
(2016) 03 GUJ CK 0022

In the Gujarat High Court

Case No : Special Civil Application No. 5241 of 2000

Kantibhai Ishwardas Patel

APPELLANT

Vs

Palanpur Municipality and Others

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 311

Gujarat Municipalities Act, 1963 — Section 48

Penal Code, 1860 (IPC) — Section 114, Section 323, Section 332, Section 341, Section 352, Section 504, Section 506(2)

Citation : (2016) 2 GCD 1270 : (2016) 3 GLR 1855 : (2016) LIC 2549

Hon'ble Judges : V.M. Pancholi, J.

Bench : Single Bench

Advocate : H.S. Munshaw, Advocate, for the Respondent

Final Decision : Allowed

Judgement

V.M. Pancholi, J.—1. By way of this petition, petitioner has prayed to quash and set aside the order dated 20.05.2000 passed by the respondent authority, by which, order of compulsory retirement of the petitioner was passed.

2. Brief facts for deciding the controversy involved in the present petition are as under:

"2.1 Petitioner was appointed as Food Inspector by the respondent Municipality on 16.05.1974. It is the case of the petitioner that he was performing his duty with honesty and sincerity and therefore, he had been awarded with various certificates in the past by the respondent Municipality and because of the efficient work of the petitioner. Criminal case was registered against the petitioner for the offense punishable under the Prevention of Corruption Act. The said case was registered as special case No. 38 of 1997. However, by an order dated 31.03.1999, petitioner has been acquitted by the Special Judge, Banaskantha at Palanpur. The Criminal Appeal No. 709 of 1999 preferred against the said order by the State was also dismissed by this Court at the admission

stage.

2.2 It is alleged by the petitioner that respondent No. 2 who was elected as MLA on the ticket of party in power and respondent No. 3 was also elected as Municipal Councilor on the ticket of the same party and because of the political pressure of respondents No. 2 and 3, the respondent No. 1 has passed the impugned order.

2.3 It is the case of the petitioner that before the impugned order was passed, petitioner was placed under suspension by an order dated 20.03.1999. Petitioner therefore challenged the said order by filing Special Civil Application No. 2106 of 1999. During the pendency of the said petition, the order of suspension was withdrawn by the respondent No. 1 on 03.06.1999.

2.4 Petitioner has contended that the respondent No. 3 demanded a bribe of Rs. 10,000/- from the petitioner. Petitioner has paid Rs. 3,000/- to him and thereafter petitioner approached before the ACB, Palanpur. FIR came to be registered against the respondent No. 3 and he was caught red-handed with the remaining amount of bribe. Respondent No. 3 thereafter made an assault on the petitioner and therefore petitioner filed another FIR for the offenses punishable under Sections 323, 504, 506(2), 341, 352 and 114 of Indian Penal Code against the respondent No. 3. Said FIR came to be lodged on 10.04.2000. Petitioner thereafter made representation to Police Inspector of ACB as well as Director of Municipalities and raised an apprehension that petitioner is likely to be victimized by the respondent No. 3 and his associates. Thus, it is the case of the petitioner that the impugned order was thereafter passed on 20.05.2000 by the respondent No. 1 at the instance of respondents No. 2 and 3 and therefore, the said order is passed with mala-fide intention. Present petition is therefore filed."

3. Heard learned advocate Mr. Chirag Patel for the petitioner and learned advocate Mr. H.S. Munshaw for respondents No. 1 and 2.

4. Learned advocate Mr. Patel mainly contended that the impugned order of compulsory retirement of the petitioner was passed by the respondent Municipality with mala-fide intention and the same is passed at the instance of respondents No. 2 and 3 and therefore, the said order be quashed and set aside.

5. He further submitted that before passing an order of compulsory retirement, no notice was issued to the petitioner, nor any opportunity of being heard was given to him and therefore, the respondent Municipality has violated principles of natural justice and therefore also, the impugned order be quashed and set aside. Thereafter, he contended that the respondent Municipality has taken into consideration irrelevant material while passing the impugned order and stated incorrect facts that departmental inquiry is pending against the petitioner since last 10 years. It is also observed in the impugned order that if the departmental inquiry is conducted against the petitioner, there would be delay in concluding the said inquiry and the same would also affect adversely to the citizens of Nagarpalika. Though notices were given time and again to the petitioner, he has

not improved his conduct and therefore, conducting departmental inquiry against the petitioner would not be practicable and reasonable. Thus, instead of conducting the departmental inquiry, the respondent Municipality has passed the impugned order of compulsory retirement of the petitioner. Hence, on this ground also, the same be quashed and set aside.

6. Mr. Patel has thereafter referred to provision contained in Section 48 of the Gujarat Municipalities Act and thereafter also referred to Rule 161 of Bombay Civil Service Rules (hereinafter referred to as "BCSR" for convenience) and contended that no officer or servant shall be reduced to a lower post or removed or dismissed from service and no punishment involving any monetary loss shall be imposed on him under Section 48 unless he has been given a reasonable opportunity of showing cause against such reduction, removal, dismissal or punishment. As per Rule 161 of BCSR before passing an order of compulsory retirement, three months notice in writing or three months pay and allowances in lieu of such notice is required to be given by the Appointing Authority to the concerned employee. He submitted that in the present case, such notice was not issued at all and therefore, the impugned order be quashed and set aside.

