
(2000) 05 CAL CK 0031

In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction W.P. No. 6418 (W) of 2000

Pradip Kumar Banerjee and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-05-2000

Acts Referred:

Companies Act, 1956 — Section 287, 300
Constitution of India, 1950 — Article 107, 14, 16, 21, 226

Citation : (2000) 3 CALLT 185 : (2002) 108 CompCas 692 : (2001) 89 FLR 820

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Mr. Saktinath Mukherjee, Mr. Sundarananda Pal, Mr. Laxmikanta Pal, Ms. Sumita Pal and Ms. Debashree Banerjee, for the Appellant; Mr. B.R. Gupta, Mr. R.N. Majumdar, Mr. Debal Banerjee and Mr. Susanta Pal., Mr. P.K. Roy and Mr. Anwari Quareshi, for the Respondent

Judgement

K.J. Sengupta, J.—In this writ petition the petitioners have challenged the Resolution of 50th Board Meeting of the respondent company circulated by the reference being No. GS-I/IAL/(50)/99 dated 6th January, 2000 whereby the respondent company has rolled back the retirement age of the employees below the board level from 60 years to 58 years. Incidentally it is mentioned that on or about 27th May, 1998 in its 39th Board Meeting pursuant to the direction given by the Central Government the respondent Corporation decided to fix the retirement age of the employees below the board level at 60 years in place of 58 years. Accordingly necessary amendment in the service regulation was incorporated and has been acted upon. The decision of rolling back with regard to retirement age has been taken pursuant to an exemption granted by the Central Government in terms of subsequent notification dated 21st August 1998.

2. Mr. Saktinath Mukherjee, learned senior advocate appearing on behalf of the petitioners submits that this decisions is wholly arbitrary, illegal and discriminatory in nature. The Central Government has taken a decision allowing all the Government of India undertakings and all Central Government

organizations to fix the retirement age of the employees at 60 years from 58 years. This is policy decision of Government of India.

3. He contends subsequent Memorandum dated August 21, 1998 is only an enabling provision for seeking exemption from operation of the earlier decision cannot be public policy of any kind. The said memorandum suffers from infirmities in absence of any guideline and/or criteria and/or norms laid down by the Government of India under which circumstances such exemption can be granted. So this right of having exemption ultra vires Article 14 and 16 of the Constitution of India. In support of his submission he relies on the following decisions of Supreme Court reported in, as follows:

(i) AIR India Vs. Nergesh Meerza and Others, , (ii) AIR 1980 SC 1801, (iii) Union of India and others Vs. Hindustan Development Corpn. and others, , (iv) M.G. Pandke and others Vs. Municipal Council, Hinganghat, Dist. Wardha and others, and (v) Osmania University Vs. V.S. Muthurangam and others, .

4. In this case the respondent corporation being a Central Government undertaking after having taken decision earlier raising retirement age to 60 years has illegally rolled back to age of 58 years. The earlier decision for raising retirement age to 60 years is a national policy and it is allowed to be followed and in fact being followed in all public sector undertakings. So there should not be and cannot be any departure in the establishment of the respondent corporation, as it results in hostile discrimination as regard the retirement age of the employees is concerned. In fact there is no justification and/or basis and/or material for taking such decision of reversion. The purported reason for rolling back is given as being financial stringency. He argues that the purported reason is absolutely baseless and absurd as admittedly the Indian Airlines Corporation unlike other public sector undertakings has not suffered any loss in the last financial year rather has earned profit. So this decision is motivated, whimsical and capricious.

5. Mr. Mukherjee's next contention is that the office Memorandum dated August 21, 1998 enabling to grant exemption, purports to make a class legislation amongst the employees of the central public enterprises. Such class legislation ultra vires the Articles 14 and 16 of the Constitution of India. In support of his contention he relies on decision of Supreme Court reported in Union of India (UOI) and Others Vs. No. 664950 IM Havildar/Clerk SC Bagari, . Under the national policy a right of the employee had been created by Increasing retirement age. By the subsequent memo of August 21, 1998 such right has been taken away without affording any opportunity being heard as such on this ground it is ultra vires and void.

6. Mr. Mukherjee pointing out to the allegation contained in paragraphs 32 and 37 of the petition contends the whole legislation dated 20th December, 1999 is invalid as no quorum was formed for taking decision only two out of six Directors were present to take the reverse decision.

