
(2002) 08 GUJ CK 0048
In the Gujarat High Court

Case No : First Appeal No. 156 of 1994 and Civil Application No. 2243 of 1997

Jamnagar Municipal Corporation

APPELLANT

Vs

Ramakant Talakchand Doshi

RESPONDENT

Date of Decision : 30-08-2002

Acts Referred:

Jamnagar Municipal Servants Age Retirement Rules — Rule 5

Citation : (2002) 08 GUJ CK 0048

Hon'ble Judges : R.R. Tripathi, J

Bench : Single Bench

Advocate : J.R. Nanavati, in First Appeal No. 156 of 1994, for the Appellant; Shirish Joshi and D.C. Raval for Anand in First Appeal No. 156 of 1994, for the Respondent

Final Decision : Dismissed

Judgement

Ravi R. Tripathi, J.—The present First Appeal is filed being aggrieved by the judgment and decree dated 23rd December, 1991 passed by the learned 3rd Joint Civil Judge (S.D.), Jamnagar in Special Civil Suit No. 203 of 1987.

2. The facts of the present case are that the plaintiff, respondent herein, filed Special Civil Suit No. 203 of 1987 challenging the legality and validity of the order dated 24th November, 1987 passed by the Commissioner of defendant-Corporation, appellant herein, compulsorily retiring the plaintiff from service with effect from 30th November, 1987 after office hours. The plaintiff had joined the service of Jamnagar Municipality, as it then was, as Light Inspector in the year 1964. He continued in service even after the Jamnagar Municipality became Municipal Corporation. The plaintiff was suspended from service on September 15, 1980 pending the departmental inquiry and subsequently, he was served with the chargesheet and departmental inquiry was held against him. The plaintiff was served with a second show cause notice dated 28th April, 1981 to show cause as to why he should not be dismissed from service, pursuant to the report made by the inquiry officer, who held some of the charges levelled against

him as proved. The plaintiff had, thereafter, challenged the legality and validity of the departmental proceedings by filing Regular Civil Suit No. 613 of 1980 before the Court of learned Civil Judge (S.D.) at Jamnagar. The said suit was contested by the defendant-Corporation and the Court, by its judgment and decree dated 28th September, 1983, decreed the plaintiff's suit by holding that the departmental proceedings were illegal. The Court was pleased to grant the plaintiff's prayer of permanent injunction restraining the defendant-Corporation from taking any punitive action against him.

2.1 The defendant-Corporation, being aggrieved of the judgment and decree dated 28th September, 1983, passed by the learned Civil Judge (S.D.), Jamnagar in Regular Civil Suit No. 613 of 1980, preferred Regular Civil Appeal No. 74 of 1984, which was pending on the date of the passing of the order, impugned in the present proceedings.

2.2 By the order, impugned in the present proceedings, the plaintiff was compulsorily retired from service at the age of 55 years though the age of superannuation is 58 years as per the service conditions applicable to the employees of the defendant-Corporation. It was contended by the plaintiff that the impugned order is vindictive in nature, as the department could not take punitive action against him in view of the decree passed by the Civil Court, he was sought to be punished by resorting to the provisions of the premature retirement. It was also contended by the plaintiff that the Commissioner of the defendant-Corporation passed the impugned order with a view to oblige his friends and admirers by appointing someone of their choice on the post held by the plaintiff; that there is no provision for "compulsory retirement" in the service conditions applicable to the plaintiff; and, that the impugned order is illegal on the ground that the day on which it was passed, the plaintiff was under suspension and the departmental proceedings were pending against him. It is also the case of the plaintiff that it is the settled position of law that an order of "compulsory retirement" could not have been passed when a departmental inquiry is pending against an employee and he is under suspension. Along with other grounds, the impugned order was also challenged, being arbitrary in nature and violative of principles of natural justice inasmuch as the same was passed without giving an opportunity of being heard to the plaintiff. The plaintiff contended that, he had not lost his utility in service and that he had not become a 'dead wood'. The plaintiff, therefore, prayed that the impugned order be declared illegal, being mala fide and without authority of law, and injunction, as prayed for, to restrain the defendant from giving effect to the impugned order be granted.

2.3 The defendant-Corporation contested the suit of the plaintiff by filing its written statement at Exh. 9. It was denied that the impugned order is punitive in nature; that it had been passed as a result of the failure of the defendant-Corporation in taking punitive action against the plaintiff due to the decree passed by the Civil Court in Special Civil Suit No. 613 of 1980; and, that the

Commissioner of Defendant-Corporation has passed the impugned order with a view to oblige his friends and admirers by accommodating someone of their choice on the post held by the plaintiff. It was also denied that the plaintiff had not lost his utility in service; that no public interest was served by the impugned order; and, that the impugned order was passed when the departmental proceedings against the plaintiff were pending and that when he was under suspension. The defendant-Corporation pleaded that the departmental inquiry was wound up and the suspension of the plaintiff was cancelled prior to the passing of the impugned order. These three orders were placed on record at Exhs. 29, 30 and 31.

2.4 The learned Judge, after taking into consideration the rival contentions of both the sides and the authorities cited before him, held that the impugned order of compulsory retirement is illegal, hence null and void, and decreed the suit of the plaintiff with costs. The defendant-Corporation was ordered to pay to the plaintiff the consequential benefits including the salary for the period between the date of the impugned order and the date on which the plaintiff reached the age of superannuation i.e. 58 years including the admissible allowances, etc. and post retirement benefits, which he would have got if the impugned order was not passed.

