
(2000) 09 GAU CK 0041
In the Gauhati High Court
Case No : Writ Petition (C) No. 2532 of 1999

Lohit Chandra Sarma

APPELLANT

Vs

State of Assam and Another

RESPONDENT

Date of Decision : 08-09-2000

Acts Referred:

Assam Elementary Education (Provincialisation) Rules, 1997 — Rule 3
Constitution of India, 1950 — Article 226, 311(2)

Citation : (2000) 3 GLT 72

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : A.K. Phookan and V.M. Thomas, for the Appellant; P.G. Baruah, A.G., for the Respondent

Final Decision : Allowed

Judgement

A.K. Patnaik, J.—Petitioner was a member of the Assam Education Service and by order dated 17.5.99 of the Government of Assam, Education Department, he has been compulsory retired from service under FR 56(b) with immediate effect in the public interest before the age of superannuation. Along with the said order, a bank draft for Rs. 25,314.00 has been served upon the Petitioner towards his three months gross salary in lieu of three months notice in writing. Aggrieved by the said order of compulsory retirement, the Petitioner has filed this writ petition under Article 226 of the Constitution for quashing the said order.

2. An affidavit-in-opposition has been filed by the Secretary to the Government of Assam, Education Department, on behalf of the Respondent Nos. 1 and 2 and in the said affidavit-in-opposition it has been stated that the Government of Assam by notification dated 9.9.96 passed an order for administrative enquiry to be conducted by Shri S. Monoharan, the then Commissioner of Lower Assam Division, into the irregular and illegal appointment of school teachers in various categories of schools in Assam during the period 1991-1996. Pursuant to the said order, Shri Monoharan conducted an enquiry on the basis of records made

available to him by the concerned officials of the respective districts and Sub-divisions and submitted his report. The Government then constituted a task force to go into the details of the Monoharan Committee Report. The task force submitted an exhaustive report indicating the names of the illegal appointees and the officers responsible for the appointments. The State Cabinet then took a decision on 13.9.98 for constituting a Screening Committee and the Screening Committee was constituted on 10.10.98 consisting of three members. The Screening Committee examined the records of the task force and recommended that those officers who had been found to be involved in flouting the Rules laid down for recruitment in appointment of teachers and had completed 25 years of service or attained the age of 50 years be compulsorily retired under FR 56(b). The Screening Committee found that the Petitioner was one such officer and accordingly recommended action against him under FR 56(b). Pursuant to the said recommendation, the Petitioner was compulsorily retired from service by the impugned order dated 17.5.99 of the Government of Assam, Education Department. It has also been stated in the said affidavit-in-opposition that the Petitioner was involved in flouting the Rules laid down for recruitment in making illegal appointments of four L.P. School teachers during his incumbency as Deputy Inspector of Schools, Barpeta, in the year 1995-96 and it is for this reason that action was taken by resorting to the provisions of FR 56(b) as recommended by the Screening Committee.

3. At the hearing of this writ petition, Mr. A.K. Phookan, learned Counsel for the Petitioner, relied on the averments made in affidavit-in-reply filed by the Petitioner in this Court on 28.9.99 and submitted that it was not factually correct that the Petitioner had made four appointments during his incumbency as Deputy Inspector of Schools, Barpeta. The Petitioner had only passed an order regularising the service of a Second founder teacher, namely Smti Radhika Das of 1859 No. Jyotinagar LP School pursuant to instructions of the Government in the letter dated 6.3.95 and the instruction of the Director of Elementary Education, Assam, dated 15.3.95. A copy of the said regularisation order of Smt Radhika Das issued by the Petitioner has been annexed to the affidavit-in-reply as Annexure-D. He explained that in respect of the other three founder teachers, it is not the Petitioner but his successor Shri D. Baishya, Deputy Inspector of Schools, Barpeta, who had issued the orders for regularisation. Copies of the said three orders of regularisation have been annexed to the said affidavit-in-reply as Annexures E, F and G. Mr. Phookan further submitted that since the regularisation order for the founder teacher had been issued by the Petitioner in accordance with the instructions of the Government and Director of Elementary Education, Assam, the Petitioner cannot be held responsible for the regularisation order. In this context, he referred to Rule 3(iv) of the Assam Elementary Education (provincialisation) Rules, 1977, which, inter alia, provided that the Deputy Inspector of Schools will appoint the selected candidates in order of merit from the list approved by the Director of Elementary Education as and when required as per Government rules and Government instructions for the time

