

(2000) 02 GUJ CK 0017

In the Gujarat High Court

Case No : Special Civil Application No's. 10352, 10363, 10364, 10365 and 10367 of 1999

Director

APPELLANT

Vs

S.L. Solanki

RESPONDENT

Date of Decision : 08-02-2000

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 161, 161(1), 31, 9(27)
Constitution of India, 1950 — Article 14, 16, 309

Citation : (2000) 02 GUJ CK 0017

Hon'ble Judges : R.M. Doshit, J

Bench : Single Bench

Advocate : Desai, Government Pleader and V.M. Pancholi, A.G.P. in Special Civil application No. 10364 of 1999, for the Appellant; P.J. Mehta, for the Respondent

Final Decision : Allowed

Judgement

R.M. Doshit, J.—Heard the learned advocates. With the consent of the learned advocates, the matters are finally heard and disposed of by this common judgment.

2. The petitioners in all these petitions are the Director, Printing & Stationery Department and the State Government. All these petitions are preferred against the common judgment and order dated 13th November, 1998 passed by the Gujarat Civil Services Tribunal [hereinafter referred to as, 'the Tribunal'] in Appeals Nos. 25 of 1998, 28 of 1998, 172 of 1998, 173 of 1998 and 179 of 1998. The appellants before the Tribunal are the respondents no. 1 before this Court. All these appellants are the servants of the petitioners. They were serving as Packer/Packing Checkers. It was the claim of the appellants that irrespective of any rules, the appellants being Class-IV servant, were entitled to continue in service till they attain the age of 60 years. While the petitioners maintain that the cadre of Packers/ Packing Checkers being a Class-III service, the age of superannuation shall be 58 years and none of the appellants had a right to be

continued in service once they attained the age of 58 years. The Tribunal, considering the relevant documents, held that the cadre of Packers/Packing Checkers was Class-IV service and the concerned employee had a right to be continued in service till he reaches the age of 60 years. Feeling aggrieved, the petitioners have preferred the present petitions.

3. Mr. Desai has submitted that prior to 1996, the concerned cadres were treated as Class-IV service and in view of the provisions contained in Rule 161 of the Bombay Civil Services Rules, they were continued in service till they attained the age of 60 years. However, by Notification dated 30th May, 1996, the Government in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India has, in supersession of all the rules made in that behalf, made rules to provide for regulating the recruitment to the posts of Packer, Drawer and of Packing Checker in the Gujarat Sub-ordinate Services Class-III in the Government Printing & Stationery Department. The rules are styled as, "The Packer, Drawer and Packing Checkers in the Government Printing & Stationery Department Recruitment Rules, 1996." He has submitted that the said rules having been made under proviso to Art. 309 of the Constitution of India, are legislative in character and are binding to all concerned. By enacting the said rules, the Government has classified the cadres of Packers, Drawers and Packing Checkers in the Government Printing & Stationery Department as Class-III service. Thus, the appellants having been classified as Class-III servants, the age of superannuation shall be 58 years and the petitioners have rightly sought to retire them on attaining the age of 58 years. He has submitted that the aforesaid rules are retroactive inasmuch as the same shall apply to all the employees who were in service on the date of the Notification i.e., 30th May, 1996 and were to retire thereafter. He has further contended that these rules are specifically made applicable to the aforesaid cadres in the department of Printing & Stationery and shall prevail over the general rules; if any, made in that regard.

4. The petitions are contested by Mr. Mehta. He has submitted that the rules are the recruitment rules and cannot be operated retrospectively and thus cannot apply to the employees who were already in service on the date of the Notification i.e., on 30th May, 1996. He has contended that all along, the concerned cadres have been treated as Class-IV service and benefit of higher age of superannuation has been conferred on all such employees. Mr. Mehta has relied upon rule 9 (27) of the Bombay Civil Service Rules and Appendix-III thereto. Rule 9 (27) defines Class-IV service, to mean, "service performed by the Government servant included in Appendix-III and service remunerated in a time-scale of pay, the maximum of which does not exceed Rs. 270/= in the case of government servants not so included. Appendix-III enlists several cadres in various Government Departments. Under the heading, "Printing Department", the Government Stationery Office and the Government Book Depot are also included. Amongst several other cadres, the cadre of Packers [including Head Packer] also is enlisted in the said Appendix. Mr. Mehta has also relied upon rule-161 of the Bombay Civil Services Rules. Rule 161 [1](b) provides, inter alia,

