

(1999) 07 GAU CK 0011
In the Gauhati High Court
Case No : Writ Appeal No. 19 (SH) of 1998

Jagadindra Arjun

APPELLANT

Vs

Meghalaya State Electricity Board and Another

RESPONDENT

Date of Decision : 22-07-1999

Acts Referred:

Electricity (Supply) Act, 1948 — Section 79
Meghalaya Fundamental and Subsidiary Rules, 1984 — Rule 57
Meghalaya State Electricity Board (Service) Regulations, 1996 — Regulation 81, 81(2)
Meghalaya State Electricity Board Employees (Discipline and Appeal) Regulations, 1996 — Regulation 9, 9(B)

Citation : (1999) 3 GLT 96

Hon'ble Judges : Brijesh Kumar, C.J;N. Surjamani Singh, J

Bench : Division Bench

Advocate : B.N. Dutta, for the Appellant; S.R. Sen, for the Respondent

Final Decision : Allowed

Judgement

Brijesh Kumar, C.J.—The main question falling for consideration in this appeal is as to whether the Respondent No. 1, namely the Meghalaya State Electricity Board, hereinafter for short "MSEB", was vested or not, by law, with the powers to retire its employees compulsorily, prior to coming into force of the Meghalaya State Electricity Board (Service Regulations) 1996 with effect from 14.8.1997.

2. We have heard Mr. B.N. Dutta, learned Counsel appearing for the Appellant and Mr. S.R. Sen, learned Counsel appearing for the Respondent Electricity Board.

3. The set of facts giving rise to the controversy, in brief, are that the Appellant initially joined the services of the Assam State Electricity Board and occupied position of Assistant Divisional Accountant in the year 1972. Later on he was promoted as Junior Divisional Accountant and Divisional Accountant which post was later on re-designated as Divisional Accounts Officer. While working as such the Petitioner-Appellant was compulsorily retired by MSEB from service by order dated 24.7.97. The Civil Rule preferred against the order of compulsory

retirement was dismissed by the learned Single Judge by order dated May 28, 1998. The instant appeal impugns the order passed by the learned Single Judge.

4. The order of compulsory retirement was challenged by the Petitioner Appellant on various grounds namely, the MSEB on the date of passing the order of compulsory retirement was not vested with any such power. The next ground was that the order of compulsory retirement was passed with malafide intention since the Petitioner had been an active trade union worker and took up cause of the workmen of the Electricity Board, and has also been the General Secretary of the Meghalaya State Electricity Supply Workers' Union (Registration No. 11 of 1976) since long and has been the Regional Secretary of All India Federation of Electricity Employees. The Meghalaya State Electricity Board according to the Appellant, has been unhappy with the trade union activities of the Petitioner-Appellant who had been expressing dissatisfaction against the actions and conduct of the employers and had always been demanding improvement in conditions of service of the employees of the Board. Consequently, he was suspended on July 30, 1988. The Industrial Tribunal did not grant approval to the suspension order and this Court dismissed the Civil Rule filed by the Meghalaya State Electricity Board and ultimately the MSEB went in appeal to the Supreme Court and the SLP was dismissed by order dated 13.5.93. Yet Anr. submission which has been raised on behalf of the Petitioner-Appellant is that uncommunicated material and ACRs have been taken into account while passing the order of compulsory retirement. It is also stressed that adverse entries were wrongly recorded in a calculated manner so as to harm the Appellant.

5. The learned Single Judge held that MSEB was possessed of power to retire its employees compulsorily in view of its resolution dated 6.10.89 adopting the Office Memo dated 21.7.88 of the State of Meghalaya for compulsory retirement in accordance with the F.R. 57(b) of the Meghalaya Fundamental and Subsidiary Rules, 1984. So far the order being mala fide, the learned Single Judge observed that the Petitioner could not make out any such case of malafide nor evidence of arbitrariness. Therefore, the order could not to be interfered with on that count.

6. First of all, we may consider the point raised relating to the competence and powers of the MSEB to compulsorily retire its employees prior to coming into force of the Meghalaya State Electricity Board (Service Regulation), 1996.

