

(2000) 01 AHC CK 0170

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 48622 of 1999

Prof. Chandra Prakash Jha and Others	APPELLANT
Vs	
Vice Chancellor, Allahabad University and Others	RESPONDENT

Date of Decision : 27-01-2000

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh State Universities Act, 1973 — Section 5

Citation : (2000) 2 UPLBEC 1134

Hon'ble Judges : M. Katju, J;D.R. Chaudhary, J

Bench : Division Bench

Advocate : Vidya Bhushan Upadhyaya, Vijay Bahadur Singh, Namwar Singh, Ramesh Upadhyaya, P.S. Baghel and A.K. Pandey, for the Appellant; R.P. Goel, General, Sabhjeet Yadav, R.G. Padia, Rajiv Joshi, Pankaj Mittal, Govind Saran, L.P. Naithani, A.K. Singh, K.K. Parikh, R.N. Singh, A.P. Sahi and S.N. Srivastava and S.C., for the Respondent

Final Decision : Disposed Of

Judgement

M. Katju, J.—This judgment covers all connected writ petitions in which similar point is involved.

2. Heard Sri V.B. Upadhyaya, Sri Vijay Bahadur Singh, Sri Namwar Singh, Sri Ramesh Upadhyaya, Sri P.S. Baghel and Sri-A.K. Pandey, learned Counsel for the petitioners, and learned Advocate General as well as Sri Sabhajeet Yadav learned Standing Counsel for the State Government, Sri R.G. Padia. Counsel for the Allahabad University, Sri Rajiv Joshi Counsel for the Central Government. Sri Pankaj Mittal, learned Counsel for the Agra University in one of the connected writ petitions. Sri Govind Saran. Counsel for Bundel Khand University. Sri L.P. Naithani learned Counsel in one of the connected writ petitions, Sri A.K. Singh, learned Counsel for Purvanchal University. Sri K.K. Parikh, Counsel for the Union of India and Sri R.N. Singh one of the interveners who has filed impleadment application in this petition.

3. The petitioners have filed this writ petition and have prayed for issuance of a mandamus directing the University of Allahabad to amend Statute 16 in accordance" with the notification issued by the U.G.C. and the directions issued by the Central Government in its letter dated 27.7.1998 Annexure 3 to the writ petition and declare the age of superannuation of University teachers as 62 years and provide for re-employment till the age of 65 years. The petitioners further prayed to issue a suitable writ, order or direction in the nature of certiorari calling for the records of the case and quash, Annexure 2, the Government order dated 16-2-1999 whereby the State Government prescribed the age of superannuation of University teachers as 60 years. They further prayed for issuance of a suitable writ, order or direction in the nature of certiorari calling for the records of the case and quash the office order/letter issued by the University dated 16-7-1999 asking the petitioners to retire on the date mentioned against their names in the said circular letter (Annexure 1 to the writ petition).

4. The petitioners are Professors in Allahabad University in its various departments. They have received a letter in which it was mentioned that they have to retire on the various dates as teachers at the age of 60 years. True copy of the order dated 16-7-1999 has been annexed as Annexure I to the writ petition.

5. Statute 16.24 of the first statute framed under the U.P. State Universities Act states as under :

"(1) Subject the provisions of Statutes 16.25 and 16.26 the age of superannuation of a teacher of the University governed by the new scale of pay shall be 60 years.

(2) The age of superannuation of a teacher of the university not governed by the new scale of pay shall, subject to Statute 16.25, be sixty two years.

(3) No extension in service beyond the age of superannuation shall be granted to any teacher after the date of commencement of these statutes, provided that a teacher whose date of superannuation does not fall on June 30 shall continue in service till the end of the academic session that is June 30 following and will be treated as on re-employment from the date immediately following his superannuation till June 30, following :

Provided further that such physically and mentally fit teachers shall be re-appointed for a further period of two years after June 30, following the date of their superannuation, as were imprisoned for taking part in struggle in 1942 and are getting freedom fighter pension :

Provided also that the teachers who were re-appointed in accordance with the second proviso as it existed prior to the commencement of the Allahabad University (32nd amendment First Statute, 1988 and a period of one year has not elapsed after the expiry of the period of their re-employment, may be considered for re-appointment for a further period of one year.)"

6. Thereafter the Central Government on 27.7.1998 Annexure 3 to the petition wrote a letter to the Education Secretaries of all States that the conditions laid down in the recommendation of the U.G.C. were to be implemented by the State Government as a composite scheme without any modification except the date of implementation and scales of pay. The Central Government also wrote a letter on the same date i.e. 27-7-1998 (Annexure 4 to the petition) to the U.G.C. in which it was mentioned that the age of superannuation of the teachers of the Universities and the Colleges should be 62 years and it will be open to the Universities and Colleges to re-employ the teachers till the age of 65 years.