that a Government servant in Class-IV service should be required to retire at the age of 60 years. Mr. Mehta has next relied upon the communications dated 28th January, 1983, 29th January, 1987 and 22nd September, 1997. The communication dated 28th January, 1983 appears to be a clarification made in respect of the eligibility of the packing staff for promotion to the post of Jr. Clerk. It is stated that the said cadre, whose pay-scale is upto Rs. 270 should be considered to be Class-IV service. The communication dated 29th January, 1987 is in respect of certain information submitted to the Government by the Director of Printing & Stationery. It enlists several cadres in Class-IV service and the respective pay scales. The cadres of Packer and Packing Checker are also included. The communication dated 22nd September, 1997 is also a clarification made by the State Government. It is stated that cases falling after the date of recruitment rules shall be governed by the Recruitment Rules.

5. It is true that Rule 161 of the Bombay Civil Services Rules, inter alia, provides for compulsory retirement of the Government servants on attaining the age of superannuation. The age of superannuation for all government servants, other than Class-IV servants is 58 years, while for Class-IV servants, it is 60 years. Rule 9 (27) defines Class-IV service to mean, 'service performed by all the Government servants included in Appendix III and service remunerated in the time-scale of pay the maximum of which does not exceed Rs. 270/= in the case of Government servants not so included.' Thus, not only those services which are included in Appendix-III but other services also which are not included in Appendix III but which are remunerated in the time-scale of pay the maximum of which does not exceed Rs. 270/= are also included in Class-IV service. Hence, Appendix-III is not an exhaustive list of Class-IV service and all the services covered under the second part of the above referred definition also shall be included in Class-IV service. It is indisputable that the cadre of packer has been included in Appendix III and the cadre of Packing Checker though is not included in Appendix III, since it was being remunerated in the time-scale of pay maximum of which did not exceed Rs. 270/=:, both shall be considered Class-IV service. Thus, the appellants were wholly justified in claiming that they were class-IV servants and had a right to be continued in service till they attain the age of 60 years. However, this should be the position till the date of the Notification. By issuing the Notification, the Government has not only provided for the mode of recruitment to the posts of Checkers, Drawers and Packing Checkers but has also declared said cadres to be in Class-III service. The Notification has been issued in exercise of the powers conferred under proviso to Article 309 of the Constitution of India. The same is, therefore, legislative in character and cannot be assailed on the ground of non-application of mind. Besides, there is no challenge to the Notification either. The question is whether the Notification should prevail over the provisions contained in the Bombay Civil Services Rules which too are framed in exercise of the power conferred by proviso to Article 309 of the Constitution of India and hence are legislative in character. In my view, the Notification shall prevail over the provisions contained

in the Bombay Civil Services Rules. The Notification is issued latter in time and in supersession of all the Rules made in that behalf. Therefore, the Notification shall be considered to have been issued in supersession of Rule 9 (27) of the Bombay Civil Services Rules read with Appendix III thereto in so far as it relates to the cadres of Packers, Packing Checkers and Drawers. Thus, the Notification having been issued expressly in supersession of the earlier rules, it shall prevail over all the rules including the Bombay Civil Services Rules made in the subject matter.

6. The next question is whether the above referred Recruitment Rules shall operate prospectively i.e., should they be applicable to those employees who are appointed after the date of the Notification or shall also apply to the persons who are already in service on the date of the Notification and are still to retire. Mr. Desai has relied upon the judgments of the Supreme Court in the matters of K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, , of Government of Andhra Pradesh and others Vs. Syed Yousuddin Ahmed, , and of G. Nagendra Vs. State of Karnataka and Others, . Mr. Mehta has relied upon the judgment of the Constitution Bench of the Supreme Court in the matter of Chairman, Railway Board & Ors. v. C.R Rangadhamaiah & Ors. [1997 (4) SLR 759].

