

(1967) 08 GAU CK 0003
In the Gauhati High Court
Case No : Civil Rule No. 256 of 1966

J. Ahmed

APPELLANT

Vs

The Union of India and others

RESPONDENT

Date of Decision : 01-08-1967

Acts Referred:

All India Services Act, 1951 — Section 3
Constitution of India, 1950 — Article 311

Citation : AIR 1967 Guw 58

Hon'ble Judges : C. Sanjeevarao Naidu, C.J.; P.K. Goswami, J

Bench : Division Bench

Advocate : J.C. Medhi, P.C. Kataki, D.M. Hazarika and S.C. Das, for the Appellant; M.C. Pathak, Sr. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

C. Sanjeeva Row Nayudu, C.J.—The petitioner in this Civil Rule was appointed Extra Assistant Commissioner by the Government of Assam, in which capacity he apparently worked till 1956, during which period he was promoted as Sadar S.D.O. and ultimately in 1958 as the A.D M., Nowgong and soon after promoted to the I.A.S. cadre and appointed as Deputy Commissioner and District Magistrate of Nowgong in 1959 in which post he continued till August 1960, when he was appointed Director of State Small Savings Scheme and transferred to Shillong. During the period he was holding this post, he received a Notification No. PLA.441/60/Pt/33 A dated 14th September, 1969, signed by the then Chief Secretary, Government of Assam (Respondent No. 3 herein), placing him under suspension. (Annexure "A"). Later, by a Memo No. PLA.441/60/Pt/36 dated 13th September, 1960, the 3rd respondent directed the petitioner to show cause by the 5th October 1960 why the petitioner should not be removed from service or otherwise punished under Rule 5(1) read with Rule 10 of the All India Services (Discipline and Appeal) Rules 1955 read with Article 311 of the Constitution. A statement of allegations against the petitioner was appended to the above communication. (Annexures B-1 and B-2).

2. During the period the petitioner was holding the post of the Deputy Commissioner, Nowgong, a general disturbance hereinafter referred to as the "Language Disturbance", took place all over Assam. Shri A. N. Kidwai, the then Additional Chief Secretary to the Government of Assam, made enquiries into the causes of disturbances at Nowgong and the responsibility of the District officials in that regard. According to the petitioner, the show cause notice against the petitioner and the statement of allegations served on him were based on the report submitted by the said Shri Kidwai.

3. The petitioner by his letter dated 17th September, 1960, addressed to the Chief Secretary to the Government of Assam, requested the latter to furnish the petitioner with a copy of the report of Shri A. N. Kidwai, but that copy of the report was, however, not furnished to the petitioner, in spite of the fact that in the show cause notice served on the petitioner, the Government had expressly made a reference to the enquiry made and the report submitted by Shri A. N. Kidwai and that the report had shown that the petitioner, who was then the Deputy Commissioner, Nowgong, was negligent in the performance of his duties, as borne out by the report of Shri A. N. Kidwai. The petitioner claims that the refusal to furnish him with the copy of the report of Shri A. N. Kidwai, on which the whole proceedings against him were based, amounted to a negation of the reasonable opportunity that he was entitled to have to defend himself. Consequentially the petitioner had to submit his explanation on 11th January 1960, without having the benefit and advantage of perusing the report made by Shri A. N. Kidwai against him in the matter. (Annexure "D").

4. An officer of the State Government, Sri K. Balachandran I.C.S. Respondent No. 4 herein) was then appointed to enquire into the charges against the petitioner. As the petitioner was not in good health, he applied for permission to engage a counsel to represent him at the enquiry, which prayer, however, was refused by the Enquiry Officer (Respondent. No. 4) (Annexures E-1 and E-2. The petitioner claims that the refusal by the Enquiry Officer to give him permission to be represented by a Lawyer the departmental proceedings resulted in the denial of a reasonable opportunity of being heard in his defence.