7. Mr. Dlswarup Gupta, learned senior advocate, appearing on behalf of the respondent Nos. 2, 3, 10, 17 and 37 submits that initially this Corporation had to take a decision In view of the direction given by the Central Government. Under the law the respondent Corporation has no option but to carry out the direction given by the Central Government. So, it most reluctantly previously decided and accepted the aforesaid direction of the Central Government as regard fixation of retirement age at 60 years from 58 years of the employees below the board level. Subsequently the Central Government by and under Memo dated 21st August, 1998 has given option to those public sector undertakings who do not want to increase this retirement age may apply for exemption. This direction providing for exemption has not been challenged. The respondent Corporation having felt its necessity duly applied for exemption in view of the fact that the respondent Corporation is gradually loosing its business and the ratio of revenue and profit is gradually decreasing. In order to overcome the financial problem and maintain competitive business against other operators in the field such decision is necessary. Moreover, the policy of the Government adopted in June 1997, of reduction of staff @ 3% per year cannot be fulfilled. So the Corporation duly applied for exemption. In view of the exemption granted by the Central Government the Corporation has adopted the aforesaid valid resolution.

8. Mr. Gupta submits the contention of the writ petitioner that said 50th resolution dated 20th December, 1999 was not adopted by a proper and valid Board, is baseless. It is not the full strength of the Board of Directors as provided in the Articles of Association as confusingly submitted by the petitioners, but it is the total strength of the Board of Directors which really matters. At present admittedly the respondent company has six number of Directors in its Board though the full strength is 15. By virtue of Article 107 of Articles of Association of the respondent No. 2 read with section 287 of the Companies Act, 1956, 1/3rd of the total strength of the Board of Directors is necessary to form quorum. Admittedly on that date two Directors were present. So it did form quorum. The allegation of one of the two Directors having left the meeting without having transacted any business is without any basis. In fact two Directors were all the time present and besides the two there was one R.S. Meena present as an Invitee. Such allegation are unfounded and without proper verification. inasmuch as the deponent was not present in the Board meeting. So he cannot possibly say how many directors were present at that point of time. The attendance sheet is the only documentary evidence that clinches the issue. Furthermore two other directors, viz., Sri K.P. Mascareunhas, Managing Director of Air India and Sri D.B. Gupta have expressed their concurrence in writing with the proposed reduction being item No. 23 of the Agenda. Under the provision of Articles of Association adoption of resolution is permissible by circulation. So he argues the allegation that resolution reducing the retirement age was not taken by any properly constituted Board or that there was no quorum at the meeting on 20th December, 1999 are wholly baseless.

9. Mr. Gupta further argues that majority of the employees have not raised any

dispute to this rolling back decision of retirement age. The writ petitioner being the small portion of the working section has raised frivolous dispute. Since majority of the employee has accepted not having raised any dispute against this decision is an indicative factor that the decision taken by the respondent Corporation is reasonable and Justified. Mr. Gupta while citing a decision of the Supreme Court rendered in case of Tata Engineering and Locomotive Company Limited Vs. Their Workmen, submits, in that case a larger section of the workmen did not raise any dispute with regard to bipartite settlement and it was held that settlement was reasonable and it is an indicative of the fairness and reasonableness of refixing of retirement age and it is also justified in public interest. Mr. Gupta submits that the decision taken by the corporation and subsequently approved by the Government of rolling back the retirement age had been taken in the public interest in order to implement the Kelkar Committee report aiming at to keep this business afloat by maintaining a healthy and sound revenue profit ratio. At present it appears that earning of revenue so also the profit over the years have gone down steadily because of the advent of the number of domestic private operators In the field. When such decision having been taken for overriding public interest vis-a-vis commercial Interest of the corporation, limited interest of small section of employees must yield to this. In support of his submission he relies on a decision of the Supreme Court reported in Vasantkumar Radhakisan Vora Vs. The Board of Trustees of the Port of Bombay, . A number of decision of Supreme Court have held that when a decision is taken in the public Interest by the Government, presumption is always that such decision Is reasonable and not being arbitrary. If one wants to displace this presumption, onus lies upon him to do so with sufficient materials and allegations that such decision is not reasonable and the same being arbitrary. In this case there is none and no attempt is there. He also relies on in this context a decision of the Supreme Court rendered in Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, . He argues that there Is no affectation of interest of the employees in real sense inasmuch as no substantial change of the relevant rules of retirement age is effected as at all material limes it was 55 years with the provision for extension at the discretion of the corporation Initially upto 58 years, and then it was increased to 60 years in view of the aforesaid first directive of the Central Government Now by rolling back the original position has been restored. Even if this exemption granted by the Central Government is withdrawn consequently last resolution is revoked till the retirement age of 55 years will remain unaltered as such there is no merit in this writ petition. The question of legitimate and/or reasonable expectation do not arise in this case since no right was created nor it was taken away. Actually the concession which was granted has been taken away in the public interest.

