

(1982) 03 CAL CK 0036
In the Calcutta High Court
Case No : C.R. No. 12776 (W) of 1980

Ganendra Nath Mukherjee	Vs	APPELLANT
Executive Officer, Khardah Municipality and Others		RESPONDENT

Date of Decision : 18-03-1982

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : 86 CWN 576

Hon'ble Judges : G.N. Ray, J

Bench : Single Bench

Advocate : Kalyanmoy Ganguly and Asit Kumar Bhattacharjee, for the Appellant; K.M. Yusuf for the State and Sibram Sett for the Municipality, for the Respondent

Final Decision : Dismissed

Judgement

G.N. RAY, J.—This Rule is directed against Memo dated October 13 1980, issued by the Executive Officer of the Khardah Municipality directing the petitioner to hand over the charge as the re-employment proposal of the petitioner had been rejected by the State Government by Order dated July 28, 1980. The petitioner also challenges the legality and/or validity of the order dated July 28, 1980, whereby the Government rejected the proposal of reemployment of the petitioner with effect from August 1, 1980 for a period of one year. It appears that the petitioner was a permanent employee of the Khardah Municipality and the petitioner Was due to retire on superannuation on August 1, 1980 after attaining of 58 years as per the then existing service condition. The petitioner contends that before the age of superannuation, the Commissioners of the Municipality upon consideration of the meritorious service rendered by the petitioner for a pretty long time adopted a resolution to extend the service of the petitioner for one year from August 1, 1980 to July 31, 1981. The petitioner contends that unfortunately through misapprehension, in the resolution it was also stated that the State Government should be moved for getting approval or

the said resolution. According to the petitioner, for such extension of the service or a Municipal employee in terms of the model rules as adopted by the Municipality and accepted by the State Government, it is not necessary to get approval of the State Government in the matter or extension of service. The petitioner also contends that the petitioner pointed out the then Chairman of the Municipality that the request for formal approval of the resolution taken for extension of the petitioner's service by one year was misconceived and the Chairman assured the petitioner that necessary rectification of that part of the resolution would be made but as the Municipality was superseded and an Executive Officer u/s 67A was appointed the proposed rectification of the Resolution was not made. The petitioner further contends that the right of the petitioner to continue in service for one year in terms of the resolution duly adopted and passed by the Commissioners of the Municipality, however, remained unaffected. The petitioner contends that although for the purpose of extension of the petitioner's service no approval by the State Government was necessary in law the State Government intimated the Executive Officer that the request for approval of the extension of service of the petitioner was rejected by the State Government., Accordingly, the Executive Officer asked the petitioner to hand over charge immediately. It is contended by the petitioner in the instant Rule that the petitioner's service was validly extended for one year with effect from August 1, 1980 and such extension did not depend upon the approval to be made by the State Government and as such rejection of the request of the Municipality to give approval of the extension already granted to the petitioner was immaterial and could not affect the right of the petitioner to continue in service. The petitioner contends that while the petitioner was continuing in service on the basis of such extension granted to the petitioner, the service condition of the Municipal employees was changed in terms of the amendment of the Bengal Municipal Act, and such amendment came Into force from April 2, 1981 and the age of superannuation of the Municipal employees has now been fixed at 60 years. The petitioner contends that accordingly the petitioner will retire on superannuation on July 31, 1982 on attaining the age of 60 years. It is also contended by the petitioner that the Municipality has also granted extension of service to some other employees of the Municipality without taking prior approval of the State Government but for reasons best known to the respondent the petitioner was singled out and the service of the petitioner was sought to be terminated on the footing that as the State Government refused to grant extension, the petitioner's Service must come to an end. The petitioners as a matter of fact, has given specific instances of such extension of service in respect of other employees of the Khardah Municipality.

2. Mr. Ganguly, the learned Counsel, appearing for the petitioner, has submitted that the State Government proceeded on a misconception by equating re-employment with extension of service. Mr. Ganguly submits that the concept of extension of service is completely different from the concept of re-employment. The question of re-employment arises when the contract of service or

employment comes to an end but if extension is given to an employee the service does not come to an end but the period gets enlarged. He has relied on a passage from Stroud's Judicial Dictionary Volume 2 at page 982. It has been noted in the said dictionary by quoting a decision made in the case of Brooke v. Clarke reported in 1 B. & Ald page 399 that Extension" is a term properly used for the purpose of enlarging, or giving further duration to, any existing right, but does not import there-vesting of an expired right; that would not be an "extension" but a re-creation". Mr. Ganguly has also referred to a decision of the Mysore High Court made in the case of Shama Rao vs. State of Mysore reported in AIR 1963 Mysore at page 208 In the said case the Government, on being satisfied that a civil servant who had reached the age of superannuation, had a satisfactory record of service, extended his period of service, according to rules framed by the Government in that behalf, but by a subsequent notification the Government recalled the previous order of extension without affording to the civil servant any of the opportunities guaranteed to him under Article 311 of the Constitution. The question arose as to whether or not the subsequent notification was patently wrong and was liable to be set aside. A Division Bench of the Mysore High Court held in the said case that where the Government had extended the service of a civil servant after reaching the conclusion that his record of service was satisfactory, the Government servant acquired the right to continue in service during the, extended period, unless he was removed from his post by process known to law. The Government after it had granted extension must treat the civil servant whose service had been extended as a civil servant whose tenure of service had not yet come to an end with the result that the civil servant had the same rights and the same privileges which he had before his service was extended. Mr. Ganguly contends that the facts of the instant case stand on a firmer footing. In the instant case the extension was granted before the petitioner had actually attained the age of superannuation and such extension was within the powers of the Municipal Commissioners under the model rules adopted by the Municipality and accepted by the State Government under the provisions of the Bengal Municipal Act. The net result was that when the date of superannuation came, the petitioner remained a Municipal employee as before and as such there could not have any occasion for re-employment of the petitioner on attaining the age of superannuation. Referring to the aforesaid passage in the Stroud's Judicial Dictionary, Mr. Ganguly contends that extension does not envisage re-vesting of an expired right. Such re-vesting will not be extension but will be re-creation. In this connection Mr. Ganguly has also drawn the attention of the Court to Annexure "K" of the Supplementary Affidavit filed by the petitioner.