The petitioner further submits that he was not allowed full opportunity to cross-examine important witnesses and was sometimes stopped from cross-examining the prosecution witnesses on vital points. The petitioner pointed out his petition a number of reasons from which, according to the petitioner, it should be concluded that the Enquiry Officer was very much biased and prejudiced against him. Consequently, the petitioner applied to the Government for a chance in the Enquiry Officer, but his request was turned down.

After the enquiry was concluded, the Deputy Secretary to the Government of India asked the petitioner in his communication No. F.7/2/62-Viz. dated 22nd February 1963 to show cause why he should not be removed from service and directed the petitioner to submit his explanation in writing. A copy of the report of the Enquiry Officer was enclosed with the communication. (Annexures I (1) & I

(2)).

5. The petitioner was due to retire from service on 31-1-1962 on his completing the age of 55 but the Government of Assam by Memo No. AAI. 24/60/43 dated 31-1-1962 retained the petitioner in service for a period of 3 months or till the termination of the departmental proceedings whichever is earlier and this period of 3 months expired on 1-5-62. Some 52 days thereafter, on 21-6-62, the Government of Assam issued a Memo No. AAI-24/60/52 retaining the petitioner in service for a further period of 3 months retrospectively from 1-5-62, and this period of 3 months again expired on 1-8-1962. Some 31 days thereafter, on 1-9-62 the Government issued yet another notification, under Memo No. AAI/24/60/160 directing the retention of the petitioner in service for a further period of six months, retrospectively from 1-8-62, which period of six months again expired on 1-2-63. On 23-2-63 the Government issued another notification under MEMO NO. AAI.24/60/Pr/28 directing the (sic) of the petitioner in service for a further period of six months, retrospectively from 1-2-63 and this period of six months again expired on 1-8-63 and the Government again issued a further notification under Memo No. AAT.24/60/1P6 on 28-3-63 that is 28 days after 1-8-63, (sic) the intention of the petitioner in service for a further period from 1-8-63 till the conclusion of the enquiry and the passing of final orders in the proceedings.

The petitioner submitted that the clear effect of the order dated 31-1-1962 was that the service of the petitioner came to an end on 1-5-62 and the State Government had no jurisdiction to extend the service of the petitioner some 52 days after the expiry of the period on 1-5-62. The petitioner submitted that the State Government had no jurisdiction to estate a fresh contract of service by unilateral action on 1-5-62 and that all notifications issued by the State Government regaining the petitioner in service without his consent after 1-5-62, were null and void and, therefore, the petitioner must be deemed to have retired from service at least by 1-5-62, and was, therefore, not amenable to any departmental proceedings being taken against him thereafter.

6. Further, the petitioner submitted that a copy of the notification of the Government of India. Ministry of Home Affairs New Delhi. No. 7/2/62-Viz. dated (sic) was sent to him which read that the (sic) in consultation with the Under Public Service Commission, removed (sic) Ahmed, an officer borne on the Assam Cadre of Indian Administrative Service from service with immediate effect (Annexure "K"). The petitioner submitted a memorial to the President of India under R. 20 of the Indian Administrative Services (Discipline and Appeal) RULES 1955 against this order of removal from service, but this memorial was rejected.

The petitioner claimed that the procedure and the provisions of law as laid down in Rule 5 of the Indian Administrative Services (Discipline and Appeal) Rules have not been complied with by the Enquiry Officer and that the Opposite Party No. 1, that is, the Union of India, Ministry of Home Affairs. New Delhi, instead of coming to the tentative conclusion as regards the guilt of the petitioner in relation to the

charges, came to the conclusion that the charges were proved even before the petitioner was called upon to submit his explanation. The petitioner claims that he was thus deprived of his constitutional rights under Article 311 of the Constitution.

The petitioner further claims that as the petitioner's services came to an end on 1-5-62, as indicated above, any further notification, either treating him as or retaining him in service, was without jurisdiction and a nullity in law, and that, in any case, the orders referred to above purporting to retain the petitioner in service beyond six months having been passed without the sanction of the Central Government are void and inoperative. The petitioner further claimed that the order purporting to remove him from service at a time when he had ceased to be in service, is a nullity and not legal and that the departmental proceedings as well as the orders passed subsequently, purporting to remove the petitioner from service had no legal effect. Accordingly, the petitioner prayed for a declaration that he had retired from service on 1-5-62 and that the subsequent notifications of the Government relating to his service or his removal from service were all null and void, and prayed for appropriate writs in this regard.

