

(1985) 11 GUJ CK 0021
In the Gujarat High Court

Mansukhlal A. Doshi

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-11-1985

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 161, 161(1)(aa)(i)

Citation : (1986) 2 GLR 1090

Hon'ble Judges : S.A. Shah, J

Bench : Single Bench

Judgement

S.A. Shah, J.—The petitioner who was at the relevant time serving as Assistant Director of Industries, Gujarat State, and alleged to have voluntarily retired, has by this petition challenged the action and orders of the respondent-State Government of not granting him benefits of Government Resolution No. 1070/5158/J, dated 8-10-1970 on the ground that the petitioner has not voluntarily retired but was made to retire by the State Government. The important question, therefore, that arises for my consideration is whether the retirement of the petitioner is voluntary or he has been made to retire by the State Government after giving him three months notice, as provided under Rule 161(1)(aa)(i) of the Bombay Civil Services Rules (B.C.S.R.).

2. It is not disputed that the petitioner was recruited as Inspector in the former State of Bombay on or about 3-11-1948, and in due course reached to the post of Assistant Director of Industries from 8-12-1967. As disclosed from the correspondence as well as the affidavit of the Government, the petitioner addressed a letter dated 2-1-1976 praying for retirement from service from 30-4-1976. The said letter was treated as notice of three months. There is also no dispute that in fact the petitioner ceased to be a Government servant from 1-5-1976, i.e. he has retired from 30-4-1976. The petitioner completed more than 26 years of service, and when he retired, his age was about 56 years. In the aforesaid circumstances, it cannot be disputed that the provisions of Rule 161 of the B.C.S.R. are applicable.

3. Age of compulsory retirement in the case of the petitioner is 58 years, i.e. when he attains the age of 58 years. However, under the provisions of Rule 161 of the B.C.S.R., the appointing authority on fulfilling the conditions mentioned therein has a right to retire a Government servant after giving him three months prior notice or salary thereof. Similar right has also been given to a Government servant, who fulfils the conditions mentioned therein, to give three months notice in writing to the Appointing Authority to retire him from service, though in certain cases the appointing authority has a right not to allow the Government servant to retire, e.g. if the departmental proceedings are pending against him, etc. But in this petition we are not concerned with that provision because it is nobody's case that there were any departmental proceedings pending against the petitioner. Under the scheme of Rule 161 of the B.C.S.R., it has been the settled legal position that while giving power to the Government to compulsorily retire a Government servant against his wish, there is a corresponding right of the Government servant to voluntarily retire from service by giving the Government three months notice in writing. There is no question of acceptance of the request for voluntary retirement by the Government when the Government servant exercises his right under Rule 161 (1) (aa) (ii) of the B.C.S.R.

4. From the facts of this case it appears that the petitioner has written a letter dated 2-1-1976 for voluntarily retirement, and by an order dated 9-3-76 (Annexure "A" to the petition), the Deputy Secretary has treated the said letter as three months notice as required under Rule 161(1)(aa)(ii) of the B.C.S.R. However, having treated the said letter as a notice for voluntarily retirement, the Government has further added the instructions laid down in para 2(ii) of the Government Circular dated 15-5-70, which is the bone of contention before me. The State Government has also accepted the application for voluntary retirement of the petitioner with effect from 30-4-76.

5. Thereafter, by the second communication dated 9-3-1976 (Annexure "A") (which according to Mr. Mehta should be dated 5-4-76) the Government has retired the petitioner with effect from 30-4-76 under the provisions of Rule 161(1)(aa) of the B.C.S.R. read with instructions laid down in paragraph 2(11) of the Government Circular dated 15-5-1970. However, by a subsequent circular dated 5-4-1976. (Annexure "B") the Deputy Secretary has stated that the petitioner has been permitted to voluntarily retire with the benefits of Government Resolution dated 8-10-1970.

