
(1983) 05 OHC CK 0003
In the Orissa High Court
Case No : O.J.C. No. 1647 of 1979

M.J. Rao

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 10-05-1983

Acts Referred:

Bihar and Orissa Service Code, 1929 — Rule 3, 71, 75
Constitution of India, 1950 — Article 14, 16

Citation : (1983) 56 CLT 194

Hon'ble Judges : J.K. Mohanty, J;B.N. Misra, J

Bench : Division Bench

Advocate : G.A.R. Dora and P.M. Das, for the Appellant; Additional Government Advocate and M.K.C. Rao, for the Respondent

Final Decision : Allowed

Judgement

B.N. Misra, J.—The Petitioner who was an officer of the Orissa Superior Judicial Service (Senior Branch) has challenged the Government order retiring him from service with effect from 31-8-1978 (afternoon) on attaining the age of fifty-eight years. He claims that he was entitled to continue in service until he attained his sixtieth year.

2. The Petitioner's case may be, briefly stated. He was born on 2-8-1920. On 15-3-1946 he took up service as a judicial officer in the ex-State of Narsinghpur and was made permanent on 15-3-1947. He was promoted as a Subordinate Judge, on 1-12-1947. After merger of the Ex-State of Narsinghpur with the State of Orissa, the services of the Petitioner were taken over by the Government of Orissa with effect from 1-4-1948 and he was appointed at Narsinghpur as a Munsif from the aforesaid date. Thereafter he received various promotions in the cadre and was appointed as a District and Sessions Judge in the Orissa Superior Judicial Service (Senior Branch) on 29-7-1968. He was confirmed as such with effect from 1-8-1969. Finally, he was promoted to the Selection Grade in November, 1976. On 17-4-1978 the Petitioner wrote to the Government in the

Home Department that under the rules he was entitled to continue in service till he attained the sixtieth year of age, vide Annexure-3. In this letter he explained that by order dated 11-8-1941 of the Darbar of Narsinghpur State, the Bihar and Orissa Service Code with the modifications stated therein was made - applicable to all the employees of Narsinghpur State and Rule 75(a) of the said Rules entitled the employees to be retained in service till the age of sixty years. Accordingly, he was entitled to continue in service till 31-3-1980. On 5-5-1978 the Petitioner represented to Government that the Rules of Ex-State of Narsinghpur, Finance Department Resolution No. 63653-Pen 6/77 dated 14-12-1977 and Rule 3 of the Orissa Service Code intited him to continue in service till sixty years. On 2-6-1978 the Petitioner - made another representation to Government, vide Annexure-4, Annexure-5 is the letter dated 28-6-1978 which the Petitioner received from the Government asking - him to produce relevant documents for reference and according to the Petitioner, he submitted all the relevant documents at once. On 2-8-1978 Government asked the Collector, Cuttack for his views regarding the age of superannuation of the employees of the ex-State of Narsinghpur after necessary verification, vide Annexure-6. Annexure-7 is the report of the Collector, Cuttack dated 18-8-1978. In this report the Collector noted that the order dated 11-8-1941 of the Raja of Narsinghpur was a genuine document as the same was corroborated by correspondence and different annual administration reports of the ex State of Narasinghpur. On 26-8-1978 the Petitioner again wrote to Government drawing its attention to the Collectors report (Annexure-7) and requesting for continuance in service till the age of sixty years, vide Annexure-8. However, Government issued notification No. 41376-HC dated 31-8-1978 to the effect that the Petitioner would retire from service on 31-8-1978 (afternoon), vide Annexure-I. It is this order of retirement which is under challenge in this writ application. By its order dated 27-9-1979, Annexure-9. Government, rejecter the representations of the Petitioner for continuance in service till the age of sixty years in Annexure-9 no reasons have been assigned by the Governments to the grounds on which the Petitioner's representations were rejected. It is further stated by the Petitioner that according to the Service Rules of the ex-State of Narsinghpur the age of superannuation of all employees of that State had been fixed at sixty year and therefore by virtue of Rule 3 of the Orissa Service Code read with Finance Department Resolution No. 63653-Pen.6/77 dated 14-12-1977 he was entitled to continue in service till 31-8-1980. The decision of Government to retire the Petitioner at the age of fifty-eight years under Rule 71(a) of the Orissa Service Code is stated to be illegal, contrary to law and void. It has also been pointed out that vide Annexure 15, the order of the Collector dated 12-10-1979, one Dinabandhu Barik, another employee of the Ex-State of Narsinghpur, whose services had been taken over by the Government, was held to be entitled to continue in service till the age of sixty years It is allotted that the Petitioner's case which has been decided otherwise is discriminatory and violative of Articles 14 and 16 of the Constitution of India.

