

(2006) 12 OHC CK 0040
In the Orissa High Court

Hari Das

APPELLANT

Vs

Director of Fisheries and Another

RESPONDENT

Date of Decision : 22-12-2006

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2007) 103 CLT 254 : (2007) 1 OLR 350 Supp

Hon'ble Judges : N. Prusty, J;A.K. Ganguly, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A.K. Ganguly, J.—The subject matter of challenge in this writ petition is an order dated 15.10.1998 passed by the Orissa Administrative Tribunal, Bhubaneswar in Original Application No. 8 of 1991, By the said order the Tribunal rejected the Original Application filed by the Petitioner, Hari Das, a driver in the Directorate of Fisheries, Orissa.

2. Hari Das, filed the O.A. impugning an order dated 26.9.1990 by which he was compulsorily retired from service in public interest with effect from 31.12.1990 in exercise of the powers under the first proviso to Sub-Rule (a) of Rule 71 of Orissa Service Code(hereinafter referred to as the "Code"). It is not in dispute that the writ Petitioner, but for the order of compulsory retirement, would have continued in service up to 28.5.1993. But in view of the compulsory retirement the Petitioner's service came to an end with effect from 31.12.1990. The relevant portion of the said Rule under which the Petitioner was compulsorily retired is set out below: "The appropriate authority may also require any officer to retire in public interest any time after he has completed thirty years qualifying service or attained the age of fifty years, by giving a notice in writing to the Government servant at least three months before the date on which he is required to retire or by giving three months pay and allowances in lieu of such notice."

3. It is not in dispute that in the instant case three months notice was given to the Petitioner and in view of such notice he retired from service on 31.12.1990. The only stand which was taken by the Opposite parties before the Tribunal was that in the Confidential Character Roll of the Petitioner certain adverse entries were recorded and the Learned Tribunal accepting the said stand came to a finding that in view of such adverse entries which are recorded in the Confidential Character Roll of the Petitioner, the order of compulsory retirement of the Petitioner in public interest is justified.

4. The adverse entries which were allegedly recorded in the Confidential Character Roll of the Petitioner and were disclosed before the Tribunal are as follows:

1989-90 He is suffering from chronic disease not capable to drive vehicle

1988-89 Not fit

1987-88 Rickety

1986-87 Good

1985-86 Above average

1984-85 Good

5. The Tribunal however in view of such adverse entries in the Confidential Character Roll of the Petitioner, who was a driver, held that he should not have been further retained in service and his compulsory retirement in public interest is justified.

6. Learned Counsel for the Petitioner, who appeared before us and also before the Tribunal, urged that those adverse entries were never communicated to the Petitioner. Factually it is not disputed by the Learned Counsel for the Opposite parties that those adverse entries were ever communicated to the Petitioner. The Learned Tribunal also accepted the position that there has been no communication of those adverse entries to the Petitioner. It is also not in dispute that the Petitioner in course of his service was regularly attending his duties save and except the leave which he had taken for about five months in 1989 and the said leave was sanctioned by the authorities. Even after availing of the leave when the Petitioner came back to join his duty he was asked to appear before the Chief District Medical Officer and the Petitioner did appear before the said. Medical Officer who examined the Petitioner and gave a certificate of fitness on 12.7.1989. Thereafter the Petitioner was allowed to join in duty. There is record to show that in between 12.7.1989 and 26.9.1990, when the order of compulsory retirement was passed the Petitioner had gone on leave on medical ground or for any other purpose.

7. Now the question which crops up in this case is whether in the facts and circumstances of the case an order of compulsory retirement against the Petitioner in public interest can be passed on the basis of uncommunicated

adverse remarks. If we look at the adverse remarks, it would be seen that there is a remark that the Petitioner is suffering from chronic disease and is not capable of driving vehicle. The adverse remarks are mostly on the ground that the Petitioner was suffering from some disease and was unfit. It is nobody's case that prior to recording of the said adverse remarks, the Petitioner was suffering from any disease and was subjected to medical examination by the employer. Apart from that the uncommunicated adverse remarks in the facts and circumstances of the case cannot form the basis of an order of compulsory retirement in view of the Rules which govern the case of compulsory retirement.