7. Mr. Patel has thereafter placed reliance upon the following decisions:

"? In case of Rajesh Gupta v. State of Jammu and Kashmir and others, reported in , (2013) 3 SCC 514

? In case of Girdharsinh Ramsinh Parmar v. Deputy Inspector General of Police, Junagadh, reported in , 1988 (2) GLR 1095

? In case of H.A. Mehta v. State of Gujarat and Another, reported in , 1993 (1) GLH 899

? In case of JM Mehta v. State of Gujarat, reported in , 1991 (1) GLR 619

? In case of Valiben Jethabhai Bhanji v. Patan Municipality, reported in , 2006 (3) GLR 2278"

8. On the other hand, learned advocate Mr. Munshaw mainly contended that number of complaints were received against the petitioner by the respondent Municipality and therefore, the respondent Municipality after considering the entire service record of the petitioner, passed the impugned order in public interest. Learned advocate has referred to the averments made in the affidavit in reply filed on behalf of respondent No. 2, which is produced at page 118 of the compilation and after referring to the said averments, he submitted that while passing the order of compulsory retirement, principle of natural justice is not required to be observed. Order of compulsory retirement is not a stigma or punitive in nature, but the same was passed in public interest and therefore this Court may not interfere with the same while exercising powers under Article 226 of the Constitution of India. He further contended that the scope of judicial review is very limited and therefore, petition be dismissed.

9. Mr. Munshaw has thereafter placed reliance upon the following decisions:

"? In case of National Aviation Company of India Limited v. S.M.K. Khan, reported in , (2009) 5 SCC 732

? In case of R.C. Chandel v. High Court of Madhya Pradesh and Another, reported in , (2012) 8 SCC 58

? In case of Rajasthan State Road Transport Corporation and others v. Babu Lal Jangir, reported in , (2013) 10 SCC 551"

10. I have considered the submissions canvassed on behalf of learned advocates appearing for the parties. I have also gone through the material produced on record and the provisions of law and the decisions relied upon by the learned advocates for the parties.

11. The issue which is required to be decided in this petition is whether this Court can interfere with the order of compulsory retirement while exercising powers under Article 226 of the Constitution of India or not. When such powers can be exercised and what is the scope of judicial review.

12. For deciding the aforesaid issue, provision of law contained in the Gujarat Municipalities Act, 1963 as well as Bombay Civil Service Rules, 1959 are required to be considered.

13. Section 48 of the Gujarat Municipalities Act provides as under:

"48. Imposition of penalties-(1) Without prejudice to the provisions of any law for the time being in force, and subject to any rules made under section 47A, the following penalties may, for good and sufficient reasons be imposed upon any officer or servant of a municipality, namely:--

(i) censure,

(ii) withholding increments or promotion including stoppage at an efficiency bar;

(iii) reduction to a lower post on a fixed pay or a time-scale or to a lower stage in a time-scale;

(iv) recovery from his pay of the whole or part of any pecuniary loss caused to the municipality by negligence or breach of orders;

(v) fine;

(vi) suspension;

(vii) removal from the service, which does not disqualify him from future employment;

(viii) dismissal from service, which ordinarily disqualifies him from future employment;

(2) Any of the penalties mentioned in subsection (1) may be imposed on an

officer or servant of a municipality by the authority competent to make the appointment of such officer or servant.

(3) No officer or servant shall be reduced to a lower post or removed or dismissed from service and no punishment involving any monetary loss shall be imposed on him under this section unless he has been given a reasonable opportunity of showing cause against such reduction, removal, dismissal or punishment:

Provided that this sub-section shall not apply-

(a) where a person is reduced, removed or dismissed or punished on the ground of conduct which has led to his conviction or a criminal charge, or

(b) where the competent authority is satisfied that, for reasons to be recorded in writing by such authority, it is not reasonably practicable to give to such person an opportunity to show cause."

14. Rule 161 of Bombay Civil Service Rules, 1959 provides as under:

"161. (1)(a). Except as otherwise provided in the other clauses of this rule, the date of compulsory retirement of a Government servant other than a Class IV servant, is the date on which he attains the age of 58 years.

Provided -

(i) Deleted

(ii) Deleted

(iii) He may be retained in service after the date of compulsory retirement only with the previous sanction of Government on public grounds which must be recorded in writing (Appellate Authority) Notwithstanding anything contained in clause (a).--

(i) An appointing authority shall, if he is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant to whom clause (a) applies by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice:

(1) if he is in Class I or Class II service or post or in any unclassified gazetted post, the age limit for the purpose of direct recruitment to which is below 35 years, on or after the date on which he attains the age of 50 years, and

(2) if he is in any other service or post, the age limit for the purpose of direct recruitment to which is below 40 years, on or after the date on which he attains the age of 55 years;

(ii) any Government servant to whom clause (a) applies may, by giving notice of not less than three months, in writing to the Appellate Authority, retire from service after he has attained the age of 50 years, if he is in Class I or Class II

service or post or in any unclassified gazetted post, the age limit for the purpose of recruitment to which is below 35 year and in any other case, after he has attained the age of 55 years..."

