(2003) 09 OHC CK 0052

In the Orissa High Court

Case No : Original Jurisdiction Case No. 18543 of 1998

Girija Shankar Panda APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 05-09-2003

Acts Referred:
COMPANIES ACT, 1956 — Section 442, 446

Citation : (2004) 97 CLT 125 : (2003) OLR 723 Supp

Hon'ble Judges : Sujit Barman Roy, C.J;P.K. Mohanty, J

Bench : Division Bench

Advocate : J. Pattnaik, A.A. Das, R. Rath, B. Mohanty, T.K. Pattanik, B.P. Misra, S. Das and P.K. Mohanty, for the Appellant; Standing Counsel (Central), for the Respondent

Final Decision : Allowed

Judgement

P. K. Mohanty, J.—The petitioner seeks for a declaration that he is entitled to continue in service till he reaches 60 years of age and as such entitled to continue upto 31.12.2000 in view of the policy decision of the Government of India.

2. The brief fact of the petitioner''s case is that he was working as a Director (Projects and Technology) in the National Aluminium Company Ltd. (Opp. Party No. 3), having been appointed by the Government of India by order dated 28.2.1995, a copy of which is Annexure-1. In terms of Annexure-1, the petitioner was to superannuate from service on attaining 58 years of age as on 31.12.1998 in accordance with the prevailing service Rules. The terms and conditions of service of the petitioner were stipulated under Annexure-2. The Government of India decided to enhance the age of superannuation from 58 to 60 years for all Government servants and also in respect of Board Level appointees of the Central Public Sector Undertaking Enterprises which includes Opp. Party No. 3, the National Aluminium Company Ltd. A copy of the decision of the Government is Annexure-3. The petitioner claims that he being a Director of the National

Aluminium Company, (hereinafter called "NALCO") is a Board Level appointee and, therefore, covered under the orders in Annexure-3. The opposite party No. 3 initiated necessary proposals in favour of the petitioner and requested the Government of India in the Department of Mines, to allow him to continue in service in terms of Annexure-3 vide letter dated 20.6.1998 (Annexure-4). The petitioner was expecting an appropriate order in his favour, but since he was reaching the age of 58 years by 31.12.1998; finding no other alternative, approached this Court.

3. The opposite parties 1 and 2 have filed a counter affidavit denying the claim of the petitioner and opp. Party No. 3, by an affidavit has adopted the said counter. It is the stand of the Union of India (opp. Parties 1 and 2) that the petitioner was appointed as Director (Production) in NALCO with effect from 28.2.1995 till the date of his superannuation on 31.12.1998 basing on the age of superannuation as 58 years. The Government of India, however, increased the age of superannuation from 56 to 60 years with effect from 30.5.1998 in respect of Board Level appointees in Central Public Sector undertakings vide Office Memorandum dated 30.5.1998. But it is their case that as per Para-1 (c) of the said memorandum, the existing incumbents who have not completed 58 years or five years tenure may continue up to 60 years or completion of five years tenure whichever is earlier. However, since according to the decision, a person may be allowed to continue in service, the word ''may'' implies that a discretion has to be applied on the part of competent authority and such discretion involves proper assessment of the Officer''s competence to continue to handle the responsibilities of the job. In the case of Sri G. S. Panda, it had become very relevant and important to have proper assessment because in the year 7998-99 (first half), there was a serious break-down in the Potline of NALCO Aluminium plant at Angul which resulted in an estimated loss of Rs. 190 crores due to loss of production in terms of quantity and quality. The Government constituted an Enquiry Committee headed by the Chairman, Hindustan Aeronautics Ltd., (HAL), Bangalore which brought out several serious administrative lapses and concluded that the main cause of the crisis was non-adherence to standard operating practices in the Smelter, and this was a failure of those in charge of production in the Angul Smelter and Sri Panda was the Director (Production) at that time. According to the opposite parties, in the circumstances his case was referred to Public Enterprises Selection Board (PESB) by Department of Mines for joint appraisal, which considered the case in its meeting held on 3.12.1998 where Sri Panda was given the opportunity to assist the PESB in their appraisal. After taking into account all factors including the submissions made by Sri Panda in course of joint appraisal with particular regard to the findings of Enquiry Committee set-up by the Ministry of Mines, the data-based performance report, the special performance report and the ACRS, PESB the committee was of the view that in the absence of attributes, including managerial ability, leadership quality, board vision, and his inability to rise to the occasion to handle the crisis there was no case for further continuance of Sri.G. S. Panda as Director and,

therefore, recommended that his tenure may not be extended beyond 31.12.1998. A copy of the'' recommendation has been annexed as Annexure-A to their counter. Such report was accepted by the Department of Mines and proposal for non-extension of his tenure beyond 31.12.1998 was sent to the office of the Establishment Officer, Department of Personnel and Training for obtaining approval of the Appointment Committee of the Cabinet (ACC). Approval of the ACC for not extending the tenure of Sri Panda was received on 31.12.1998, copy whereof is Annexure-B. According to the opp. Parties, in such circumstances, the tenure of the petitioner was not extended.