being in force and submitted that when Government instructions are issued for making appointment of a candidate without the approval of the Director of Elementary Education, the Deputy Inspector of Schools will have to comply with such instructions and make the appointment without approval of the select list by the Director of Elementary Education. He referred to the instructions of the Government in the letter dated 8.6.97 to the effect that no approval of the Director of Elementary Education was necessary if the Sub-divisional Advisory Board which made the recommendation was headed by a minister. According to Mr. Phookan, therefore, this is a case where the impugned order of compulsory retirement had been passed without any application of mind. He also submitted that in *S. Ramachandra Raju Vs. State of Orissa*, the Supreme Court has held that the entire service records and more particularly the latest should form the foundation for the opinion as to whether or not a government servant should be compulsorily retired from service and that where the Government took only solitary adverse report of one year against the employee to compulsorily retire him from service, the order of compulsory retirement was arbitrary and liable to be set aside. According to Mr. Phookan, therefore, a case of one irregular appointment even if made out against the Petitioner cannot constitute the basis for compulsory retirement in the public interest under FR 56(b) and the impugned order of compulsory retirement was liable to be quashed.

4. In reply to the aforesaid submissions, Mr. P.G. Baruah, learned Advocate General, Assam, submitted that the power of judicial review under Article 226 of the Constitution in respect of an order of compulsory retirement is limited. Under FR 56(b), the appropriate authority has the power to compulsorily retire a government servant who has attained the age of 50 years or has completed 25 years of service whichever was earlier if the appropriate authority was of the opinion that it was in the public interest to do so. According to Mr. Baruah, the opinion that has to be formed as to whether or not a government servant is to be compulsorily retired in the public interest is that of the appropriate authority and if the appropriate authority has formed an opinion that a particular Government servant is to be retired in the public interest, the High Court cannot sit as an appellate authority over the said opinion of the appropriate authority and substitute its own opinion for that of the appropriate authority. He cited the leading case of *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* 1948 1 KB 223, in which it was held that the court cannot interfere as an appellate authority to override a decision of a local authority, but as a judicial authority is concerned only to see whether the local authority has contravened the law by acting in excess of its power. He submitted that Rule 3(vi) of the Assam Elementary Education (Provincialisation) Rules, 1977 provided a detailed procedure for selection and appointment of teachers in provincialised L.P. Schools and that the said rule required that the selection committee will finalise the list of candidates in order of merit after interview and shall put up the list before the Sub-Divisional Advisory Board for elementary education and after the approval of the list by the said Board, the same is to be sent to the Director

of Elementary Education for his final approval and only thereafter the Deputy Inspector of Schools is to appoint the selected candidates in order of merit from the list approved by the Director of Elementary Education as and when required as per Government rules and Government instruction for the time being in force. According to Mr. Baruah, therefore, until and unless the list of selected candidates approved by the Sub-Divisional Advisory Board is finally approved by the Director of Elementary Education, the Deputy Inspector of Schools cannot appoint any of the selected candidates. Mr Baruah explained that it has been found by the Monoharan Committee and the task force that the Petitioner has not followed the aforesaid procedure as provided in the rules and has made illegal appointments of teachers in provincilised schools. According to him, even if one illegal appointment is made, the authority is empowered under FR 56(b) to compulsorily retire the government servant making illegal appointment because such a government servant is no longer desirable in service. He cited a passage from page 181 in the book "Essays in Constitutional Law " by RFV Heuston (Second Edition) in support of his submission that if the Petitioner is to succeed in a case before the court questioning the validity if administrative discretion, he must establish that the predominant motive or purpose of exercise of administrative discretion was objectionable. He explained that since in the present case the predominant motive for the exercise of administrative discretion by the administrative authority for compulsorily retiring the Petitioner from service was the fact that the Petitioner had made illegal appointment of teacher, the predominant motive was not objectionable and hence the challenge to the order of compulsory retirement in the present case cannot stand. Mr. Baruah further submitted that once it is found that the Petitioner had made illegal appointments, he cannot take the defence that he has made the illegal appointments under instructions from the superior authorities. He cited passages from 41 pages and 192 of the aforesaid book "Essays in Constitutional Law " by RFV Heuston (Second edition) for the proposition that superior orders or state necessity are no defence to an action otherwise illegal. He also cited the decision of the Supreme Court in the case of S. Kannan and Others Vs. Secretary, Karnataka State Road Transport Authority, in support of his argument that where the power under the rules is vested in the Director of Elementary Education to approve the list of selected candidates, that power cannot be usurped by lower authority such as the Deputy Inspector of Schools. Mr. Baruah argued that since the impugned order of compulsory retirement is not arbitrary or perverse, this Court should not in exercise of its powers of judicial review interfere with the discretion of the authority in compulsorily retiring the Petitioner under FR 56 (b) in the public interest.