15. In case of R.C. Chandel (*supra*), relied upon by the learned advocate for the respondent, the Hon"ble Supreme Court observed and held as under:

"27. In Rajendra Singh Verma, this Court restated what has been stated in earlier decisions that compulsory retirement from service is neither dismissal nor removal; it differs from both of them, in that it is not a form of punishment prescribed by the rules and involves no penal consequences inasmuch as the person retired is entitled to pension and other retiral benefits proportionate to the period of service standing to his credit. An order of compulsory retirement being not an order of adverse consequence, principles of natural justice have no application. This Court took into consideration a long line of cases including *State of U.P. and another v. Bihari Lal*, *Union of India v. V.P. Seth and another*, *Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada and another*, *Baidyanath Mahapatra v. State of Orissa and another*, *Union of India v. Col. J.N. Sinha and another*, *All India Judges' Association (1) v. Union of India and others* and *All India Judges' Association (2)*⁶ and culled out the legal position in paragraph 183 (Pg. No. 75) of the Report as follows:

"183. It is well settled by a catena of decisions of this Court that while considering the case of an officer as to whether he should be continued in service or compulsorily retired, his entire service record up to that date on which consideration is made has to be taken into account. What weight should be attached to earlier entries as compared to recent entries is a matter of evaluation, but there is no manner of doubt that consideration has to be of the entire service record. The fact that an officer, after an earlier adverse entry, was promoted does not wipe out earlier adverse entry at all. It would be wrong to contend that merely for the reason that after an earlier adverse entry an officer was promoted that by itself would preclude the authority from considering the earlier adverse entry. When the law says that the entire service record has to be taken into consideration, the earlier adverse entry, which forms a part of the service record, would also be relevant irrespective of the fact whether the officer concerned was promoted to higher position or whether he was granted certain benefits like increments, etc."

16. In case of National Aviation Company of India Limited (*supra*), relied upon by the learned advocate for the respondent, the Hon"ble Supreme Court observed and held in paragraphs No. 13 to 16 as under:

"13. An order of compulsory retirement in pursuance of a rule/regulation which enables the competent authority to prematurely retire an employee, on the formation of a bona fide opinion that continuation of the employee in service will not benefit the institution or be in the interest of the institution (or will not be in public interest where the employee is a government servant), on review of the

performance/service record of the employee, on the employee attaining the specified age or completing the specified period of service, is valid and not open to challenge. It is neither a punishment nor considered to be stigmatic. Where the compulsory retirement, is not by way of punishment for a misconduct, but is an action taken in pursuance of a valid condition of service enabling the employer to prepone the retirement, the action need not be preceded by any enquiry and the principles of natural justice have no application.

14. The unsatisfactory service of the employee which may include any persistent misconduct or inefficiency furnishes the background for taking a decision that the employee has become a dead wood and that he should be retired compulsorily. Such "compulsory retirement" is different and distinct from imposition of a punishment of compulsory retirement (or dismissal/removal) on a specific charge of misconduct, where the misconduct is the basis for the punishment. The difference is on account of two factors: firstly, the employee on account of completing a particular age or number of years of service falls within the zone where his performance calls for assessment as to whether he is of continued utility to the employer or has become a deadwood or liability for the employer. Secondly, the record of service, which may include poor performance, unsatisfactory service or incidentally any recent conduct (which if separately considered may constitute a misconduct subject to punishment) when considered as a whole, leads the Reviewing Authority to the conclusion that the employee in question is not fit to be continued in service and not of utility to the employer. Therefore, any incidental reference to unsatisfactory service, or any remarks in the context of explaining the reason for compulsory retirement under the relevant rule, in the letter of compulsory retirement will not be considered as stigmatic, even though read out of context, they may be capable of being construed as allegations of misconduct.

15. Any order of compulsory retirement in terms of the rule/regulation providing for such compulsory retirement is not open to interference unless shown to be malafide or arbitrary or not based on any background material at all relating unsatisfactory service justifying the premature retirement.

16. When an order of compulsory retirement purports to be one under the rule/regulation providing for such premature retirement, the proper approach of the court would be to consider whether the order is sustainable with reference to the requirements of the relevant rule, rather than examining whether the order could also be construed as a punishment for misconduct -- vide *Baikuntha Nath Das v. Chief District Medical Officer, Allahabad Bank Officers' Association v. Allahabad Bank, I.K. Mishra v. Union of India, State of Uttar Pradesh v. Lalsa Ram and M.L. Binjolkar v. State of Madhya Pradesh*."

