
(2011) 11 GAU CK 0036
In the Gauhati High Court
Case No : Writ Appeal No.40 of 2011

Dwijdas Chakraborty

APPELLANT

Vs

State of Tripura and Ors.

RESPONDENT

Date of Decision : 08-11-2011

Acts Referred:

Citation : (2012) 3 GLR 855

Hon'ble Judges : I.A.Ansari, J and C.R.Sarma, J

Bench : Division Bench

Advocate : Mr. Somik Deb for the appellant.??Ms. A.S. Lodh for the respondents., Advocates appearing for Parties

Judgement

I A. Ansari, J.—Whether a person, appointed on his retirement from the Indian Army, in the Tripura State Rifles, becomes a member of the Tripura State Rifles ("the TSR")? Whether a person, as a member of the TSR, on extended service beyond the period of retirement in the TSR, will be entitled to receive the benefit of the increase in age of the members of the TSR? These are the two important questions, which the present writ appeal has raised.

2. In order to answer the questions posed above, we set out, in brief, hereinbelow the material facts, which have given rise to the present writ appeal.

3. The petitioner was, by order, dated 23.4.2001, appointed, though provisionally, as a Naik, in the TSR, against existing vacancy of 8th Battalion, Tripura State Rifles.

4. At the relevant point of time, when the petitioner was so serving as a member of the TSR, the age of superannuation, for the post of Naik in the TSR, was 50 years. In the ordinary course, the petitioner would have superannuated as a Naik in the midnight of 31.8.2010. Before, however, the petitioner could retire, on superannuation, as indicated hereinbefore, an order was made, on 23.7.2010, by the Director General of Police, Tripura, extending the petitioner's service beyond the age of his superannuation with effect from 1.9.2010 to 30.11.2010. On

20.10.2010, the State Government, in exercise of its powers under section 22 of the Tripura State Rifles Act, 1983, amended, by way of "substitution", rule 27 of the Tripura State Rifles (Discipline, Control, Service conditions, etc.) Rules, 1986, prescribing 52 years as the age of superannuation for the rank holders of Naik increasing thereby the age of superannuation by two years from 50 to 52 years. The petitioner made a representation seeking to receive the benefit of the said amended provisions of rule 27 so as to enable him to get enhanced pensionary benefits. This was declined by order, dated 30.11.2010, issued by the Commandant, 8th Battalion, Tripura State Rifles, whereby the petitioner has been released on the ground of having attained the age of superannuation in terms of the unamended rule 27, which prescribed, as indicated hereinbefore, 50 years as the age of superannuation for the rank holders of Naik. The petitioner, feeling aggrieved, filed a writ petition, under article 226 of the Constitution of India, challenging, inter alia, the order, dated 30.11.2010, aforementioned, and seeking setting aside and quashing of the same. This writ petition gave rise to WP(C) No.97/2011. As the writ petition has been dismissed by judgment and order, dated 10.8.2011, the petitioner is before us in appeal.

5. We have heard Mr. Somik Deb, learned counsel, for the appellant, and Ms. A.S. Lodh, learned Government advocate, appearing on behalf of the respondents.

6. Shorn off immaterial details, what needs to be noted, at the very outset, is that it is the admitted case of the parties that by notification, dated 20.10.2010, the State Government, in exercise of its powers, under section 22 of the Tripura State Rifles Act, 1983, amended rule 27 by, inter alia, increasing the age of superannuation of various rank holders including the holders of the rank of Naik, who were to retire, under the preamended rule 27, on completion of 50 years of age. By way of amendment of rule 27, as mentioned hereinbefore, the age of superannuation of a person, holding the rank of Naik, was increased to 52 years. The petitioner, having been appointed on his release from the Army to the post of Naik, against the existing vacancy in 8th Battalion, in the regular scale of pay, became a member of the TSR. This position could not be assailed before us, because the term "Rifles" has been defined, by section 3(s) of the Tripura State Rifles Act, 1983, to mean Tripura State Rifles and section 3(j) defines "Member of the Rifles" to mean, inter alia, a person, who has been appointed to the Rifles by the Inspector General or, as the case may be, by the Commandant.

