

(1971) 02 OHC CK 0017
In the Orissa High Court
Case No : O.J.C. No. 794 of 1968

Kishori Charan Mohanty

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 16-02-1971

Acts Referred:

Constitution of India, 1950 — Article 226
Orissa Service Code, 1939 — Rule 71

Citation : (1971) 37 CLT 410

Hon'ble Judges : G.K. Misra, C.J.;A. Misra, J

Bench : Division Bench

Advocate : M. Patra, for the Appellant; Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, C.J.—The Petitioner's date of birth is 15th of September 1908. He joined Government service as a paid probationer in the Registration Department in 1929 and was confirmed on 14-2-1931 as a Lower Division Clerk under the Bihar and Orissa Government. After separation of the Province in 1936, he remained in Orissa Government service. He reached the superannuation age of 55 years on 14-9-1963. On 3rd July 1963 the District Registrar gave him notice for retirement in the following terms:

You are hereby informed that you will complete 55 years of age on the afternoon of the 14th day of September 1963 and as such you have to retire from the Government service.

The Petitioner retired on 14-9-1963. After the service of this notice on 3rd July 1963 he was promoted to the post of Head Clerk on 19.7.1963 in which post he worked for about two months. He made various representations to the Inspector General of Registration, Orissa, against the order of the retirement without any success. The writ application was filed on the 12th of August 1968, about 4 years and 10 months after the date of retirement. On 25th of October 1968 the

concerned authority extended the services of the Petitioner by 19 days from 14-9-1963. Thus the Petitioner was made to retire on 3-10-1963. This extension was given to give three months notice before retirement. The petition assails the order of retirement under Article 226 of the Constitution of India seeking protection under Rule 71(b) of the Orissa Service Code. His stand is that he continued to be efficient after the age of 55 years and should not have been retired before he reached the 60th year.

In the counter affidavit filed on behalf of the opposite parties the facts narrated above are not disputed. It is conceded that the Petitioner's retirement is governed by Rule 71(b). The case of the opposite parties is that the Petitioner was found to be lacking in efficiency and as such he was made to retire on attainment of 55th year. The extension of service by 19 days was given to give three months notice to the petitioner under the misapprehension that he was entitled to such notice though in fact he was not. At the time of argument, the learned Government Advocate told us that as the Petitioner was made to retire he was given a temporary promotion on 19.7.1963 for a period of about two months as a matter of favour and an act of favour cannot be utilised as proof of efficiency.

2. It is the common case of the parties that Rule 71(b) covers the case of the Petitioner's retirement. On the counter affidavit that the Petitioner did not continue to be efficient, he was rightly retired at the age of 55. At the appropriate time the Petitioner's case was considered and he was made to retire at the age of 55. In such a case the age of superannuation even under Rule 71(b) is 55. The exercise of the power in this case is not arbitrary or capricious. The principles laid down in *Lingaraj Patnaik and Ors. v. District Judge of Cuttack and Ors.* 1971 C.L.T. 1, apply to this case. As was observed in that case, after the age of 55 is reached by the servant the authority has to exercise its discretion whether or not to retain and there is no right in the servant to be retained even if he continues to be efficient.

3. It need hardly be stressed that the question whether the servant continues to be efficient or not is not justiciable. Even if the servant continues to be efficient he can be retired under Rule 71(b) at the age of 55 years, if the appropriate authority on other considerations is of opinion that the servant should not be allowed to continue. The opinion of the appropriate authority as to efficiency is final and cannot be questioned except on the ground of mala fides. In this case, the appropriate authority examined the case, of retirement and came to the conclusion that the Petitioner lacked efficiency. The retirement was therefore justified.

4. It is contended by Mr. Patra that the notice (Annexure-3) does not indicate that the concerned authority applied its mind to the facts of the case in accordance with Rule 71(b). This contention has no force. Notice, is required to be given under Rule 71(b). Even if one is given for the convenience of the servant the reason that mind was applied with reference to Rule 71(b) is not required to be stated therein. That is a matter which is to be dealt with in the

official file by the appropriate authority.

5. It is next contended that as just before retirement the Petitioner was given a temporary promotion for about two months, the averment in the counter affidavit that he ceased to be efficient is not true. We are not impressed with this argument. It is well known to every administrative authority that sometimes temporary promotions are given to an officer just before retirement at the fag end of his career by way of grace or favour. A favour cannot be construed as proof of efficiency. We do not treat this temporary promotion as negating the averment in the counter affidavit that the Petitioner ceased to be efficient or as establishing mala fides.

6. We are therefore satisfied that even on the application of Rule 71(b) the Petitioner was rightly made to retire at the, age of 55.

7. Mr. Patra contended that the adverse entry in the character roll is mala fide. The facts on the basis of which mala fide is urged have neither been pleaded nor proved. The onus is very heavy on the Petitioner to establish mala fides. In the writ application if any foundation of mala fides would have been laid, we would have directed the Petitioner to go to civil Court to establish the same. No foundation was laid for such a case. We accordingly reject this contention.

8. The petition is liable also to be dismissed on account of its being filed after about four years and ten months after the date of retirement. The Petitioner was in fact retired on 14-9-1963 though by the subsequent order dated 25-10.1968 his services were extended by 19 days under a misapprehension that he was entitled to three months notice. The explanation given by the Petitioner is that from 11.9.1963 till the date of filing of the writ application he had made representations to the Inspector General of Registration without any response. There is no rule that any appeal or representation is to be made against an order of retirement. At any rate, when the first representation was not responded to, it was the duty of the Petitioner to seek relief without delay. He cannot be allowed to take advantage of his own laches by sitting at home without doing any official work and then at the end of five years claim to be continuing in service and ask for arrears of pay for five years. Even if he had filed a civil suit for arrears of pay, the same would be barred after three years. This is an appropriate case in which the writ application is not to be entertained after such a long delay. The fact that his services were extended by 19 days by an order dated 25.10.1968 does not condone the delay. By the subsequent order the retirement at the age of 65 was not affected. The basic and essential cause of action which accrued in 1963 was not removed or extinguished by the order dated 25.10-1968. Reference may be made to *Manoranjan Gupta v. State of Orissa* and 2 Ors. 1970 C.L.T. (Notes 61), *Nrushingha Charan Behuri v. State of Orissa* ILR 1970 Orissa 251, and *Trilokchand Motichand and Ors. v. H.B. Munshi Commissioner of Sales Tax Bombay* and Anr. 1970 C.L.T. (Notes 164).

9. On the aforesaid analysis, we hold that the writ application has no merit and is

not maintainable as it has been filed after long delay. The writ application fails and is dismissed but in the circumstances, without costs.

A. Misra, J.

10. I agree.