8. The attention of the Court has been drawn to a notification issued by the Addl. Chief Secretary to the Government which has been circulated to all the Secretaries to Government regarding Premature Retirement of Government Servants in pursuance of Clause (a) of Rule 71 of the Orissa Service Code. In this connection the attention of this Court has been drawn to Clause-6 of the said notification. Clause-6 of the said notification is set out below:

Premature retirement in pursuance of Clause (a) of R. 71 of the Orissa Service Code can be ordered in public interest only and not as a penalty to the employee concerned. Compulsory retirement is one of the major penalties listed under R.13 of the Orissa Civil Services (Classification, Control and Appeal) Rules and, before it is imposed on any employee, the procedure outlined in the said rules for imposition of major penalties must be complied with. Premature retirement under Clause (a) of R. 71 of the Orissa Service Code is not and must not be used as a substitute that can be restored to more conveniently. In other words, where it appears that any employee is guilty of misconduct or negligence in duty and that he would probably have been compulsorily retired had disciplinary proceedings been initiated against him, the proper course would be to initiate * such proceedings instead of trying to circumvent the prescribed procedure and thereby extinguishing the employee's right of defending himself against allegations of misconduct or negligence. "Premature retirement can only be ordered where it is obvious that retention of the employees in service will not be in public interest.

Pursuant to Clause-6, premature retirement can only be ordered where it is obvious that retention of the employee in service will not be in public interest. In Paragraph 11 of the said notification it has been specifically mentioned "No adverse entries should be used to recommend an employee's premature retirement unless it has been communicated to him" and unless(a) "either the time limit for representation against the remark has expired without his submitting a representation," or (b) "after considering his representation, the original remark has been allowed to stand.

9. From a conjoint reading of the various provisions of the said notification it is clear that if a person has to be compulsorily retired from service on the basis of adverse entries in his Confidential Character Roll such consideration can only be made provided the employee has been given an opportunity to know the adverse

entries in his Confidential Character Roll and is further given an opportunity to make a representation against the same. The Rule is very specific that such representation should be considered and if after consideration of the representation the remarks are not altered, in that case those remarks can be taken into consideration for the purpose of directing compulsory retirement of the employee. In the instant case none of the specified procedures has been followed.

10. This Court is of the opinion that those procedural safeguards are meant for the protection of the employee against any arbitrary exercise of power by the authority in compulsorily retiring an employee. These are administrative instructions to fill up the gap in the statutory Rule. The statutory Rule 71(a) of the Code does not specify any procedure as to how the power of compulsory retirement in public interest shall be exercised. It is well settled where rules are silent that gap can be filled up by administrative instructions which are not inconsistent with the rules. Please see *Sant Ram Sharma Vs. State of Rajasthan and Another*, . Here that gap has been filled up by the aforesaid notification issued by the Government itself for compliance by the Secretaries of the Department of the Government. Therefore, the safeguards indicated in those notification must be followed when compulsory retirement of an employee in public interest has to be ordered.

11. The Learned Tribunal while upholding the compulsory retirement on the basis of uncommunicated adverse remarks has referred to two Judgments of the Supreme Court. One was rendered in the case of *Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another*, and the other was in the case of *The State of Punjab Vs. Gurdas Singh*, .

12. The Learned Judges of the Apex Court while confirming the order of compulsory retirement in the case of *Baikuntha Nath Das* formulated certain principles. One of the principles is that non-communication of adverse remark by itself is not a ground vitiating the order of compulsory retirement. The matter has to be considered in its entirety. In paragraph 31 at pages 1030-1031 of the report, the Learned Judges clarified the position as follows:

We may not be understood as saying either that adverse remarks need not be communicated or that the representations, if any, submitted by the government servants (against such remarks) need not be considered or disposed of. The adverse remarks ought to be communicated in the normal course, as required by the rules/orders in that behalf. Any representations made against them would and should also be dealt with in the normal course, with reasonable promptitude.