7. Initially there was no separate electricity Board for the State of Meghalaya. It was a joint Board namely the Assam State Electricity Board governed by the Assam Electricity Board (General Condition of Service) Regulations, 1960 in the matter of condition of service of its employees. In the year 1975 the Assam State Electricity Board was bifurcated and Meghalaya State Electricity Board came into being. The Meghalaya State Electricity-Board adopted the Assam State Electricity Board (General Condition of Service) Regulations, 1960. There has not been any provision for compulsory retirement under the Assam State Electricity Board (General Conditions of Service) Regulations, 1960 for compulsory retirement of an employee. The same position continued after the Meghalaya State Electricity

Board came into being in 1975.

8. In exercise of powers u/s 79(c) reads with Section 79(k) of the Electricity Supply Act, 1948 the MSEB framed regulations namely the Meghalaya State Electricity Board (Discipline and Appeal) Regulations, 1996. The said Regulations were published in the Gazette on January 9, 1997. It was for the first time that compulsory retirement was provided as one of the major penalties under Regulation 9(B)(c). Regulation 9 as contained in Part III of the Regulations deals with penalties. Regulation 9(B)(c) reads as follows:

(9) The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a Board employee:

(A)....

(B) Major penalties :

(a) (i) reduction to a lower rank in the seniority list or

(ii) to a lower stage in the time scale of pay or

(iii) to a lower time scale of pay not being lower than that to which he was directly recruited or

(iv) to a lower Grade or post not being lower than that to which he was directly recruited.

(b) withholding increments of pay with cumulative effect for any period.

(c) Compulsory retirement.

....

Explanation to the Regulation 9 reads as follows:

The following shall not amount to a penalty under this regulation:

. . .

. . .

(ix) Compulsory retirement of a Board employee made in accordance with the relevant regulations.

9. It is to be noted that till then, namely, January 9, 1997 no such regulation had been framed by the MSEB as envisaged in Clause (ix) of the Explanation to Regulation 9 of the Regulations viz. compulsory retirement of an employee of MSEB could only be resorted to as a major punishment and not otherwise.

10. Later on the Meghalaya State Electricity Board framed the Meghalaya State Electricity Board Service Regulations, 1996 under the powers conferred u/s 79(c) read with Section 79(k) of the Electricity Supply Act, 1948. These regulations were published in the Gazette on 14.8.97. Regulation 81 in Section 12 of the

Regulations, deals with retirement. Clause (1) of Regulation 81 provides for retirement on superannuation on attaining the age of 58 years. Clause (2) of Regulation 81 provides for compulsory retirement by giving three months' notice after the employee attained the age of 50 years or completed 25 years of service whichever be earlier. Thus before coming into force of the Meghalaya State Electricity Board Service Regulations, 1996, which came into force on 14.8.97, there was no provision for compulsory retirement except by way of major punishment. Regulation 81(2) of the MSEB Service Regulations, 1996 may be relatable to Clause (ix) of the Explanation to Regulation 9 of the Meghalaya State Electricity Board Employees (Discipline and Appeal) Regulations, 1996. The order of compulsory retirement in this proceedings was passed by the MSEB on 24.7.97. As observed earlier, Regulations providing for compulsory retirement without being punishment was provided for with effect from 14.8.97 on publication of the Meghalaya State Electricity Board Service Regulations, 1996 in the Gazette. It is thus clear that on 24.7.97 the MSEB had no provision or power to retire its employees compulsorily on three months' notice. It was vested with such power only with effect from 14.8.97.

11. The next question to be examined is as to whether there was any other provision, as submitted by the Respondents to cover the order of compulsory retirement dtd 24.7.97 or not. In connection with the above the Respondents have pressed into service the decision/resolution of the MSEB dated 10.5.98 adopting the State Government's Memo dated 21.7.88 relating to compulsory retirement of employees of the State Government. The Office Memo issuing the decision of the MSEB dated 10.5.89 is contained in the Office Memo dated October 6, 1989. It may be appropriate first to see the Office Memo of the Govt. of Meghalaya, a copy of which has been placed on record by the parties. The Office Memo dated 21.7.88 is quoted below:

No. PER. 218/75/106 Government of Meghalaya, Personnel & A.R. (A) Department. Dt. Shillong the 21st July, 1988 OFFICE MEMORANDUM Sub: Premature retirement of Government Servants under F.R. 57(b).