3. The State has entered appearance as opposite party No. 1 and in its counter it has denied the claim of the Petitioner to continue in service till the age of sixty years. It is conceded that the service conditions of the ex-State employees have been protected under the provisions of the Orissa Service Code and that the rules in force in the ex State of Narsinghpur prior to its merger would govern the age of superannuation of the ex State employees, of Narsinghpur, However, in the present case the State Government found that there was no conclusive evidence in support of the, contention that the provisions of the Bihar and Orissa Service Code were applicable to the employees of the ex-State of Narsinghpur before its merger. Government was not in a position to accept the genuineness of the order of the Raja of Narsinghpur dated 11-8-194 as copies of the said order were neither available in any of the Government offices for in any of the official records and documents which were taken over from Narsinghpur Darbar. Government had also taken into consideration that fact that none else except the Petitioner had chilled that the age of superannuation of the ex State employees of" Narsinghpur was sixty years In these circumstances Government decided not to acapnia the Raja of Narsinghpur"s order dated 11-8-1941. It is stated; that Government was justified in passing the order of retirement (Annexure-1) as the High Court had expressed the view that the Petitioner had ceased to be physically and mentally fit to discharge the duties and responsibilities as a member of the senior Branch of the Superior Judicial Service However, as the Government decided to superannuate the Petitioner under Rule 71(a) of the Orissa Service Code, views regarding the suitability of the Petitioner for continuance in service beyond 58 years were not considered relevant It is stated that the Finance Department Resolution with regard to ex State employees has no application to the case of the Petitioner and that the representations of the Petitioner for continuance in service were duly considered and rejected. It is pointed out that the State Government was not bound to accept the views of the Collector,Cuttack with, regard to the genuineness of the Durbar order dated 11-8-1941. It is admitted that in the case of Dinabandhu Barik, another employee of the ex State of Nursinghpur the age of superannuation was held to be sixty years by the Collector, Cuttack, who was in that case the appointing authority. In the case of the Petitioner the State Government is the appointing authority and therefore the decision of the Collector, Cuttack with regard to Barik did not have any binding effect on the Government. Finally it is stated that the retirement of the Petitioner on 31-8-1978 is valid and legal.

4. Opposite party No. 4 is the ex-Ruler of the ex State of Narsinghpur. In his counter he has stated that the original order-dated 11-8-1941 of the Raja of Narasinghpur has been in his custody and it was kept by him along with other important documents in the domestic office and that this order regulated the service conditions including the age of superannuation of the employees of the ex-State of Narsinghpur. He had submitted the original order to the Collector, Cuttack during the enquiry and the Collector was satisfied about its genuineness.

5. In his rejoinder the Petitioner has submitted that the Government had no

justification in not accepting the genuineness of the Raja of Narsinghpur's order dated 11-8-1941. It is pointed out that the remarks of the High Court regarding the suitability of the Petitioner did not deserve any notice and that Government had admitted in its counter that it was irrelevant as the Petitioner had been retired from service under Rule 71(a) of the Orissa Service Code. It is also stated that the remarks of the High Court as against the Petitioner were unjustified as the Petitioner had earned all his promotions during his career and had also been promoted to the Selection Grade, before his retirement. In an affidavit filed by the Petitioner it is stated that Government in the Home Department had allowed one Jayakrishna Patnaik, an employee of the ex-State of Narsinghpur, to continue in service up to the age of sixty years and a copy of the relevant Government order dated 24-7-1982 has been filed as Annexure-24.

6. The "History of Gazetted and other Officers" serving under the Government of Orissa, Volume-I (corrected upto 1st July 1954), page 353, which is a Government publication and" was referred to at the hearing, shows that the Petitioner was born on 2-8-1920. He joined the ex-State service on 15-3-1946. His services were taken over by the Government of Orissa with effect from 1-4-1948 and after serving at different stations he was confirmed in the Orissa Judicial Service, Class II, on 7-4-1951. Further admittedly the Petitioner earned his promotions in the judicial service, was appointed as a District and Sessions Judge on 29-7-1968 and finally promoted to the selection grade in November, 1976. He worked as a District and Sessions Judge until his retirement on 31-8-1978. As already noted it is conceded by the State Government that the service conditions of the ex-State employees have been protected under the provisions of the Orissa Service Code and that the rules in force in the ex State of Narsinghpur would govern the age of superannuation of the Petitioner. Thus, there is no dispute that the age of superannuation of the employees of the ex-State of Narsinghpur as provided in the rules in force in that State prior to its merger is protected by virtue of Rule 3 of the Orissa Service Code which is extracted hereunder:

3. Nothing in these rules shall operate either to deprive any person of any right or privilege to which he is entitled by or under any law or by the terms of any contract or agreement subsisting between such persons and the Government or to confer on him any right or privilege in respect of any matter for which specific provision is made by the terms of any contract or agreement between himself and the Government.

