
(2012) 05 DEL CK 0459
In the Delhi High Court
Case No : LPA 570 of 2006

R.A. Khemani

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-05-2012

Acts Referred:

Citation : (2012) 190 DLT 616

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : P.D. Gupta, Mr. Kamal Gupta and Mr. Abhishek Gupta, for the Appellant; Abhimanyun Kumar for Mr. Sachin Datta, CGSC for UOI. And Ms. Renuka Arora, for DDA, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, Acting Chief Justice

1. In this Intra-Court appeal preferred by the appellant questioning the validity of the order dated 28th February, 2006 passed by the learned Single Judge in W.P. (C) No.11/1987 preferred by the appellant under Article 226 of the Constitution of India, a short but neat question of law arises for consideration which touches upon the interpretation that has to be given to Fundamental Rule 56 (j)(i) as adopted by the Delhi Development Authority (DDA). Before we re-capitulate the said provision and the issue which arises on the interpretation thereof, it would be necessary to re-capitulate some important facts of this case. The appellant herein had initially joined the services of Central Public Works Department (CPWD) on 24th April, 1958 in CES Class-I after selection by Union Public Service Commission (UPSC). He got promotion as Executive Engineer and thereafter as Superintending Engineer. Sometime in the year 1976 he came on deputation with the respondent DDA as Superintending Engineer and while on deputation he was promoted as Addl. Chief Engineer and then as Chief Engineer in the year 1976 & 1977 respectively. In 1978 he was repatriated to CPWD. In the year 1980 he was again posted in DDA and while he was working with DDA he was promoted as

Chief Engineer in the scale of 2250-2500 in CPWD. At that time his age was 49 years and 9 months. The case of the appellant for absorption in the respondent DDA was considered by the respondent DDA and a decision was taken to absorb him. He was accordingly absorbed in the respondent DDA on 26th March, 1984 as Chief Engineer. At that time his age was 50 years and 2 months 11 days.

2. The respondent DDA invoked the provisions of FR 56 (j)(i) and passed an order of compulsory retirement of the appellant's service on 23rd December, 1985. The said FR 56 (j)(i) reads as under:-

56(j) Notwithstanding anything contained in this rule, the appropriate authority shall if it is of the opinion that it is in the public interest to do so have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice.

(i) If he is in Class I or II service or post and had entered the DDA service before attaining the age of thirty five years after he has attained the age of fifty years.....

3. The Fundamental Rules are applicable in case of employees of the Central Government. However it is a common case of the parties that these Rules are made applicable by the respondent DDA to its employees mutatis mutandis.

4. The appellant challenged the order of compulsory retirement by filing W.P.(C) No.11/1987. His main submission was that provision of FR 56 (j)(i) could not be invoked by the respondent DDA as this was applicable only in those cases where the incumbent joined the services of the respondent DDA before attaining the age of 35 years. According to the appellant, in his case since he had joined the services with the respondent DDA at the time when he was more than 35 years of age, only FR 56 (j)(ii) could be attracted and as per that provision, his case of compulsory retirement could be considered only on attaining the age of 55 years. A statement is made by the counsel for the appellant as well as the appellant who is present in the Court that the appellant is not interested and would not claim any salary for the intervening period i.e. from the date of the order of compulsory retirement till the age of normal superannuation or any retiral benefits or pension on said count and is fighting only on principle. We take this statement on record.

5. The appellant, before the learned Single Judge relied upon the judgment of the Division Bench of this Court in S.C. Dikshit v. Union of India 1987(12) DRJ 157. That was also a case of an employee who was initially in the service with the Government of Uttar Pradesh and had come on deputation to the DDA and was ultimately absorbed there. At the time of his absorption he was over 48 years of age. In his case also DDA had compulsorily retired him from the services on attaining the age of 50 years invoking FR 56(j)(i). The Division Bench set aside the said order of compulsory retirement holding that FR 56(j)(i) conferred power upon the DDA only if the officer entered the service of DDA before

attaining the age of 35 years. The entire discussion in the said judgment is contained in para 11 thereof which is re-produced below:-

11. The sanction issued by the DDA after the permanent absorption of the petitioner in relation to the pay fixation is the clincher. The order dated January 3, 1985 says that the petitioner's pay as on January 1, 1981, the date on which he was absorbed in DDA would be re-fixed as a re-employed pensioner. The petitioner was made entitled to his retiring pension, gratuity etc. from the State of U.P. on the acceptance of his resignation. He became a pensioner. The case of the petitioner is thus clearly of a re-employed pensioner he having snapped his earlier relations with the State of U.P. on the acceptance of the resignation of the service. As his employment with the DDA with effect from January 1, 1981 as a pensioner of the State of U.P. and his entry into the service with DDA was after attaining the age of 35 years, there was no jurisdiction to retire the petitioner under FR 56(j)(i) reading as under:-

56(j) Notwithstanding anything contained in this rule, the appropriate authority shall if it is of the opinion that it is in the public interest to do so have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice.

