

(2015) 08 GUJ CK 0040

In the Gujarat High Court

Case No : Special Civil Application No. 4094 of 2014

Popatbhai Bhimabhai Sutreja

APPELLANT

Vs

Managing Director and Others

RESPONDENT

Date of Decision : 06-08-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(2)

Citation : (2015) 08 GUJ CK 0040

Hon'ble Judges : J.B. Pardiwala, J

Bench : Single Bench

Advocate : Falguni D. Patel, for the Appellant; H.S. Munshaw, Advocates for the Respondent

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J—By this writ-application under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs:-

"(A) YOUR LORDSHIP may be pleased to admit this petition.

(B) YOUR LORDSHIP may be pleased to quash and set aside the impugned order of premature retirement of petitioner passed by the respondent No. 1 at Annexure-A

(C) YOUR LORDSHIP may be pleased to stay the execution, operation and implementation of impugned order of premature retirement of petitioner passed by the respondent No. 1 at Annexure-A, pending admission and final disposal of this Special Civil Application.

(D) Be pleased to pass further relieves in favor of the petitioner which may be deemed fit, just and proper in the facts and circumstances of the case."

2. It appears from the materials on record that the petitioner was appointed on 24th November, 1982 as the Assistant Manager by the respondent No. 3. He was promoted as the Nayab Jila Manager in 1997. It is his case that he was promoted

to the post of Manager but the promotion was not accepted due to certain social circumstances.

3. In January, 2012, the petitioner was detected with cancer. He submitted a leave report. He was transferred from Junagadh to Gandhinagar. He reported at Gandhinagar in April, 2012, on completion of his first round of treatment for cancer. On 12th July, 2013, he was again transferred to Junagadh for nine months on his request. He was transferred again to Gandhinagar and was told by the respondents to remain present before the Medical Board.

4. It is his case that the Medical Board issued a certificate dated 6th August, 2013 that the petitioner was suffering from cancer and was in need of adequate treatment and rest. However, the petitioner was not declared unfit for service by the Medical Board.

5. On 29th October, 2013, the petitioner was served with the show cause notice calling upon him to show cause as to why he should not be punished for remaining absent.

6. It appears that thereafter vide order dated 26th February, 2014, the petitioner was made to retire prematurely. Being dissatisfied with the impugned order passed by the respondent No. 1 he has come up with this writ-application.

7. Ms. Patel, the learned advocate appearing for the petitioner submitted that the respondent No. 1 committed a serious error in passing the impugned order of premature retirement. She submitted that the impugned order is contrary to the provisions of the rules as well as the government resolution dated 28th July, 1987 of the General Administration Department. She submitted that according to the government resolution dated 28th July, 1987 it is only the appointing authority who is empowered to take the decision of premature retirement of a non gazetted government servant at the age of 55 years. According to her, the respondent No. 1 is not the competent authority to pass the order of premature retirement as the respondent No. 1 is not the appointing authority in the case of the petitioner. She submitted that the order of premature retirement is without application of mind and no reasonable person could have formed such an opinion on the basis of the material available. She submitted that the order of compulsory retirement is punitive in nature and amounts to removal from the service within the meaning of Article 311(2) of the Constitution of India.

8. In such circumstances referred to above, Ms. Patel submits that there being merit in this writ-application the same be allowed and the impugned order be quashed.

9. This application has been vehemently opposed by Mr. Varun K. Patel, the learned advocate appearing for the respondent No. 2 and Mr. Rohan Yagnik, the learned AGP appearing for the State. Both the learned counsel submitted that no error not to speak of any order of law could be said to have been committed by the respondent No. 1 in passing the impugned order of the premature

retirement. They submitted that the petitioner is suffering from cancer and is unable to discharge his duties efficiently. The Department cannot afford to compromise with the efficiency of any of its employee as the same would have an adverse affect on the administration of the department.

10. They submitted that there being no merit in this writ-application the same be rejected.

11. On behalf of the respondents Nos. 1, 2 and 3 an affidavit-in-reply has been filed, inter alia, making the following averments:-

"1. I deny the correctness of each and every allegations and/or submissions and/or contentions raised in the petition unless otherwise expressly admitted herein. Not dealing with any of the allegations, contentions and averments raise and submissions made in the petition specifically may not be construed as having been admitted by me.