The undersigned is directed to say that under F.R. 57(b) of the Meghalaya Fundamental and Subsidiary Rules, 1984 the "appropriate authority" may, if he is of the opinion that it is in the public interest to do so, retire a Govt. servant by giving him notice of not less than three months in writing or three monthly pay and allowances in lieu of such notice after he has attained fifty years of age or has completed twenty five years of service, whichever is earlier. The term "appropriate authority" referred to above means the authority which has the power to make substantive appointment to the post or service from which the Government servant is required to retire.

The above rule, commonly referred to as the rule of premature retirement, is based on sound policy and is meant to sub-serve public interest. The object of the above rule is to weed out (1) Govt. servants of doubtful integrity (2) Govt. servants who have outlived their utility and have become inefficient or ineffective

and (3) Govt. servants whose physical and mental condition is such as to make them incapable of further satisfactory service.

In order to achieve the objective mentioned above, the State Government is pleased to constitute a Review Committee for each and every department of the Government to consider the cases of premature retirement of the Government servants under F.R. 57(b) as recommended by the Appointing Authority on the basis of C.R. dossiers and other reports/documents made available to it, and consisting of the following officers:

1. Shri J.M. Phira, IAS ...Chairman
2. Shri H.N. Mookherjee, IAS ...Member
3. Shri W.M.S. Pariat, IAS ...Member
4. Special Secretary/Secretary/Addl. Secretary of the Deptt. Concerned ...Member Secretary

Where the appointing authority is satisfied that a Government servant who has attained fifty years of age or has completed twenty five years of service has ceased to take any interest in his work or has become ineffective or inefficient or whose physical and mental condition is such as to make him incapable of further service or whose integrity is in doubt, such persons should be considered for premature retirement under F.R. 57(b). A list of such persons with their service records and character Rolls together with the recommendation of the Appointing Authority that they may be prematurely retired under F.R. 57(b) should be sent to the Member Secretary of the Review Committee of the Department for the purpose of placing of such cases for consideration of the Review Committee. The Special Secretary/Secretary/Addl. Secretary of the respective Department (in his capacity as Member Secretary) should ensure that such cases are placed before the Review Committee for consideration as early as possible. Since premature retirement is sought to be made purely in public interest, the Review Committee should not have any hesitation in deciding such cases on merits.

In order to ensure that the review is undertaken regularly it is desirable that every department should maintain a register of the Government servants who are due to attain the age of fifty years or are due to complete twenty five years of service, as the case may be. The register should be scrutinised at the beginning of every quarter and the review undertaken according to the following schedule:

The review as indicated above should be started immediately in respect of all those Govt. servants who have since attained fifty years of age or completed twenty five years of service as of date.

A quarterly report of cases of premature retirement should be sent to Personnel and Admn. Reforms (A) Department at the end of every quarter.

Sd/- V. Ramakrishnan Chief Secretary to the Govt. of Meghalaya

(emphasised supplied by us by underlining)

12. A perusal of the Office Memo dated 21.7.88 issued by the Govt. of Meghalaya makes it clear that it refers to government's power of premature retirement of government servants under F.R. 57 (b). It mentions of the source of power to compulsorily retire a Government servant as contained in F.R. 57(b) of the Meghalaya Fundamental and Subsidiary Rules, 1984. It than emphasise the objective of Rule 57(b) of the F.S.R. 1984 and states that to achieve the objective behind F.R. 57(b), the procedure which should be adopted and the Committees which are to be constituted and the manner in which the power vested under F.R. 57(b) may be exercised. The said memorandum is procedural in nature. It does not vest any power in the Government to compulsorily retire its employees.

13. The Office Memo dated 6.10.89 issued by the MSEB adopting the Office Memo dated 21.7.88 of the Govt. of Meghalaya is quoted below:

No. MSEB/GA/213/75(Vol-II)/61 Dated Shillong the 6th October, 1989. OFFICE MEMORANDUM

The question of retiring a Board's employee by giving him/her notice not less than 3 months in writing or 3 months pay and allowances in lieu of such notices after he/she has attained 50 years of age or has completed 25 years of service, whichever is earlier, if it serves the interest of the Board has been under consideration for sometimes. The Board in its meeting held on the 10th May, 1989 after a very careful consideration decided to adopt the orders contained in the Government of Meghalaya, Personnel and A.R. (A) Department's Office Memorandum No. PER. 218/75/106 dt 21.7.88, a copy of which is enclosed and to come into force with immediate effect.

