(2003) 10 J&K CK 0010

In the Jammu And Kashmir High Court

Case No : SWP No 771 of 2003

J.S. Modi — APPELLANT

Vs

State and Others — RESPONDENT

Date of Decision : 16-10-2003

Acts Referred:

Citation : (2004) 1 JKJ 556

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Advocate : D.C. Raina, for the Appellant; B.S. Salathia, AAG, for the Respondent

Final Decision : Allowed

Judgement

Permod Kohli, J.—Heard the learned counsel for the parties. Petition is admitted to hearing and taken up for final disposal on the consensus

of the learned counsel for the parties.

2. Petitioner was the Member of Kashmir Administrative Service and was placed in selection grade. In the year 2002. Vide Government order

No. 793-GAD of 2002 dated 27-4-2002 petitioner came to be transferred and posted as Member, Jammu & Kashmir Service Selection Board,

Jammu. He was ordered to be retired from the said post on attaining the age of superannuation i.e. 58 years as a Member of Kashmir

Administrative Service. Petitioner on being retired from service was made to relinquish the office as a Member of J&K Services Selection Board.

He has invoked the writ jurisdiction of this Court seeking answer to following questions formulated in the petition and consequently the reliefs

claimed in the writ petition that include his continuation as Member of J&K Services Selection Board and the arrears of salary w.e.f. 1-8-2002 till

May, 2004:-

(i) Whether the term/tenure of two years as Member of J&K State Services Selection Recruitment Board has the over riding effect upon Art 226

of the J&K Civil Service Regulations requiring a public servant to retire at the age of 58 years;

(ii) Whether a public servant during his service tenure when appointed as a Member of the Board is entitled to serve for the tenure provided under

Rules notwithstanding the fact that superannuation age falls during the intervening period.

3. In respone to the petition, respondents No. 1 & 2 filed their dis-claimer contesting the right of the petitioner to continue as Member of the J&K

Services Recruitment Board after his superannuation as Member of Kashmir Administrative Service (KAS). Respondents have asserted that the

petitioner has no right to continue as Member of the Board after his retirement in terms of Article 226 of the J&K Civil Services Regulations.

4. The short question involved in the writ petition is whether the petitioner has a right to continue as Member of J&K Civil Services Recruitment

Board, for the tenure prescribed under rules irrespective of his superannuation as a Government employee.

5. Jammu & Kashmir Subordinate Services Recruitment Rules 1992 are creation of SRO 194 dated 18-8-1992. Recruitment rules have been

framed by the Government in exercise of the power conferred by proviso to Section 124 of the Constitution of Jammu and Kashmir. These

transitory rules framed under Article 124 of the Constitution of Jammu & Kashmir has the force of law till an enactment is passed by the State

legislature. Constitution of the Board is provided under Rule 4, whereas qualification for appointment of the Chairman and the Members of the

Board are prescribed under Rule 5. Both these rules being relevant for the purposes of the present petition are re-produced:-

4. Constitution of the Board:-

(i) There shall be constituted a Service Selection Board for making recruitment to subordinate services;

(ii) The Board shall consist of a Chairman and two or more members to be appointed by the Government; provided that any temporary vacancy

caused in the Board by temporary absence, death, removal or resignation of the

Chairman or any of the members shall not effect the constitution of

the Board;

Provided further that no action of the Board shall be invalid or called in question on the ground merely of temporary absence or existence of any

vacancy of the Chairman or Member of the Board.

(iii) The term of the office of Chairman or a Member shall be two years from the date on which he enters upon his office unless transferred or

removed earlier.

5. Qualification for appointment:-

A person shall not be qualified for appointment as Chairman or Member of the Board unless he-

Is holding or has held the post of Secretary, Special Secretary, Additional Secretary to Government or Judge of the District Court, or any

equivalent or higher post.

6. Petitioner who was a Member of Kashmir Administrative Service and was in the cadre of Additional Secretary to Government was duly

qualified to be appointed as Member of the Board in terms of Rule 5 (Supra). Term of office of the Chairman and Member of the Board is

prescribed under Sub-rule (iii) of Rule 4. An examination of the afore-said rule makes it clear that the term of the office of the Chairman or a

Member of the Board shall be two years from the date on which he enters upon his office unless transferred or removed earlier. Contention of the

petitioner is that though he was a member of Kashmir Administrative Service and as such Member of the said service was to retire on attaining the

age of superannuation on 31-7-2002. However, on his appointment as a Member of Services Selection Board he is entitled to serve for a period

of two years irrespective of his superannuation from the Government service. According to him he was appointed as Member of the J&K Services

Selection Board vide Govt order No. 793-GAD of 2002 dated 27-4-2002 and joined there immediately there-after. Therefore, he is to continue

as Member of the Services Selection Board for a period of two years w.e.f. 27-4-2002. The action of the respondents not to permit him to

continue as Member of the J&K Services Selection Board is illegal and un-warranted, besides being in contravention to SRO 194 (Supra).

