
(1999) 10 AP CK 0010

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 17408 of 1999

Kotipally Murali Mukunda Rao

APPELLANT

Vs

State of A.P. and another

RESPONDENT

Date of Decision : 01-10-1999

Acts Referred:

Andhra Pradesh Public Employment (Regulation of Age of Superannuation)
(Amendment) Act, 1998 — Section 3(1)
Andhra Pradesh Revised Pension Rules, 1980 — Rule 44

Citation : (1999) 6 ALD 586 : (1999) 6 ALT 223

Hon'ble Judges : P. Venkatarama Reddi, J;B. Prakash Rao, J

Bench : Division Bench

Advocate : Mr. K.V. Satyanarayana, for the Appellant; Government Pleader for Home and Mr. C.V. Nagarjuna Reddy, SC for HC, for the Respondent

Judgement

P. Venkatarama Reddi, J

1. The petitioner formerly a District and Sessions Judge, Grade-II and who was retired from service on 30-9-1993 on attaining the age of 58 years pursuant to the recommendation of the High Court, unsuccessfully challenged the legality of the order issued by the State Government in G.O. Ms. No.515, General Administration (SC F) Department, dated 30-9-1993. In Writ Petition No.14670 of 1993, a Division Bench of this Court reached the conclusion that the impugned order of retirement of the age of 58 years was in perfect conformity with the judgment of the Supreme Court in All India Judges' Association and Others Vs. Union of India and Others, and that there was no arbitrariness nor legal flaw in the decision of the High Court and the Government in retiring the petitioner on completion of the age of 58 years on the ground that he did not have the requisite potential for continued useful service beyond that age. The judgment of the Division Bench rendered on 10-12-1993 reached finality. However, taking shelter under an Act of the State Legislature (Act 26 of 1998), the petitioner has taken resort to the second round of litigation.

2. The said Act is titled as "A.P. Public Employment (Regulation of age of Superannuation) (Amendment) Act, 1998". Sub-section (1-A) of Section 3 was brought into force with respective effect from 26-12-1992, which is the date main judgment in AIJA case (supra). Subsection (1-A) of Section 3 reads as follows:

"Notwithstanding anything contained in sub-section (1), every member of the Andhra Pradesh State Higher Judicial Service or the Andhra Pradesh State Judicial Service shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that any such member of the Andhra Pradesh State Higher Judicial Service or the Andhra Pradesh State Judicial Service may be compulsorily retired from service on the afternoon of the last day of the month in which he attains the age of fifty eight years if he is not found fit and eligible to be continued in service by the High Court of Andhra Pradesh on an assessment and evaluation of the record of such member for his continued utility well within time before he attains the age of fifty eight years by following the procedure for compulsory retirement under the rules applicable to him;

.....

Explanation :--The assessment and evaluation by the High Court of Andhra Pradesh for the purpose of this subsection is in addition to and independent of the assessment for compulsory retirement that may have to be undertaken at any other time under the relevant rules applicable to such members of the Andhra Pradesh State Higher Judicial Service or the Andhra Pradesh State Judicial Service".

3. This provision, according to the learned Counsel for the petitioner, entitles a Judicial Officer to remain in service till he attains the age of sixty years unless he, on application of the rules governing compulsory retirement, can be retired from service prior to that date. The teamed Counsel proceeds to submit that the only provision governing the compulsory retirement with reference to State Higher Judicial Service is Rule 44 of A.P.Revised Pension Rules according to which the Government servant can be required by appointing authority to retire in public interest on completion of 33 years of qualifying service, but before attaining the age of 58 years. It is submitted that by the date of passing of the impugned order of 29-1-1993, the petitioner did not complete 33 years of service and moreover, the impugned order does not show that the power was exercised by the appointing authority in public interest. Therefore, it is submitted that the conditions stipulated in the proviso to sub-section (1-A) are not satisfied. Stress is laid on the words "by following the procedure for compulsory retirement under the rules applicable to him". It is then submitted that the enactment of the above provision with retrospective effect furnishes a new cause of action to the petitioner to question the compulsory retirement notwithstanding the dismissal of the earlier writ petition, more so, when there was no occasion for the High Court

to consider the said provision. Reliance is placed on the recent judgment of the Supreme Court in *Rajat Baran Roy and Others Vs. State of W.B. and Others*, , and to get-over the bar of *res judicata*/constructive *res judicata*, the learned Counsel seeks to rely on the decision of the Supreme Court in *Nand Kishore Vs. State of Punjab*, .

