
(2005) 12 GAU CK 0034
In the Gauhati High Court
Case No : Writ Appeal No. 511 of 2005

Mukut Ch. Borah	Vs	APPELLANT
Shafiqur Rahman Choudhury and Others		RESPONDENT

Date of Decision : 23-12-2005

Acts Referred:

Assam Municipal Act, 1956 — Section 209, 298, 299, 50

Citation : (2006) 2 GLR 699 : (2006) 1 GLT 579

Hon'ble Judges : D. Biswas, J; Anima Hazarika, J

Bench : Division Bench

Advocate : P.C. Deka and Devojit Goswami, for the Appellant; M. Bhuvan, P. Hazarika, B.P. Bora, A.C. Bora and P.K. Musahary, for the Respondent

Judgement

D. Biswas, J.—The appellant herein, who was the respondent No. 6 in the W.P.(C) No. 93 of 2003, has assailed the legality and validity of the impugned judgment and order dated 30.8.2005 passed by the learned Single Judge ruling, inter alia, that the appellant has no legal right to hold the post of Head Assistant by virtue of the order passed by the Municipal Board by way of review recalling the order of compulsory retirement as the powers of review are not available to the Board under the provisions of the Assam Municipal Act, 1956.

2. The appellant was working as Head Assistant of Nagaon Municipal Board. He was placed under suspension by the Executive Officer by an order passed on 24.4.1997. Thereafter, by the order dated 17.6.1997, the Executive Officer of the Board compulsorily retired him from service. The order of compulsory retirement reads as follows:

Perused all the service records and other relevant records relating to the service of Shri Mukut Chandra Bora, Head Asstt. (under suspension), Nagaon Municipal Board. Shri Bora has completed 29 years of service. After perusal of all the records and facts, I am satisfied that it is on public interest that Shri Mukut Ch. Bora be sent on compulsory retirement. Accordingly Sri Mukut Ch. Bora is directed to be sent on compulsory retirement. This decision is not related to any

disciplinary proceedings pending against him at this time. The period of his suspension given vide order No. 1-12/ 97-98/270-74 dated 28.4.1997 shall be treated as on duty. He will be entitled to all benefits of retirement as per rule.

3. The aforesaid order of compulsory retirement was challenged by the appellant in Civil Rule No. 2884 of 1997, The said writ petition was dismissed by this Court by the Judgment and Order dated 5.1.2003. Writ Appeal No. 34 of 2001 was preferred against the judgment of the learned Single Judge. During the pendency of the writ appeal, elected representatives assumed charge of the affairs of the Municipal Board. Thereafter, the Board by Resolution Nos. 3 and 4 dated 12.11.2001 reinstated the appellant in service and rejected the prayer of the Sim Safiqur Rahman Choudhury (respondent No. 1) to grant him senior position with effect from the date of extension of service of another employee, namely, Shri Atul Ch. Baruah. On such resolutions having been passed, the appellant did not press, the Writ Appeal No. 34 of 2001 which stood dismissed on 10.9.2002. The Resolution Nos. 3 and 4 dated 12.11.2001 read as follows:

Resolution No. 3:

The former Head Assistant of the Board (sent on Compulsory retirement) Sri Mukut Ch. Bora's letter dated 2.11.2001 addressed to the Chairman has been placed in the meeting for discussion. Said Sri Bora, in his petition mentioned that in serving for a period of about 29 years in the Board in different capacities, he was promoted to the post of Head Assistant and while he was in that post he was placed under suspension by the then Executive Officer of the Board and subsequently sent on compulsory retirement illegally. Sri Bora moved the hon'ble High Court against that illegal order of compulsory retirement and praying for his reinstatement and the said Writ Appeal petition is under consideration of the hon'ble High Court and stand undisposed of. Sri Bora also mentioned in his petition that previously Sri Atul Chandra Boruah and Sri Safiqur Rahman Choudhury, both employees of the Board were removed from their services and subsequently reinstated in their services while their petitions challenging the legality of their dismissal order was pending in the Court for disposal which is precedence. The meeting thoroughly discussed about all the facts mentioned in the petition of Sri Bora. In the course of discussion, it appears that before Sri Mukut Ch. Bora was sent on compulsory retirement, he was working as Head Assistant and the that Executive Officer placed him under suspension. It is seen that Sri Borah was placed under suspension by the Executive Officer charging on a light fault. There has not been found any financial anomaly or any such grievous charge against Sri Borah during his service period. On the other hand, Sri Borah is equipped with vast knowledge by his long period of service in the Board. So this .meeting considers that if Sri Bora is reinstated in his original post the Board will be a gainer getting his well experienced service. So, considering all aspects this meeting has unanimously decided that Sri Mukut Ch. Bora be reinstated in the same post of Head Assistant which he was holding before he was compulsorily retired and he will be granted all admissible benefits.