2. It is submitted that the respondent No. 1 (hereinafter referred to as the respondent corporation) is a Government company engaged in public distribution system. It is submitted that Rules and Regulations applicable to the Government employees are not ipso facto applicable to the respondent corporation unless they are adopted by the corporation. It is submitted that Rule 161(1)(aa) of the Bombay Civil Service Rules empowers the State Government to retire a government servant from Government service prematurely on attaining the age of 50-55 years as the case may be if the Government is satisfied that it is necessary to do so in the public interest. The Government of Gujarat vide Resolution dated 28.07.1987 (Annexure-E, Page-29) has prescribed the procedure for premature retirement to Government servant under the said Rule 161(1)(aa) of BCSR. The said procedure was further modified by the Government vide Resolution dated 12.1.1999, copy of which is annexed hereto and marked as Annexure-R/1. It is submitted that the said provision of premature retirement is adopted by the respondent corporation vide decision of the Board of Directors in its meeting held on 27.09.2013. Thereafter, the respondent corporation has issued circular dated 22.10.2013 regarding implementation of the provisions for premature retirement in the respondent corporation. Annexed hereto and marked as Annexure-R/2 is the copy of the said circular dated 22.10.2013. It is submitted that the purpose and object of premature retirement of employees of Government/Government Corporation etc., is to weed out inefficient employees or employees whose services are no more useful from the service of the Government, Government Corporation etc. as the case may be. It is submitted that premature retirement as per the said provision/circular is distinct from the premature retirement/compulsory retirement by way of punishment. The principles of natural justice have no application in case of premature retirement for inefficient or unsatisfactory service as per the said provisions/circular since the said premature retirement is neither a punishment nor stigma.

3. It is submitted that in the present case, the petitioner was working as Deputy

Manager (Commerce) at the Head Office of the Respondent Corporation since 1.7.2013. The petitioner was remaining continuously absent due to his ill health since July 2013. Earlier also when the petitioner was working at Junagadh, he had remained absent from 49 days on medical ground during the year 2012. It is further submitted that it is not in dispute that the date of birth of the petitioner is 15.11.1958 and he has completed the age of 55 years as on 15.11.2013. The Review Committee as contemplated in the said Circular of the Corporation dated 22.10.2013 is therefore authorized to evaluate the service of the petitioner and to take appropriate decision with regard to his premature retirement. Accordingly, the Review Committee in its meeting held on 16.1.1914 had unanimously decided that long and continuous absence of the petitioner due to his ill health had adversely affected the administration of the corporation and therefore it was in the interest of the corporation to retire the petitioner prematurely. Accordingly, the petitioner vide office order dated 26.02.2014 was prematurely retired (Annexure-A page-11).

4. It is submitted that the impugned order for premature retirement of the petitioner is in consonance with the said Board Resolution dated 27.09.2013 and the Circular of the Corporation dated 22.10.2013. The said order is passed due to inability of the petitioner to serve the corporation and in the overall interest of the respondent corporation. It is further submitted that the said impugned decision to retire the petitioner prematurely is taken by the competent reviewing committee after following the procedure laid down in the said circular of the corporation dated 22.10.2013. The said decision of premature retirement of the petitioner is neither punitive nor stigmatic. The respondent corporation was therefore not required to follow principles of natural justice before passing the impugned order of premature retirement of the petitioner. It is therefore submitted that there is no procedural lapse while retirement of the petitioner nor the said decision is arbitrary, unreasonable, unjust or illegal.

5. It is further submitted that the contention of the petitioner to the effect that review for premature retirement is required to be done exactly before six months from completing the age of 55 years as per the provision of Clause (1) (3) of the Government Resolution dated 28.07.1987 is not only erroneous and illegal but also misleading and contrary to the provisions of the very same Government Resolution dated 28.07.1987. The petitioner while making the aforesaid submission has deliberately suppressed the clause-(VI)(5) of the said G.R. dated 28.07.1987 (page-42) which permits review even after the said prescribed age of 50/55 years as the case may be. The said clause permits premature retirement even after completing the age of 50/55 years.

6. It is therefore submitted that in view of what is stated hereinabove, the present petition does not deserve to be entertained by this Hon"ble Court and the petitioner is not entitled to get any relief including interim relief as prayed for in the present petition.

7. The answering respondents further crave liberty to file further and/or

additional affidavit including parawise reply if required.

8. What is stated hereinabove is true and correct to the best of my knowledge and information and I believe the same to be true. The documents annexed hereto are the true copies of the original."

12. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is whether the respondent No. 1 committed any error in passing the impugned order of premature retirement.

13. It appears that the decision to retire the petitioner prematurely was based on the findings recorded by the screening committee. The screening committee in its report observed, the free English translation is as under:-

"Mr. P.B. Sutreja, Deputy Manager (Commerce), Head Office, Gandhinagar.

Mr. P.B. Sutreja is working as a Deputy Manager (Commerce), Administrative Branch, Head Office Gandhinagar since 01/07/2013. His date of birth is 15.11.1958.

