

(2020) 09 SHI CK 0381
In the High Court Of Himachal Pradesh
Case No : Civil Writ Petition No. 527 Of 2020

Krishna Nand

APPELLANT

Vs

State Of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 24-09-2020

Acts Referred:

Citation : (2020) 09 SHI CK 0381

Hon'ble Judges : Tarlok Singh Chauhan, J; Jyotsna Rewal Dua, J

Bench : Division Bench

Advocate : Mandeep Chandel, Ashok Sharma, Vikas Rathore, Vinod Thakur, Shiv Pal, Seema Sharma, Bhupinder Thakur, Yudhbir Thakur

Final Decision : Dismissed

Judgement

Tarlok Singh Chauhan, J

1. The petitioner is orthopaedically handicap and has filed the instant petition for grant of the following substantive reliefs:

"i) That the respondents may kindly be directed to give promotion to the petitioner with all consequential benefits.

ii) Issue a writ of mandamus directing the Respondent authorities to superannuate the service of the petitioner after attaining the age of 60 years i.e. 31-07-2022.

Or

In alternative the respondents may kindly be directed to decide the representation of the petitioner i.e. Annexure P-3 within time bound manner."

2. The Government of Himachal Pradesh vide memorandum No.Fin(C)-A(3)-2/2013 dated 29.03.2013 decided to raise the retirement age of visually handicapped persons from 58 to 60 years and later on the benefit of this was extended under the orders of the Court to the handicapped persons with other

functional disabilities like the petitioner.

3. However, later on, the aforesaid memorandum dated 29.03.2013 was withdrawn vide memorandum dated 4th November, 2019, which reads as under:

"The undersigned is directed to refer to this department Office Memorandum of even number dated 29th March, 2013 on the above cited subject vide which retirement age from 58 to 60 years in respect of blind Government employees was enhanced. Now after careful consideration of the matter the Governor of Himachal Pradesh is pleased to order that this Office Memorandum dated 29.3.2013 be hereby withdrawn with immediate effect, in public interest."

4. Therefore, the moot question is as to what would be the effect of the subsequent memorandum. This question has already been considered by this Bench in batch of petitions, the lead being CWP No. 851 of 2020, titled *Ses Ram vs. State of H.P. and others*, decided on 31.7.2020, whereby after taking into consideration the rival contentions, it was observed as under:

"3(i). At the outset, it may be noticed that OM dated 29.03.2013 was issued by State in exercise of its Administrative/ Executive Power. Therefore, there was no legal embargo upon the respondents/State to withdraw the same by subsequently issuing another office memorandum on 4.11.2019. The administrative or executive power of the respondents/State to issue OM dated 4.11.2019 cannot be questioned. 3(ii) Learned counsel for the petitioners relied upon following para of the judgment in (2007) 6 SCC 196 titled *Union of India vs. A.S. Gangoli & others*:-

"11. There is considerable force in the submission of the appellant. Varying periods of weightage are added to the qualifying service of defence service officers to compensate for, or offset the disadvantage of early age of superannuation in defence service. The weightage of 7 years for a Group Captain is because he normally retires from Air Force Service at a comparatively early age of 52 years. If a Group Captain is permitted to prematurely retire so that he can be permanently absorbed immediately in a public sector undertaking where the retiring age is 58 or 60, the need to provide weightage disappears. Further, special provisions were made for such retirees under the circulars dated 17.3.1986 and 19.2.1987. They directed that premature retirement, to take up employment under PSUs, with the permission of the Government, will not entail forfeiture of service or retirement benefits. In such cases, the officer is deemed to have retired from the date of premature retirement and eligible to receive the retirement benefits, enumerated in those circulars. Therefore, the decision not to extend the benefit of weightage to those who retired prematurely for immediate permanent absorption in a PSU or autonomous body is a matter of policy of the government supported by logical reasons. So long as such policy is not manifestly arbitrary and does not violate any constitutional or statutory provision, it is not open to challenge."

This judgment has no applicability for determining the point involved in the

instant case. Also the judgment delivered by this Court in CWP No.1577/2018 was in the backdrop of facts as they existed at that time, where the State by way of OM dated 29.3.2013 had enhanced the retirement age of its blind employees from 58 to 60 years. Since all persons with physical disabilities constituted a homogeneous class, therefore, the benefit of enhancement in the age of superannuation extended by erstwhile H.P. Administrative Tribunal to certain other categories of persons with disabilities, was upheld. Situation in these writ petitions is different. State has now withdrawn OM dated 29.03.2013. OM dated 29.03.2013 cannot be saved on the strength of judgment delivered in CWP No.157/2018.

