

(1994) 07 SC CK 0114
In the Supreme Court Of India
Case No : Civil Appeal No. 3030 Of 1979

Mohd. Hussain

APPELLANT

Vs

C.G. of Defence Accounts and Others

RESPONDENT

Date of Decision : 20-07-1994

Acts Referred:

Citation : (1995) 3 SCC 595 Supp

Hon'ble Judges : B. L. Hansaria, J;A. M. Ahmadii, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. The short questIO n which arises fur consideratIO n is whether the appellant was entitled to remain in service till he attained the age of 60 years. The facts reveal that the appellant who was born on 6/10/1916 entered government service in the erstwhile State of Hyderabad as a Third Grade Clerk on a substantive pro tempore post in the Accountant General's office with effect from 28/11/1936. He was confirmed on the said post on 4/9/1950 and after integratIO n that took place on 14/1/1950 ho was absorbed aa an Upper DivisIO n Cleric in the central Services with effect from that date. He received promotIO n in due course and was retired as SelectIO n Grade Auditor on his attaining the age of 58 years on 6/10/1974. His representatIO n that he was entitled to continue till he attained the age of 60 years was rejected. Therefore, the questIO ns which fall for decisIO n are (i) whether he can be stated to be a pre-1938 entrant and (ii) whether he was governed by Article 459(c) of the Civil Services RegulatIO ns or Fundamental Rule 56(a). The learned Single Judge in the High court came to the conclusIO n that he was entitled to continue in service till he attained the age of 60 years, he being governed by Fundamental Rule 56(c) since he held a lien on a permanent post. The State went in appeal against the said decisIO n before the divisIO n bench of the High court. The divisIO n bench took the view that the learned Single Judge had committed an error in placing reliance on the decisIO n of an earlier divisIO n bench of the same High

court in the case of *State of A.P. v. Mohd. Khutubuddin Khan* as in that case, the court considered the status of a substantive pro tempore appointee only from the limited point of view of the application of Article 311 of the Constitution. As we shall presently point out this distinction is not correct.

2. The provisions of Article 459(c) and Fundamental Rule 56(c) are in pari materia and provide that a ministerial government servant who entered service on or before 31/3/1938 and held on that date (i) a lien or a suspended lien on a permanent post, or (ii) permanent post in a provisional substantive capacity and continued to hold the same without interruption until confirmation in that post, shall be retained in service till he attains the age of 60 years. The facts of the present case clearly reveal that the appellant was appointed as a Third Grade Clerk on a pro tempore post in November 1936 and he occupied the said post continuously till he was confirmed in September 1940. The appellant's case was that he was appointed in a substantive vacancy on probation and therefore he held a lien on the said post. The learned Single Judge had the benefit of perusing the service register of the appellant which affirmed the appellant's contention. The learned Single Judge observes:

"ON a reading of the order, it does not appear that he was appointed temporarily in a temporary vacancy."

The learned Judges of the division bench have not pointed out that the appellant's appointment was a short duration appointment or in leave vacancy or the like. It was within the special knowledge of the respondents to point out the nature of his appointment on a substantive vacancy. The decision on which the learned Single Judge placed reliance stated in no uncertain terms that "an officer appointed 'sub-pro tempore' has a lien over the post which lien is only subject to lien of an officer who has a superior lien". Since the order was sought to be supported on the ground that he was a temporary employee, the court had to go into the character of his status to decide if his reversal could be upheld notwithstanding non-compliance with Article 311(2) of the Constitution. We, therefore, think that the division bench wrongly overturned the decision of the learned Single Judge.

3. IN the result we allow the appeal, set aside the decision of the division bench and restore the decision of the learned Single Judge. Consequential benefits to be worked out and given within four months from today. The appellant will also be entitled to the interest at the rate of 9% per annum throughout.