

(1995) 07 MP CK 0026

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2003 of 1995

Gopinath Jwala Prasad Goyal

APPELLANT

Vs

State of Madhya Pradesh and Another

RESPONDENT

Date of Decision : 24-07-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 226, 233, 233(1), 32

Citation : (1996) JLJ 571 : (1996) 1 MPJR 301 : (1996) 41 MPLJ 457 : (1996) MPLJ 457

Hon'ble Judges : S.K. Dubey, J

Bench : Single Bench

Advocate : Prashant Singh, for the Appellant; A.K. Khaskalam, Government Advocate for Respondent No. 1 and Ravindra Shrivastava, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Dubey, J.

The petitioner was a member of Higher Judicial Service of the State of M. P., on attaining the age of 55 years in afternoon of 3-10-1994, was ordered to be retired in Public interest, by the State Government under Fundamental Rule 56(a) (3) on payment of three months notice pay in lieu of three months notice, vide order dated 15-7-1994 (Annexure P-I). The petitioner challenged the said order before the Supreme Court of India, in Civil original jurisdiction by a petition under Article 32 of the Constitution of India in Writ Petition No. 550 of 1994. The Supreme Court did not find any infirmity in the order and dismissed the petition, vide order dated 26-9-1994 (Annexure P-I-A).

As a consequence of the order (Annexure P-I), mistakenly, the petitioner was relieved on 23-7-1994 from the post of Additional Judge to the Court of District Judge, Bilaspur, at Shakti having found a mistake has crept in, an order dated 25-8-1994 (Annexure P-2) issued in the name of Hon'ble the Chief Justice, the petitioner was ordered to be posted on the vacant post as Eleventh Additional

Judge to the Court of District Judge, Bhopal till afternoon of 3-10-1994. On receipt of this order on 31-8-1994, the petitioner joined at Bhopal on the same day, who, was allowed to continue to hold the post till his retirement on 3-10-1994.

After reply to show cause notice on admission on behalf of the respondent No. 2, the petitioner filed an application for amendment in the petition for seeking permission to take a ground that Fundamental Rule 56(3) is not applicable because it contravenes with Article 233(1) of the Constitution as the appointment or termination of the District Judge can only be made by the Governor after effective consultation, hence, the order (Annexure P-1) of compulsory retirement passed under the Fundamental Rule 56(a)(3) of Fundamental Rules is unconstitutional.

Shri Prashant Singh, learned counsel for the petitioner contends, that the order (Annexure P-1) of the State Government of compulsorily retiring the petitioner is illegal, as the order of compulsory retirement could only have been passed on attaining the age of 55 years, and after effective consultation, whatsoever, with the High Court/the respondent No. 2 as contemplated under Article 233(1) of the Constitution of India, reliance was placed on a decision of the Supreme Court in case of Chandra Mohan v. State of U. P., AIR 1966 SC 1987. It is also submitted that the said order stands superseded by the order of High Court, (Annexure P-2), as after relieving the petitioner, the petitioner was taken back in service and was ordered to be posted at Bhopal, hence, the petitioner could not have been retired from 3-10-1994, as power of retiring a District Judge, vests in the State Government, the order is punitive and is liable to be quashed.

Shri Ravindra Shrivastava, learned counsel for respondent No. 2 submitted that validity of the order of compulsory retirement on its challenge before Hon"ble the Supreme Court stands concluded, the petitioner, by this petition, cannot reagitate the same, only because, the petitioner was mistakenly only relieved, was taken back and posted at Bhopal to continue to hold the office till 3-10-1994. The petitioner did not raise the ground of his relieving prematurely and his reposting, before, the Supreme Court, now cannot be allowed to raise as the petition is barred on the principles of constructive res judicata, reliance was placed on the decisions of Supreme Court in case of Daryao and Others Vs. The State of U.P. and Others, , G.K. Dudani and Others Vs. S.D. Sharma and Others, . It is also submitted that the petitioner had already received three months pay in lieu of three months notice, and had taken the advantage of the order (Annexure P-2), petitioner is estopped to challenge the order, the petition is not maintainable and is liable to be dismissed.

Shri A. K. Khaskalam, learned Government Advocate, supported the submissions made by the learned counsel for respondent No. 2, on preliminary objections.

After hearing counsel, I am of the opinion that this petition has to be dismissed, as once the validity of the order (Annexure P-1) of compulsory retirement,

having been decided by the Supreme Court, the petitioner cannot be allowed to reagitate the same before this Court. It is not that, the grounds of challenge which are being raised now in this petition were not available to the petitioner before the Supreme Court, as admittedly the matter came up for hearing after the petitioner in compliance of order (Annexure P-2), joined at Bhopal and was allowed to continue to hold the post till 3-10-1994.

Besides, admittedly, the appointing authority is the State Government and not the High Court, the order of compulsory retirement was passed in consultation and on advice of the High Court on a resolution passed by the Full Court to recommend the retirement of the petitioner, in "public interest", the order so passed was to come into effect on attaining the age of 55 years, i.e. 3-10-1994, but, because of the D. O. letter of the registry the mistake was committed of relieving the petitioner prior to 3-10-1994, that mistake having come to notice of the Respondent No. 2, an order was passed rectifying the mistake by posting the petitioner and allowing him to work and continue to hold the post of Additional Judge to the Court of District Judge, Bhopal till 3-10-1994 of which all emoluments were paid to the petitioner.

In the circumstances, in the opinion of this Court as the State Government has not passed any fresh order of retirement of the petitioner, the High Court being not the appointing authority, relieving of the petitioner on a letter of Registry of High Court as a consequence of the order (Annexure P-1), and then reposting of the petitioner, vide order (Annexure P-2) will not give fresh cause to the petitioner to challenge and reagitate the legality and validity of the order of retirement which has already been decided by the Supreme Court on merits. After the decision of the Supreme Court, this Court cannot reopen and re-examine the validity of the order of compulsory retirement as the petition under Article 226 of the Constitution is barred on the doctrine of res judicata. As the grounds of challenge, which admittedly were available and were not taken by the petitioner, before the Supreme Court the petition of the petitioner is barred according to Explanation IV to Section 11 of the Code of Civil Procedure. See the decisions of the Supreme Court in cases of Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another, ; C. K. Dudani case (supra); Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others, and The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, .

In the result the petition is dismissed with no order as to costs.