7. It is contended by the learned counsel for the petitioner that the petitioner had retired from service on 1-3-62 on superannuation, and that, thereafter, he was no longer in Government service. He further contended that the Government had no jurisdiction to order unilateral extensions of the petitioner's service without his consent, and that, assuming that the Government had the power and jurisdiction, the first extension having come to an end on 30-4-62, there being no further extension on the expiry of the period, the petitioner ceased to be in Government service at least from 1-5-62. In other words, as the first extension, assuming it to be valid had expired on 1-5-62 and no order of extension having been made on or before 1-5-62, the petitioner ceased to be a Government servant, and that the Government had no further jurisdiction to deal with him, as if he were continuing in service, the point taken being that the further extensions relied on by the Government cannot have any retrospective effect.

It is further contended by the learned counsel for the petitioner that the petitioner being an I.A.S. Officer, any extension of service by the State Government in this connection could not be for a period longer than six months. In support of this proposition, he placed reliance on Rule 16(1) of the All-India Services (Death-cum-Retirement Benefits) Rules, 1958, hereinafter referred to as the "Rules". This Rule provides for the Central Government extending the service of the petitioner for a further period of six months and, in the instant case, the Central Government had extended the service of the petitioner for six months with effect from 1-8-62, whereas the petitioner was removed from service by the order of the Respondent No. 1 on 11-10-63. Therefore, it is contended that between the period 1-2-63 and 11-10-63 the petitioner's service was not extended by the Central Government but was extended by the State Government, who had no power to do so, their power to extend the same having

been exhausted by 1-5-62. It is further claimed that Rule 16(2) of the Rules is not applicable to the petitioner. It is further contended that as the petitioner had retired on 1-2-62 and, at any rate, deemed to have retired on 1-2-63, no action could be taken against him thereafter by way of departmental proceedings.

8. It is further claimed that the extensions of service of any employee of the Government could only be given on public grounds and not to clutch at jurisdiction to punish the officer.

9. Before examining the contentions raised by the petitioner, it would be useful to refer to the relevant provisions of the All-India Services Act, 1951, hereinafter referred to as "the Act", as well as the rules framed by virtue of the powers conferred on the Central Government by that Act, Section 3 of the Act provides for the regulation of recruitment and conditions of service and it is as follows:

3. (1) The Central Government may, after consultation with the Governments of the States concerned, including the State of Jammu and Kashmir, make rules for the regulation of recruitment, and the conditions of service of persons appointed, to an All-India Service.

(2) All rules made under this section shall be laid for not less than fourteen days before Parliament as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as Parliament may make on a motion made during the session in which they are so laid.

It is in exercise of this power that the All-India Services (Conduct) Rules, 1954 and the All-India Services (Death-cum-Retirement Benefits) Rules, 1958, have been framed.

Rule 3 of the All-India Services (Conduct) Rules 1954, is as follows:

3. GENERAL.--Every member of the service shall at all times maintain absolute integrity and devotion to duty.

Rule 16 of the Rules is in the following terms:

16. SUPERANNUATION GRATUITY OR PENSION:--

(1) A member of the Service shall be required compulsorily to retire from the service with effect from the date on which he attains the age of 55 years:

Provided that he may be retained in service after the date of compulsory retirement on public grounds which shall be recorded in writing--

(a) for an aggregate period not exceeding six months by the State Government; and

(b) for any period beyond six months, with the sanction of the Central Government:

Provided further that a member of the service shall not be retained in service

beyond the age of 60 years except in very special circumstances.

(2) A member of the Service under suspension on a charge of misconduct shall not be required or permitted to retire from the service, but shall be retained in service until the enquiry into the charges against him is concluded and a final order is passed.