4. The learned panel Counsel for the High Court who appeared on notice at the stage of admission has vehemently contended that it is not open to the petitioner to agitate the question once again after having lost in the first round of litigation. It is pointed out that the enactment of Act 26 of 1998 does not enure to the benefit of the petitioner and the efficacy of the Division Bench judgment of this Court dismissing the petitioner's writ petition, is not lost on account of retrospective amendment of the Act. He submits that there is no change in the legal position as regards the retirement age of the Judicial Officers, even with the enactment of Act 26 of 1998.

5. Irrespective of the question whether the petitioner is precluded from agitating the question of legality of the order dated 20-9-1993, retiring him on attaining the age of 58 years over again by entering into second round of litigation, even on merits, we find no force in the contentions advanced by the learned Counsel for the petitioner. We do not think that the foundation or substratum of the judgment of this Court in Writ Petition No. 14670 of 1993 is obliterated or whittled down by the subsequent Legislation so as to remove its binding effect and efficacy. The exercise of assessing the petitioner's utility to continue in service beyond the age of 58 years was undertaken in terms of the review judgment in *AIJA* case (*supra*). The Division Bench of this Court held in Writ Petition No. 14670 of 1993 that the petitioner was validly retired from service by applying the criteria laid down in that judgment and the compulsory retirement of the petitioner at the age of 58 years was in accordance with that judgment. Citing the dicta of the Supreme Court, the learned Judges of the Division Bench held that the said exercise was independent of the normal service rule providing for compulsory retirement in public interest. The ratio of this judgment which in turn is based on the pronouncement of the Supreme Court in the celebrated case of *AUA* (*supra*) is in no way shaken by Act 26 of 1998. On the other hand, as could be seen from the extracts given hereunder, the Act far from making any departure from the Supreme Court judgment in *AUA* case (*supra*) was conceived to give effect to that judgment in letter and spirit. Let us now notice the crucial observation of the Supreme Court in paragraph 31 of the said judgment:

"The High Court should undertaken and complete the exercise in case of officers about to attain the age of 58 years well within time by following the procedure for compulsory retirement as laid down in the respective Service Rules applicable to the judicial officers. Those who will not be found fit and eligible by this standard should not be given the benefit of the higher retirement age and should be compulsorily retired at the age of 58 years by following the said procedure for compulsory retirement. The exercise should be undertaken before the attainment

of the age of 58 years even in cases where earlier the age of superannuation was less than 58 years. It is necessary to make it clear that this assessment is for the purpose of finding out the suitability of the concerned officers for the entitlement of the benefit of the increased age of superannuation from 58 years to 60 years. It is in addition to the assessment to be undertaken for compulsory retirement and the compulsory retirement at the earlier stage/s under the respective Service Rules".

6. Sub-section (1-A) of Section 3 together with its explanation has virtually borrowed the language employed by the Supreme Court in Para 31 dealing with the retirement age of the Judicial Officers. It is nothing more nor less. It is not as if any additional rights are conferred by the Act over and above what the Supreme Court ordained. It is not a case where the Legislature prescribed the rule of retirement uniformly and unqualifiedly at the age of 60 years for the Judicial Officers, as has been done in West Bengal vide Rajat Baron Roy's case (supra).

7. We do not, therefore, find any qualitative difference between the rule of retirement embodied in Act 26 of 1998 and the rule laid down in the Judge made law in AIJA's case. The State Legislature only wanted to amend the provisions of A.P. Public Employment (Regulation of Age of Superannuation) Act in relation to Judicial Officers so as to fall in line with the Supreme Court's judgment. We find no dichotomy between the legislative provision and the principle evolved in AUA case (supra). Both are in perfect harmony with each other.