4. In view of the pleadings of the parties, the moot question that requires consideration is as to whether in terms of the office memorandum of the Government of India, Ministry of Industries, Department of Public Enterprises dated 30.5.1998 (Annexure-3), there is any scope for the administrative department to consider the case of individual officers at the Board level for their continuance.

5. The petitioner was appointed in terms of Article 63(1)(c) of the Articles of Association of National Aluminium Company Limited (NALCO) as a Director (Production) with effect from the date he assumes charges till the date of superannuation on 31.12.1998 vide Ministry of Mines Order dated 28.2.1995, copy whereof is Annexure-1. The details of terms and conditions of appointment of the petitioner, Sri G. S. Panda is contained in the Ministry of Mines letter dated 19.6.1995 (Annexure-2). Under Clause (i), the period of his appointment was up to 31.12.1998 with effect from 28.2.1995 till the age of superannuation. Undisputedly the age of superannuation of Board level appointee as on the date of appointment was 58 years and the petitioner was completing the age of 58 years as on 3.12.1998, his date of birth being 3.12.1940. The appointment was subject to conduct discipline and Appeal Rules framed by the PSE in respect of their non-workmen category of staff which would mutatis mutandis apply to him with the modification that the Disciplinary Authority in his case would be the president. The DGM (HRD) in his letter dated 20.6.1998 addressed to the Under Secretary to the Government of India, Department of Mines, Ministry of Steel and Mines with reference to office memorandum dated 30.5.1998 raising the age of retirement of Board Level appointees for extension of petitioner''s tenure till 27.2.2000 since the petitioner would have complete five years tenure as Director by that date.

The office memorandum dated 30.5.1998 may be quoted hereunder for ready reference :

Subject : Age of retirement of Board Level appointees in Central PSEs-raising from 58 to 60 years.

The undersigned is directed to say that the Government has decided to enhance the age of retirement for board level appointees of Central PSEs in the manner mentioned below :

(a) The age of retirement of board level appointees in PSEs will be 60 years with effect from the date of issue of the O.M.

(b) This will not apply to those who are on extension beyond 58 years on the date of issue of this OM, They will retire upon expiry of the extension.

(c) Those existing incumbents who have not completed 58 years or 5 years'' tenure may continue up to 60 years or completion of 5 years'' tenure, whichever is earlier, Orders may be issued by the Ministries concerned without reference to ACC.

(d) Where ''existing incumbents complete 5 year'' tenure and there is a need to continue their service up to 60 years, reference will first have to have made to PSEB on a case by case basis for assessment of their performance and thereafter approval of ACC obtained as per usual procedure.

(e) If as a consequence of (c) above, an existing incumbent completes 5 years'' tenure before 31st August, 1998 and it is considered necessary to continue his service, the administrative Ministry/ Department with the approval of the Minister concerned may grant extension of tenure up to three months pending completion of the procedures as prescribed in (d) above.

2. All the administrative Ministries/Departments are requested to take necessary action to implement the above decisions.

6. A perusal of Para-1 (a) and (c) of the Office Memorandum above would unerringly indicate that those existing incumbents who have not completed 58 years or five years tenure were to continue up to 60 years or completion of five years tenure whichever is earlier, the age of superannuation being enhanced to 60 years. In view of the memorandum, the order of extension was required to be issued by the concerned Ministries without reference to the ACC. The contention of the opposite parties is that in view of the word ''may'' used in Clause (c) the authorities are vested with the right either to or not to enhance such age of superannuation depending upon the assessment of the officer''s competence to continue and to handle responsibilities of the job. A conjoint reading of clauses (a) and (c) of Para-1 of the office memorandum in its letter and spirit would mean that the tenure of such officer covered thereunder shall be continued up to 60 years or completion of five years tenure whichever is earlier. The word ''may'' used in Clause (c) will have to be read in the context of extension of the age of superannuation and mean ''shall'' since there is no stipulation vesting any power with such authority either to allow continuance or not to allow continuance of the incumbents inasmuch as the Ministries concerned were authorized to issue the orders without reference to ACC. The stipulation that the orders may be issued by the concerned Ministry without reference to the ACC is of special significance and makes it clear that nothing further than giving extension is to be done by them. On a reading of the office memorandum, there can be no manner of doubt that the Ministries concerned did not have the option to assess the merit or suitability of the concerned officers for their continuance in office. It is not in