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10. Considering the above Rules, we are clearly of opinion that unless the case fell within the scope of Rule 16(2), quoted above, the maximum extension of service that the State Government could give, is only six months, and thereafter, any further extension could only be given by the Central Government. It may be seen from the above, therefore, that the petitioner's service could not be extended beyond six months by the State Government acting on its own, but it is open to the Central Government to extend the service of the I.A.S. Officer for any period they may choose, normally not beyond 60 years of age.

11. Undoubtedly, if the case fell under Rule 16(2), there is no question of any extension of service, as the member of the Service concerned will not be required or permitted to retire from the service, but shall be retained in service, until the enquiry into the charges against him is concluded and a final order is passed.

12. Two main questions, therefore, fall to be determined in this Civil Rule:

(1) Whether the case of the petitioner falls under Rule 16(2) of the Rules in other words, whether Rule 16(2) could be made applicable to the petitioner in the instant case?

(2) If it did not apply, whether there had been valid extensions of service of the petitioner, so that he could be held to have been retained in service so as to be amenable for disciplinary action to be taken by the authorities concerned, whether it be State Government or Central Government?

13. As regards the first question, the scope and applicability of Rule 16(2) of the Rules would have to be examined. This rule requires the following conditions to be fulfilled before it could be applied:

(1) The Officer should have been placed under suspension on a charge;

(2) The charge should be one of misconduct;

(3) If conditions (1) and (2) are fulfilled, the officer shall be retained in service and shall not be permitted to retire from service until the enquiry into the charges against him is concluded and a final order is passed.

It has to be examined further whether all these conditions have been fulfilled in this case.

That the petitioner has been placed under suspension is not disputed. But, what

is disputed is that the charges on which he had been placed under suspension are not charges of misconduct. The charges against the petitioner, as seen from Annexure B-1, may be briefly stated as follows:

- (1) That the petitioner completely failed to take any effective preventive measures against widespread disturbances breaking out in Nowgong District in spite of adequate warning;
- (2) That the petitioner showed complete lack of leadership when the disturbances actually broke out and failed to give proper directions to his subordinate Magistrates and the Police to restore law and order;
- (3) That the petitioner did not personally visit the scenes of disturbances within the town or in the rural areas to take personal control of the situation and to exercise necessary supervision;
- (4) That he did not keep the Government informed of the actual picture and the extent of the disturbances;
- (5) That he showed complete ineptitude, lack of foresight, lack of firmness, and capacity to take quick and firm decision, and that, consequently, there was complete breakdown of law and order in Nowgong town as well as in the rural areas of the Nowgong District.

Consequently, it is claimed that the petitioner had proved himself completely unfit to hold any responsible position. Based on these specific charges, the petitioner was given a show cause notice under Rule 5(1) read with Rule 10 of the All India Services (Discipline and Appeal) Rules 1955, read with Article 311 of the Constitution, why he should not be removed from service or otherwise punished for the charges stated above.

14. It is seen from the above description of the charges against the petitioner, as well as from the statement of allegations made against him, all that was alleged, is that the petitioner was negligent in the performance of his duties. Throughout, the allegations related to the omission to take certain steps and actions, and some defective feature of his ability, such as lack of leadership, ineptitude, lack of foresight, lack of capacity to take quick and firm decisions. The burden of the case obviously is negligence and inability, and not misconduct. There is no allegation anywhere of any misconduct attributed to the petitioner; for example, it was not stated anywhere that the petitioner's negligence was due to any guilty mind or mens rea.

There is a good deal of difference, in our opinion, between negligent conduct and misconduct. The expression "misconduct" has been defined in the Larger Oxford Dictionary as follows:

"improper conduct; wrong behaviour." The verbal form of expression was treated as equivalent "to misbehave oneself. In Stroud's Judicial Dictionary, the expression "misconduct" has been defined as follows:

"misconduct" means misconduct arising from ill motive; acts of negligence, errors of Judgment, or innocent mistakes, do not constitute such misconduct (Moore v. Brompton County Court High Bailiff, (1893) 62 LJ QB 498).