17. Similarly in the case of *Rajasthan State Road Transport Corporation and others (supra)*, which has been relied upon by learned advocate for the respondent, the Hon"ble Supreme Court has observed and held in paragraphs No. 24 to 27 as under:

"24. Having taken note of the correct principles which need to be applied, we can safely conclude that the order of the High Court based solely on the judgment in the case of Brij Mohan Singh Chopra was not correct. The High Court could not have set aside the order merely on the ground that service record retaining to the period 1978-90 being old and stale could not be taken into consideration at all. As per the law laid down in the aforesaid judgments, it is clear that entire service record is relevant for deciding as to whether the government servant needs to be eased out prematurely. Of course, at the same time, subsequent record is also relevant, and immediate past record, preceding the date on which decision is to be taken would be of more value, qualitatively. What is to be examined is the "overall performance" on the basis of "entire service record" to come to the conclusion as to whether the concerned employee has become a deadwood and it is public interest to retire him compulsorily. The Authority must consider and examine the overall effect of the entries of the officer concerned and not an isolated entry, as it may well be in some cases that in spite of satisfactory performance, the Authority may desire to compulsorily retire an employee in public interest, as in the opinion of the said authority, the post has to be manned by a more efficient and dynamic person and if there is sufficient material on record to show that the employee "rendered himself a liability to the institution", there is no occasion for the Court to interfere in the exercise of its limited power of judicial review."

25. With this we revert to the facts of the present case: In so far as period of 1978-1990 is concerned, the respondent was charge sheeted in 19 cases. In few cases he was exonerated and in some other cases he was given minor penalty like admonition, stoppage of pay, annual grade increment for a limited period. The gist of these cases is as follows:

26. The aforesaid record projects the dismal picture. The High Court has observed that the respondents have not been able to show anything adverse in the career of the respondent after 1990 i.e. in last 12 years preceding the order of retirement. These observations are not correct in as much as:

a) There was an inquiry against the respondent for which he was imposed the penalty of stoppage of increment for two years. He had made a representation against this penalty on 5.11.1998 which was dismissed on 25.5.1998.

b) Further another criminal case was also instituted against him in the year 1999. Though outcome of this criminal case is not mentioned, fact remains that the accident was caused by the Respondent while driving the bus of the appellant Corporation, and the appellant corporation had to pay heavy compensation to the victims as a result of orders passed by MACT.

Thus even the service record after 1990 does not depict a rosy picture. In any case, there is nothing to show his performance became better during this period.

27. It hardly needs to be emphasized that the order of compulsory retirement is neither punitive nor stigmatic. It is based on subjective satisfaction of the

employer and a very limited scope of judicial review is available in such cases. Interference is permissible only on the ground of non application of mind, malafide, perverse, or arbitrary or if there is non-compliance of statutory duty by the statutory authority. Power to retire compulsorily, the government servant in terms of service rule is absolute, provided the authority concerned forms a bonafide opinion that compulsory retirement is in public interest."

18. In the case of Rajesh Gupta (supra), relied upon by learned advocate Mr. Chirag Patel, learned advocate for the petitioner, the Hon"ble Supreme Court has observed and held in paragraphs No. 8, 9, 20, 21, 22, 29, 30 and 31 as under:

"8. We may also notice at this stage that the appellant had a spotless service record throughout 24 years of service. In the annual performance report for the period 1.4.1997 till 31.3.1998, his work has been assessed as "Good". The reviewing authority has graded the appellant as a "Very Good Officer". Against the column of integrity, the remark is "Excellent". Similarly, for the year 1998-1999, he was assessed as "Good officer" and having "excellent" integrity. In the annual performance report for the year 1999-2000 again his integrity is said to be "Excellent". He has been assessed as a very capable and efficient officer. The overall assessment given by the reviewing authority is "A very good officer". For the year 2000-2001, the annual performance report again records that the appellant is "A good officer" with good integrity. A separate assessment was given on 12th March, 2005 for the period 27th October, 2001 to 29th July, 2002 and thereafter from 23rd October, 2002 till 23rd December, 2002. This annual performance report was recorded by the Deputy Commissioner, Jammu for the period of 11 months. In the aforesaid two tenures, the work and conduct of the appellant was found to be good. It is also recorded that no complaint was brought to the notice of the reporting officer. For the year 2003-2004 against the column integrity, it is mentioned that "nothing against came in notice". The reporting officer has said "he is a very good field officer". The reviewing officer assessed the appellant as "An outstanding officer".

9. In spite of having a blemish-free record of service as noticed above, the appellant was directed to be prematurely retired by order dated 26th April, 2005 on the basis of the recommendations made by the High Powered Review Committee. The conclusion on the basis of which the recommendations for retirement of the appellant has been made are as under:--

"5. As per inputs provided by the Additional DG CID the officer has amassed property disproportionate to his known sources of income which include a palatial house at Krishna Colony Kathua built over about 3 kanals of land; two shops in Kathua market; six kanals of land in Kathua town, one kanal of land at Trikuta Nagar Jammu (Sector No. 3), two kanals of land at Trikuta Nagar extension, three kanals of land at Greater Kailash Colony, Jammu; 10 marla plot at Bhatiandi and bank account and lockers in United Commercial Bank, R.N. Bazar and Vijay Bank, Purani, Mandi, Jammu.