7. Considering the fact that rule 27 stood, admittedly, amended, by way of "substitution", on 20.10.2011, whereby the age of superannuation of a person, holding the rank of Naik, was increased to 52 years, the question, which, now, arises is : whether a person, who was, on 20.10.2010, a member of the Rifles, (i.e., member of the TSR), could have derived the benefit of the amended rule 27? In order to appreciate the question raised, the relevant portion of the amendment of rule 27 is reproduced below :

"No. 42(5)/PD/2004

GOVERNMENT OF TRIPURA

HOME DEPARTMENT

Dated, Agartala, the 20th October, 2010

NOTIFICATION

In exercise of the power conferred by section 22 of Tripura State Rifle Act, 1983, the State Government hereby makes the following rule, namely,

1. Short title and commencement.

(i) These Rules may be called the Tripura State Rifles (Discipline, Control Service Condition (etc.) (Amendment) Rules, 2010.

(ii) They shall come into force on and from the date of their publication in the Official Gazette.

2. Amendment of rule 27.

For the provisions under rule 27 of the (Discipline, Control Service Condition, etc.,) Rules, 1986, the following shall be substituted, namely,

27. Superannuation

Age of superannuation for the members of the Rifles shall be as under:

SI. No.

Ranks

Age of superannuation

(a) ***

(b) ***

(c) ***

(d) ***

Naiks

52 years

(e) ***

(f) ***

(g) ***

No. 01080856 Naik (OPr) Dwijadas Chakraborty (GroupC) of TSR 8th Bn. is hereby granted 3 (three) months extension in service beyond age of superannuation in TSR w.e.f. 1.9.2010 to 30.11.2010.

2. This has been issued by exercising the power of the Head of Department as laid in Memorandum of the Appointment and Services Deptt. Government of Tripura issued vide No. F. 19(2)GA/77(I)(ii) dated 25th May, 1998.

Sd/ (Pranay Sahay)

Director General of

Police

Tripura: Agartala."

8. As the provisions, whereby amendment has been made, uses the expression "shall be substituted", the question, which, immediately, arises, is: what the word substitute would, in the context of the present case, mean?

9. It may be noted, with regard to the above, that the word "substitute" would, ordinarily, mean "to put (one) in place of another"; or "to replace". In Black's Law Dictionary, 5th edn., at p. 1281, the word "substitute" has been defined to mean "to put in the place of another person or thing", or "to exchange". In Collins English Dictionary, the word "substitute" has been defined to mean "to serve or cause to serve in place of another person or thing"; "to replace (an atom or group in a molecule) with (another atom or group)"; or "a person or thing that serves in place of another, such as a player in a game who takes the place of an injured colleague".

10. It is a matter of legislative discretion as to whether, while enacting and amending law, an existing provision shall be deleted or a new provision shall be substituted. If there is both repeal and introduction of another provision in place thereof by a single exercise, the expression "substituted" is used. Such deletion has the affect of repeal of the existing provision and also makes room for

introduction of a new provision, "substitution" of one text for the other preexisting text is one of the known and wellrecognised practices employed in legislative drafting, "substitution" has to be distinguished from "supersession" or a mere repeal of an existing provision.

11. In *Koteswar Vittal Kamath v. K. Rangappa Baliga and Co.*, (1969) 1 SCC 255, the Supreme Court held that the process of "substitution" consists of two steps. The first step is that the old rule, it made, ceases to exist and, next, the new rule is brought into existence in its place. Thus, in *Koteswar Vittal Kamath* (supra), the Supreme Court clarified the distinction between "supersession" of a rule and "substitution" of a rule by pointing out that the process of "substitution" consists of two steps: first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place.