In line with the orders above a Review Committee is constituted to consist of the following members--

In order to ensure that the review is carried out regularly, all the heads of offices are required to maintain a register of the Board's employees who are due to attain the age of 50 years or age due to complete 25 years service, as the case may be. The register should be scrutinised at the beginning of every quarter and the review undertaken according to the following schedule--

All the Heads of Offices are also required to ensure a regular submission of a quarterly report of cases requiring decision in the matter of premature retirement to the Member Secretary of the Review Committee with a copy to his superior Officer and the Head of the Department concerned. Even if there is no case for consideration of such employees, a Nil Report should be submitted.

The above instructions should be strictly adhered to.

Sd/- 6.10.89 (Smt. L. Phookan) Secretary.

(Emphasis supplied)

14. The above Memo dated 6.10.89 shows that the MSEB had been considering the question of compulsory retirement of its employees for some time and in that background the Board in its meeting held on May 10, 1989 adopted the orders contained in the Office Memo dated 21.7.88 of the Government of Meghalaya, Personnel and A.R. (A) Department issued under Memo No. PER. 218/75/106. It therefore in the line of the Government Office Memo dated 21.7.88 constituted a Review Committee and provided for regular periodical scrutiny of the cases of those employees who attained 50 years of age or due to complete 25 years of service. The provision for a submission of quarterly report, on scrutiny, has also been enshrined. It is thus clear that what has been adopted in connection with compulsory retirement is the Office Memo dated 21.7.88 of the Govt. of Meghalaya and not Rule 57(b) of the Govt. of Meghalaya Fundamental and Subsidiary Rules, 1984. A close reading of the Office Memo of the Govt. of Meghalaya dated 21.7.88 indicates that in the light of the power vested in the Govt. under F.R. 57(b) of the Meghalaya Fundamental and Subsidiary Rules, 1984 constituted a Review Committee to consider the cases of premature retirement of Government servants under F.R. 57(b). The cases have been provided to be considered periodically as scheduled in the Office Memo. It actually prescribed the details and procedure of working of the F.R. 57(b) so as to ensure an effective implementation of the said provision. The Office Memo of the Meghalaya does not contain any provision for compulsory retirement and for that purpose reference of F.R. 57(b) of the FSR has been made. It may have obviously been thought and rightly so that in absence of any substantive power vesting the State Government under the Rules there was no occasion to constitute any Review Committee for consideration of cases of compulsory retirements in any manner whatsoever. Therefore, the substantive provision by which the right to compulsory retire its employees is vested in the State Government was specifically referred to in the Office Memo while prescribing the procedure and details for the working of F.R. 57(b) to achieve an effective result in implementation of the provision contained in F.R. 57(b).

15. Nothing has been shown on behalf of the Respondents that there existed any such provision at the relevant time investing the MSEB with the substantive powers to compulsorily retire its employees. Therefore, what emerges out from the contents of the Office Memo dated 21.7.88 of the Govt. of Meghalaya is that the MSEB only adopted the procedure for compulsory retirement of its employees. Adoption of procedure without possessing substantive provisions for compulsory retirement would be of no consequence. There is nothing to indicate that MSEB ever adopted F.R. 57(b) of the Fundamental and Subsidiary Rules, 1984 of the Government of Meghalaya. In the Office Memo of the Govt. of Meghalaya dated 21.7.88 only a reference of the provision which vested the State Government with the power of compulsory retirement of its employees has been referred to by referring to Rule 57(b) of the FSR and no such power was vested in the Government by virtue of the Office Memo dated 21.7.88. Therefore, adoption of the above noted Office Memorandum by the MSEB in its meeting held

on May 10, 1989 would not vest in the Board the power to compulsorily retire its employees as F.R. 57(b) vests in the Government.