Therefore the ratio in the case of *Baikunthanath* was not properly appreciated by the Learned Tribunal in the facts of this case. The provisions of compulsory retirement in Rule 71 (a) of the Code has to be read with administrative circular referred to above.

13. In view of the decision of the Supreme Court in the case of *Sant Ram*, the

administrative notification has the character of a Rule since it fills up the gap in the Rule and such notification must be treated as supplementing the Rules by way of filling up its gaps. However, It may be noted that before the Tribunal the notifications were placed and they are annexed to the O.A. Even then the Tribunal did not consider the same. Thus the Tribunal committed an error of law.

14. The next Judgment on which reliance was placed by the Learned Tribunal is in the case of *The State of Punjab Vs. Gurdas Singh*, . In the said Judgment the Learned Judges of the Supreme Court opined that the authorities while compulsorily retiring a Government employee is required to consider the whole record of service of such employee and adverse entry prior to earning of promotion and uncommunicated adverse entries can also form part of such consideration. In the said case also we do not find that any notification comparable to the present one came up for consideration by the Hon"ble Supreme Court. In the instant case, the notification gives a new complexion to the construction of the relevant Rules in the Code.

15. It has been stated very clearly by the Supreme Court that when executive authorities themselves frame a procedure as has been done in this case, the executive authorities are bound by such procedure. In the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . Hon"ble Mr. Justice P.N. Bhagwati (as his Lordship then was) speaking for the Bench and relying on the formulation by Justice Frankfurter in the case of *Vitarelli v. Seaton* and held that it must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas, the Government cannot act arbitrarily. But it must adhere to the standards fixed by it. The exact observations of Justice Frankfurter which have been quoted at page 1635 of the report are as follows:

An executive agency must be rigorously held to the standard by which it professes its, action to be judged

..."Accordingly," if, dismissal from employment is based on a defined procedure even though generous beyond the requirements that bind such agency that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.

The Apex Court has accepted the said formulation of Justice Frankfurter as valid and applicable in the case of *Dr. Amarjit Singh Ahluwalia Vs. The State of Punjab and Others*, and in another subsequent decision in the case of *Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation*, . The Apex Court further held that the said principle is virtually emanating from Article 14. The Apex Court also held that the said Rule has an independent existence apart from Article 14

and is a Rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority.

16. That being the legal position, in the instant case the elaborate procedure for exercise of the power of compulsory retirement, must be followed while passing an order under Rule 71 (a) of the Code.

17. Apart from the aforesaid legal aspect, coming to the factual aspect, this Court finds that the aforesaid adverse entries relating to the years 1988-89/1989-90 are totally confined to the extent of unfitness of the Petitioner on the ground that he is suffering from chronic disease. What is the disease is not spelt out in the C.C.R. As already noted; the Petitioner has not been communicated with any adverse remarks. As such, the Petitioner did not get any chance for contradicting the said adverse remarks nor was the Petitioner subjected to any test by the Motor Vehicle Inspector or by a doctor about his driving. In the absence of all these, the decision to compulsory retire the Petitioner on the basis of some uncommunicated adverse entries, in the facts of this case amounts to an arbitrary decision.

18. In the instant case, having regard to the legal and factual aspect of the case, this Court is of the opinion that the order of compulsory retirement which has been passed against the Petitioner was not passed in accordance with law and the relevant notification which is governing the field. As such the same is quashed by this Court.

19. The Petitioner however would have otherwise retired from service on 28.5.1993. Therefore, there is no question of reinstatement. The only benefit the Petitioner will get is the financial benefits and we, therefore, direct that the Petitioner's salary which was admissible to him from 31st December, 1990 till 28.5.1993 should be paid to him after deducting the amount which the Petitioner has received by way of pension. The pension of the Petitioner should also be refixed by taking his last pay which he would have received had he continued till 28.5.1993. This exercise should be completed by the Respondents within a period of three months from service of a copy of this Judgment on them.

20. The writ petition is allowed. The order of the Tribunal is quashed. There will be no order as to cost.

N. Prusty, J.

21. I agree.