5. The scope of judicial review in respect of an order of compulsory retirement has been considered by the Supreme Court in Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, and after considering the earlier decisions on the point of length, the Supreme Court has laid down the following principles:

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

(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) malafide 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 record/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.

The aforesaid principles laid down by the Supreme Court indicate that the order of compulsory retirement is passed on the subjective satisfaction of the government and in exercise of its power of judicial review, the High Court would not examine the matter as an appellate court and may interfere only if it is satisfied that the order was passed (a) malafide or (b) that it is based on no evidence or (c) that it is arbitrary or perverse in the sense that no reasonable person would form the requisite opinion on the given materials.

6. The Supreme Court also laid down in the aforesaid case of *Baikuntha Nath Das v. Chief District Medical Officer* (supra) that the government or the Review Committee, as the case may be shall have to consider the entire records of service before taking any decision in the matter though it has to attach more importance to records of performance during the later years and that the records to be considered would include entries in the confidential reports/character rolls, favourable and adverse. In *S. Ramachandra Raju Vs. State of Orissa*, the Supreme Court after referring to the aforesaid principle laid down in the case of *Baikuntha Nath Das v. Chief District Medical Officer* (supra) further held:

It is thus settled law that though the order of compulsory retirement is not a punishment and the government employee is entitled to draw all retiral benefits including pension, the government must exercise its power only in the public interest to effectuate the efficiency of the service. The dead wood need to be removed to augment efficiency. Integrity in public service need to be maintained. The exercise of power of compulsory retirement must not be a haunt on public servant but must act as a check and reasonable measure to ensure efficiency of service and free from corruption and incompetence. The officer would live by reputation built around him. In an appropriate case, there may not be sufficient evidence to take punitive disciplinary action of removal from service. But his conduct and reputation is such that his continuance in service would be a menace in public service and injurious to public interest. The entire service record or character rolls or confidential reports maintained would furnish the back drop material for consideration by the Government or the Review Committee or the appropriate authority. On consideration of the totality of the facts and circumstances alone, the government should form the opinion that the government officer needs to be compulsorily retired from service. Therefore, the entire service record more particularly the latest, would form the foundation for the opinion and furnish the base to exercise the power under the relevant rule to compulsorily retire a government officer.

Thus in the aforesaid decision in *S. Ramchandra Raju v. State of Orissa* (supra), the Supreme Court reiterated that the entire service records more particularly the latest should form the foundation for the opinion for exercising the power under the relevant rules to compulsorily retire a government officer. In the aforesaid decision, the Supreme Court held that the exercise of power by the Government to compulsorily retire *S. Ramchandra Raju* was arbitrary because the government had not taken into consideration his total records of service but had taken only solitary adverse report of 1987-88 against him as the foundation to compulsorily retire him from service and quashed the order of compulsory retirement.

7. In the case of *State of Gujarat v. Suryakanta Chunilal Shah* (1999) 1 SCC 529, the Supreme Court after discussing at length its earlier decisions on compulsory retirement including the decision in the case of *Baikuntha Nath Das v. Chief District Medical Officer* (supra) found in that case that although there was no entry in the character roll of the government officer that his integrity was doubtful the Review Committee on its own probably on the basis of the FIR lodged against him that he had granted permits to vague and bogus institutions formed the opinion that he was a person of doubtful integrity and should be compulsorily retired from service and the Supreme Court held in paragraph- 27 of the said judgment that there was no material on the basis of which a reasonable person could form an opinion that the government servant had outlived his utility as government servant or that he had lost his efficiency and had become a dead wood. In the said decision, the Supreme Court further held that the order of compulsory retirement on the facts of that case was punitive

having been passed for a collateral purpose of his immediate removal rather than public interest and the Division Bench of the High Court was justified in directing reinstatement of the government servant.