Apart from the dictionary meaning, we are satisfied that the expression "misconduct" used in Rule 16(2) means "misbehaviour" involving some form of guilty mind or mens rea. Mere negligent performance of the duty or neglect in the performance of the duty, or, for the matter of that, an error of judgment in the performance of his duties, cannot amount to "misconduct" within the meaning of Rule 16(2). Inaction, or inability to take action either through incapacity or lack of foresight or otherwise, cannot, in our opinion, mean or amount to "misconduct." "Misconduct" implies doing something bad or doing something in a wrong or illegal way. "Neglect" or "negligence" involve the not doing of a thing or neglect in the doing of it.

In our opinion, the two are entirely different concepts and, therefore, mere negligent conduct can never amount to "misconduct", unless in very special cases, where the negligence is the result of a guilty mind and wilful, and has as its basis a mens rea. Such is not the case here. Hence, we are satisfied that the charges levelled against the petitioner amounted to a mere negligent conduct and possible errors of judgment and not misconduct, and hence Rule 16(2) has no application to the case of the petitioner, and there can, therefore, be no question of his not being permitted to retire from service.

In other words, the Government had no authority or power under the Rule to stand in the way of the retirement of the petitioner in the normal course. Such being the case we are satisfied that the petitioner must be deemed to have retired from service on 1-2-1962 when he attained the age of superannuation. That being the case, he was no longer amenable, after that date, to any disciplinary action being taken against him by the Government, and any action so taken, in our opinion, must be deemed to have been taken without jurisdiction and, therefore, is null and void.

15. The gravamen of the charges against the petitioner, according to the Government, is, that he lacked the initiative and did not make a correct appreciation of the situation of the possible dangers developing at different parts of the town of Nowgong as well as the District. Apart from the fact that what is alleged, as pointed out by us earlier, is only negligent conduct and possible errors of judgment and not misconduct, one has got to notice that even the negligence alleged, which involved the not taking of the action, which, according to the Government, should have been taken in the manner they felt was the correct one. The decision on this aspect of the matter is dependent on so many factors.

If we may analyse the same, the following would enter into the calculations:

- (1) the nature of the danger;
- (2) the quantum of risk;

- (3) the quickness with which the feelings were provoked among the public and the disturbances consequently spread in all directions;
- (4) the amount and the adequacy of police force available at the disposal of the petitioner;
- (5) the availability of transport which could move the policemen to different pockets of trouble;
- (6) the question as to how quickly the information as to the outbreak of disturbances at different places could have reached the petitioner;
- (7) the appreciation of the situation;
- (8) the making of a judgment as to what action would suit the particular situation, and the particular place, and the nature and the extent of the disturbances;
- (9) the probable repercussions on aggressive action being taken in a hurry involving grave risk to the petitioner as well as to his own officers and the police force.

These and perhaps some more factors enter into the calculations in judging whether the petitioner could be held to have been negligent in the performance of his duties.

The judgment of a distant authority, sometimes may be wrong, whereas that of the man on the spot may be more correct. To judge the decision and judgment of the petitioner in the light of the judgment of the Government reached several days after the occurrence, in the light of different types of information involved by them meanwhile, would be (sic) just nor proper. Having considered all these aspects of the case, we are clearly of opinion that there is no material placed before us on record on the points referred to above, which would enable us, even to a remote degree, to hold that the petitioner was guilty of mis-conduct in the performance of his duties.

16. Looked from another aspect, the allegations in Annexure B-1 may make out a charge on the ground of inefficiency. Inefficiency, in our opinion, can never take the place of misconduct. An efficient person may be guilty of misconduct whereas an inefficient person may claim to be free from the vice of misconduct. Inefficiency can well be the motivating force of an order of removal, discharge or dismissal, but such an order on that score would not per se be one for misconduct.