7. The Petitioner's case is that the then Ruler of the ex-State of Narsinghpur by order dated 11-8-1941 adopted and enforced in that State the Bihar and Orissa Service Code with necessary modifications to suit local conditions (Annexure-10). The following Rules 75(a) and (b) were substituted in place of Rule 75 of the Bihar and Orissa Service Code.

75.(a) A State servant is required to retire on attaining the age of 60 years. He may be retained in service after that date under the orders of the Ruler on Public

Grounds which must be recorded in writing, but he must not be retained for more than two years, except in very exceptional circumstances. No extension of service may be granted for any period exceeding one year at a time.

(b) The Ruler may require any State Servant who has completed 30 years of service from the date of first appointment but not attained the age of 60 years to retire from State Service if he "considers that the efficiency of such State Servant is not such as to justify his retention in service, but in case of compulsory early retirement on this or any other grounds he shall be compensated for the loss sustained by him, provided that he does not consent to such early retirement.

It is clear from the rules extracted above that the age of superannuation of the ex-State employees of Narsinghpur was 60 years, Obviously these rules have not found acceptance with the State Government. When the Petitioner brought these rules to the notice of the State Government prior to his retirement, the State Government directed the Collector, Cuttack to give his views in the matter. The Collector held an enquiry in course of which he examined the ex Ruler of Narsinghpur, other documents and the rules and reported to the Government that the order dated 11-8-1941 was a genuine document. Government, however, did not accept the report of the Collector and retired the Petitioner from service on 31-8-1978. Neither at the time of retiring the Petitioner nor while rejecting his representations Government assigned any reason as to why it did not accept the report of the Collector. The reasons were disclosed for the first time in the counter filed in this case by the State Government. It is submitted by the learned Additional Government Advocate that Government had a three-fold objection to the acceptance of the said rules. First, the rules were not typed, but were handwritten. Second, the rules did not bear any official seal. Third, the custody of the rules with the ex-Ruler was not proper: On examining the facts and the records of this case we find that none of the aforesaid objections has any force. The rules have been signed by the then Ruler of Narsinghpur and his signature has been identified by his son, opposite party No. 4, who has further explained that the rules along with other documents had been preserved by him in the domestic office of, the Ruler. Further Annexures-16 and 17 are the copies of the letters issued by the then Diwan and the then Ruler of Narsinghpur to the Political Agent and in these letters it, has been stated that the Bihar and Orissa Service Code with necessary modifications regulated the tenure of service of the employees of the State. The Annual Administration Reports of the ex-State of Narsinghpur for the years 1943-44, 1944-45 and 1945-46 have been filed and it is noted in these reports that the security of tenure of service is regulated inter alia by the Bihar and Orissa Service Code with necessary modifications. In these circumstances there was no basis for the State Government to come to the decision that Rules 75(a) and (b) which were in force in the ex-State of Narsinghpur were not genuine. The Collector's report in this regard indicated the correct position and should have been accepted. Further, it appears from Annexure-24 that in July, 1982 the State Government in the Home Department

has alleged one Jayakrishna Patnaik, an employee of the ex-State of Narsinghpur, to continue in service up to the age of 60 years. Surely this decision has been taken by the Government on the basis that the age of superannuation was 60 years in the service rules of the ex-State of Narsinghpur. Therefore if the service rules have been found to be genuine in the year 1982, they were certainly genuine in 1978 when Government took a decision to the contrary while dealing with the case of the Petitioner. On consideration of the facts and materials placed on record we hold that the age of superannuation of the employees of ex-State of Narsinghpur was 60 years according to the service rules in force in that State prior to its merger. The Petitioner is therefore entitled to the protection of" Rule 3 of the Orissa Service Code. The Government order retiring the Petitioner from service with effect from 31-8-1978 (afternoon) was illegal. The question of suitability of the Petitioner to continue in service beyond the age of 58 years was not considered by the Government on the ground that it was not relevant and therefore does not require any consideration in this case.

8. We now proceed to consider the Government Resolution No. 63653-Pen-6/77, dated the 14th December, 1977. Relevant portions of the said Resolutions are extracted hereunder.