dispute rather it is the admitted case that the petitioner is covered under Paragraph-1(c) of the Office Memorandum, but the Ministry of Mines appears to have undertaken the exercise of assessing the merit and desirability for extension of petitioner''s service, while the mandate of the office memorandum was that the age of superannuation of Board Level appointees stand extended up to 60 years, subject, however, to clause (a) to (e) of Para-1. In course of joint appraisal the Board went into a critical evaluation of the performance of the petitioner on the basis of the finding of the Enquiry Committee report and the administrative Ministry. The Board also heard the oral submission of the petitioner and on taking into consideration all the relevant factors, the Joint Appraisal Committee on the basis of the Enquiry Committee set up by the Ministry of. Mines, data-based performance report, the special performance report, the ACRs and the inputs given by the Secretary, Ministry of Mines, was of the view that in the absence of attributes including managerial ability, leadership quality, broad vision and his inability to rise to the occasion to handle the crisis which eventually resulted in huge loss to the Corporation. There was no case for further continuance of Sri G. S. Panda as Director (Production). The appointment Committee of the Cabinet approved the proposal for not extending the tenure beyond 31.12.1998 as communicated in letter dated 31.12.1998 of the Under Secretary to the Government of India, Department of Personnel and Training copy of whereof is Annexure-8 to the counter affidavit. If the intention of the Government of India in taking the decision for continuance of a Board Level Appointee was subject to the assessment of the performance, then it ought to have been stipulated in the said memorandum itself. Rather the mandate that Ministries were authorized to pass appropriate orders without reference to the Appointment Committee of the Cabinet (ACC), makes it clear that it was more or less of clerical nature.

7. It is strenuously urged on behalf of the opp. Parties that the word "may" used in clause "c" of Para-1 of the memorandum clearly implies and vests a discretion on the Administrative Department of the concerned PESB to consider and assess the competence and desirability of the Officer to get the benefit of enhancement of age of superannuation or extension. It is also urged that in respect of the petitioner it was more necessary since during the incumbency of the petitioner as the Director (Production) in the year 1998-99, there was a serious break down in the front line of NALCO Aluminium plant at Angul resulting in huge loss for which an Enquiry Committee was constituted and the Committee opined that the cause of crisis was non-adherence to standard operating practice in the smelter and this was the failure of those in charge of production. The contention is raised in the premises that the office memorandum authorized the Administrative Department of the Board Level Officer to consider and assess the desirability of extending the age of superannuation. It appears that there having no departmental enquiry against the petitioner on the alleged lapses nor he was found guilty on any lapses excepting while considering extension in terms of the office memorandum the report of the Committee was taken into consideration.

8. In view of the submissions raised at the Bar, the question for determination is as to whether the word "may" used in Clause-C of para-1 would mean ''shall'' or ''must'' or merely directory giving option to the concerned Ministry to consider and appraise the merit and desirability of the officer concerned to allow him continuance till the 60th year or completion of the term of 5 years whichever is earlier. Generally the word "may" does not mean "must" or "shall", but it is well settled that the word "may" can mean, "must" or "shall", in the light of the context. It is also well settled that where discretion is conferred upon a public authority coupled with the obligation, the word "may" which denotes discretion should be construed to mean a command. While-vesting a power at a high office the word "may" is used out of deference to the high status of the authority on whom the. power and the obligation are intended to be conferred and imposed. The sole purpose of the office memorandum is enhancement of the age of retirement in respect of the Board Level Appointees or the Central PESB. If the views of the opp. Parties are accepted and it is construed that in view of the mention of the word "may" in clause "c" of the Office Memorandum, it vests on a discretion on the authority concerned to reappraise and reassess the relevance or desirability or continuance of an Officer till the enhanced age of superannuation as contemplated in the memorandum, but a plain reading of the memorandum indicates otherwise. The decision making authority presumably thought having regard to the status of the concerned Ministries, it would be appropriate to use the word ''may'' instead of ''must''. In the context, therefore, keeping in view the purpose of issuing Office Memorandum the word ''may'' shall have to be construed as ''shall'' or ''must'' since it puts an obligation on the concerned authorities to act upon the notification in its letter and spirit.