12. With regard to the above, the following passages from *Crates*, on Statute Law and *Sutherland on Statutory Construction*, are relevant:

"When an Act of Parliament is repealed," said Lord Tenterden in *Surtees v. Ellison*, "it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule." *Tindal*, CJ, stated the exception more widely. He said: "The effect of repealing a statute is to obliterate it as completely from the records of Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded, whilst it was an existing law."

"Since an amendatory act alters, modifies, or adds to a prior statute, all courts hold that a repealed act cannot be amended, that is, no court will give effect to a repealed law because the Legislature attempted to amend it."

13. In other words, the "substitution" of a provision results in repeal of the earlier provision and its replacement by the new provision. As regards repeal of a statute, the law is stated, in *Sutherland on Statutory Construction*, thus :

"The effect of the repeal of a statute where neither a saving clause nor a general saving statute exists to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act in future and to divest the right to proceed under the statute, which, except as to proceedings past and closed, is considered as if it had never existed."

14. In *Zile Singh v. State of Haryana*, (2004) 8 SCC 1, the Supreme Court held that mere absence of a provision, expressly giving retrospective operation to the legislation, is not determinative of its prospectively and/or retrospectively. The Supreme Court held as under :

"Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to *Craies*, (Statute Law, (7th Edn.)), it is open for the Legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language

employed. If it is a necessary implication from the language employed that the Legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the Legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the Legislature contemplated, (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right." (emphasis supplied).

15. From the above observations, made in *Zile Singh* (supra), it becomes clear that the former state of law is one of the factors to be taken into consideration to determine as to whether any amendment is retrospective or prospective in the sense that it is the duty of the court to decide as to what was the former state of law, what the Legislature contemplated and what remedy the Legislature has sought to apply. The further observations made, in this regard, in *Zile Singh* (supra), being relevant, are reproduced below :

"Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute relates back to the time when the prior Act was passed. The rule, against retrospectively, is inapplicable to such legislations as are explanatory and declaratory in nature." (emphasis supplied).

16. One may also pause to refer to the decision in *Bengal Immunity Co. Ltd. v. State of Bihar*, AIR 1955 SC 661, wherein, explaining the principle of interpretation of statute, the Supreme Court held as under :

"It is a sound rule of construction of a statute firmly established in England as far back as 1584, when *Heydon* case was decided that

"...for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth, and 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

17. From the judicial pronouncements cited above, it becomes transparent that when a provision is substituted, then, the existing provision stands repealed and new provision stands brought into existence in its place and the said act consists of repeal as well as substitution. The effect of repeal of a provision is that the said provision stands obliterated from the statute book as if the provision never existed and the new provision comes into existence in its place as if the new provision was the one, which existed from the beginning. By the amendment, in the present case, the old rule 27 stands substituted by new rule 27. What this substitution implies? This implies that the earlier rule 27 has been deleted and, in its place, new rule 27 has been substituted and thereby the new rule 27 shall have the effect from the date, when the old rule 27 had come into force.

18. We may pause here to take note of the observations, made in *Allied Motors (P.) Ltd. v. CIT*, (1997) 3 SCC 472, at para 13, which read as under:

"Therefore, in the wellknown words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of *R.B. Jodha Mai Kuthiala v. CIT*, this court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole."

19. From the above observations, made in *Allied Motors (P.) Ltd.* (supra), it becomes clear that it is the duty of the court to determine the legislative intent, and purpose and the present one is a case, which, undoubtedly, invites this court to determine the legislative intent. This court, therefore, must give to the amended rule 27 a purposive interpretation.

20. In *Corpus Juris Secundum*, while dealing with the subject with remedial statutes, it has been stated as under :

"While general rule that statutes are construed as prospective only applied to remedial statutes, remedial or procedure statutes which do not create, enlarge, diminish or destroy vested or contractual right but relate only to remedies or modes of procedure are generally held to operate retrospectively and to apply to pending actions or proceedings, unless such operation or application would adversely effect substantive rights."