3(iii) A three judge Bench of Hon'ble Apex Court in State of Uttar Pradesh and others Vs. Hirendra Pal Singh & others, reported in (2011) 5 SCC 305, quashed the interim orders of the High Court, which had directed the Government to restore 62 years as the age of superannuation for Government pleaders. Hon'ble Apex Court held that fixation of the retirement age falls within exclusive domain and competence of the State and that Courts should not interfere with such decision, unless they were unconstitutional. Relevant extracts from para-8 are as under:-

"8. So far as the issue of reduction of age from 62 to 60 years is concerned, it has not been brought to the notice of the High Court that it is within the exclusive domain of the State Government to reduce the age even in Government services. So in case of purely professional engagement, the age could validly be reduced by the State Government unilaterally."

In the afore referred judgment, previous judgments in Bishun Narain Misra Vs State of U.P. (AIR 1965 SC 1567), Roshan Lal Tandon Vs. Union of India (AIR 1967 SC 1889), K. Nagaraj Vs. State of A.P. (AIR 1985 SC 551),

were also noticed as per following extracts:-

"9. A Constitution Bench of this Court in Bishun Narain Misra v. The State of Uttar Pradesh & Ors., AIR 1965 SC 1567 held that new rule reducing the age of retirement from 58 to 55 years could neither be invalid nor could be held to be retrospective as the said rule was a method adopted to tide over the difficult situation which could arise in public services if the new rule was applied at once and also to meet any financial objection arising in enforcement of the new rule.

10. In Roshan Lal Tandon v. Union of India & Ors., AIR 1967 SC 1889, a similar view has been reiterated by this Court observing that emoluments of the Government servant and his terms of service could be altered by the employer unilaterally for the reason that conditions of service are governed by statutory rules which can be unilaterally altered by the Government without the consent of the employee. (See also B.S. Vadera v. Union of India & Ors., AIR 1969 SC 118; The State of Jammu & Kashmir v. Triloki Nath Khosa & Ors., AIR 1974 SC 1; B.S. Yadav & Ors. v. State of Haryana & Ors., AIR 1981 SC 561; and State of Jammu & Kashmir v. Shiv Ram Sharma & Ors., AIR 1999 SC 2012).

11. In *K. Nagaraj & Ors. v. State of Andhra Pradesh & Anr . etc.*, AIR 1985 SC 551, this Court examined the amended provisions of Andhra Pradesh Public Employment (Regulation of Conditions of Service) Ordinance, 1983 by which the age of retirement was reduced from 58 to 55 years and this Court upheld the amended provisions being neither arbitrary nor irrational. The court further rejected the submission of the appellants therein that the said amended provisions would have retrospective application taking away their accrued rights. (See also *State of Andhra Pradesh etc. etc. v. S.K. Mohinuddin etc. etc.*, AIR 1994 SC 1474).

12. In view of the above, it is evident that even in government services where the terms and conditions of service are governed by the statutory provisions, the Legislature is competent to enhance or reduce the age of superannuation. In view of the above, it is beyond our imaginations as why such a course is not permissible for the appellant-State while fixing the age of working of the District Government Advocates."

3(iv) It is well settled that in order for executive instructions to have the force of statutory rules, it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the constitution providing therefore. In the instant case the OM's in question have not been issued either under the authority conferred on the State Government by some statute or under some provision of the constitution, therefore, it has to be held in the nature of administrative instructions and not statutory rules. Petitioners have no vested right to remain in Government employment upto the age of 60 years. Their entitlement to continue upto the age of 60 years was only under OM dated 29.03.2013, which stands withdrawn vide office OM dated 4.11.2019. Both the office memorandums were issued by the State in exercise of its administrative power. In (2004) 1 SCC 592, titled *Sureshchandra Singh and others Vs. Fertilizer Corporation of India Ltd and other*, Hon'ble Apex Court held that the Courts cannot issue a writ for enforcement of administrative instruction and that office memorandums are only administrative directions not having force of law.

In *P.U. Joshi and others Vs. Accountant General and others* (2003) 2 SCC 632, it was held that question relating to constitution pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions is all within the exclusive discretion and jurisdiction of the State subject to the limitation or restriction envisaged in the Constitution of India.

3(v) Petitioners cannot insist for continuing in service upto the age of 60 years on the strength of OM dated 29.03.2013. This OM did not create any right much-less any vested right in their favour. It cannot be enforced in exercise of writ jurisdiction of this Court. More so when this OM has been withdrawn by the State by issuing another OM. The respondents/State had the power to issue the OM as well as the power to withdraw it later by issuing another OM. It has not

demonstrated before us that OM issued on 4.11.2019 was unconstitutional."

5. In view of the aforesaid exposition of law, we have no difficulty in concluding that the petitioner has no right to continue beyond 58 years of service as his claim was based upon the earlier memorandum dated 29.03.2013 which now stands withdrawn by the Government.

6. As regards the prayer made by the petitioner for grant of promotion with consequential benefits, we find that there is not even a whisper in the entire petition with regard to the claim of promotion and the same has simply been set out in the prayer clause without any factual foundation. There is no allegation that the respondents are effecting any promotions and if so to which post. Consequently, even this prayer being devoid of merit is rejected.

7. In view of the aforesaid discussion and for the reasons stated above, we find no merit in this petition and the same is dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.