3. The plaintiff was compulsorily retired from service on reaching the age of 55 years in the year 1987. Today, the plaintiff is aged about 70 years. Mr. Shirish Joshi, learned Advocate appearing for the respondent herein, submitted that the plaintiff is suffering from cancer; and, that the amount of gratuity, leave encashment and commutation of pension, etc., at the time of passing of the impugned order, were offered to the plaintiff by the defendant-Corporation, but were not accepted by the plaintiff. The plaintiff did not accept the same even in 1992 when the same were offered again.

4. Mr. J.R. Nanavati, learned Advocate appearing for the appellant, assailed the judgment of the learned trial Judge mainly on the ground that the learned Judge has committed an error in coming to the conclusion that "the orders of winding up of the departmental proceedings", cancelling the suspension order and compulsory retirement, were not passed in this sequence, as can be seen from their outward numbers. He submitted that outward number is not the determining factor. He submitted that in fact, the order of dropping of departmental proceedings was first in point of time, thereafter, there was cancellation of suspension and thereafter, the order of compulsory retirement was passed. He submitted that in the alternative, the learned Judge ought to have held that the same were passed simultaneously. The learned Judge ought to have accepted that it was within the powers of the Corporation to pass the aforesaid orders and to retire the plaintiff compulsorily. He submitted that the learned Judge ought to have held that the plaintiff had lost his utility in service and that he had become a dead wood and, therefore, it was justified on the part of the Corporation to retire him prematurely on reaching the age of 55 years,

more particularly, when the Corporation is having that power and the order under challenge of compulsory retirement does not cast any stigma on him.

5. Meeting with the contention raised by Mr. J.R. Nanavati, learned Advocate for the appellant, Mr. Shirish Joshi, learned Advocate appearing for the respondent-original plaintiff, submitted that it is a well settled position of law that when an employee is under suspension and when the departmental proceedings are pending against an employee, it is not open for the employer to pass an order of compulsory retirement. He submitted that this position is well settled by a judgment of this Honourable Court in the matter between Doshi Fatehchand Morarji v. Jamnagar Municipal Corporation reported at 2002 (1) GLH 50 and the judgment of the Honourable Apex Court in the matter between Avtar Singh Vs. State of Haryana and Another, , which more succinctly lays down the aforesaid proposition of law.

Mr. Shirish Joshi submitted that in the matter before this Court, Rule 5(a) of "Jamnagar Nagarpalika Karmachari Na Nivrut Vay Maryada Niyam" (Jamnagar Municipal Servant's Age of Retirement Rules) were under consideration and this Court has made very meaningful observations in paragraph 9. He submitted that the observations, in nutshell, are to the effect that,

".... Even when there is power available with the authority, there has to be some guiding principles for exercising the said powers."

".... Even if it is assumed that the respondent-Corporation had the power to retire a servant at the age of 55 years by 3 months" written notice without assigning any reasons, the question is that even if an authority is possessed of a power whether such power has been exercised in a reasonable manner or it has been exercised in an arbitrary or capricious manner. "

".... Even if the rule does not provide any guidelines or criteria and provides that the concerned authority may retire any servant at any time on after attaining the age of 55 years by giving 3 months" notice without assigning any reason, it goes without saying that out of more than one employee who attained the age of 55 years, any one employee or more than one employees are chosen to be subject to the action under Rule 5(a) so as to retire at the age of 55 years, there must be some basis and material for taking a decision that his retirement at the age of 55 years as against the normal age of superannuation of 58 years was warranted. The question as to who should be retired at the age of 55 years or thereafter, before attaining the age of 58 years and who should be allowed to be continued till the age of 58 years, i.e. the normal age of superannuation can't be left at the sweet will and caprice of the authorities so as to pick and choose."

".... It may be observed that even if a rule is valid, the exercise of power under that rule in an arbitrary and unreasonable manner, renders the action taken under that rule to be invalid."

Mr. Joshi relied upon paragraphs 5 and 11 of the Honourable Apex Court's judgment in the matter of Umedbhai M. Patel (supra), which read as under:

"5. This Court, in a number of cases, had occasion to consider the law relating to compulsory retirement and has laid down various principles. In State of Orissa and others Vs. Ram Chandra Das, , this Court held in paragraph 3 of the judgment as follows :

"It is needless to reiterate that the settled legal position is that the Government is empowered and would be entitled to compulsorily retire a Government servant in public interest with a view to improve efficiency of the administration or to weed out the people of doubtful integrity or are corrupt but sufficient evidence was not available to take disciplinary action in accordance with the rules so as to inculcate a sense of discipline in the service. But the Government, before taking such decision to retire a Government employee compulsorily from service, has to consider the entire record of the Government servant including the latest reports."

"11. The law relating to compulsory retirement has now crystallized into definite principles, which could be broadly summarised thus :

(i) Whenever the service of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure."

6. Learned Advocate for the respondent submitted that in the present case, the order of compulsorily retiring the plaintiff does not disclose any reason. Further, the defendant has not produced any material to justify its action except stating that it has power to retire a person on reaching the age of 55 years.

7. In view of the aforesaid discussion and in view of the settled legal position to the effect that even if the authority has a power, there has to be guidelines for exercising that power and in absence of any material to justify the impugned order, the order cannot be held to be valid only because there is a power with the authority.

In the result, this First Appeal fails and the same is dismissed with costs of Rs. 5,500=00.

8. In view of the dismissal of the main First Appeal, the Civil Application No. 2243 of 1997 does not survive and the same is disposed of.