
(1998) 11 DEL CK 0058
In the Delhi High Court
Case No : CWP No. 2718 of 1993

K.K. Sethi

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 05-11-1998

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1998) 7 AD 609 : (1998) 76 DLT 925 : (1999) 48 DRJ 349 : (1998) 2 ILR Delhi 1011

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Mr. C.P. Singh, for the Appellant; Mr. Maninder Singh, for the Respondent

Judgement

Vijender Jain, J.—This writ petition raises the question of applicability of the ratio laid down by the Supreme Court in Balram Gupta Vs. Union of India (UOI) and Anr, to the case of the petitioner. The petitioner submitted an application for pre-mature retirement on compassionate grounds on 1.4.1992. The case of the petitioner is that he was conveyed approval of his request for pre-mature retirement on 21.3.1993 whereas the case of the respondent is that the petitioner came to know of the order accepting his application for retirement prior to 22.3.1993 when the petitioner wrote to the respondent withdrawing his earlier letter dated 1.4.1992 seeking pre-mature retirement. The case of the petitioner is that he came to know about his retirement from 2.5.1993 only on 21.3.1993 and on 22.3.1993 he made an application for recalling the earlier application for pre-mature retirement.

2. Lengthy arguments have been addressed by the respective counsel appearing for both the parties. Mr. Maninder Singh, learned counsel appearing for the respondents, has contended that in terms of Article 33 of the Constitution, the rights conferred under Chapter III of the Constitution can be curtailed/modified and in support of his contentions he has cited defense Services Regulations and

argued that in terms of Regulation 104 of the said Regulations, the right of person serving in the army may be curtailed under Chapter III of the Constitution. Mr. Maninder Singh in support of his contentions has cited Regulation 105 and particularly sub-clause (e) of Regulation 105, which reads as under :-

"(e) Every Officer desirous of leaving the Army Service by re-signing or retiring prematurely should apply only after weighing the pros and cons of premature retirement/resignation because requests for withdrawal of such requests subsequently, when the same are at advanced stages of considerations cause administrative difficulties. The applicant officer should, Therefore, resort to premature retirement/resignation as a last resort when no other practical alternative is available to him. If he has any grievances with regard to posting, adverse remarks in ACR, punishment and so on, he should first seek redressal through prescribed channels and submit his application only when he finally decides to leave the service unconditionally. While making an application, he should given undertaking that he will not withdraw his request after it has been accepted."

3. Mr. Maninder Singh has contended that unlike Regulations, which were before the Supreme Court in Balram Gupta's case (supra), in the Army when application is made for pre-mature retirement an undertaking has to be given that person concerned will not withdraw his request after the same has been accepted. Mr.Maninder Singh has further contended that in Balram Gupta's case (supra), Supreme Court was seized with the interpretation of rules governing civil services and same parameters and yardsticks cannot be made applicable in the case of defense personnel.

4. Yet another contention of the learned counsel for respondent is that in the case of Balram Gupta (supra) letter of resignation given by petitioner therein was to take effect from a subsequent date and in that case petitioner withdrew the resignation prior to effective date whereas in the present case respondents agreed on the request of petitioner, completed all the formalities and issued an office order dated 12.2.1993 retiring the petitioner w.e.f.2.5.1993. Learned counsel for the respondents has contended that after 12.2.1993 nothing remained to be done by respondents and, as a matter of fact, he was no more on the roll of respondent after 12.2.1993.

On the other hand, learned counsel appearing for the petitioner, Mr. C.P. Singh, has contended that ratio of Balram Gupta's case (supra) is fully applicable to the case of the petitioner. He has further contended that on 5.3.1997, as a matter of fact, respondent has conceded that Balram Gupta's case (supra) was applicable to the petitioner's case. He has contended that vide order dated 5.3.1997 the Court has directed the respondent to examine afresh in the light of Balram Gupta's case (supra) whether the case of the petitioner was covered under the said judgment. Mr.Maninder Singh, learned counsel for the respondents, has further contended that respondent vide its order dated 1.5.1997 has held that

Balram Gupta's case (supra) was not applicable to the present case on the ground that the civilian employee has a vested right under statutory rules to retire from service, on the other hand, an army officer does not enjoy any such right. In fact, while applying for pre-mature retirement, petitioner had certified in writing that he would not withdraw his request after the same was accepted. He further contended that the Supreme Court had further held that permission to withdraw the notice of pre-mature/voluntary retirement can be granted only when there is material change in circumstances in consideration of which notice was originally given. Such position also does not exist in the case of petitioner, Therefore, decision of Supreme Court in a different case being on facts which are not identical, is not applicable or binding in the instant case.

5. This Court while referring the matter for the consideration of the respondent on 5.3.1997 has observed :-

".....The matter was heard at length. Learned counsel for the petitioner submits that the case of the petitioner is squarely covered by the judgment of the Supreme Court in Balram Gupta Vs. Union of India (UOI) and Anr, . The judgment of the Supreme Court is law of the land and this judgment was available way back in 1987 and petition was filed almost five years thereafter. Learned counsel for the respondent is agreeable that this judgment covers the case of the petitioner.