6. Thereafter, the petitioner appears to have demanded the benefits available to him under Government Resolution dated 8-10-1970 which were not given to him. Under the said Resolution, if a Government servant retires, he is given notional benefits of five years' service which may not extend more than 30 years. The petitioner appears to have retired on reaching the age of 58 years. Therefore, he would be entitled to notional service of 20 months. Ultimately, by letters dated 2-6-1977. (Annexure "E") and 30-9-1978 (Annexure "F"), the Government

refused to extend the notional benefits to the petitioner as per the Resolution dated 8-10-1970. Hence, the petitioner has filed the present petition.

7. Mr. M.D. Shukla, Under Secretary to the Government of Gujarat, Industries, Mines and Power Department, has filed the affidavit, wherein he has admitted that the petitioner was retired from Government service with effect from 1-5-1976. He has also stated that the order dated 5-4-1976 giving benefits to the petitioner of Government Resolution dated 8-10-1970 was issued by mistake and was withdrawn by an order dated 22-6-1977. The said order has not been brought on the record. In paragraph 6 of the affidavit it has been pointed out that the petitioner was served with three months notice retiring him prematurely with effect from 24-12-1976 and, therefore, he is not entitled to the said benefits. It is admitted on behalf of the Government that the petitioner applied vide his letter dated 2-1-1976 for voluntarily retirement, and that his application should be considered as three months notice for voluntary retirement operative from 1-2-1976, and he should be allowed to retire from 30-4-1976 (i.e. after three months). However, it is added in the affidavit that if the petitioner had not made such an application, he would have been retired by Government prematurely, and the said application for retirement does not confer on the petitioner any additional benefits. However, the next statement in the affidavit being contradictory, is reproduced as under:

The petitioner was already served with three months notice for his premature retirement from Government service and, therefore, with a view to facilitate the petitioner to have an opportunity, to retire voluntarily, the application dated 21-1-1976, and accordingly the petitioner was allowed to retire with effect from 30-4-1976. Therefore, the question of giving him the benefit under Government Resolution F.D. dated 8-10-1970 does not arise as the petitioner had not himself asked for retirement under F.D.G.R. dated 8-10-1970. But he has only asked for retirement after Government served him with notice for premature retirement.

Unfortunately, nowhere in the affidavit it has been stated as to on what date notice for premature retirement was served by Government on the petitioner. Orders of retirement, annexures "A" and "B" and other correspondence nowhere mentions that any such notice was ever given by the Government to the petitioner. However, by way of abundant caution I asked Mr. Desai, learned Assistant Government Pleader, to produce a copy of the notice served by the Government or give particulars regarding the date of notice. Unfortunately, Mr. Desai is not in possession of any such notice or is able to give date of the notice. In my opinion, the affidavit has been filed without any application of mind. Nowhere it is stated that the Govt, had served any such notice and that was within the knowledge of the deponent. No record is produced before me. No reference of the date of the notice, which is the most important factor, is mentioned anywhere in the affidavit. Therefore, it cannot be said that the Government has proved service of any notice.

8. Again, if we refer to paragraph 2(11) of the Government circular dated

15-5-1970 it will clarify the position. It reads:

2(11). When it is decided not to retain any Class I Officer in service beyond the age of 50 years, he should be informed in the first instance, by a confidential letter that Government proposes to retire him prematurely with effect from a particular date (to be specified) and that he can himself tender, if he so desires, a notice to Government, asking for retirement from service under Clause (aa) (ii) of B.C.S.R. Rule 161(1). A notice for premature retirement should be issued to such government servant, only if necessary, after the opportunity given to him of asking for premature retirement voluntarily is not availed of by him.

This clause really clinches the issue. Even in case the Government comes to the conclusion not to retain a Class I Officer, Government has accepted the position that it will permit the concerned officer to make an application for voluntary retirement under Rule 161(1) (aa) (ii) of the B.C.S.R., and the petitioner might have received such intimation, though the same has not been specifically pleaded.

9. Since the question that arises is a question of some importance, I will deal with all the three situations that might have arisen in this case, viz. (1) The petitioner has voluntarily retired in accordance with Rule 161(1) (aa) (ii) of the B.C.S.R. (2) The petitioner has been retired by Government under Rule 161(1) (aa) (i) of the B.C.S.R. and (3) An intimation might have been given to the petitioner under paragraph 2(11) of the Government Circular dated 15-5-1970 and, therefore, that might have led the petitioner to make an application for voluntary retirement under Rule 161(1)(aa)(ii) of the B.C.S R.