10. Mr. P.K. Roy, learned senior advocate appearing on behalf of the Union of India submits that the Government after reconsidering all aspects particularly question of meaningful survival of the important public sector under takings from

commercial point of view, exemption from applicability of earlier direction has been provided. The respondent corporation duly applied for granting exemption and while doing so various materials was placed before the Government and considering such material It has granted exemption. He argues that there is no challenge against this notification providing for exemption against granting of exemption by the Central Government in the writ petition. Tills apart Mr. Roy has adopted the argument of Mr. Gupta.

11. Having heard the learned counsels of the parties and considering the materials placed, it appears to me the challenge in substance in this matter is against the Resolution of the 50th Board Meeting of the respondent corporation circulated by the reference being No. GS-I/IAL/(50)/99 date 6th January, 2000 and the reference being No. DCA/99 dated 20th December, 1999 being annexure "L" to the petition, the approval thereof has however subsequently been accorded by the Central Government by Memorandum dated 16th February, 2000.

12. By the aforesaid impugned resolution the respondent corporation has taken a decision to roll back retirement age on extension of the employees from 60 years to 58 years which was originally prevailing. In the petition, however, the grounds of attacks are that the aforesaid resolution being arbitrary, invalid and it has subjected the petitioners to the hostile discrimination. The argument advanced by Mr. Mukherjee and his learned Junior on legitimate expectation in the context of rolling back by the subsequent notification do not find place in the petition. Though the theory of legitimate expectation as well as points of estoppel being advanced but such plea do not find place in the petition. In the petition it is alleged on the day when the aforesaid resolution was adopted there was no validly constituted Board of Directors. In fact, only two Directors were present. As such no quorum did form. Further ground is that there was no basis to take decision for reduction of retirement age. I am unable to accept the submission of Mr. Mukherjee that on that date there was no quorum. As it has been rightly argued by Mr. Gupta and I accept, that the respondent company at present have total strength of six number of Directors though there is provision for appointment of 15 Directors but unfortunately those Directors have not yet been appointed. Under the provision of section 287 of the Companies Act, 1956 read with 107 of Articles-of Association of the respondent company that 1/3rd of the total number of the directors is to form quorum. It is the total strength rather than full strength that really matters.

13. Section 287 of the Companies Act and Article 107 of the Articles of Association are usefully quoted hereunder :

"287. Quorum for meetings.--(1) In this section-

(a) "total strength" means the total strength of the Board of Directors of a company as determined in pursuance of this Act, after deducting therefrom the number of the directors. If any, whose places may be vacant at the time; and

(b) "Interested director" means any director whose presence cannot, by reason

of section 300, count for the purpose of forming a quorum at a meeting of the Board, at the time of any discussion or vote on any matter.

(2) The quorum for a meeting of the Board of Directors of a company shall be one-third of its total strength (any fraction contained in that one-third being rounded off as one), or two directors, whichever is higher :

Provided that where at any time the number of Interested directors exceeds or is equal to two-thirds of the total strength, the number of the remaining directors, that is to say, the numbers of the directors who are not interested, present at the meeting being not less than two, shall be the quorum during such time."

"Article 107 of the Articles of Association-

(a) The quorum for a meeting of this Board of Directors shall be one-third of its total strength. Provided that, where at any time the number of interested Directors at any meeting exceeds two-third of the total strength, the number of the remaining Directors during such time shall form the quorum.

(b) For the purpose of clause (a)

(i) "Total strength" means total strength of the Board of Directors of the Company determined in pursuance of the Act, after deducting therefrom number of the Directors, if any, whose place may be vacant at the time; and

(ii) "Interested Directors" means any Director whose presence cannot by reason of any provision in the Act, count for the purpose of forming a quorum at a meeting of the Board, at the time of the discussion or vote on any matter."