7. Mr. B.S. Salathia, learned Addl Advocate General appearing on behalf of the respondents submits that SRO 194 stands amended vide SRO

02 dated 6-1-2003 whereby Sub-rule (iii) of Rule 4 has been re-cast, which reads-

The term of the Chairman or a Member of the Board, as the case may be, shall be till he/she resigns or retires on superannuation or is

transferred/removed.

According to Mr. Salathia the Chairman or Member of the Board can continue on the Board till he resigns or retires on superannuation or is

transferred/removed. According to him in view of the clear provision of amended SRO petitioner is not entitled to continue as Member and had to

relinquish the office on his superannuation.

8. SRO 02 dated 6-1-2003 relied upon by Mr. Salathia was issued after the appointment of the petitioner as Member of the J&K Services

Selection Board. On the basis of amendment introduced vide SRO 02 dated 6-1-2003 the petitioner was entitled to continue as Member of the

Recruitment Board only till such time, he is in Government service and shall have no right to continue on superannuation. Since this SRO came into

being subsequent to appointment of the petitioner as Member of the Board, the relevant question is whether the amendment introduced by way of

SRO 02 can be put in aid to curtail the right of the petitioner to continue as Member of the Board before the expiry of tenure provided under Rule

4 (iii). There is absolutely no doubt that appointment as Member or Chairman of the Board is a tenure appointment. The only exception for

curtailment of the tenure is as prescribed under original SRO 194 till the transfer or removal. Now vide the amended SRO the tenure of a Member

can be cut-short under two more contingencies i.e. resignation or retirement. These two contingencies were not in the original SRO. If the

amended SRO applies retrospectively than definitely the petitioner has no right to continue as Member of the Board. However in the event the

amendment introduced has no application and operates prospectively, the term of two years for which the petitioner was initially appointed cannot

be curtailed irrespective of the petitioner's superannuation. It is settled proposition of law that every statute is prospective unless made

retrospective by necessary legislative intendment. A right vested at the time of amendment of the statute cannot be taken away unless the amending

statute so provides.

9. Now, the next question that needs examination, is the nature of amendment introduced whether the same has prospective or retrospective

operation. The question of operations of law came to be considered by the Privy Council in AIR 1927 242 (Privy Council) where the right of

appeal was conferred by amendment in the Income Tax Act. Lord Blaneshburgh while considering the scope of amendment brought in by the

amending Act and relying upon an earlier judgment to Board held:-

... while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have

retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not be applied retrospectively in

the absence of express enactment or necessary intendment..

The Apex Court considered the fundamental rule of interpretation of statute in case of ""Mithilesh Kumari v. Prem Beharim Khare"" AIR 1989 SC

124 and held:

We read in Maxwell that it is a fundamental rule of English Law that no statute shall be construed to have retrospective operation unless such a

construction appears very clearly at the time of the Act or arises by necessary and distinct implication retrospective operation is, therefore, not to

be given to a statute so as to impair existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided

without doing violence to the language of the enactment. Before applying a statute retrospective the Court has to be satisfied that the statute is in

fact retrospective. The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively would

prejudicially affect vested rights or the illegality of the past transactions, or impair contracts, or impose new duty or attach new disability in respect

of past transactions or consideration already passed. However, a statute is not properly called a retrospective statute because a part of the

requisites for its action is drawn from a time antecedent to its passing. We must look at the general scope and purview of the statute and at the

remedy sought to be applied, and consider what was the former State of Law and what the legislation contemplated. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive. But Laws made justly and for the

benefit of individuals and the community as a whole, as in this case, may relate to a time antecedent to their commencement. The presumption

against retrospectivity may in such cases be rebutted by necessary implications from the language employed in the statute.

10. The question also came to be considered by a constitution Bench of the Apex Court in the case of ""K.C. Arora v. State of Haryana"" (1984) 3

SCC 282. In the case before the Apex Court certain officers of the Panchayat were treated as Government Servants. By an amendment, they

were deprived of the status as such, Government Servants. The Court on consideration of the scope of the amendment and its impact on the

existing rights of the officers who were earlier treated as Government Servants and deprived of such a status by the amending Act held:-

...The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing

laws but since the laws are made under a written Constitution, and have no conform to the does and don't of the Constitution, neither retrospective

nor retrospective laws can be made so as to contravene fundamental rights. The laws must satisfy the requirements of the Constitution today taking

into account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no rights, therefore, the

requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights and not yesterday's. A

legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights

accrued in the Course of the 20 years. That would be most arbitrary, unreasonable and a negation of history--Today's equals cannot be made

unequal by saying that they were unequal 20 years ago and we will restore that position by making a law today and making it retrospective.