8. The stress laid on the words "following the procedure for compulsory retirement under the Rules applicable" is, if we may say so, rather misconceived. The premise on which the learned Counsel for the petitioner has built up his argument rests on a wrong assumption as to the real purport and nuances of that phraseology. In fact, the same language is used in the judgment of the Supreme Court. The real emphasis, in our view, is on the word "procedure". The legislative injunction in tune with the Supreme Court's ruling is that the procedure laid down in the service Rules or the procedure evolved by administrative instructions if any on the subject should be followed. It does not mean that substantive requirements of the rule relating to compulsory retirement such as the fundamental conditions for initiating a move to compulsorily retire a public servant can be regarded as the "procedure for compulsory retirement". For instance, the rule contained in the proviso to Rule 44 requiring the appointing authority to give a notice in writing three months ahead of the date on which the employee is required to retire or to tender three months' pay in lieu of such notice, is a part of procedural requirement. It is also possible to visualise the issuance of certain administrative instructions to provide for modalities for assessment of the performance and utility of the public servant for the purpose of taking a decision under Rule 44. For instance, there may be some instructions as to the materials to be considered by the Review Committee or obtaining of reports from any administrative superiors. Such instructions may

be regarded as part of the procedural gamut for consideration of cases of compulsory retirement under Rule 44.

9. It would lead to incongruous and contradictory results if we consider the expression "Procedure for compulsory retirement" as to mean that the entire Rule 44 of A.P. Revised Pension Rules is to be transplanted into sub-section (1-A) of Section 3. Completion of 33 years of qualifying service will be wholly out of place in the context of sub-section (1-A) which we have already clarified is nothing but reiteration of the principle laid down by the A1JA case (supra). "Public interest" as such cannot also be imported into this provision though very often, the considerations which go into the assessment of fitness and continued utility as member of the Judicial Service coincide with the considerations of public interest. The expression "procedure for compulsory retirement" cannot be divorced from the context and it cannot run counter to the mandate of opening clause of the proviso. The proviso which is in the nature of an exception or qualification to the main provision ordains that a Judicial Officer should be compulsorily retired from service on the last date of the month on which he attains the age of 58 years when once the High Court on assessment reaches a decision that the Officer does not have the continued utility to remain in service and therefore, he is unfit to continue beyond 58 years. The concept of completion of 33 years is wholly alien to the proviso to sub-section (1-A) which empowers the competent authority to retire a Judicial Officer on attaining the age of 58 years, in case he is found lacking in utility and fitness to continue further in service. The Explanation to sub-section (1-A) dispels any doubts in this regard and eloquently speaks for itself as to what is the true nature and purport of the assessment to be made in terms of the proviso. It is categorically stated therein - again in reiteration of the principle laid down by the Supreme Court, that the assessment and evaluation is in addition to and independent of the assessment for compulsory retirement that may have to be undertaking in accordance with the relevant service rules governing the members of the A.P. Higher Judicial Service and A.P. Judicial Service. This again emphasises that the power conferred under sub-section (1-A) of Section 3 of Act 26 of 1998 is a special power exercisable vis-a-vis the retirement age of Judicial Officers. The entire provision would be unworkable if we endorse the interpretation placed by the learned Counsel for the petitioner on the expression "following the procedure for compulsory retirement".

10. At the risk of repetition, we would like to clarify that the "procedure" contemplated by the proviso does not mean substantive requirement for ordering compulsory retirement under the Service Rules. The procedure for compulsory retirement will only apply "mutatis mutandis". In the guise of applying the procedure, the essence and core of the substantive power to compulsorily retire a Judicial Officer on considerations of continued utility and fitness cannot be destroyed. It may be mentioned that what is stated in the Explanation to sub-section (1-A) was also stated by the Division Bench of this Court in Writ Petition No. 14670 of 1993 based on the dicta of the Supreme Court. The petitioner is

placed in no better position by reason of the Amendment Act of 1998. Considering the question from every stand point, we have therefore no hesitation in rejecting the contention of the learned Counsel for the petitioner.

11. We find no relevancy in the decision of the Supreme Court in R.B. Roy's case (supra) on which the learned Counsel for the petitioner sought to derive strong support. The proviso to sub-section (1-A) is not similar to the Office Memorandum dated 20-6-1992 issued by the State of West Bengal, the said OM did not provide for pre-retirement assessment at the age of 58 years. The age of retirement was uniformly raised to 60 years in relation to certain categories of Government employees including the members of the Higher Judicial Service. The attempt to justify the order of compulsory retirement as one made in public interest under Rule 75(a)(a) of West Bengal Service Rules, was rejected by the Supreme Court because the order of compulsory retirement was not traceable to the said Rule, i.e., the Rule providing for compulsory retirement on grounds of public interest. Therefore, the said decision does not help the petitioner.

12. In the light of the foregoing discussion, we find no merit whatsoever in this petition. The writ petition is dismissed, but without costs.