The meeting held on today has unanimously decided that the absence period of Sri Bora from the date of compulsory retirement upto the date of his office joining on this reinstatement be treated as Earn Leave and the period of leave will not be debited to his leave account and his continuation of service be counted. Moreover, it is decided that out of admissible amount of money payable to Sri Bora in respect of pay, allowance etc. an amount equal to 20% be deducted by the Board and the balance amount be paid on instalment basis and in future Sri Borah will not be entitled to claim this 20% or any amount of compensation. This meeting further decided to direct Sri Borah to join in his previous post forthwith and to authorise the Chairman to take necessary steps in the matter.

Resolution No. 4:

Employee of the Board Sri Safiqur Rahman Choudhury petition dated 9.11.2001 was placed in the meeting today for discussion. In that petition, Sri Choudhury mentioned that he has no objection, against the decision of the Board held on 26.7.2001 granting extension of service of Sri Atul Ch. Baruah, Head Assistant for 2 years with effect from 1.1.2002. But he (Choudhury) should be promoted to the post of Head Assistant. It is clear that Sri Atul Ch. Baruah is senior to Sri Choudhury in respect of service. There has been a threadbare discussion on the petition of Sri Choudhury. In respect of the extension of service of a retiring person, he is not degraded with effect from the date of extension and hence, the demand of Sri Choudhury to grant him in the senior post with effect from the date of extension of service of Sri Atul Ch. Baruah, is unreasonable, unlawful and baseless and hence, the petition of Sri Choudhury has been rejected in the meeting today unanimously.

4. We are primarily concerned with the legality and validity of the Resolution No. 3. Shri Shafiqur Rahman Choudhury, respondent No. 1 herein, challenged the aforesaid resolutions in Writ Petition No. 9, of 2003. The learned Single Judge disposed of the writ petition by the Judgment and Order dated 30th August, 2005 holding, inter alia, that the Municipal Board being a quasi-judicial authority cannot review its own order of compulsory retirement unless the powers of review are expressly available to it under the statute from which it derives its jurisdiction. The learned Single Judge was of the view that the controversy relating to compulsory retirement of the appellant was set at rest by the order passed in the earlier writ petition and, therefore, the Board had no jurisdiction to pass orders for reinstatement of the appellant. The learned Single Judge referring to the decision in Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, observed that a quasi-judicial authority cannot review its own orders unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. This being the settled position of law, the Board had no jurisdiction to adopt the Resolution No. 3.

5. The Resolution No. 3 quoted hereinbefore clearly indicates that the Board had

taken the decision to reinstate the appellant for reasons recorded in details. this Court in exercise of powers of judicial review can only examine the correctness and legality of the decision making process and, obviously, cannot sit on the judgment over the decision of the Board. In respect of Resolution No. 4, the Board has also recorded enough reasons. Therefore, only question that calls for decision is whether the Board was competent to reverse the order of the Executive Officer by way of review purportedly retiring the appellant under F.R. 56(b). The other question to be answered is whether the Executive Officer was competent to pass the order of compulsory retirement under provisions of the Assam Municipal Act, 1956 without prior approval of the Director of Municipal Administration.

6. At the relevant time, the affairs of the Board were looked after by the Executive Officer appointed by the State Government. As already mentioned hereinbefore, the officer so appointed placed the appellant under suspension and thereafter, retired him compulsorily from service. Section 299 of the Act of 1956 takes care of the consequences after dissolution of the Board. Section 299 reads as follows:

299. Consequence of dissolution. - When an order of dissolution has been passed u/s 298, the following consequences shall ensue:

(a) all Commissioners of the Board shall, as from the date of order of dissolution, vacate their offices as such Commissioners ;

(b) all powers and duties which under this Act may be exercised and performed by the Board whether at a meeting or otherwise shall, during the period of dissolution be exercised and performed by such person as the State Government may direct till Commissioner and Chairman are elected:

Provided that the officer so appointed after dissolution of the Board shall obtain prior approval of the Director or Municipal Administration on the matter on which but for the dissolution, the decision of the Board is necessary.

(c) all properties vested in such Board shall during the period of dissolution vest in the State Government.

7. Clause (b) quoted above, and the proviso thereto clearly indicate that the officer appointed by the State Government authorized to exercise the powers and duties of the Board is required to take prior approval of the Director of Municipal Administration Department on such matters which could only be decided by the Board. The objection in the instant case is that the Executive Officer failed to obtain prior approval of the Director of Municipal Administration before issuing the order of compulsory retirement. The affidavit-in-opposition filed by the Executive Officer on behalf of the Board on 7th April, 2003 in W.P.(C) No. 93 of 2004 also indicate that no such approval was granted by the Director, Municipal Administration Department. In para 18, it has been specifically stated that no approval was taken by the Executive Officer before passing of the order of

compulsory retirement, and the Director of Municipal Administration Department also does not appear to have accorded any approval at any point of time as required u/s 209(b).