7. The U.G.C., wrote a letter to the Vice Chancellor of all the Universities dated 24-12-1998, a copy of which is Annexure 2 to the petition. In this letter it was mentioned that the age of superannuation of Universities teachers should be 62 years instead of 60 years and it should be open to the University to re-employ the teachers till the age of 65 years. The U.P. Government has written a letter dated 16-2-1999 to the Director of higher Education for raising the pay scale.

8. Counter-affidavit has been filed by the Joint Director of Higher Education. In paragraph 3(B) of the counter-affidavit it has been mentioned that raising the age of retirement is a legislative function and hence it is not desirable to issue any direction in this connection. Since the retirement age of a University teacher has been fixed by Statute 16 of the first Statute, the same can be amended only be an amendment of the Statute. Annexure C.A. 2 of the counter-affidavit is the letter of State Government dated 6-10-1998 seeking certain relaxations from the Central Government in the letter dated 27-7-1998. The Central Government vide letter dated 29th December, 1998 (Annexure 3 to the writ petition) stated that it has no objection.

9. Sri V.B. Upadhyaya, learned Counsel for the petitioners, has invited the attention of the Court to Entry 66 of List 1 of the Schedule of the Constitution as well Entry 25 of List 3 of the 7th Schedule. The Entry 66 of List 1 states as follows."

"Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

Entry 25 of List 3 states "Education, including technical education, medical education and Universities, subject to the provisions of Entries 63, 64, 65 and 66 of List 1 vocational and technical training of labour,"

10. Sri V.B. Upadhyaya, learned Counsel for the petitioner urged that the Central Government has executive power under Article 73 of the Constitution which is co-extensive with the legislative powers of Parliament. Hence he submitted that the letter of the Central Government dated 27-7-1998 is binding on all Universities. We cannot agree with this submissions. It is settled law that executive order cannot override a legislative enactment. Statute 16 of the first statutes of the University has been made u/s 49 of the U.P. State Universities Act and licence it amounts to delegated legislation. It is settled law that delegated legislation is as

binding as the parent legislation unless there, is conflict between the two. We do not find any conflict. In fact Sections 49(d) and (e) of the Act states that the statutes of the Universities can provide the terms and conditions of service of a person appointed to a post under the University. In our opinion Sections 49(d) and (e) includes the power to fix the age of superannuation of the University teachers. Since the age of superannuation has been fixed by Statute 16, it can only be altered by amending the Statute. In the system of administration we have adopted from the British, the executive is subordinate to the legislature. Hence in our opinion the Central Government has no power to issue any executive order abrogating or modifying any provision in the U.P. State University Act or the statutes made thereunder. In our opinion if any direction of the U.G.C. had not been complied with by the University concerned, the U.G.C. can withhold or reduce the financial assistance given to that university, but neither the Central Government nor the U.G.C. has any power to amend the Act or statute. u/s 50(1) the State Government could amend the first statute made by the State Government at any time upto 31-12-1990, and the Executive Council u/s 50(2) can amend the Statute, thereafter. u/s 50(4) the amendment in the statute has to be submitted to the Chancellor who may assent to it or withhold his assent therefrom or remit it to the Executive Council for further consideration. Hence any amendment to Statute 1624 changing the age of superannuation of University teachers can only be done in accordance with Section 50 and by the authority mentioned in Section 50. No such amendment can be made by any other authority or, in any other manner. If Sri Upadhyaya's submission is accepted it will logically lead to the result that the Central Government or U.G.C. can issue a direction to the University not to obey or comply with the Act or-statutes, and thus by an executive order the University statute (which is a piece of delegated legislation) can be abrogated or modified. We cannot accept such submission.

11. Sri V.B. Upadhyaya, learned Counsel for the petitioner then submitted that in view of para 4 of the letter of the Central Government dated 27-7-1998 (Annexure 3 to the writ petition) the University has to accept the entire scheme or reject the entire scheme, but it cannot accept it partially while rejecting the remaining part. In our opinion if the University docs not accept the whole of the scheme the U.G.C. can withhold financial assistance to the University or reduce it. The Central Government and U.G.C., however, cannot modify the Statute 16.24, as such modification can only be done in accordance with Section 50 of the Act.