9. In the case of State of Uttar Pradesh Vs. Jogendra Singh, the Apex Court while construing the word ''may'' used in Rule 4(2) of the U.P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 took the view that the Rule is to provide an option to the Gazetted Government servants to request the Governor that their cases should be tried by an Administrative Tribunal and not otherwise. The rule-making authority presumably thought that having regard to the status of the Gazetted Government servants, it would be legitimate to given such an option to them. The Rule, therefore, imposes an obligation on the Governor to grant a request made by the Gazetted Government servant that his case should be referred to the Tribunal under the Rules and not by an appropriate authority under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules. It was held that where discretion is conferred upon a public authority coupled with an obligation, the word ''may'' which denotes discretion should be construed to mean a command.

10. The Apex Court in the case of The Official Liquidator Vs. Dharti Dhan (P) Ltd., while construing the powers conferred u/s 442(b) and 446 of the Companies Act, to stay proceedings whether discretionary by using the word "may" before stay the proceedings, observed that it is always the purpose of the power which has to be examined in order to determine the scope of the discretion conferred upon

the donee of the power. If the conditions in which power is to be exercised in a particular case are also specified by a statute, then on the fulfillment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner. Where power is wide enough to cover both acceptance or refusal of an application for its exercise depending upon the facts, it is directory or discretionary. However, if the conditions in which the power is to be exercised in particular cases are also specified by a Statute, then, on fulfillment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner only.

11. In State (Delhi Admn.) Vs. I.K. Nangia and Another, the Apex Court while construing the Explanation 17(2) of the Prevention of Food Adulteration Act and considering the word "may" used therein, held that though the explanation in terms, permissible impose a duty on such a Company to nominate a person in relation to different establishment of branches or units, the word "may" used therein implies the purpose of a public duty as otherwise the scheme underlying the Section could be unworkable. It was held that normally the word "may" implies what is optional but, it should in the context in which it appears mean ''must'', since an element of compulsion and it is a power coupled with a duty.

12. In the case at hand, it may be reiterated that the office memorandum (Annexure-3) unequivocally declared the Government decision of enhancing the age of retirement for Board Level appointees of Central PESB on the conditions and in the manner mentioned therein. Admittedly the petitioner comes within the scope and ambit of Clause (c), paragraph-1 of the memorandum which declares that the incumbent who have not completed 58 years or five years tenure, may continue up to 60 years or completion of 5 years tenure whichever earlier. It also authorized the Ministries concerned to issue necessary orders without reference to the ACC and as such, the power conferred thereunder had to be exercised in the manner and in the terms contained therein and not otherwise. It was not open to the opp. Parties nor a discretion is vested with it, that it should re-assess and consider the desirability of continuance of a person covered under that clause, the petitioner. The office memorandum read and understood as a whole does not contemplate an exercise for re-assessment of desirability of continuance of an Officer covered therein. Nothing has been brought on record to show that a regular disciplinary proceeding was brought against the petitioner and he has been found guilty therein after following the principle of natural justice, while he was continuing in office and the alleged occurrence took place. Thus, the office memorandum did not contemplate or authorized the concerned Ministries to reassess or judge the merit of concerned Officer and his suitability.

13. In view of the conspectus of the decision of the Apex Court and the decision of the Central Government in the office memorandum, that the Board level appointees of Central Government PESB covered under Clause (a) to (e) of paragraph-1 therein are enhanced to 60 years or the end of tenure whichever is earlier, it was not open to the concerned Ministry to further consider as to

whether a person covered thereunder should be allowed to continue in service by re-appraisal of merit of desirability of continuance. Clause (c) of paragraph-1 has thus to be construed as mandatory and it did not vest the concerned Ministries with the discretion to go further-and consider the desirability of enhancement of age of superannuation. The direction in paragraph-2 of the office memorandum that the concerned Ministries/Departments to take necessary action to implement decision, clearly signifies the intention and the mandate that the persons covered under Clauses (a) to (c) of paragraph-1 are to continue in the manner stipulated there under.

14. In such view of the matter, the petitioner being covered under Clause (c) of paragraph-1 was entitled to the benefits of enhancement of age of superannuation till 60 years or till he completed five years tenure, but he has been illegally deprived of such benefits and made to retire on completion of 58 years as on 31.12.1998. The petitioner since would have completed a term of five years by 27.2.2000, he could not have continued till completion of 60th year. Thus we are of the considered view that the petitioner is deemed to have continued in service tilt 27.2.2000 when he was to complete the 5 years tenure and accordingly entitled to be extended all service benefits on such basis. The order dated 31.12.1998 of the Ministry of Steel and Mines, Department of Mines refusing to extend the tenure beyond 31.12.1998 is quashed. The opposite parties are accordingly directed to extend such benefits as are admissible to the petitioner within three months hence.

The writ petition is allowed in the aforesaid terms. However, there shall be no order as to cost.

Sujit Barman Roy, C.J.

15. I agree.