21. What surfaces from the above discussion is that by virtue of the amendment of rule 27 by substitution, as indicated hereinbefore, the age of superannuation of a person, holding the rank of Naik, became 52 years as if rule 27, at all points of time, prescribed the age of superannuation of a person, holding the rank of Naik, as 52 years. Let us consider, in this light, the order of extension of the petitioner's service, which was passed on 23.7.2010. This order read :

"GOVERNMENT OF TRIPURA

OFFICE OF THE DIRECTORATE GENERAL OF POLICE

TRIPURA: AGARTALA

ORDER

Subject : Regarding extension of service for a period of three months beyond superannuation age in TSR in respect of Naik (OPr) Dwijadas Chakraborty of TSR 8th (IRIII) Bn.

No. "01080856 Naik (OPr) Dwijadas Chakraborty (GroupC) of TSR 8th Bn. is hereby granted 3 (three) months extension in service beyond age of superannuation in TSR w.e.f. 01/09/2010 to 30.11.2010.

2. This has been issued by exercising the power of the Head of Department as laid in Memorandum of the Appointment and Services Department Government of Tripura issued vide No. F.19(2)GA/77(IXii) dated 25th May, 1998.

Sd/(Pranay Sahay)

Director General of Police

Tripura: Agartala."

22. From a minute reading of the order, dated 23.7.2010, it becomes clear that before the petitioner could retire, in the ordinary course, on expiry of 31.8.2010, his service stood extended till 30.11.2010. The petitioner, thus, was a member of the Rifles on 23.7.2010, he did not retire as he would have, otherwise, retired on superannuation on expiry of 31.8.2010, but continued to remain a member of the Rifles, i.e., TSR, till 30.11.2010.

23. What, therefore, follows is that when rule 27 came to be amended, on 20.10.2010, by increasing the age of the holders of the rank of Naik to 52 years, the petitioner, being in service as a member of the Rifles, was entitled to remain in service up to the age of superannuation of 52 years. Though the petitioner was on extended service, the fact of the matter remains that the extension was granted to him before he had, stood retired, on superannuation, on 31.8.2010, and he, thus, continued to remain a member of the Rifles without any break till 30.11.2010 and, as the age of superannuation of the persons, holding the rank of Naik, was increased to 52 years, the petitioner ought to have been treated as a person covered by amended rule 27 and, instead of retiring him on 31.8.2010 or 30.11.2010, in terms of the order, dated 23.7.2010, the petitioner ought to have been, in the light of amended rule 27, treated to have retired on 31.8.2010 and not on 30.11.2010 as has been contended by the respondents and concluded by the learned Single Judge.

24. It needs to be carefully noted that by virtue of the order, dated 23.7.2010, the petitioner was retained as a member of the Rifles as his service stood extended by order, dated 23.7.2008, beyond 31.8.2010 and, in fact, up to

30.11.2010. The petitioner could not have, therefore, been described to be a person reemployed; rather, there was continuity in his service and he was, as indicated hereinabove, a member of the Rifles, when the notification, dated 20.10.2010, came into force and by virtue of the amendment of rule 27, he ought to have been treated as a person, who would retire, on superannuation, in the rank of Naik, at the age of 52 years. This having not been done, the decision of respondents/authorities concerned is wholly bad in law and cannot be sustained.

25. Responding to a representation of the petitioner, Deputy Secretary to the Government of Tripura, on 27.11.2010, wrote a letter addressed to the petitioner conveying that the notification, dated 20.10.2010, was meant for persons, who were on regular service on the date of the notification as a member of the TSR as if the petitioner was not a regular member of the TSR.

26. Black's Law Dictionary, (5th edn.), gives meaning of the word "extended" as follows:

"Extended A lengthening out of time previously fixed and not the arbitrary setting of a new date. Stretched, spread, or drawn out."

27. The above definition of the word "extended", given in Black's Law Dictionary, has been relied upon by the Supreme Court in *Provash Chandra Dalui and another v. Biswanath Banerjee and another*, 1989 Supp (1) SCC 487. In fact, the Supreme Court, in *Provash Chandra Dalui (supra)*, has pointed out that "to extend" means to enlarge, expand, lengthen, prolong, to carry out further than its original limit.