14. Admittedly two Directors were present on that date so requisite quorum was duly formed. Moreover, there was ratification of this resolution by some other Directors. So, I hold the Resolution was adopted by validly constituted Board of Directors.

15. Next question is whether there is any reason or material for adopting this Resolution or not.

16. It appears from the minutes of 39th Board Meeting that the respondent corporation was not in fact willing to accept stipulation of the Central Government for enhancing retirement age from 53 years to 60 years and the Board was looking for way out of the rigour of the said notification. But the corporation was compelled to implement as it had no option in view of the language of the earlier Memorandum. After considering in detail, financial implication and burden from the commercial point of view the respondent corporation has taken a decision to bring back original age of retirement. So it cannot be said that there was no material to come to decision. Though it has been argued that the respondent corporation is running with the profit and therefore plea of adverse financial implication is wholly absurd. This argument is not acceptable as I find from the data given in the affidavit-in-opposition that the business of the corporation has been decreasing and ratio of revenue and profit

has fallen. As for as the financial aspect of the corporation is concerned the same are entirely a policy decision of the corporation and the writ Court cannot substitute its own wisdom and/or Judgment as to whether this corporation financially sound or not. Though argument of legitimate expectation and promissory estoppel have been advanced by Mr. Mukherjee's learned Junior initially. I am unable to take note of or deal with the same as no case has been made out in the position. Case of legitimate expectation must be pleaded specifically so also the case of promissory estoppel. These are not pure question of law without related to fact. Naturally I do not feel it necessary to deal with any of the cases cited by the learned lawyers on this subject.

17. As regard the challenge of Mr. Mukherjee against the Memorandum of August 21, 1998 is concerned I am of the opinion that in the petition nowhere the aforesaid memorandum has been challenged but when the point of law has been raised it would be the duty of this Court to examine on the anvil of Article 14 of the Constitution of India. In the decision cited by Mr. Mukherjee reported in AIR 1981 SC 1821 it has been held amongst other that excessive power of delegation without having any guideline and/ or procedure is invalid and unconstitutional as the same opposed to the Article 14 of the Constitution of India. It is true in this case there is no guideline and/or norms and/or basis under which the exemption should be granted. In absence of such guideline there are scopes and rooms for arbitrary action being taken. Mr. Roy rightly argued and I accept that the whole idea of the Government to on hence the retirement age of the employees to 60 years is to lighten unwarranted financial burden aiming at to strengthen the economy of the country. When such decision was taken it was not perhaps foreseen that such a policy decision of the Government would have reverse effect to a number of public sector undertakings. So considering all the aspects the aforesaid right of applying for exemption was given to all public sector undertakings. Therefore, I hold that subsequent decision providing for granting exemption is policy decision taken in larger Interest of the public.

18. Now whether I should strike down the decision taken by the respondent corporation following grant of exemption on the ground that the aforesaid. Memorandum dated August 21, 1998 is without any norms and/ or guideline, or not.

19. In my view in all cases the action cannot be struck down on the above ground. The object of providing norms and guidelines in executive action is to guard against arbitrary and whimsical step being taken and further to contain unreasonableness. If it is found that decision has been taken pursuant to an unguided and/or uncontrolled power, reasonably and with material Justifying such action the Court should not strike down the same. In this case it appears to me the decision being taken on the basis of material and upon deliberation. The corporation respondent felt that if the decision to enhance the retirement age was implemented then the earlier decision of the Government to reduce the staff strength for economic survival of the corporation cannot be followed. It appears

from the resolution of the Board of Directors that over the last few years the corporation has not done good business. Revenue profit ratio is dwindling. In such a situation it cannot be said that the decision taken for applying exemption is not without material. So the exemption has been granted reasonably and on the basis of the proper materials.

20. Therefore, I am unable to accept the submission of Mr. Mukherjee that the aforesaid Memorandum dated August 21, 1998 is liable to be struck down in this case having no guideline and/or norms. In appropriate cases instead of striking down any executive order the same should be read down keeping in view of the object of such decision. Here Memorandum providing for grant of exemption should be read down that the same can be applied and granted in case enhancement of retirement age will economically and adversely affect a public sector undertaking. The ratio decided in all other cases cited by Mr. Mukherjee cannot be disputed but in this case because of my aforesaid finding the ratio of the aforesaid principle cannot be applied.