8. In the case of *Ram Ekbal Sharma Vs. State of Bihar and another*, it was held that even though the order of compulsory retirement is couched in innocuous language without making any imputations against the government servant who was directed to be compulsorily retired from service, the court in appropriate cases can lift the veil to find out whether the order is based on any misconduct of the government servant or the order has been made bonafide and not with any oblique or extraneous purposes. In the case of *High Court of Punjab and Haryana Through R.G. Vs. Ishwar Chand Jain and Another*, the Supreme Court after taking into consideration the aforesaid decisions as well as its other decisions including *Baikuntha Nath Das v. Chief District Medical Officer (supra)*, found that the conclusion of the Full Court of the High Court of Punjab and Haryana to compulsorily retire *Shri Iswar Chand Jain* was based on the allegation of misconduct which was the subject matter of enquiry before a judge of the High Court and held that the impugned order of compulsory retirement of *Shri Jain* though innocuously worded was in fact an order of removal from service and cannot be sustained.

9. From the aforesaid decisions of the Supreme Court it will be clear that the High Court in exercise of its powers of judicial review cannot examine the matter relating to compulsory retirement as an appellate court but can interfere with the order of compulsory retirement if it finds that the order of compulsory retirement is arbitrary or perverse. Further, where the government or the Review Committee as the case may be does not consider the entire service records including the entries in the confidential reports/character rolls of the government servant, the order of compulsory retirement is arbitrary. This is because it is only on consideration of the entire service records of the government servant that a reasonable person can form the requisite opinion that the government servant is inefficient or a dead wood and has outlived his utility or that he has a doubtful integrity. Further even where the order of compulsory retirement is couched in innocuous language and does not make any imputation against the government servant sought to be compulsorily retired from service, if the court finds that the said order of compulsory retirement is actually punitive in nature and is based on allegation of misconduct against the government servant and has been passed for the purpose of immediately, removing him from service, the court will set aside the order of compulsory retirement.

10. In the instant case, even though the impugned order of compulsory retirement is innocuously worded and does not make any imputation against the Petitioner, the Screening Committee recommended the compulsory retirement of the Petitioner and the government accepted the said recommendation of compulsory retirement of the Petitioner because the Petitioner had made illegal appointment of teachers. The impugned order of compulsory retirement is really

an order to remove the Petitioner from service for a charge of misconduct and is punitive in nature and could not have been passed without following the procedure laid down in Article 311(2) of the Constitution.

11. Moreover, the entire service records of the Petitioner including his ACRs have not been considered by the Screening Committee which recommended the compulsory retirement of the Petitioner under FR 56(b) nor considered by the Government before passing the order of compulsory retirement under FR 56(b). Only the reports of the Monoharan Committee and the task force have been considered by the Screening Committee before making the recommendation for compulsory retirement of the Petitioner and by the Government before passing the order of compulsory retirement of the Petitioner. The said reports of Monoharan Committee and the task force have been produced before the court and I have perused the same and I am of the considered opinion that the said reports are relevant but are not the only relevant material for forming the opinion that the Petitioner had become a dead wood and had outlived his utility or was of doubtful integrity. The entire service records and in particular those of the later years including the ACRs of the Petitioner were required to be considered by the authorities for forming an opinion as to whether the Petitioner should be compulsorily retired from service in the public interest. The impugned order of compulsory retirement is, therefore, arbitrary in the sense that no reasonable person could have formed an opinion only on the basis of the reports of the Monoharan Committee and the task force placed before the Screening Committee that the Petitioner had outlived his utility and had become a dead wood or that he was an officer of doubtful integrity and should be compulsorily retired from service in the public interest under FR 56(b).

12. In the result, the impugned order of compulsory retirement dated 17.5.99 is quashed and the Petitioner will be forthwith reinstated in service if he has not yet attained the age of superannuation and will be entitled to all consequential service and financial benefits. The writ petition is allowed, but considering the facts and circumstances of the case the parties shall bear their own costs.