16. Shri S.R. Sen, learned Counsel appearing for the Respondent MSEB submits that technically, may be, that by adoption of Memorandum dated 21.7.88, the power to compulsorily retire its employees may not vest in the MSEB, but it would only be a technical commission which may not come in the way of the MSEB to compulsorily retire its employees. It is submitted that the Office Memo of the State Govt. dated 21.7.88 deals with the subject compulsory retirement, therefore it can well be taken that by adoption of the Office Memo the power of compulsory retirement also vests in the MSEB. Giving due consideration to the contention raised on behalf of MSEB we fail to appreciate the argument. The matter relates to possessing of substantive power to compulsory retirement which cannot be a matter of technical lapse. The technical lapses which may occur in execution or implementation of any provision under the law or in exercise of powers lawfully vested under any provision, may be ignored or may be taken to be cured by implication, or in a case where there may be some infraction of a rule here and there relating to execution or procedure that may be overlooked as a technically. But in the present case there is total absence of substantive power enabling the MSEB to compulsorily retire its employees. The application of procedure without having substantive power under the law to compulsorily retire its employee is not a technical lapse or infraction of any rule which can be overlooked. On the other hand, it goes to the root of the matter. It is a case where there is inherent lack of jurisdiction in the MSEB to compulsory retire its employees in absence of any such power under the rule governing service conditions of the employees of MSEB or without adoption of such Rule by the MSEB.

17. The learned Single Judge while dealing with the matter has placed reliance upon a judgment in the case of S.C. Choudhury v. Meghalaya State Electricity Board and Ors. in Civil Rule No. 58 (SH)/96 decided on 30.6.98. This question has been dealt with in para 13 of the judgment and it has been held:

...In the circumstances, I have no hesitation in agreeing with the contention of the learned Counsel for the Petitioner that what was actually adopted by the Board means of its resolution dated 6.10.89 was the office memorandum dated 21.7.88 of the Meghalaya Govt. and not FR 57(b). However, in view of what has been mentioned in the opening part of the O.M. dated 21.7.88 it is not possible to hold that the Board has no power to pass an order of compulsory retirement in case of its employees under FR 57(b) only because it did not adopt that Rule vide its resolution dated 6.10.89.

18. Thus, the learned Single Judge in the case of S.C. Choudhury (supra) has clearly recorded a finding that FR 57(b) has not been adopted by the MSEB in its resolution dated 10.5.89. But at the same time it has been held that the Board became possessed of the power to pass an order of compulsory retirement as per the Govt. of Meghalaya Office Memorandum dated 21.7.88 adopted by the

MSEB. With due regard, we are unable to record our agreement with the view expressed by the learned Single Judge in the case of S.C. Choudhury (supra) which view has been agreed to by the learned Single Judge in the impugned judgment.

19. For the reasons we have already indicated in the proceeding paragraphs, the conclusion arrived at in the case of S.C. Choudhury (supra) is not in consonance with the finding recorded in the same judgment to the effect that by Resolution dated 10.5.89 F.R. 57(b) was not adopted by the MSEB. The finding is self contradictory. What has been missed to be noted is that in the opening paragraph of the Office Memorandum dated 21.7.88 of the Govt. of Meghalaya only the source of power to compulsorily retire its employees under FR 57(b) has been referred to as well as the object of possessing of such power by the State Government. We are, therefore, of the view that unless the MSEB was lawfully vested with any such power or it adopted the F.R. 57(b), it inherently lacked power to compulsorily retire its employees. It cannot be kept in the category of technical lapse or a mere technicality as it relates to the conditions of service of the employees. It results in some vested rights in the employees of the MSEB to continue in service till the age of superannuation as provided under the Service Regulations. We, therefore, further hold that on the point of vesting of the power "compulsory retirement" the decision in the case of S.C. Choudhury (supra) which has been followed in the impugned judgment as well does not lay the correct legal position regarding powers of MSEB to compulsorily retire its employees.

20. In view of the discussion held above, we hold that on 24.7.97, the date on which order of compulsory retirement of the Petitioner-Appellant was passed, the MSEB did not possess the power to compulsorily retire its employees by giving three months' notice. The provision for compulsory retirement was made in the Meghalaya State Electricity Board Service Regulations, 1996 which were published in the Meghalaya Gazette only on August 14, 1997 viz. after the impugned order of compulsory retirement was passed.

21. Since we have held that order of compulsory retirement of the Appellant was passed without jurisdiction and power to pass such an order, we do not consider it necessary to enter into merits of other points raised before us.

22. In the result, the impugned judgment is set aside and the appeal as well as the Civil Rule are allowed and the order of compulsory retirement of the Appellant dated 24.7.97 is quashed. It is, however, clarified that in view of coming into force of the Meghalaya State Electricity Board Service Regulations, 1996 with effect from 14.8.97, this judgment would not be a bar for the MSEB to exercise such powers under the said Regulations, if so advised and felt necessary, in accordance with law.

Cost easy.