8. Section 50 deals with "appointment and pay of establishment". Section 50 provides the Board at a meeting may, from time to time, determine and appoint the establishment to be employed by it and may fix the salaries and allowances to be paid to such establishment. It is, therefore, clear that the Board is the appointing authority of the employees of the Municipal Board. The Board being the appointing authority is, therefore, competent to initiate disciplinary proceedings and impose penalties including compulsory retirement upon its employees according to administrative exigency. The provisions of Section 299(b) read with the provisions of Section 50 make it incumbent upon the Executive Officer to obtain prior approval and/or at least ex post facto approval from the Director before or after issuing the order of compulsory retirement, as the case may be. This provision admittedly has not been followed in the instant case. Therefore, the initial order of compulsory retirement of the appellant is bad in law being violative of the mandatory provisions of the Act. The order having been passed by an authority without jurisdiction is a nullity and, the relationship of master and servant between the appellant and the Municipal Board continued without any interruption though the appellant was not in actual service. Here it would be apposite to refer to the decision in *Baldev Raj Chadha Vs. Union of India (UOI) and Others*, where the hon''ble Supreme Court held that the order to retire must be passed only by the "appropriate authority". The Executive Officer though the appropriate authority did not act in the manner he is required to act as per law. His failure to obtain prior permission of the Director of Municipal Administration has been in violation of the principles of law settled long back by their Lordships" in *Nazir Ahmed v. King Emperor* reported in 1936 Privy Council 253. Arbitrary exercise of powers by an authority has been deprecated in unequivocal terms. On the other hand, the decision of the hon''ble Supreme Court in *P. Lal Vs. Union of India (UOI) and Others*, also appears to be out of context in view of marked difference of factual matrix.

9. The other question to be answered is whether the Municipal Board was competent to review the order of compulsory retirement. The learned Single Judge was of the view that the Municipal Board is a quasi-judicial authority and, therefore, not authorized under law to review its own orders unless the powers of review is expressly vested on it by the relevant statute. Observing thus, the learned Single Judge reversed the decision of the Board to recall the order of compulsory retirement. The powers of appointment, initiation of departmental proceedings and imposition of penalty are essentially administrative powers available with an appointing authority. The appointing authority does not act as a quasi-judicial authority while making appointment or imposing penalty upon its employees. We are unable to subscribe the view that the Board was acting as a quasi-judicial authority while adopting the Resolution No. 3 and acted beyond jurisdiction in recalling the order of compulsory retirement since the powers of

such review having not been expressly provided in the Act. The various judgments referred to in the judgment under appeal, are not relevant for the issue at hand.

10. The other question posed is whether the orders passed by the Executive Officer, which attained finality in view of the judgment in Civil Rule No. 2884 of 1997 and dismissal of Writ Appeal No. 34 of 2001, could be by-passed by the Board by recalling the earlier order of compulsory retirement. There is no dispute at the Bar that the aforesaid Civil Rule was filed by the appellant challenging the order of his compulsory retirement and this petition was dismissed by the learned Single Judge. Further, there is also no dispute that the Writ Appeal No. 34 of 2001 filed by him challenging the said judgment attained finality in view of the dismissal of the same as not pressed. Consequent upon this, it has been contended by Mr. Bhuyan, learned Counsel for the respondent that the subsequent writ petition could not be maintained in law. According to Mr. Bhuyan, the Board was not competent to review its earlier order in negation of the judgment and order passed in the earlier writ petition. In our considered opinion, the earlier writ petition was based on the cause of action that arose because of the decision of the Executive Officer to send the appellant on compulsory retirement. The cause of action, which led to the initiation of the instant writ petition, arose out of the subsequent decision of the Board to recall the order of compulsory retirement. That apart, the dispute in the earlier writ petition was in between the appellant and the Board. By the dismissal, a right not to admit the appellant to the service was created in favour of the Board. The Board, later on, on re-appreciation of the factual background decided to correct the wrong committed earlier by the Executive Officer. In such a situation, even if the interest of the writ petitioner (respondent herein) stood affected adversely, such a decision cannot be interfered with since the appellant was divested of his right to continue in service by the Executive Officer in gross violation of the provisions of law. The promotion of the writ petitioner (respondent) was consequential. He would not have been given promotion had there being no compulsory retirement of the writ appellant. Naturally, on reversal of the order of compulsory retirement, the writ petitioner (respondent herein) will have to go back to his original position. The right created in his favour on retirement of the appellant was contingent and, on cessation of such contingency, his right also ceased. The powers to recall the order of compulsory retirement is there with the Board and the Board has in there wisdom after re-appreciation of the factual details decided to reinstate the appellant in reversal of the order of compulsory retirement. A writ Court in exercise of powers of judicial review will not interfere with such a decision unless the decision making process suffers from legal infirmity.

11. In the result, the writ appeal is allowed. The Judgment under appeal is set aside. Consequent thereupon, the Writ Petition No. 93 of 2003 is dismissed. The Board shall take appropriate steps for reinstatement of the appellant provided that he had in the meantime not attained the age of superannuation and, in the

later eventuality, the Board shall take a decision about the financial benefits which may be extended to the appellant in accordance with the provisions of law.