3. The said Annexure "K" is a copy of the decision of the Government as communicated by the Special Officer and Deputy Secretary, Government of West Bengal, Municipal service to the Commissioner of Jalpaiguri relating to extension of service of one Shri Dip Tshering Lepcha who was Head Clerk cum-Accountant of the Kalimpong Municipality. The Deputy Secretary informed the Commissioner

of Jalpaiguri in reply to the Commissioner's correspondence with the Municipal Service Department of the Government of West Bengal that it was decided by the Government that re-employment in service and extension of service were not the same. Extension of service of an ex-existing incumbent in the same post could not be termed as new appointment. It simply meant extension of the period of the appointment already sanctioned and as such the same did not come under the purview of Section 66(s) (ii) of the Bengal Municipal Act 1932. Under the model Rules regarding appointment of Municipal Officer.; and servants when adopted by the Municipality, the Municipal Commissioners at a meeting were competent to sanction such extension without prejudice to the provisions of the Act, but in the case of re-employment the incumbent could not be allowed to draw his remuneration at the same rate as was drawn by him immediately before superannuation. Mr. Ganguly states that the said decision of the State Government is in conformity with the definition of extension and the powers given to the Municipal Commissioners under the model Rules and as a matter of act completely supports the case made by the petitioner in the instant Rule. Mr. Ganguly submits that unfortunately without any justification a different view was sought to be made by the State Government and also by the Respondents in the case of the petitioner.

4. Mr. Sett, the learned Counsel appearing for the authorities of Khardah Municipality, however, submits that extension of the service of the employee became effective only after he attained the age of superannuation and as such, such extension was nothing but re-employment after retirement. Accordingly, the prior approval of the State Government was necessary. He submits that Section 75 of the Bengal Municipal Act was amended by the Bengal Municipal Second Amendment Act of 1976 and such amendment was published in the extraordinary issue of the Calcutta Gazette of November 15, 1976. Under the amended provisions of Section 75, a proviso has been added to Section 75 wherein it is stated that the age of superannuation of municipal officers and servants shall be such as may be prescribed by the State Government and no officer or servant after retirement shall be re-employed in any post without the prior sanction of the State Government". Mr. Sett submits that the Rules contained in the model Rules adopted for Khardah Municipality must be subject to the amended provisions of Section 75 and as under the said amendment provision, no reemployment is permissible without prior approval of the State Government when an employee attains the age of superannuation. The purported extension of the service of the petitioner must be held to be bad and of no consequence because such approval was not obtained previously and was also not granted subsequently. Mr. Sett has drawn the attention of the Court to a communication received by the Khardah Municipality from the Deputy Secretary to the Government of West Bengal, Department of Urban Development regarding re-employment of Municipal employees and the Deputy Secretary informed by the said Memo that many Municipalities have granted re-employment of their staff beyond the age of superannuation in anticipation of Government orders but that

practice should be stopped forthwith as re-employment or extension of services of the staff of the Municipality beyond the age of superannuation was not the general policy of the Government and in a very exceptional circumstances and with prior approval of Government u/s 75 of the Bengal Municipal Act, 1932 such re-employment could be made. Mr. Yusuf, the learned Counsel"- appearing for the State, also supported Mr. Sett in his contention.

5. Mr. Ganguly, the learned Counsel, in reply to the said contention of the learned Counsels appearing for the respondents, has submitted that as the extension of service cannot be equated with re-employment for the reasons indicated hereinabove the question of prior approval even under the amended Section 75 does not arise, in the facts of the case. He also submits that the State Government also understood the implication of extension of service as indicated in the communication in respect of the employee of the Kalimpong Municipality referred to hereinbefore but the subsequent Memo of the Deputy Secretary was for all intent and purpose a communication regarding reemployment of service and even if it, is assumed that the Government had asked for prior approval in the matter of extension of service, such contention of the State Government must not be accepted to be correct.

6. After considering the respective submissions of the learned Counsels appearing for the parties, it appears to me that extension of service implies enlargement of the period of service and consequent continuation of service without any break and re-employment envisages first a determination or cessation of service and thereafter re-creation. In my view, Mr. Ganguly is justified in his contention that the petitioner having obtained an extension of service under the existing Rules as contained in the model rules before the date of superannuation must be deemed to be continuing in service despite the fact that he had attained the normal age of superannuation on August 1, 1980 during the continuance of extended period. In the circumstances, it cannot be contended that the petitioner's service automatically came to an end on the said date and thereafter he was allowed to continue as a re-employed employee. The petitioner, in my view, on the basis of extended service, is entitled to be treated as an employee all through continuing in service thereby entitled to normal increments and other benefits on the basis of the length of service without any break. As during the continuance of the service of the petitioner on the strength of extension granted to him the service condition of the petitioner has been changed by the said Municipal Amendment Act, the petitioner is entitled to continue in service until he attains the age of 60 years. The writ petition therefore, succeeds and the respondents are directed to treat the petitioner as in service and pay all arrears of salaries and emoluments within two months from today on the basis that the petitioner has been continuing in service all along.

There will be no order as to costs.