12. As regards the contention that age of retirement of a University teacher is a matter covered by Entry 66, List 1, we are not in agreement with this submission. Entry 66 of List 1 has to be harmonized with Entry 25 of List 3. Entry 66 of List 1 refers to co-ordination and determination of standards in the institutions for higher education. Thus Entry 66 does not deal with all matters relating to Universities, but only matters relating to co-ordination and determination of standards in the University. Other matters relating to

Universities are not covered by Entry 66 of List 1 but by Entry 25 of List 3. In our opinion fixing of the age of superannuation has nothing to do with co-ordination and determination of standards of education, and hence they, pertain only to Entry 25 of List 3 of the VII Schedule. Learned Counsel for the petitioner referred to the decision of the Supreme Court in *Dr Preeti Srivastava and Another Vs. State of M.P. and Others*, . In paragraph 3 of the said decision, the Supreme Court observed that it could not be correct to say that the norms for admission have no connection with the standards of education. The present case before us has nothing to do with norms for admission to the University, but it pertains to the age of superannuation of University teachers. Hence the decision of the Supreme Court in the case of *Preeti Srivastava* is clearly distinguishable.

13. Sri V.B. Upadhyaya, learned Counsel for the petitioner then relied upon the decision in *University of Delhi v. Raj Singh and Ors.*, 1994(3) Supp SCC 516. He relied upon para 13 of the said decision where the Supreme Court observed that co-ordination and determination of standards of education in Entry 66 cannot be interpreted to mean only evaluation. In our opinion it is true that Entry 66 cannot be narrowly construed, but it can also not be extended to include even thing pertaining to a University. If we interpret Entry 66 to include all the matters pertaining to a University that will make Entry 25 of List 3 redundant. Hence we cannot accept this submission also.

14. On the other hand, learned Counsel for the respondent has relied upon a decision of the Supreme Court in *T.P. George and Others Vs. State of Kerala and Others*, In that decision the Supreme Court observed that fixing the age of retirement of teachers of affiliated college at 55 years was too low since it is only after a teacher acquires several years of teaching experience that he really becomes adept at his job. However the Supreme Court also observed that it is not for the Court to prescribe the correct age of retirement of teachers. That is a function requiring considerable expertise which can properly be done by the State Government or the State Legislature or the Universities concerned. In our opinion the decision in the case of *T.P. George and others* (supra), squarely applies to the facts of the present case. This Court cannot increase the age of retirement. That can only be done by amending the statute in accordance with Section 50 of the U.P. State Universities Act, as already mentioned above.

15. Sri V.B. Singh, learned Counsel for the petitioner urged that this Court should adopt an activist approach and do judicial legislation, and for this submission he relied on the decision in *Rattan Chand Hira Chand Vs. Askar Nawaz Jung (Dead) by Lrs and Others*, . In para 17 of the said decision the Supreme Court observed "the legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the Courts to step in to fill the lacuna. When Courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the

goals of the society.

16. In this connection Prof. Friedmann of Columbia University writes,--

"The Blackstonian doctrine as the "declaratory" function of the Courts, holding that the duty of the Court is not to "pronounce a new law but to maintain and expound the old one", has long been little more than a ghost. From Holmes and Geny to Pound and Cardozo contemporary jurists have increasingly recognized and articulated the law making functions of the Courts.....It is therefore time to turn from the state controversy over whether judges make law to the much more complex and controversial question of the limits of judicial law making."

17. In *Mrs. Sarojini Ramaswami Vs. Union of India and others*, , para 92, the Supreme Court observed :

"In this context it is also useful to recall the observation of R.S. Pathak, C.J., speaking for the Constitution Bench in *Union of India (UOI) and Another Vs. Raghbir Singh (Dead) by Lrs. Etc.*, about the nature and scope of judicial review in India. The learned Chief Justice stated thus :

".....it used to be disputed that judges make law. Today, it is no longer a matter of doubt that a substantial volume of law governing the lives of the citizen and regulating the function of the State flows from the decision of the superior Courts. "There was a time", observed Lord Reid. "when it was thought almost indecent to suggest that judges make law-they only declare it.....But we do not believe in fairy tales any more."

18. It may be mentioned that in this connection that 19th century theory of positivist jurisprudence of Bentham and Austin did not permit a judge to make law. Under that theory making of law was the task of legislature whereas the judges were meant to only interpret the law and enforce it. However, the positivist theory of the 19th Century has been largely replaced in the 20th Century by the theory of sociological jurisprudence as expounded by Jhering, Geny, Roscoe Pound. Frank, Llywellyn, Julius Stone etc. which permits a certain degree of judicial legislation.

