department until further orders of this Court."

3. There is no dispute with regard to the date of birth of all the petitioners that they were born on 1.3.1943. Obviously, the aforesaid order was passed in view of the provisions of FR 56(a).

4. The State also filed miscellaneous application registered as Misc. Case No.352/2001 for modification/vacation of the aforesaid order.

5. I have heard Mr. N. Dutta, learned senior counsel for the petitioners and also Mr. B.C. Das, Learned Senior State Counsel.

6. Shri B.C. Das, Learned State Counsel submitted that the interim order was passed taking into consideration the provisions of FR 56(a) prior to the amendment made in September, 1991. According to Shri Das, the State in exercise of powers under Article 309 amended FR 56(a) and an explanation was inserted below FR 56(a) which provided for superannuation from the afternoon of the last day of the preceding month for those Government servants whose date of birth fall on the first day of the month.

7. Shri Das submitted that this notification came into force with effect from 11th September, 1991 and the provisions of FR 56(a) as amended being the law does not permit the writ petitioners to continue in service after 28th February, 2001.

8. The notification dated 11th September, 1991 (Annexure-2) reads as follows: -

"NOTIFICATION

In exercise of the powers conferred by the provisions to Article 309 of the Constitution of India, the Governor of Assam is pleased to direct that the following "Explanation" shall be inserted below FR 56(a) In Chapter IX of the Assam Fundamental Rules and Subsidiary Rules.

"Explanation for the purpose of this Sub-rule, a Govt. servant whose date of birth falls on the first day of month shall have attained the age of 58 years on the afternoon of the last day of the preceding month".

10. The said notification appears to have been made in the light of the provisions of Note-7 to FR 56 which is applicable to the Central Government Employees inserted by the Government of India vide MF notification No. 7(7)-E.V(A)/74 dated 7th February, 1975 which came into force from 5th of April, 1975. If we go by the above quoted amended provision, the writ petitioners cannot continue in service beyond 28th February, 2001. Shri Dutta, Learned Senior Counsel vehemently opposed the contention of the State on the ground that the said notification cannot be treated as an amendment to FR 56(a) since it does not specify the date of its enforcement and that it was not acted upon by the State. According to Shri Dutta, in all the cases dealt with by the High Court after 1991 and till date, this notification was never referred to and relied upon by the State Authority. The High Court has consistently followed the provision of FR 56(a) as it stood prior to amendment and decided a number of cases. The judgment delivered in Civil Rule No. 1393/93 and Civil Rule No. 5148/96 have been cited

by way of reference.^e According to Shri Dutta, the decision rendered by the High Court consistently in a number of cases cannot be ignored by this court inviting discrimination. Besides, it would also amount to laying down two different laws by this Court on the same issue. In support of this contention Shri Dutta has referred to a few decisions of the Apex Court.

11. The first point to be resolved in this petition is whether the FR 56(a) stood amended with effect from 11th September, 1991 providing for superannuation from the afternoon of the last day of the preceding month for those employees whose date of birth fall on the first day of the month in which they attain the age of 58 years.

12. There cannot be any dispute with regard to powers of the State to amend the Fundamental Rules invoking the provision of Article 309. The notification was issued by the competent authority within the meaning of Article 372(1) in exercise of powers under Article 309. It is true that no date has been indicated in the said notification from when it was intended to come in force. But this will have no nugatory effect. In the absence of any specific date for enforcement and unless the contrary is expressed, the same will come into force on the date when it is issued and is first published in the Official Gazette.

13. It is true that the State has not relied upon this amendment in Civil Rule No. 1393/93 and Civil Rule No.5148/1996. It may be due to inadvertence. It also appears to have escaped the notice of this court while decisions in the aforesaid two Civil Rules were pronounced. But that does not mean that the amendment stood obliterated from the statute book. It is the law applicable to the State Government Employees who were born on the first day of the month. It cannot be said to be arbitrary, irrational or unreasonable inasmuch as there is a nexus with the objective sought to be achieved by introducing the restriction in regard of superannuation of a class of employees whose date of birth fall on the first day of the month. The employees of this class attain the age of 58 years on the previous day and, therefore, the provisions to superannuate them from the afternoon of the previous day of the date of birth cannot be construed as a reduction of their age of superannuation. The argument that the State cannot reduce the age of superannuation is, therefore, of no consequence. The rules made by the President or the Governor under Article 209 have the force of law and it will have the force of law until the appropriate Legislature makes law in that behalf or amends it. Its existence and enforceability cannot be ignored merely because it was not taken care of by the respondent authority.

14. I have carefully perused the judgment in Civil Rule No. 1393/93 and Civil Rule No. 5148/96. The amended provisions of the FR was not dealt with by the learned Single Judge while disposing of the said two Civil Rules. It escaped notice presumably because it was not referred to by the Learned State Counsel. There is no reference to this notification and no decision was given as to its" enforceability in the aforesaid two Civil Rules. Therefore, an appropriate decision about the enforceability of the amended provisions seem to be inevitable. Any

decision given under the present circumstances will not in any manner be in conflict with the judgments in the earlier Civil Rules as no opinion was expressed on this notification . There may be conflict with regard to the benefit a group of employees might have received for omission and default on the part of the State respondents to follow the amended provisions. That does not mean that such default will have to be there in case of all other employees for all time to come. In my opinion there will be no violation of Articles 15 and 16 if the provisions in the notification are now applied in case of employees who are yet to retire. The employees born on the first day of the month in which they attain the age of 58 years are not entitled to the grace period made available only to those who were born on the 2nd or on any subsequent day of the month.

15. Shri Dutta, Learned Senior Counsel referred to the decisions in K. Nagaraj and Others Vs. State of Andhra Pradesh and Another,

16. Discussion of the decisions in details in my opinion will be of no consequence as the writ petitioners are not entitled to continue in service beyond 28.2.2001. Therefore, the period after 28.2.2001 they have served as per orders of this court may not be computed for the purpose of pension and other retrial benefits. The petitioner will, however, be entitled to pay and allowances for the period they have served after 28.2.2001.

17. In the result the writ petition stands dismissed. Consequently, the interim order passed on 1.3.2001 also stands vacated.

18. No costs.