(i) If he is in Class I or II service or post and had entered the DDA service before attaining the age of thirty five years after he has attained the age of fifty years.....

Power is conferred under FR 56(j)(i) only if the officer entered the service of DDA before attaining the age of 35 years. The impugned order is entitled to be quashed on this short ground.

6. The learned Single Judge after hearing the parties came to the conclusion that FR 56(j)(i) would be applicable in the instant case. For arriving at this opinion the learned Single Judge has given two reasons i.e., a) the order of the Division Bench in S.C. Dikshit (supra) was passed by not taking into account the text of FR 56(j)(i); and, b) the decision in S.C. Dikshit was contrary to the Supreme Court judgment in U.P. State Mineral Development Corpn. and Another Vs. K.C.P. Sinha, . The reasons in support of the aforesaid conclusion are contained in para 30 of the impugned judgment and in order to appreciate the said reasons, we re-produce the same:-

30. The first point to be decided is whether the impugned order is vitiated as being in conflict with FR 56(j)(i). In SC Dikshit (supra) the Court proceeded on the footing, presumably on the derivative reasoning that by virtue of Rule 6 of the 1961 Rules, which extended inter alia, the Fundamental Rules, mutatis mutandis, to DDA employees, that the rule reads as follows:

Notwithstanding anything contained in this Rule the appropriate authority shall, if it is of the opinion that it is in the public interest so to do have the absolute right

to retire any government servant by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice.

(i) If he is in Class I or Class II Service or post and had entered the DDA service before attaining the age of thirty five years, after he has attained the age of fifty years.

(emphasis supplied)

The assumption is not based on any amendment of the Fundamental Rule; it continued to read "the Government service" and not "the DDA service" as quoted in the judgment. The entire reasoning in the judgment that previous government service was not to be reckoned, is on the assumption that the rule specifically read as if the officer entered "the DDA service before attaining the age of thirty five years". This interpretation is not borne out by the rule; indeed, the petitioner himself asserts that the rule reads as if the official held a Class I/Class II post and "had entered the Government service before attaining the age of thirty five years". Such being the correct position, it would be immediately apparent that the petitioner's previous service with the CPWD too had to be taken into consideration, since it was "Government service". If the other construction placed, viz that the absorption meant fresh employment, were to be accepted, as it was in Dikshit's case, the very rule would be rendered redundant, since DDA would be powerless to invoke FR 56(j)(i) in the case of Class I and Class II employees absorbed into its services, after they cross 35 years, whereas, in the case of those who entered before such age, in the same category of posts, the power would be available. There is no discernible rationale for such a classification; indeed the amplitude of the power, and the logic of its existence would be undermined. Secondly, the decision of the Supreme Court in K.P.C. Sinha (supra) contains observations which suggest that absence of a minimum qualifying service, where the rule provided a minimum age for issuing an order of compulsory retirement, do not necessarily invalidate the order. I am of the opinion, therefore, that the decision in S.C. Dikshit is not good law, both on account of its not taking into account the text of FR 56(j)(i) as also in view of the decision in K.P.C. Sinha's case.

7. A reading of the aforesaid para would clearly demonstrate that in so far as interpretation to FR 56(j)(i) is concerned, the learned Single Judge has held that the words "the DDA service" cannot be substituted in place of the words "Government service" in FR 56(j)(i). It is held that as the appellant was earlier working in CPWD the previous government service is to be reckoned and as the appellant had joined at an age below 35 years, the provision of FR 56(j)(i) would be applicable.

8. We are afraid this interpretation given by the learned Single Judge is not the correct interpretation in law. After the absorption of the appellant with the respondent DDA, he had become DDA's employee. Fundamental Rules, as mentioned above, are framed regulating the service conditions of government

employees. They are not applicable to any other statutory authority or government corporation etc. At the same time such statutory authorities like the DDA in the instant case can adopt those rules. As pointed out above, the respondent DDA has taken the decision for applying *mutatis mutandis*, to its employees as well. Once a decision in this behalf is taken such rules have to be read as deemed to have been framed by the respondent DDA for its employees, the very words "*mutatis mutandis*" suggest that wherever occasion arises these are to be read with necessary modifications obviously when these rules are made applicable to DDA's employees, wherever the expression "Government service" occurs it has to be substituted with the respondent DDA's service; otherwise, while considering so many other aspects of the service of the DDA's employees it would create various anomalies in case the words "Government service" are allowed to remain as such even when they are made applicable qua employees of DDA.