Constitutional rights, constitutional consequences cannot be tampered with that way. A law which if made today would be plainly invalid as

offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective. Past virtue

(constitutional) cannot be made retrospective. Past virtue (Constitutional) cannot be made to wipe out present vice (Constitutional) by making retrospective laws. We are, therefore, firmly of the view that the Gujrat Panchayats (Third Amendment) Act, 1979 is constitutional as it offends

Article 311 and 14 and is arbitrary and unreasonable.

11. Another Constitution Bench of the Apex Court considered the scope of Hindu Adoption and Maintenance Act (1956) on the rights of a

married woman under Mitakshara School of Hindu Law (uncodified). The ratio of this judgment is as under:

.Now before the Act came into force, rights of maintenance out of the estate of a Hindu dying before the commencement of the Act were

acquired, and the corresponding liability to pay the maintenance was incurred under the Hindu law inforce at the time of his death. It is well

recognized rule that a statute should be interpreted, if possible so as to respect vested rights, and such a construction should never be adopted if

the words are open to another construction. See Craies on Statute Law, 6th Edn. (1963) P.397. We think that Ss 21 and 22 read with Section 4

do not destroy or affect any right of maintenance out of the estate of a deceased Hindu vested on his death before the commencement of the Act

under the Hindu Law in force at the time of his death. On the death of Lingayya, the first respondent as his concubine and the second, third and

fourth respondents as her illegitimate sons had a vested right of maintenance during their lives out of the estate of Lingayya. This right and the

corresponding liability of the appellants to pay maintenance are not affected by Sections 21 and 22 of the Act. The continuity claim of the

respondents during their lifetime springs out of the original right vested in them on the death of the Lingayya and is not founded on any right arising

after the commencement of the Act.

12. In view of the law laid down by the Privy Council and the Apex Court, referred to above, SRO 02 dated 6-1-2003 cannot be said to have

retrospective operation as no such legislative intendment is evident from the language implied in the amending SRO.

Rule 5 of SRO 194 dated 18-8-1992 which prescribes the qualification for appointment as Member of the Board, not only specify that a person

holding one of the ranks mentioned therein, but also a person who has held any such post, is qualified to be the Member of the Board. The words

used in Rule 5 ""is holding"" or ""has held"", therefore, do not only make serving officer eligible for appointment but even a retired officer. Hence, there

is absolutely no prohibition in appointment or continuation of a retired officer as Member of the Board. Admittedly, under un-amended Sub-rule

(iii) of Rule 4, the term of two years can only be curtailed on transfer or removal. Petitioner has neither been transferred nor removed. The word

removal"" has not been defined under the rules but even ordinary meaning attached to this word by no stretch of imagination encompass, the

superannuation of a Government Servant. The word ""remove"" has been defined under the Websters' Dictionary to mean ""to displace, or dismiss as

from office."" It necessarily means an act to remove or dis-lodge a person from the office. As far as the retirement on superannuation is concerned,

it is pre-determined and is automatic. Therefore, the superannuation of a Government servant cannot be termed as a ""removal from service or

office"".

13. Even the framers of the rule had no intention to construe superannuation as a removal. Had it been so, there was no necessity of introducing the

amendment to provide the ""resignation"" and or ""superannuation"" as two more situations to cut short the period of two years, provided for the

Chairman or the Member of the Board. It is only after the amendment by SRO 02 dated 6-1-2003 that in addition to transfer and removal, a

person who is appointed as Member or the Chairman of the Board, can be asked to relinquish the office on resignation or superannuation. A

conjoint reading of Rules 4 & 5 makes it abundantly clear that a person, who is holding any of the post specified under Rule 5 or has held the post

in past, is qualified to be appointed as Chairman/Member of the Board. The appointment can be made by transfer or other-wise by the

Government. Admittedly, the petitioner was appointed Member of the Board. The tenure of Chairman or the Member is prescribed as two years

and can be curtailed only on transfer or removal and after the amendment if the incumbent resigns or retires. Since the amdnement has been held to

be prospective in nature, therefore, the two years tenure of the petitioner can only be curtailed by transferring him or removing him from office.

None of these contingencies have happened and a retired officer being also qualified to be a Member of the Board, the petitioner has right to

continue as Member of the Board for a period of two years w.e.f. 27-4-2002.

Since under SRO 194 a retired officer is also held entitled to be a

member of the Board, question No. 1 formulated by petitioner need not be answered.

In view of the above, this petition is allowed. Respondents are directed to allow the petitioner to join as Member of the Jammu and Kashmir

Subordinate Services Recruitment Board and continue till 26-4-2004. Petitioner shall also be entitled to salary for the intervening period i.e. from

1-8-2002 till the completion of two years i.e. 26-4-2004.