20. The principles on which a government servant can be ordered to be compulsorily retired were authoritatively laid down by this Court in the case of Baikuntha Nath Das (supra). In Paragraph 34, the principles have been summed up as follows:

"34. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above.

21. The aforesaid principles have been re-examined and reiterated by this Court in the case of Nand Kumar Verma (supra). The principles have been restated as follows:--

34. It is also well settled that the formation of opinion for compulsory retirement is based on the subjective satisfaction of the authority concerned but such satisfaction must be based on a valid material. It is permissible for the courts to ascertain whether a valid material exists or otherwise, on which the subjective satisfaction of the administrative authority is based. In the present matter, what we see is that the High Court, while holding that the track record and service

record of the appellant was unsatisfactory, has selectively taken into consideration the service record for certain years only while making extracts of those contents of the ACRs. There appears to be some discrepancy. We say so for the reason that the appellant has produced the copies of the ACRs which were obtained by him from the High Court under the Right to Information Act, 2005 and a comparison of these two would positively indicate that the High Court has not faithfully extracted the contents of the ACRs.

36. The material on which the decision of the compulsory retirement was based, as extracted by the High Court in the impugned judgment, and material furnished by the appellant would reflect that totality of relevant materials were not considered or completely ignored by the High Court. This leads to only one conclusion that the subjective satisfaction of the High Court was not based on the sufficient or relevant material. In this view of the matter, we cannot say that the service record of the appellant was unsatisfactory which would warrant premature retirement from service. Therefore, there was no justification to retire the appellant compulsorily from service.

22. In the case of *State of Gujarat v. Umedbhai M. Patel* (supra), the same principles were reiterated in the following words:--

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

(i) Whenever the services 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."

...

...

29. The report also does not indicate that there is any irregularity in the bank accounts maintained by the appellant. The affidavit filed on behalf of the State of Jammu and Kashmir clearly shows that according to the Vigilance Organization, three First Information Reports bearing Nos. 49/91, 11/95 and 63/94 were registered by the State Vigilance Organization against the appellant when he was posted as Executive Engineer (REW, Kathua). Upon investigation, all the FIRs were found to be "Not Proved". However, recommendation was made to initiate departmental action against the officer. In spite of the aforesaid recommendation, it has not been disputed before us, that no departmental action was ever initiated against the appellant. In fact, after the completion of the investigation into the FIRs, the appellant was promoted to the post of Executive Engineer on 15.12.1996. Therefore, it can be safely concluded that there were no material before the High Powered Committee to conclude that the officer possessed assets beyond his known source of income.

30. This now takes us to the other material on the basis of which the recommendation has been made by the High Powered Committee. It has been noticed by us earlier that the appellant was required, in the performance of his official duties, to recommend the sanctioning of technical approval to the construction of works of various projects. The allegation with regard to issuing back dated technical sanctions was duly inquired into. The conclusion ultimately reached by inquiry officer noticed in the earlier part of the order indicates that at best the appellant acted in a casual and haphazard manner in the maintenance of records. Such negligence on the part of the appellant cannot per se lead to the conclusion that the appellant was acting in such a manner with an ulterior motive. The conclusions reached by the High Powered Committee also do not correlate to the assessment of work and integrity of the appellant in the annual performance report. As noticed earlier, in all the annual performance reports, the officer has been rated "very good", "excellent" and even "outstanding".

31. In view of the aforesaid, the conclusion is inescapable, that the order passed by the State Government suffers from vice of arbitrariness. The High Court erred in arriving at conclusions which were not borne out by the record produced before the High court. In view of the settled law, it is not possible for us to uphold the judgments of the Single Judge as also of the Division Bench."

19. In the case of H.A. Mehta (supra), this Court observed and held in paragraphs No. 18 to 20 as under:

"18. The question is as to what is the scope of such power of judicial review? are the courts justified in re - appreciating and re - assessing evidence and material and in reaching conclusions different from that reached by the appropriate authority? should the courts delve deep into the service record and try to find out factors favourable to the employee by ignoring factors which are quite

relevant and material to the foundation of public administration? should the courts sit in appeal over the order of decision of the appropriate authority? answers to all such questions are in negative and the jurisdiction and scope of judicial review is very limited. When the court is satisfied that the exercise of power under this rule amounts to colourable exercise of power or is arbitrary or mala fide it can always strike down the order. However as observed by justice v. H. Krishnaiyer in the case of baldevraj chadha v. Union of India (supra) judicial monitoring becomes an unpleasant necessity where power may be humour and a career may be a victim. Potential compulsory retirement under rule 161 haunting the afternoon of official life injects an awesome uncertainty which makes even the honest afraid the efficient tremble and almost everyone genuflect. Since exercise of such power has very drastic consequences on the govt. Servants in the evening of his career and since the scope of judicial review is staled to be very limited it becomes the duty of the court to sedulously check exercise of such power. The adverse effect of the order on the govt. Employee cannot be better stated that in the words of justice krishna iyer in the case of baldevraj chadha v. Union of India (supra). Justice krishna iyer observed in the case aforesaid as under:

"The administration to be competent must have servant who are not plagued by uncertainty about tomorrow. At the age of 50 when you have family responsibility and the some problems of ones own life evening your experience accomplishments and fullness of fitness become an asset to the administration if and only if you are not harried or worried by what will happen to me and my family? where will i go if i cashiered? how will i survive when i am too old to be newly employed and too young to be superannuated? these consideration becomes all the more important in departments where functional independence fearless scrutiny and freedom to expose evil or error in high places is the task. And the ombudsmanic tasks of the office of adult vested in the c and ac and the entire army of monitors and mentions under him are too strategic for the nations financial health and discipline that immunity from subtle threats and oblique overawing is very much in public interest. So it is that we must emphatically state that under the guise of public interest if unlimited discretion is regarded acceptable for making an order of premature retirement it will be the surest menace to public interest and must fail for unreasonableness arbitrariness and disguised dismissal. To constitutionalise the rule we must so read it as to free it from the potential for the mischiefs we have just projected. The exercise of power must be bona fide and promote public interest. There is no demonstrable ground to inter mala fide here and the only infirmity alleged which deserves serious notice is as to whether the order has been made in public interest. When an order is challenged and its validity depends on its being supported by public interest the state must disclose the material so that the court maybe satisfied that the order is not bad for want of any material whatever which to a reasonable man reasonably instructed in the law is sufficient to sustain the grounds of public interest justifying forced retirement of public servant. Judges cannot substituted

their judgment for that of the administrator but they are not absolved from the minimal review well - settled in administrative law and founded on constitutional obligations. The limitations on judicial power on this area are well - known and we are confined to an examination of the material merely to see whether a rational mind may conceivably be satisfied that the compulsory retirement of the officer concerned is necessary".

19. It becomes clear from the above observations that under the guise of public interest if unlimited discretion is regarded acceptable for making the order of premature retirement it will be the surest menace to public interest and it must fail for unreasonableness arbitrariness and disguised dismissal. Shortly speaking in order to succeed in an action challenging the order of premature retirement the authority exercising power must prove that the exercise of power is bona fide and is to promote public interest. The authority must disclose the material based on which the order is passed and the court must be satisfied that the order is not bad for want of any material whatever which to a reasonable man reasonably instructed in the law is sufficient to sustain the ground of public interest. I however the court cannot substitute its judgment for that of the authority but the courts are not absolved from the minimal review well - settled in administrative law and founded on constitutional obligations.

20. Whether there is colourable exercise of power or the authority is lacking any bona fide while passing the order can be tested by ascertaining and finding out. As to whether the authority has taken into consideration the factor which were irrelevant and or extraneous or whether it has failed to take into consideration the factors which were relevant and material. From the enquiry the courts have tried to justify the exercise of powers. When the court was satisfied that the decision was vitiated by taking into consideration irrelevant and extraneous factors or by ignoring relevant and material factors it has invalidated such action on the ground that the order was passed in colourable exercise of powers.

20A. From this enquiry a new line of reasoning is developed. The question is as to whether the authority should consider the entire service record and the confidential reports of an employee or it should only consider the service record and confidential reports of 5 to 10 years immediately preceding the date of retirement? further question is as to whether the order of compulsory retirement is necessarily bad if the authority has taken into consideration the reports of remote past so as to justify the action by ignoring the reports of recent service career of the employee? further question may also arise as to whether a subsequent factum of promotion to a govt. Employee necessarily renders his earlier service record beyond scope of consideration by the authority exercising power of premature retirement? whether a purely administrative action of permitting a govt. Employee to cross e. B. Would also put his entire service record prior thereto outside the field of consideration while assessing his suitability for continuance in service beyond the age of 50 years? enquiry into all these aspects has gradually resulted into widening the scope of judicial review.

In fact power of premature retirement which was once stated to be absolute power is now subjected to a detailed judicial scrutiny under the heading of colourable exercise of powers. What is relevant and what is not relevant. What should be looked into and what should not be looked into for assessing fitness of the employee for continuance in service is indirectly taken into judicial scrutiny and very often the order of premature retirement is avoid on the ground that the authority has taken into consideration irrelevant and extraneous factors or has failed to take into account the relevant or get mane factors."