28. Since "extended" means "lengthening out of time previously fixed", it clearly follows, as has been correctly held by the learned Single Judge, that the word "extended" means extension of a preexisting benefit and has to be, therefore, read to mean that though the memorandum, dated 13.8.1996, has been made effective from 1st June, 1996, the benefit of the provisions, contained in the said memorandum, stand extended to all "pending" cases, where employment has not been provided so far.

29. In *State of Assam and Another v. Padma Ram Bora*, AIR 1965 SC 473, a Government servant was to retire from service on and from 1.1.1961. But on 22.12.1960, an order of suspension was passed pending the departmental enquiry started against him. This had the effect of placing the servant under suspension and retaining him in service till the departmental enquiry against him were finalised. This suspension order was followed by another order passed on 6.1.1961 fixing a period of three months from 1.1.1961? Under this order, the service of the servant came to an end on 31.3.1961. The departmental enquiry not having been concluded, the State Government passed an order, on 9.5.1961, extending the service of the servant for a further period of three months with effect from 1.4.1961. In the context of these facts, the Supreme Court held, at para 7, in *Padma Ram Bora (supra)*, thus :

"7. Let us proceed on the footing, as urged by learned counsel for the appellant, that the order dated December 22, 1960 itself amounts to an order retaining the respondent in service till departmental proceedings to be drawn up against him are finalised..... Therefore, the effect of the order dated 22nd December, 1960 was twofold : firstly, it placed the respondent under suspension and secondly, it retained the respondent in service till departmental proceedings against him were finalised. We treat the order as an order under Fundamental Rule 56 which order having been made before January 1, 1961, the date of respondent's retirement, cannot be bad on the ground of retrospectivity. Then, we come to the order dated 6th January, 1961. That order obviously modified the earlier order of 22nd December, 1960 inasmuch as it fixed a period of three months from 1st January, 1961 or till the disposal of the departmental proceedings, whichever is earlier, for retaining the respondent in service. The period of three months fixed by this order expired on 31st March, 1961. Thus, the effect of the order of 6th January, 1961 was that the service of the respondent would come to an end on 31st March, 1961 unless the departmental proceedings were disposed of at a date earlier than 31st March, 1961. It is admitted that the departmental proceedings were not concluded before 31st March, 1961. The clear effect of the order of 6th January, 1961, therefore, was that the service of the respondent came to an end on 31st March, 1961. This was so not because retirement was automatic but because the State Government had itself fixed the date up to which the service of the respondent would be retained. The State Government made no further order before 31st March, 1961, but about a month or so after passed an order on 9th May, 1961 extending the service of the respondent for a further period of three months with effect from 1st April, 1961. We do not think that the State Government had any jurisdiction to pass such an order on 9th May, 1961. According to the earlier order of the State Government itself, the service of the respondent had come to an end on 31st March, 1961. The State Government could not by unilateral action create a fresh contract of service to take effect from 1st April, 1961. If the State Government wished to continue the service of the respondent for a further period, the State Government should have issued a notification before 31st March, 1961."

30. From what has been observed, in *Padma Ram Bora (supra)*, it becomes clear that the order, purporting to remove the appellant from the service at a time, when he had almost two years of service, is a mere nullity and the same cannot be sustained.

31. The learned Single Judge seriously fell into error in treating the petitioner's extension of service by virtue of the order, dated 23.7.2010, as an order of "reemployment". Had the petitioner been allowed to retire and, then, "reemployed", the situation would have been different. Far from this, the petitioner was not allowed to retire and was continued in service and he was still a member of the Rifles, when the amendment of rule 27 took place and since the said amendment was brought, by way of "substitution", the petitioner was fully

covered by the amendment and could not have been retired before he had completed the age of 52 years.

32. Because of what have been discussed and pointed out above, this appeal succeeds. The impugned orders, dated 27.1.2010 and 30.11.2010, are hereby set aside and quashed.

33. No order as to costs.