9. Merely because previous government service rendered by the appellant in CPWD is to be reckoned would not mean that in the FR 56(j)(i), the expression "Government service" would continue. Such service is reckoned because of other provisions and that too for limited purposes primarily for the purpose of payment of pension. This is clear from the following provision contained in other service regulations:-

III C.C.S. (Pension) Rules, 1972. 37. Pension on absorption in or under a corporation, company or body. A Government servant who has been permitted to be absorbed in a service or post in or under the Corporation or company wholly or substantially owned or controlled by the Government or in or under a body controlled or financed by the Government shall, if such absorption is declared by the Government to be in the public interest, be deemed to have retired from service from the date of such absorption and shall be eligible to receive retirement benefits which he may have elected or deemed to have elected, and from such date as may be determined, in accordance with the orders of the Government applicable to him.

Extract of Para 10 from Appendix 18 (Section I, para 444) to C.C.S.(Pension) Rules, 1972.

10. With the coming into force of C.C.S. (Pension) Rules, 1972 (which, inter alia, contain a provision of deemed retirement in the case of Government servants absorbed permanently in a public sector undertaking/autonomous body), it has now been decided that obtaining of formal resignation is not necessary if an individual is deemed to have retired from service by virtue of Rule 37 of C.C.S. (Pension) Rules, 1972, i.e. consequent on the conditions required by this Rule, viz, permission should have been granted to the absorption in the service of the company or other body corporate, the absorption should be declared by the Government to be in the public interest, there should be an actual order of absorption and the Government service should also consent to such absorption, being satisfied."

IV. Government of India Decision No.154 below Article 26 of Civil Service Regulations.

3.4.1 In the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for "Transfer on deputation/Transfer"), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he was, however, been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from- The date he has been holding the post on deputation, Or The date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department, Whichever is later.

10. We have also pointed out above that a Division bench of this Court in S.C. Dikshit (supra) had taken the view that the provision of FR 56(j)(i) is not applicable in the instant case. The said judgment of the Division Bench was binding on the learned Single Judge and should not be distinguished on the ground that the judgment was rendered by not taking into account the text of FR 56(j)(i). From the reading of the judgment in S.C. Dikshit it is very clear that the Division Bench had referred to FR 56(j)(ii) and given a particular interpretation thereto. Therefore, when a provision was expressly taken into consideration, it was not a case which could be treated as per incuriam. Even if the learned Single Judge held a contrary view, the judgment of the Division Bench could not be ignored.

11. The second aspect which needs to be considered is as to whether judgment in S.C. Dikshit is contrary to the judgment of the Supreme Court in K.P.C. Sinha. The learned Single Judge has observed that K.P.C. Sinha contains observations which suggest that absence of a minimum qualifying service, where the rule provided a minimum age for issuing an order of compulsory retirement, does not necessarily invalidate the order. However, from the reading of the said judgment it becomes clear that the Supreme Court had held that if the Rule does not prescribe minimum length of service it does not invalidate the Rule and Rule will not suffer from the vice of arbitrariness. In that case the Court was concerned with the Rule 27 of the Uttar Pradesh State Mineral Development Corporation Ltd. Employees Service Rules, 1978 which was concerned with the "retirement of employees". Sub Rule (iv) thereof, which was the subject matter, makes the following reading:-

the authority may at any time retire in the public interest or in the interest of the Corporation an employee at the age of 50 years by giving him three months notice or pay in lieu thereof or pay for the said period which falls short of said period of three months.

12. This Rule is entirely different from the provision contained in FR 56(j)(i). It entitles the employer to retire an employee at the age of 50 years. There is no

provision for minimum service or entering into service before a specified age. In fact the employee had challenged the validity of that Rule on the ground that this Rule does not prescribe minimum length of service for exercise of power of compulsory retirement and this challenge was negated by the Supreme Court.

13. We are therefore of the opinion that the aforesaid Rule that is materially different from FR 56(j)(i) or the interpretation thereof would have no application to the facts of the present case. Even as a Co-ordinate Bench, bound as we are by the judgment of other Division Bench in S.C. Dikshit (supra), following that judgment we hold that the FR 56(j)(i) could not be applied by the respondent DDA in the instant case. The impugned order passed by the learned Single Judge has to be set aside on this ground. The effect thereof would be to hold that the compulsory retirement of the appellant invoking Rule 56(j)(i) was not in accordance with law. We thus allow this writ petition filed by the appellant and hold his compulsory retirement as bad in law. It is a matter of record that the appellant had attained even the normal age of superannuation long ago. As a consequence the only question would be about the payment of retiral benefits and pension if any. The appellant has already given up claim for wages and monetary benefits. The retiral benefits and pension if any would accordingly be worked out without counting the period from the date of the order of compulsory retirement (which we have set aside) till the normal age of superannuation. However the observations made in para 41 of the impugned judgment of the learned Single Judge about the damages for overstaying in the staff quarter shall be taken into consideration by the respondent and the amount on that account can be adjusted.