7. In the matter of K. Nagaraj & Ors [Supra], the Court has held that, `...It is well settled that the service rules can be as much amended, as they can be made, under the proviso to Article 309 and that the power to amend these rules carried with it the power to amend them retrospectively. The power conferred by the proviso to Article 309 is of a legislative character and is to be distinguished from an ordinary rule-making power. "In the matter of Government of Andhra Pradesh & Ors [Supra], the Court while considering the status of the Government servant has held that, `the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant but a legal relationship something in the nature of status. Origin of government service is contractual. But once appointed to his post or office, the government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which under Article 309 of the Constitution can make law determining the service conditions of the government employees and such law can also be retrospectively made. But in the case in hand the question of retrospective application of the amended provisions of Rule 31 of the Revised Pension Rules really does not arise. It becomes applicable to all the employees who were in service on the date the amended rules came into force for the purpose of finding out the meaning of the expression `emoluments" on the basis of which the pension of the employee has to be calculated on superannuation. In this view of the matter the contention of the learned counsel for the respondent that Rule 31 would apply only to those employees who joined service after the amended rules came into force is wholly without substance and the same is accordingly rejected." In the matter of G. Nagendra [Supra] also, the same view has been expressed by the Hon"ble Supreme Court. The Court has held that, `... it is seen that the Rules are framed under Article 309 of the Constitution and it is too late in the day to dispute that

such Rules cannot be given retrospective effect. Therefore, the Tribunal was not right in holding that the Rules shall be valid only with effect from the date on which it was published." In the matter of Chairman, Railway Board & Ors. [Supra], the subject matter of challenge was amendment to Railway Establishment Code Rule-2301. Under the impugned amendment, the method of calculation of pensionary benefits was modified. While considering the said challenge in paragraph 21 of the judgment, the Court has held that, "...It can, therefore, be said that a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retrospectivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed i.e., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively." In paragraph 25 of the judgment, the Court has discussed 'vested right' and 'an accrued right'. It is held that, 'an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution.' As held by the Hon'ble Supreme Court in the above referred matters as well as many other judgments, the service conditions of the Government servant is regulated by the statutory provisions and not by the terms of contract. The statutory provisions can be altered with prospective effect as well as with retrospective effect. A rule which alters the future position of a government servant already in service cannot be said to be retrospective in nature inasmuch as it does not take away a right already accrued to the government servant concerned.

8. In the present case, the Recruitment Rules of 1996 are not specifically made retrospective nor are they applied to the persons who had already retired from service before the date of the Notification. However, the rules cannot be made prospective so as to affect only those persons who join the service after the date of the Notification and not those who were already in service on the date of the Notification. If such were the interpretation, a common class of employees would be divided into two different groups, to be governed by two different sets of rules. Such cannot be the effect of the statutory rules. Once the rules are framed, they should uniformly apply to all the persons who are in service on the date of the rules and who join the service thereafter. Besides, all the earlier rules having been superseded the service of the petitioners cannot be governed by the rules which are superseded and have become non-est. No government servant has a 'vested right' to continue in service till he attains a particular age, irrespective of the relevant rule. Such a right amounts to a condition of service and the Government has a right to alter the condition of service unilaterally. If such an alteration is made, the altered rules shall govern the service condition of all the government servants concerned. In my view, therefore, the Rules of 30th May, 1996 shall apply to all the employees uniformly including the petitioners

herein. The petitioners, therefore, shall be treated to be Class-III servants and shall retire from service on reaching the age of 58 years in consonance with Rule 161 of the Bombay Civil Services Rules. Considering the view that I have taken, the several communications relied upon by Mr. Mehta and referred to hereinabove fall into insignificance. The internal communication cannot prevail over the statutory rules. The Tribunal appears to have erred in holding that the Notification is prospective so that it shall govern the service conditions of only those employees who entered the service after the date of the Notification and shall not affect the employees who were in service on the date of the Notification and had yet not retired.

9. Mr. Mehta has next argued that if such were the effect of the Notification, the employees belonging to the same cadre shall be meted differential treatment inasmuch as though the petitioners are placed in a time-scale of pay applicable to Class-IV service, they would be made to retire at the age of 58 years, while those who enter the service after the date of Notification, though will be retiring at the age of 58 years, will receive the salary in the time-scale of pay applicable to Class-III service. I believe the grievance is imaginary. There is nothing on the record which points out such discrimination. The contention, therefore, requires to be rejected.

10. No other contention is raised before me. In view of above discussion, the petitions are allowed. The judgment and order dated 13th November, 1998 passed by the Tribunal in Appeals nos. 25 of 1998, 28 of 1998, 168 of 1998, 172 of 1998, 173 of 1998 and 179 of 1998 are quashed and set-aside. The said appeals are dismissed. The appellants shall retire from service on attaining the age of 58 years. The parties shall bear their own costs.