21. The argument of Mr. Mukherjee that Memorandum dated August 21, 1998 purports to create a class legislation amongst the employees of the central public enterprises is not convincing to me. The Supreme Court in series of decision has permitted to create a class legislation for the public interest as such reservation in favour of particular caste or community or for that matter for a weaker section is always done for the welfare of the public. It is settled law that a class cannot be created amongst the equal but there can be a classification amongst the unequals. In the decision of the Supreme Court reported in AIR India Vs. Nergesh Meerza and Others, the Apex Court has permitted in AIR India's case that classification amongst the different class and status of the employees having regard to their peculiar attributes and condition of service in the same establishment. It has been laid down amongst other Article 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like, are differently treated in public Interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination having close nexus with the object sought to be achieved so that in such cases Article 14 will be completely out of the way.

22. In this case the Indian Airlines Corporation though a public sector undertaking and controlled by the Government but it is run autonomously. The survival of the business of the company is paramount. The financial condition and activity of the business of the respondent corporation cannot be equated with other public sector undertakings, viz., SAIL and Banking Corporation. This corporation stands on a different footing and it has to run its business competing with other rival operators. This corporation while carrying on business has to conform with the international standards as to its efficiency. So the economic soundness is the only criteria to run this business efficiently. When it is found that the earlier policy decision of enhancing the retirement age of the employees

is not helpful to the survival of this corporation it is always open for the Government to take a changed decision and it may create a classification amongst the unequals. So I cannot accept the contention of Mr. Mukherjee that this Memorandum dated August 21, 1998 has created class legislation and it would be discriminatory and it will place the employees of the corporation to the hostile discrimination as I have already observed that survival of the business of the respondent corporation is the paramount consideration and this must yield to the limited interest of the employees as far as continuance of service for another two years is concerned. I am unable to accept the argument of Mr. Mukherjee that any right was created in favour of the employees as far as the retirement age is concerned. In fact the policy decision was taken by the Government for the public interest and for the interest of the survival of the public sector undertakings inclusive of Indian Airlines Corporation but after review of this matter it has been found that such decision would not be helpful. So for public interest such changed decision has been taken providing for option for applicability of the aforesaid rule of enhancement of retirement age. In this context reference may be drawn from a Judgment of Apex Court reported in Punjab Communications Ltd. Vs. Union of India and Others, . In that case it was held amongst other that the policy decision can be changed reasonably and rationally and even defeating the claim of substantive legitimate expectation.

23. The decision of the Supreme Court reported in Osmania University Vs. V.S. Muthurangam and others, cited by Mr. Mukherjee is not applicable in this case. In that case Osmania University inspite of statutory provision did not bring about parity as regard fixation of retirement age between the teaching and non-teaching staff. So the Apex Court directed to bring about parity in fixation of retirement age.

24. Another Supreme Court decision reported in M.G. Pandke and others Vs. Municipal Council, Hinganghat, Dist. Wardha and others, cited by Mr. Mukherjee is inapplicable as in the case cited the fact was the retirement age of the teacher of the municipal school was unilaterally reduced from the age as it was prevailing at the time of appointment. In this backdrop of the fact the Apex Court held such action of reducing retirement age is not permissible. Here Interregnum change of retirement age has been done away with aiming at to restore original age of retirement that was prevailing at the time of appointment.

25. Another point which should not be brushed aside is that this petition in fact has been made by only one petitioner, viz., the petitioner No. 1. He does not appear to have any authority on behalf of others. The other petitioners have not even signed the petition, in fact as rightly submitted by Mr. Gupta that the petitioner Nos. 2, 4, 6 and 8 are not even sui Juris. As such it cannot be said that this action has been taken on behalf of majority section of the employees. So it appears to me that when a majority section of the employees have not come forward to challenge the same it can safely be held that the aforesaid changed decision is reasonable and is conducive to the working condition of the

employees. It would be useful In relation to this subject to rely on a decision of Supreme Court cited by Tata Engineering and Locomotive Company Limited Vs. Their Workmen, of the said decision it was observed amongst other that grievance of small section of workman as regard bipartite settlement, cannot be factor for not holding the settlement being reasonable and fair, rather it should be presumed such settlement is fair and reasonable.

Under such circumstances I am of the view that this application must fail and the same is rejected.

There will be no order as to costs.

26. Application rejected