Mr. Sutreja after joining his service on 06-07-2013 vide letter dated 06-07-2013 prayed leave for two months for his treatment of cancer (with the certificate of Aishwarya Cancer hospital). The Medical certificate issued by the civil surgeon was obtained with regard to such ailment forwarding a letter dated 12-07-2013 from the medical board in connection with the leave. Prior thereto, Mr. Sutreja had taken leave of 49 days i.e. from dated 02-02-2012 to 21-03-2012 during his service at Junagadh. Mr. Sutreja vide his letter dated 16-09-2013 had asked for the leave for the treatment of cancer from 16-09-2013.

It is noticed that the medical board has vide its letter dated 28-11-2013 suggested Mr. Sutreja to take rest from 25-07-2013 to 31-08-2013. Thereafter Mr. Sutreja did not produce the fitness certificate till today. Mr. Sutreja has refused to join service because of his transfer at Gandhinagar on one pretext or the other. Later on, after 31-08-2013 he has not produced fitness certificate even. Because of his ailment and irregularity in his duty, there has caused maladministration in the office and thereby the serious effect has been caused on the administration.

Looking to the aspects above, due to long time absenteeism in the duty of Mr. Sutreja, the work of the office has been affected and therefore long absentism in the duty could not have been condoned in the interest of the corporation. Therefore, the decision has been taken by the committee to retire Mr. Sutreja prematurely as the services of the board has been affected due to such long absentism from the duty."

14. The principles on which a Government servant can be ordered to be compulsorily retired were authoritatively laid down by the Supreme Court in the case of Baikuntha Nath Das and another Vs. Chief District Medical Officer,

Baripada and another, AIR 1992 SC 1029 : (1992) 73 CLT 665 : (1992) 2 JT 1 : (1992) 1 LLJ 784 : (1992) 1 SCALE 428 : (1992) 2 SCC 299 : (1992) 1 SCR 836 : (1992) 1 SLJ 177 . In Paragraph 34, the principles have been summed up as follows:-

"34. The following principles emerge from the above discussion:

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

(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) mala fide 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 records/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, moreso, 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. This aspect has been discussed in paras 30 to 32 above.

15. The aforesaid principles have been reexamined and reiterated by the Supreme Court in the case of Nand Kumar Verma Vs. State of Jharkhand and Others, (2012) 133 FLR 13 : (2012) 2 SCALE 663 : (2012) 3 SCC 592 : (2012) 3 SCC 580 : (2012) 2 SLJ 6 : (2012) AIRSCW 1791 . The principles have been restated as follows:-

"34. It is also well settled that the formation of opinion for compulsory retirement is based on the subjective satisfaction of the authority concerned but such satisfaction must be based on a valid material. It is permissible for the Courts to ascertain whether a valid material exists or otherwise, on which the

subjective satisfaction of the administrative authority is based. In the present matter, what we see is that the High Court, while holding that the track record and service record of the appellant was unsatisfactory, has selectively taken into consideration the service record for certain years only while making extracts of those contents of the ACRs. There appears to be some discrepancy. We say so for the reason that the appellant has produced the copies of the ACRs which were obtained by him from the High Court under the Right to Information Act, 2005 and a comparison of these two would positively indicate that the High Court has not faithfully extracted the contents of the ACRs.

36. The material on which the decision of the compulsory retirement was based, as extracted by the High Court in the impugned judgment, and material furnished by the appellant would reflect that totality of relevant materials were not considered or completely ignored by the High Court. This leads to only one conclusion that the subjective satisfaction of the High Court was not based on the sufficient or relevant material. In this view of the matter, we cannot say that the service record of the appellant was unsatisfactory which would warrant premature retirement from service. Therefore, there was no justification to retire the appellant compulsorily from service."

16. In *State of Gujarat Vs. Umedbhai M. Patel*, AIR 2001 SC 1109 : (2001) 89 FLR 173 : (2001) 3 JT 223 : (2001) 2 LLJ 1140 : (2001) 2 SCALE 261 : (2001) 3 SCC 314 : (2001) SCC(L&S) 576 : (2001) 2 SCR 170 : (2001) 1 UJ 664 : (2001) AIRSCW 862 : (2001) 2 Supreme 193 , the same principles were reiterated in the following words:

"11. The law relating to compulsory retirement has now crystallized into definite principles, which could be broadly summarized thus:

(i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the

confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure."