The Supreme Court has finally determined the controversy in a particular case then thereafter all the cases of that nature must be determined by the authorities concerned.

It would be unfair to compel the citizen/officer to approach the Court for similar reliefs. In this case this Court deem it appropriate that instead of deciding this case by the Court, the Court direct the respondents to decide the case of the petitioner in the light of the judgment of Balram Gupta....."

6. Let me deal with the contention of the learned counsel for the respondent regarding the applicability of Article 33 of the Constitution to the defense Services Regulations. What is contemplated under Article 33 of the Constitution is "Power of Parliament to modify the rights conferred by this Part in their application" to the defense personnel. Article 33 of the Constitution reads as under:-

"Power of Parliament to modify the rights conferred by this Part in their application etc. _ Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to :-

- (a) the members of the Armed forces; or
- (b) the members of the Forces charged with the maintenance of public order: or
- (c) persons employed in any bureau of other organisation established by the State for purposes of intelligence or counter intelligence; or

(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c),

be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

7. From the plain reading of Article 33 of the Constitution, it is manifest that only exception, which has been carved out is that Parliament may enact any law with relation to the members of the armed forces in terms of sub-articles (b) and (c) of Article 33 of the Constitution. What kind of restriction has been imposed in terms of Article 33 of the Constitution has to be seen from the main statute governing the army. The Army Act, 1950, which is enacted by the Parliament, defines certain curtailments of the power which are otherwise available to other citizens of this country under Part III of the Constitution. Section 21 of the Army Act reads as under :-

"Power to modify certain fundamental rights in their application to persons subject to this Act.- Subject to the provisions of any law for the time being in force relating to the regular Army or to any branch thereof, the Central Government may, by notification, make rules restricting to such extent and in such manner as may be necessary the right of any person subject to this Act-

(a) to be a member of, or to be associated in any way with, any trade union of labour union, or any class of trade or labour unions of any society, institution or association, or any class of societies, institutions or associations;

(b) to attend or address any meeting or to take part in any demonstration organized by any body of persons for any political or other purposes;

(c) to communicate with the press or to publish or cause to be published any book, letter or other document."

8. The restriction to the class of persons, who are defense personnel, are only in terms of their fundamental right of expression or speech as would be evident from sub-sections (a), (b) and (c) of Section 21 of the Army Act. By no stretch of imagination, it can be said that all other laws in force or constitutional rights which are available to the citizen of this country, are not available to the defense personnel. Much reliance has been placed by the respondent on defense Services Regulations which in its preface written by the Secretary to the Government of India Ministry of defense on its very first page states that the "Regulations for the Army" are issued under the authority of the Government of India. It has been further stated that these Regulations are non-statutory are supplemental to the relevant statutory provisions wherever they exist and do not supplant them.

9. That being the case, respondents themselves cannot take recourse to defense Services Regulations in the areas where the restriction has not been imposed by the statute as referred to in Section 21 of the Army Act. Even otherwise, I do not see any force in the arguments advanced by the respondent with regard to its

interpretation to paragraphs 104 and 105 of the Regulations. The whole approach of the respondents is totally misconceived. Para-104 of the Regulations deals with "Retirement and Resignation". Para-104 of the Regulations is reproduced below:-

Retirement And Resignation.-

(a) The President may call upon any officer to retire or resign his commission at any time without assigning any reason.

(b) The Central Government may call upon any officer to retire or resign his commission at any time subject to the provisions of the rules in this behalf, as made under the Army Act.

(c) No authority other than that specified in sub-paras (a) and (b) above, may call upon an officer to retire or resign his commission or exert any pressure on him to do so.

(d) An officer will not be relieved of his duties until receipt of intimation that his application to retire or resign has been accepted. An officer whose application to retire or resign has been accepted may apply to the Central Government for his application to be cancelled. In the case of officers who have once proceeded on leave pending retirement, permission to withdraw such applications will only be granted in exceptional circumstances. The decision of the Central Government on all applications to retire will be final.

(e) An officer of the Army who resigns from the service, vacates any civil appointment under the Central Government that he may be holding, unless the Central Government otherwise directs."

10. One has to look at the plain and simple language under sub-para (d) of para-104, which itself postulates that an officer whose application for retirement has been accepted may apply to Central Government for his application to be cancelled. The words appearing in sub-para (d) of para-104 are very material and relevant. When Regulation of the respondents itself provides for a review of the application for resignation or pre-mature/voluntary retirement even after the same has been accepted, goes to show that once the application of the petitioner was accepted, the petitioner was entitled for review or modification of that acceptance, contrary stand of the respondent is not in consonance with their own Rules and Regulations, which had been put forward by the learned counsel for the respondents. Now, let me take a close look at para-105 of the Regulations, on which much reliance has been placed by the respondents. In sub-para (e) of para-105 of the Regulations, it has been mentioned that while making an application the incumbent must give an undertaking that he will not withdraw his request after it has been accepted. Counsel for the respondents has contended that at the time of making application, the petitioner has also given an undertaking that he will not withdraw his request and, Therefore, at a later stage, he is estopped from withdrawing that request. Respondents cannot even

sustain this argument on the basis of the said Regulations in view of sub-para (h) of para-105, which gives officer concerned option to withdraw application due to change in circumstances. Sub-para (h) of para-105 of the Regulations is as follows:-

"(h) If an officer is forced to seek withdrawal of his application due to unforeseen reasons after acceptance of his request for premature retirement/resignation but before he is retired, he may apply to the Central Government and his request may be granted at the discretion of the Central Government."