10. In absence of any other evidence that such an intimation was even given to the petitioner under paragraph 2(11) of the Circular dated 15-5-1970, and the date of such intimation, it will not be possible to come to the conclusion that application dated 2-1-1976 of the petitioner was in response to any such intimation. The date of retirement is admittedly 30-4-1976, which is the date-on which the petitioner proposed to retire. Therefore, there is no manner of doubt to come to the conclusion that the petitioner has retired on 30-4-1976 in pursuance of his notice for voluntary retirement, and the Government has accepted the retirement from 30-4-1976. In that view of the matter, the petitioner is entitled to the benefits of Government Resolution dated 8-10-1970.

11. If the appointing authority has made the petitioner to retire, it should be in public interest and must have some other date. No evidence has been produced showing the date of the notice or the date of retirement (compulsory) proposed by the Government. On the contrary in the affidavit, as stated earlier, it has been stated that the petitioner was made to retire from 24-12-1976. However, Mr. Desai, learned Assistant Government Pleader, for the respondent-State, states that the date 24-12-1976 is a mistake, and it must be 24-2-1976. This also is a very sorry state of affairs. While filing the affidavit nobody bothers to check the date, which is the most relevant point. Assuming that the date is 24-2-1976, the

petitioner has not retired on 24-2-1976 as alleged. Therefore, in absence of the notice or the proof with regard to the notice, it is not possible to arrive at the conclusion that the petitioner has been retired by the Appointing Authority. This contention, therefore is rejected.

12. Though there is no specific pleading whether the petitioner has tendered his notice for voluntary retirement in pursuance of the intimation received by him in my opinion, even if the petitioner asked for voluntary retirement, on receipt of such intimation there would not be any change in the position because such an intimation as contemplated under the Government Circular is to be given to Class I Officer to enable him to voluntarily retire and get benefits. If Class I Officer retires voluntarily, he must be given the benefits of Government Resolution dated 8-10-1970, because compulsory premature retirement by the Government is always subject to challenge. Government has to prove that the order is for public interest, and that the concerned officer is a dead-wood, in order to save itself from such difficulties, the Government has adopted the procedure of giving intimation so that the concerned officer may apply for voluntary retirement and get the benefits of Government Resolution dated 8-10-1970; otherwise there is no reason for such an officer to volunteer retirement because the Government would naturally take time to serve notice and he gets benefits for further three months salary and the order might also be subject to challenge.

13. There is another inherent evidence in the Circular dated 15-5-1970 itself which says that a Government servant may apply for retirement under Clause (aa) (ii) of Rule 161(1) of the B.C.S.R. Option is, therefore, given to give notice under that clause, and in pursuance of that intimation if a Government servant has given notice for voluntary retirement, he cannot be denied the benefits available to him or voluntary retirement.

I therefore, hold that even in case the petitioner has given notice for voluntary retirement after the receipt of the intimation under paragraph 2(11) of the Circular dated 15-5-1970, he would be entitled for the benefits of the Government Resolution dated 8-10-1970.

14. In the instant case. Government has accepted the voluntary retirement of the petitioner and has also stated in terms in its letter dated 5-4-1976 that the benefits will be available to the petitioner. The petitioner having acted upon that and having retired, and not taken any proceedings against the Government, the Government cannot be permitted to resile from its commitment which is prejudicial to the petitioner; even if the same was a mistake which was discovered by the Government after more than a year, such a mistake cannot be corrected without observing the principles of natural justice. In any view of the matter, there is no justification for the Government to deny to the petitioner the benefits of Resolution dated 8-10-1970.

15. In the aforesaid view of the matter, the petition is allowed. The State Government is directed to grant to the petitioner the benefits of Government

Resolution dated 8-10-1970, and refix his pensionary benefits within four weeks from the date of the receipt of the writ of this Court. If any delay is made by the respondent-State in granting the benefits to the petitioner within the aforesaid period, the respondent shall be liable to pay to the petitioner interest at the rate of 12 per cent per annum on the delayed amount. Rule is made absolute accordingly with costs.