19. However, judicial legislation has its limits. It can only fill up the gap in the statutory law (as observed by Cardozo in his *The nature of the Judicial Process*) or interpret the statutory law in accordance with the needs of society. Such gaps often occur because after the industrial revolution society has become dynamic and is fast changing (whereas feudal agricultural society was relatively stable). Hence it cannot be expected of the legislature to conceive of and provide for every contingency or situation which may occur in the future. Hence cases often come before the Court where there is no law dealing with the point involved, and the judge can fill up the gap in the law by judicial legislation. Also where the law is capable of two or more interpretations, or if strictly interpreted would lead to absurd results the Court can give an interpretation, which is in accordance with the present needs of society. For instance, Article 1, Section 8 of the U.S.

Constitution states that Congress can raise armies and navies. It does not mention that Congress can raise an air force, but that was because the U.S. Constitution was made in 1791 whereas the first aircraft was invented in 1903. However, in modern times no army can fight a conventional war without air cover, and hence to interpret Article 1, Section 8 literally would lead to absurd results. We have therefore to interpret it to mean that Congress can raise all armed forces necessary for state security.

20. However, in the present case the age superannuation is unambiguously fixed by the Statute, and hence it can be said that there is a gap and no law on the subject.

21. Sri V.B. Singh learned Counsel for the petitioner has relied upon a decision of the Supreme Court in the case of *Osmania University Vs. V.S. Muthurangam and others*, In that case the question involved was whether the age of superannuation of the non-teaching staff of Osmania University should be raised to 60 years when the University had raised the age of superannuation of the teaching staff of the University to 60 years. In our opinion the decision in the case of *Osmania University (supra)*, is clearly distinguishable. A careful perusal of the above decision shows that Section 38(1) of the *Osmania University Act* had prescribed that as far as possible there should be uniformity in the conditions of service of all the salaried staff of the University. There was no distinction drawn between the teaching and non-teaching staff in Section 38(1). Thus under the *Osmania University Act* both teaching staff and non-teaching staff had to be treated at parity, so far as the conditions of services were concerned. There is no provision under the *U.P. State Universities Act*, which is similar to Section 38(1) of the *Osmania University Act*. Hence the aforesaid decision is clearly distinguishable.

22. In view of the above discussion we are of the opinion that we can not issue any direction for increasing the age of superannuation of University teachers in the State Universities of U.P. to 62 years. However, we make a strong recommendation to the authorities concerned to increase the age of superannuation of University teachers of State Universities in U.P. to 62 years taking into consideration the fact that the teachers in Central Universities in the State have 62 years as their retirement age, and also the fact that the Executive Council of Lucknow University has passed a resolution for raising the retirement age of teachers to 62 years and has sent the resolution to the Chancellor where it is still pending. Several other Universities e.g. Bhopal University, Delhi University, Rewa University, Gwalior University, Jamiya Milliyya University, Sagar University, Hyderabad University, Indian Institute of Science, Bangalore etc. have the age of retirement at 62 years. Hence we are of the opinion that the retirement age of teachers of Allahabad University and other States Universities in U.P. should also be increased to 62 years, and we make a strong recommendation to the Executive Council of the State, Universities to amend their statutes accordingly and we also recommend to the Chancellor to accept

such recommendation.

23. The learned Advocate General has referred to Annexure CA-2 to the counter-affidavit which is copy of a letter dated 6-10-1998 of the State Government to the Central Government. In this letter it has been stated in para 4 that the retirement age of teachers of the State Universities should not be raised from 60 to 62 years since the proposal to raise the age of retirement of State Government employees from 58 years to 60 years was not accepted. We are of the opinion that the age of retirement of University teachers should not be linked with the age of retirement of Government servants. Teachers enjoy a higher status in our culture than Government servants. A teacher is a guru and in our culture a Guru enjoys a very high status. The State Government was, therefore, not justified in linking the question of raising the age of retirement of the University teachers with that of Government Servants.

24. In our opinion the age of retirement of University teachers should certainly be increased to 62 years age. As observed by the Supreme Court in T.P. George's case (supra), if a University teacher is made to retire-earlier students will lose the benefit of his experience. Also, since the Central Government and U.G.C. have recommended that the retirement age of University teachers should be raised to 62 years, and in fact it has been fixed at 62 years in Central Universities and several other universities in the Country, there is no reason why the U.P. State University teachers and teachers of affiliated colleges should not have 62 years as their retirement age.

25. Hence although we cannot issue a binding direction to the authorities concerned to increase the age of superannuation of teachers of Universities and affiliated Colleges to 62 years we make a strong recommendation to the authorities concerned to do so and increase the age of retirement to 62 years as expeditiously as possible. The Executive Councils of the State Universities in U.P. should take up this matter as early as possible.

26. With these observations this petition is finally disposed of.