20. In case of J.M. Mehta (supra), this Court observed and held in paragraphs No. 16 as under:

"16. The Division Bench of this court in Special Civil Application No. 28 of 90 decided in October 1990 following the above-referred decision of the Supreme Court and in the context of Rule 161 of the Bombay Civil Service Rules found that "even if the order of premature retirement is couched in innocuous language without making any imputations against the Govt. servant who is directed to be compulsorily retired from service, the court if challenged, in appropriate cases, can lift the veil to find out whether the order is based on any misconduct of the Govt. Servant concerned or the order has been made bona fide and not with any oblique or extraneous purposes". In the case before the Division Bench, the court found that the employee in that case was not only permitted to cross Efficiency Bar but he was promoted to the higher post. The court, therefore, found that the employee could not be regarded as "dead-wood". The court found that it was the case of the State Govt. in its affidavit reply that number of departmental enquiries were pending against the employee and it was further their case that the integrity of the employee was doubtful. The Division Bench, therefore, found that in fact the order passed against the employee was not an order of premature retirement simpliciter in exercise of powers conferred by Rule 161 of Bombay Civil Service Rules, but in pith and substance, it was a punitive order; the order was a short-cut to a regular departmental enquiry under Article 311 of the Constitution of India."

21. In the case of Valiben Jethabhai Bhanji (supra), this Court observed and held in paragraphs No. 13 and 17 as under:

"13. ...

...

It may be noted that the term compulsory retirement is often used for non-penal premature retirement. One may, however, not lose sight of the fact that there is a distinct difference between these two kinds of retirements, namely, penal retirement upon departmental inquiry on the basis of proved misconduct which normally results into disentitling an employee from seeking any pensionary benefits and a non-penal retirement referred to as the premature or compulsory retirement upon completion of certain number of years of service in which case the employee retains all the benefits of the past service and is entitled to full

post retiral benefits on that basis. One may also notice that in recent past, voluntary retirements pursuant to voluntary retirement schemes are getting currency. Employers often come up with voluntary retirement schemes to reduce the staff and the salary burden. Such schemes are construed as an invitation to offer as was held by the Hon"ble Supreme Court in the case of Bank of Inida v. O.P. Swarnakar, reported in , (2003) 2 SCC 721.

...

...

17. Upshot of the above judicial pronouncements would be that the concept of compulsory retirement as a non-penal termination of the employee upon crossing certain age but before crossing the age of superannuation in terms of the service rules has received definite connotation. Such powers are required to be exercised in public interest. The concept of compulsory retirement public interest in this context is understood to be the requirement of administration to energize itself for better and more efficient administration and in this regard it is found that it is always open for the employer in exercise of such powers to weed out the dead wood, to remove inefficient and to augment the efficiency and integrity in public service. It is found that the Government has power to weed out the dead wood, inefficient, corrupt and people of doubtful integrity by compulsorily retiring them from service. It can thus be seen that in the context of the powers of the employer to compulsorily retire an employee without holding an inquiry, the same must be based on public interest as is understood in the context of several decisions of the Hon"ble Supreme Court, reference to some of which have been made herein-above. The crux of the matter therefore would be that such powers can be exercised in public interest to improve the efficiency of the administration and in that sense such powers can be exercised either to weed out dead wood or to remove inefficient employees or to remove the persons of doubtful integrity. In my opinion, the term public interest in context of such powers cannot be given such a wide meaning as to include any and every question of public importance or interest as is sought to be done by the respondent in the present case. In the ordinary sense of the term though to downsize the work force or to reduce the salary burden, may be considered as public interest, in my opinion, reference to such a purpose is not to be included for the purpose of exercising powers of compulsorily retiring an employee before he attains the age of superannuation. Nature of powers enjoyed by employer under such provisions have been discussed and outlined by various decisions cited herein-above. There is reasonable guarantee that an employee will be permitted to discharge his duties till he crosses the age of superannuation. As observed in the case of Doshi Fatechan Morarji (supra) normal age of superannuation cannot be left at the sweet will or caprice of the employer."

22. From the aforesaid decisions rendered by the Hon"ble Supreme Court as well this Court following points would emerge.

"A. An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehavior.

B. The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government servant compulsorily.

C. The principles of natural justice have no place in the context of an order of compulsory retirement. However, the judicial scrutiny is not excluded, High Court did not examine the matter as an Appellate Court, but High Court has jurisdiction to interfere with the order of compulsory retirement if the order is based I) mala-fide, ii) that it is based on no evidence, or iii) that it is arbitrary, iv) or perverse order.

D. The order of compulsory retirement shall not be passed as a short cut to avoid departmental inquiry when such course is more desirable.

E. Compulsory retirement shall not be imposed as punitive measure.

F. Any adverse entries made in the confidential record shall be made note of and be given due weightage in passing such order."

23. Thus, keeping in mind the aforesaid principles laid down by various Courts, if the facts of the present case are considered, it emerges from the record that the petitioner has placed on record the affidavit in rejoinder alongwith the certificates dated 24.02.1993, 31.08.1994 and 29.09.1999 issued by the Chief Officer, Administrator and President of respondent Municipality respectively. In all the aforesaid certificates, it has been categorically stated that the petitioner is sincere, hardworking and honest. He bears a good moral character. He has given a satisfactory work during his service period and no departmental inquiry is pending against him. The respondents have not filed any sur-rejoinder to this and denied the aforesaid aspects. Thus, if the certificates were issued by the responsible/authorised officers of the respondent Municipality in the years 1993, 1994 as well as in the year 1999, it can be said that till 1999, no departmental inquiry was pending against the petitioner. In spite of that, in the impugned order passed on 20.05.2000, it has been observed that inquiry was initiated against the petitioner in the year 1990. However, the said inquiry was not concluded during period of 10 years. The respondent has not produced any material on record to suggest that such inquiry was initiated and was pending at the time of passing the impugned order against the petitioner.