The question of determination of the age of superannuation of employees of the ex-State (as per list enclosed) who continue in service under the State Government after merger of the ex-State has been under consideration of Government for some time past.

2. * * *

3. * * *

4. * * *

5. There was a great diversity of rules and practices in the various ex-States regarding retirement of their employees. It is not possible to extend the benefit of higher age of superannuation under Rule 71(b) of the Orissa Service Code in general to all "such cases without conferring unintended concessions. It has been denied that cases of such ex State employees may be dealt with on merits. Ordinarily for the purpose of retirement, the persons taken over from the ex-State services will be regulated under Rule 71(a) of the Orissa Service Code, but where under the rules or service regulations of the ex-States, an employee was entitled to continue in service up to the age of 60 years, he is to be retained in service up to the age of 60 years, if in the opinion of the appointing authority he is efficient and continues to be physically and mentally fit to discharge his duties. On receiving claims from such ex-State employees who are entitled to continue up to the age of 60 years, the appointing authorities will review the cases of an such ex-State employees who are/were serving under their control to determine the age of superannuation accordingly. For this purpose, they may call for evidence from the concerned employee regarding the rules/regulations in force in the ex-State under which he was appointed If the appointing authority will have

any doubt in determining the age of superannuation after receiving evidence from the concerned employees, he may refer the matter to the Collector of the district. in which the Ex-State merged, to ascertain the age of superannuation under the rules/regulations of the concerned ex-State.

6. An ex State employee, who is entitled to continue in service up to the age of 60. years but has already been retired prior to that and has completed the age of 60 years after superannuation, for which he will not be in a position to rejoin service, shall be given the following benefits:

(a) Pension and gratuity of the employee shall be calculated and paid on the basis of pay admissible to him had he retired on completion of 60 years of age.

(b) A lump sum amount equal to twelve months presumptive pay he would have last drawn had he not retired subject to a maximum. of Rs. 5,000/- shall be paid in lieu of his salary he would have drawn had he continued up to 60 years of age, in addition to pension and/or gratuity already drawn by him. If such an employee has died in the meanwhile, the amount shall be payable to his legal heir on production of non-employment certificate of the employee by the claimant.

This Resolution was made applicable to the ex-States noted therein. By subsequent Resolution No. Pen.10/78-48048/F, dated 1-9-1978, the aforesaid 1977 Resolution was made applicable to the employees of all the ex-States of Orissa.

9. Learned Additional Government Advocate has submitted that even if the retirement of the Petitioner on 31-8-1978 is held to be illegal, he would be entitled only to the payment of a lump sum amount (subject to a ceiling of Rs. 5000/-) and to other pensionary benefits as indicated in para 6 of the 1977 Resolution. Learned Counsel appearing for the Petitioner has, on the other hand, submitted that in the facts of this case the Petitioner is entitled to full arrears of salary and all other benefits due to him and that para 6 of the resolution has no application to the Petitioner's case. In support of this contention learned Counsel for the Petitioner refers to a decision of this Court reported in Durga Charan Pattanaik Vs. The State of Orissa and Another, The Petitioner in that case was an employee of the ex State of Dhenkanal and had been retired from service on 15-7-1973. After referring to the service rules of the ex-State of Dhenkanal and the 1977 Government Resolution noted above it was held that the Petitioner's retirement with effect from 15-7-1973 was illegal and he was held entitled to the arrears of salary and other consequential service benefits till the date on which he attained the age of 60 years. The Petitioner's case here is much stronger. Months before his retirement the Petitioner brought to the notice of Government that according to the service rules of the ex-State of Narsinghpur his age of retirement should be fixed at 60 years and he should be allowed to continue in service till he attained that age. But he was made to retire from service on 31-8-1978 on attaining the age of 58 years and his representations against his illegal retirement were rejected by the Government. Thereafter he filed this writ

application on 26-11-1979 and attained the age of 60 years while the writ application was pending disposal in this Court. These are circumstances which should not be held against him. After all the Petitioner had as little control over his age as he had over the illegal order of Government retiring him from service and the delay in disposal of his writ application. In the facts and circumstances of this case we have arrived at the conclusion that the Petitioner is entitled to the areas of salary and all financial benefits due to him.

10. In the result, this writ application is allowed. The Government order vide notification No. 41376-HC, dated 31-8-1978 retiring the Petitioner from service is quashed. The Petitioner shall be deemed to have continued in service from 31-8-1978 till he attained the age of 60 years. He is entitled to the arrears of salary and all other service benefits till that date. There would be no orders as to costs.

J.K. Mohanti, J.

11. I agree.