17. In Jugal Chandra Saikia Vs. State of Assam and Another, AIR 2003 SC 1362 : (2003) 97 FLR 328 : (2003) 3 SCALE 193 : (2003) 4 SCC 59 : (2003) SCC(L&S) 394 : (2003) 2 SCR 615 : (2003) 3 SLJ 248 : (2003) AIRSCW 1787 : (2003) 2 Supreme 825 , the Supreme Court reiterated the principles in the following words:-

"6...It cannot be disputed that the passing of an order of compulsory retirement depends on the subjective satisfaction of the competent authority, of course on objective consideration. Unless it is shown that the order of compulsory retirement was passed arbitrarily and without application of mind or that such formation of opinion to retire compulsorily was based on no evidence or that the order of compulsory retirement was totally perverse, the court cannot interfere."

Examining the record of the appellant therein and the material that was placed before the Screening Committee, the High Court as well as the Supreme Court came to the conclusion that on an objective consideration of the material on the record it was not possible to accept the argument that the Screening Committee had acted only on the basis of the report of the Rao Committee. It was found that the recommendations of the Screening Committee were based on the relevant material.

18. The Supreme Court examined whether the order of compulsory retirement, passed in that case, cast a stigma on the appellant No. 2. The impugned order therein had recited that there was "want of application to the Banks work and lack of potential" and "he has also been found not dependable". It was the case of the appellant No. 2 that the aforesaid expressions were stigmatic as they cast aspersions on his conduct, character and integrity. The High Court rejected the plea of appellant No. 2 on the ground that the recitals do not cast any stigma but only assesses the work of appellant No. 2 for determining the issue of his compulsory retirement. In these circumstances, it was observed that the object of the compulsory retirement is to weed out the dead wood in order to maintain efficiency in the service and also to dispense with the services of those whose integrity is doubtful, so as to preserve purity in the administration. The order of compulsory retirement was distinguished from the order of dismissal and removal, as it does not inflict any punishment on the Government servant. It only deprives the Government servant of the opportunity to remain in service till the age of superannuation. Therefore, the order of compulsory retirement differs from an order of dismissal or removal both in its nature and consequence. However, in case it is found that the order is stigmatic or punitive it would be treated as an order of punishment, which cannot be passed without complying with the provisions of Article 311(2) and the rules of natural justice. Upon examination of a large body of case law, it was observed that the order of compulsory retirement does not cast a stigma on the Government servant. But if

the order contains a statement casting aspersion on his conduct or character, then the Court will treat the order as an order of punishment, attracting the provisions of Article 311(2) of the Constitution. In the facts of that case, it was concluded that the two recitals contained in the order of premature retirement had been made in relation to the work of appellant No. 2 and not for any other purpose. Therefore, the Court declined to interfere with the order of the High Court. (In Officers Association Vs. Allahabad Bank 1996 4 SCC 2004).

19. In the present case, the impugned order dated 26th February, 2014, whereby the petitioner has been prematurely retired is an administrative order, wherein, it has been stated that in the interest of the department it was not desirable to continue the petitioner in service. It also appears that along-with the order of the premature retirement a cheque for the amount of Rs. 1,76,262/- towards salary and allowances for a period of three months was also enclosed therewith.

20. In my opinion, the impugned order of premature retirement is neither punitive nor stigmatic, but in the light of law laid down by the Supreme Court in the above decisions the same does not need to be a reasoned order stating the reasons as to why the concerned employee had been prematurely retired.

21. Since the order of compulsory retirement is neither punitive nor stigmatic taken the facet of the principle of natural justice cannot be imported.

22. It appears that to the misfortune of the petitioner he was detected with cancer and the dreadful ailment impaired his efficiency in the service.

23. Insofar as the decision of the Supreme Court in the case of State of Gujarat Vs. Umedbhai M. Patel, AIR 2001 SC 1109 : (2001) 89 FLR 173 : (2001) 3 JT 223 : (2001) 2 LLJ 1140 : (2001) 2 SCALE 261 : (2001) 3 SCC 314 : (2001) SCC(L&S) 576 : (2001) 2 SCR 170 : (2001) 1 UJ 664 : (2001) AIRSCW 862 : (2001) 2 Supreme 193 is considered, I am of the opinion that the present case does not fall into any of the categories which are enumerated in paragraph-11 of the said decision. In the present case, from the averments made in the memorandum of the petition, there is nothing to reveal that any proceedings for initiating departmental inquiry had been either initiated or were contemplated at the time when the order of compulsory retirement was passed. Therefore, there is no reason to believe that the order of compulsory retirement had been passed as a short cut to avoid any departmental inquiry.

24. In the light of the above discussion, the petition fails and is, accordingly, dismissed.

25. The respondents are directed to consider the claim of the petitioner for sanctioning of all his medical bills towards the treatment of cancer. I am sure to this extent the respondents shall show some grace to its employee who put in almost more than 30 years of unblemished service.