24. It has further emerged from the record that in the impugned order, there is a reference with regard to criminal complaint filed against the petitioner for the offense punishable under the Prevention of Corruption Act. However, the petitioner has produced on record the order dated 31.03.1999 passed by Special Judge, Banaskantha, Palanpur, passed in Special Case No. 38 of 1997, whereby, the petitioner has been acquitted, petitioner has specifically averred in the petition that against the said order, Criminal Appeal No. 709 of 1999 was preferred by the State and the said appeal was dismissed at the admission stage

by an order dated 01.11.1999. Thus, before passing the impugned order on 20.05.2000, the petitioner was acquitted by the competent Criminal Court. It is also revealed from the record that petitioner has filed FIR against the respondent No. 3, who was working as Chairman of Food Adulteration Committee of the respondent Municipality under the Prevention of Corruption Act. Said FIR is produced at page 100 of the compilation and the same was registered on 23.03.2000 against the respondents No. 3. Thereafter, another FIR came to be registered against the respondent No. 3. Said FIR was also filed by the present petitioner under Sections 323, 504, 506(2), 332, 341, 352 and 114 of Indian Penal Code on 10.04.2000. Petitioner has also produced on record the letter dated 03.04.2000 written by him to the Police Inspector, ACB, which is produced at page 109 and in the said letter, he has also made an allegation against the respondent No. 3 herein and shown an apprehension that respondent No. 3 will implicate him in false cases. Similar letter was written to the Director of Municipalities, which is produced at page 113 of the compilation, wherein also, he has stated that threats are given to him at the instance of respondent No. 3 and requested the Director to disqualify the respondent No. 3. It was also apprehended that the President of Nagarpalika would dismiss him or suspend him and therefore necessary action be taken against such officers.

25. Thus, from the material produced on record, it is clear that respondent Nagarpalika has passed the impugned order on 20.05.2000 with a mala-fide intention at the instance of respondents No. 2 and 3. The petitioner has well in advance shown apprehension about the same. It is further clear that while passing the impugned order, the respondent authority has taken into consideration the irrelevant material and not at all considered the service record of the petitioner i.e. the certificates dated 24.02.1993, 31.08.1994 and 29.09.1999, issued by the various officers of the respondent Municipality, which are produced at page 214 to 216 of the compilation. If the petitioner was working with honesty and sincerity as reflected in the said certificates, there was no question of taking into consideration the irrelevant material while passing the impugned order. Even, no departmental inquiry was pending against the petitioner which is reflected from the aforesaid certificates till 1999. Thus, the observation made by the respondent Municipality in the impugned order that for certain charges, departmental inquiry was initiated against the petitioner in the year 1990 and for a period of 10 years, said inquiry was not concluded because of the petitioner. The said fact is not supported by any material produced on record and the said fact is also incorrect in view of the certificates issued by the respondent authority. Thus, irrelevant material/fact of departmental inquiry pending since 10 years was considered and observed in the impugned order that now if the disciplinary proceedings is initiated against the petitioner, then it would not possible to conclude the inquiry against him and therefore in public interest, it is decided to pass an order of compulsory retirement of the petitioner. Thus, instead of initiating the inquiry against the petitioner, order of compulsory retirement was passed. This is nothing but a short cut adopted by the

respondent Municipality to avoid conducting departmental inquiry, which is not permissible. Thus, such an order is punitive in nature.

26. In view of the aforesaid discussion, this Court is of the opinion that the impugned order passed by the respondent Municipality was with mala-fide intention and at the instance of the respondents No. 2 and 3 and therefore, the same is required to be quashed and set aside. The said order is also arbitrary and perverse as irrelevant material was considered by the respondent Municipality and the relevant material was ignored. The said order is also required to be quashed and set aside on the ground that the same was passed as a short cut to avoid departmental inquiry against the petitioner. Thus, though the scope of judicial review is limited while exercising powers under Article 226 of the Constitution of India by this Court, in the facts and circumstances of the present case, and in view of the aforesaid discussion, the impugned order is required to be interfered with and is required to be quashed and set aside. Accordingly, the following order is passed.

27. Impugned order dated 20.05.2000 passed by the respondent Municipality is hereby quashed and set aside. It is pointed out by the learned advocate that petitioner has expired during the pendency of this petition and therefore, his legal heirs are brought on record and it is also pointed out that if the impugned order was not passed against the petitioner compulsory retiring him from services, he would have retired on reaching the age of superannuation i.e. on 14.10.2012. Thus, direction of reinstatement cannot be granted in the aforesaid circumstances. The respondents are therefore directed to give all the consequential benefits to the legal heirs of the petitioner as if the order of compulsory retirement was not passed on 20.05.2000.

28. The petition is allowed. The Rule is made absolute. No order as to costs.