11. In Balram Gupta's case (supra), the petitioner, who was working with the Photo Division of the Ministry of Information and Broadcasting gave a letter to the Union of India dated 24.12.1980 seeking voluntary retirement from the service from 31.3.1981. Sub-rule (4) of rule 48-A of the Central Civil Services (Pension) Rule, 1972 provides as follows:-

"(4) A Government service, who has elected to retire under this rule and has given the necessary notice to that effect to the appointing authority, shall be precluded from withdrawing his notice except with the specific approval of such authority."

12. In Balram Gupta's case (supra) no such specific approval in terms of sub-rule (4) of Rule 48-A of Central Civil Services (Pension) Rule, 1972 was given by authority and on that Supreme Court held :-

".....The dissolution would be brought about only on the date indicated, i.e. 31st of March, 1981; up to that the appellant was and is a Government employee. There is no unilateral termination of the same prior thereto. He is at liberty, and entitled independently without sub-rule (4) of Rule 48-A of the Pension Rules, as a Government servant, to withdraw his notice of voluntary retirement....."

13. Thereafter Supreme Court discussed Union of India (UOI) and Others Vs. Gopal Chandra Misra and Others, . AIR India Vs. Nergesh Meerza and Others, after taking into consideration these authorities, Supreme Court held that the petitioner had a locus to challenge non-grant of approval by the authority and held :-

".....The approving authority who as the statutory authority must act reasonably and rationally. The only reason put forward here is that the appellant had not indicated his reasons for withdrawal. This, in our opinion, was sufficiently indicated that he was prevailed upon by his friends and the appellant had a second look at the matter. This is not an unreasonable reason....."

Supreme Court further held that:-

"We hold, Therefore, that there was no valid reason for withholding the permission by the respondent. We hold further that there has been compliance with the guidelines because the appellant has indicated that there was a change

in the circumstances, namely, the persistent and personal requests from the staff members and relations which changed his attitude towards continuing in Government service and induced the appellant to withdraw the notice. In the modern and uncertain age it is very difficult to arrange one's future with any amount of certainty, a certain amount of flexibility is required, and if such flexibility does not jeopardize Government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement in the facts and circumstances of this case. Much complications which had arisen could have been thus avoided by such graceful attitude. The court cannot but condemn circuitous ways "to ease out" uncomfortable employees. As a model employer the government must conduct itself with high probity and candour with its employees."

14. Let me apply the facts of Balram Gupta's case (supra) to this case. The petitioner herein applied for retirement stating certain reasons in between petitioner re-married and thought that it would be better for his future prospects to remain with the respondents and wrote a letter on 22.3.1993 withdrawing his earlier letter/communication seeking pre-mature retirement. Even if it is assumed that the petitioner came to know about the order of acceptance of his representation regarding pre-mature retirement prior to 22.3.1993, i.e. on 21.3.1993, it would not affect the case of the petitioner as the petitioner admittedly was to retire w.e.f. 2.5.1993. I do not see any force in the arguments of the learned counsel appearing for the respondents that for all intent and purposes the petitioner retired from the service of respondent on 12.2.1993 the date of the order retiring the petitioner, when the order retiring the petitioner itself gives the date of retirement of the petitioner w.e.f. 2.5.1993. That being the case, I hold that after submitting the application for withdrawal of the earlier application moved by the petitioner with respondent the actual date of retiring the petitioner was 2.5.1993. I further hold that the consideration of withdrawal application by the respondent is without any basis and the respondent has not taken into consideration the changed circumstances i.e. the second marriage of the petitioner with the daughter of an army officer and other reasons stated by the petitioner which persuaded the petitioner to change his mind and stay with the respondent. In view of the facts and circumstances of this case I quash the order dated 1.5.1997 passed by the respondent rejecting the application of the petitioner for withdrawing the application for pre-mature retirement. I also quash the order dated 2.5.1993 ordering the petitioner to proceed on pre-mature retirement as well as the order dated 12.2.1993. The petition is allowed. Rule is made absolute. Petitioner shall be entitled to all the consequential reliefs as per the rules as if he was in regular services of the respondent.

Petitioner, Major K.K. Sethi, is present in Court and states that he is bound by the undertaking given by him on 29.4.1994 to the effect that he may be posted/transferred anywhere at any time depending upon the exigencies of service and that the petitioner will not insist upon his posting only in Delhi. The petitioner will

also file an affidavit with the respondents that he was not gainfully employed during this period.

There will be no order as to costs.