It has been observed by their Lordships of the Supreme Court in the case of Parshotam Lal Dhingra Vs. Union of India (UOI), , that the Government cannot terminate the services of an employee unless it is entitled to do so, amongst others, after a proper enquiry on notice to him of misconduct, negligence, inefficiency or any other disqualification. It is well settled that a permanent Government employee's mere termination of service will prima facie be a

punishment but that does not mean that when his service is terminated for inefficiency or for negligence, it is a termination for misconduct. It is clear therefore that Rule 16(2) of the aforesaid Rules will not cover a case of termination of service when the same is based on a charge of inefficiency or negligence.

17. Alternatively it is contended that the Government has the power to extend the retention of the petitioner in Government service after the date of the compulsory retirement only on public grounds, and even then only for an aggregate period not exceeding six months at the instance of the State Government, and retention for any period beyond the period of 6 months could only be with the

sanction of the Central Government. This being the case, the State Government had extended the service of the petitioner up to 30-4-1962 and thereafter no order of extension having been received before the expiry of the period, the petitioner retired from service on 1-5-62, the extension period of three months having expired on that date. It is contended that the subsequent extension of service of the petitioner made by the Government on 21-6-1962 for a further period of three months, had no legal validity or effect.

18. In *The State of West Bengal Vs. Nripendra Nath Bagchi*, , it was held by their Lordships as follows:

We find it sufficient to say that we agree that the retention of Bagchi in service under R. 75(a) for the purpose of enquiry was not proper and the extension of the service was illegal.

This decision directly applies to the instant case and we are clearly of opinion that apart from other grounds, the extension of service for the purpose of conducting enquiry against the officer is clearly illegal and cannot be regarded as an extension on public grounds within the meaning of Rule 16(1).

We are, therefore, clearly of opinion that once the period of extension had expired, the services of the petitioner must be deemed to have come to an end with the Government, and if he is not deemed to have retired on 1-2-1962, it must necessarily be held that he retired from service on 1-6-1962, and, that subsequently, he was no longer in Government service. The order issued by the Government of Assam in its Memo No. AAI.24/60/52 dated 21-6-1962 extending the service of the petitioner for a further period of three months cannot have any legal validity or effect and cannot have the effect of bringing back the petitioner into service, he having retired at least by 1-5-1962. The subsequent extensions ordered by the Government, for the same reasons, in our opinion, cannot have the effect of keeping the petitioner in service.

19. This conclusion of ours receives support from a decision of the Supreme Court in *State of Assam and Others Vs. Padma Ram Borah*, , wherein their Lordships held as follows:

The clear effect of the order of January 6, 1961 therefore, was that the service of the respondent came to an end on March 31, 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 March 31, 1961, but about a month or so after passed an order on May 9, 1961 extending the service of the respondent for a further period of three months with effect from April 1, 1961. We do not think that the State Government had any jurisdiction to pass such an order on May 9, 1961. According to the earlier order of the State Government itself, the service of the respondent had come to an end on March 31, 1961. The State Government could not by, unilateral action create a fresh contract of service to take effect from April 1, 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 March 31, 1961.

Accordingly, their Lordships held in that case that the respondent had ceased to be in service on March 31, 1961 by the very order of the State Government and that the order of retention in service passed more than a month thereafter, was a mere nullity and cannot be sustained.

20. The gaps in the extensions made by the Central Government, in our opinion, have also the effect of breaking the continuity of the retention of the petitioner in service and hence, we are clearly of opinion that on the date on which the order dismissing the petitioner was passed, namely, on 11-10-1963, the petitioner was no longer in service and neither the Central Government nor the Government of Assam had any jurisdiction to pass any order of dismissal against the petitioner on that date. We are, therefore, clearly of opinion that the order of the Central Government, ordering the dismissal of the petitioner, is clearly illegal, invalid and without jurisdiction. We accordingly, order that the same should be quashed.

21. The result of our decision, therefore, is that the petitioner must be deemed to have retired from service on 1-2-1962 and that the punitive or disciplinary action taken against him after that date is completely without jurisdiction and wholly unjustified and should be quashed, which we hereby order.

22. We accordingly, allow this petition and make the Rule absolute with costs. Advocate's Fee: Rs. 250/-.