

(1994) 10 BOM CK 0070

In the Bombay High Court

Case No : Writ Petition No. 1531 of 1994

Rajahansa Vasudeo Bagwe

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 18-10-1994

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1994) 10 BOM CK 0070

Hon'ble Judges : V.H. Bhairavia, J;P.S. Patankar, J

Bench : Division Bench

Judgement

1. We have passed the final order in this matter on 11th October 1994 and today we proceed to give reasons.

2. This is a Petition under Article 226 of Constitution of India challenging the order dated 13th May 1994 (Exh. A to the petition) of compulsory retirement of the petitioner under Rule 10(4)(a)(i) of Maharashtra Civil Service (Pension) Rules, 1982.

3. The petitioner was born on 15-8-1940 and would have retired in ordinary course on 15-8-1998. He joined to the post of the Clerk in the Court of Small Causes at Bombay in May 1961, after his selection by Maharashtra Public Service Commission. He was promoted from time to time to the post of Judicial Clerk, Chief Clerk, Additional Cashier, Cashier, Chief Judge's Judicial Clerk, Accountant and Additional Assistant Registrar. The Petitioner came to be promoted to the post of the Additional Registrar on 25-7-1990 which was Class I Gazetted post. At the relevant time when the order was passed he was Additional Registrar. The petitioner officiated as a Registrar in June 1991 and in May 1994 in leave vacancy.

4. The order of compulsory retirement is challenged on four grounds :

The learned Advocate for the Petitioner submitted that the impugned order is not complying with the rules. The relevant part of Rule 10(4)(a)(i) is as follows :-

10(4)(a)(i)

(4) Notwithstanding anything contained in sub-rules (1) and (2) of this rule, the appropriate authority, if it is of the opinion that it is in the public interest so to do, by giving notice of three months in writing in Form 30 or in Form 31, as the case may be, or three months' pay and allowances in lieu of such notice, have the absolute right to retire (a) any Gazetted Government Servant under the rule making control of the State Government.

(i) if he had entered Government service under any Government in India, before attaining the age of thirty-five years, after he has attained the age of fifty years, and

He submitted that Part (i) of the order no doubt speaks of giving 3 months pay and allowance in lieu of 3 months notice. However, part (ii) takes away the same by providing that "he shall be allowed leave salary only for the period of leave excluding that period for which pay and allowances, in lieu of notice have been paid to him". He, therefore, submitted that entire order is illegal. The learned counsel appearing for the Respondents conceded that Part (ii) of the Order is not proper and legal. However, he submitted that the same can be separated and can be set aside and this would not vitiate or make the entire order illegal. We agree with the learned Counsel for the Respondents. This part of the Order can be separated and can be set aside. That would not make the entire order illegal since it is not inextricably linked with the main order of compulsory retirement. Therefore, it is not possible to accept this submission.

5. The learned Advocate for the petitioner then submitted that Petitioner would not have been retired as there would not have been any review at this stage and relying on the Circular dated 1-9-1983 Exh. B, he submitted that review ought to have been done before the age of 50 years or on completion of 30 years of qualifying service, whichever is earlier, as the Petitioner was Class I Gazetted Officer and entered the service before the age of 35 years. If such a review is not made and if the petitioner is retained in service then the review is possible only when the petitioner reaches the age of 55 years. He pointed out that annexure to the said Circular dated 1-9-1983 lays down the procedure in that respect. He submitted that this provision is mandatory and ought to have been followed as the Rule is silent in this respect. The learned Counsel for the Respondent submitted that Rule 10(4)(a)(i) is clear which gives power to make review "after" attaining the age of 50 years by the Government employee covered under it. He pointed out that Circular annexed itself reserves such power to the Government. He further submitted that Circular cannot be treated as mandatory in nature. Circulars supplement the rules, and to be read in a reasonable manner. He further pointed out this is the first review which was taken place of the petitioner and mere retention after 50 years cannot mean that review was done when he attained the age of 50 years. We agree with the submission made by the learned Counsel for the Respondents. This Circular cannot be treated as a mandatory one. Circular can only supplement the rule. It is in the nature of

guidelines for the purpose of proper administration of the rule. If files the gaps in the rules. This requires to be followed ordinarily. It cannot supplant the rule itself. The rules gives power to the Government and obviously for serving the public interest. That after a Government servant, covered under the rule, attains the age of 50 years, he can be compulsorily retired. It is in order to remove the dead-wood. It may become dead-wood any time after 50 years. If the Circular is treated as mandatory and read as the learned Advocate for the Petitioner wants us to read, then it would lead to absurd result. It would mean that there can be no review prior to attaining the age of 55 years, even if review is not made at 50. It will be giving licence to the Government employee or imposing inability on the Government even though an employee is not physically fit to carry out the duties or his integrity is doubtful or there is inefficiency. Secondly in the present case it is merely because the petitioner was retained after he attained the age of 50 years, it cannot mean that review had taken place at that stage. This is the first review which was conducted by the Special Review Committee. Therefore there is no bar or prohibition from reviewing his service after his attaining the age of 50 years or completion of 30 years of qualifying service. Further the circular itself reserves such a right to Government. The annexure to the said Circular only prescribes the procedure in that respect which provides "purposes of scrutiny should be to identify the officers who are no longer fit to be continued in service in view of the deterioration in their work, conduct or physical or mental health after the clearance at 50". Therefore, we reject this contention of the learned Advocate for the Petitioner and held that review held by the Special Review Committee was not illegal on this count.

6. The learned Advocate for the Petitioner submitted that impugned order is malafide one. Relying upon *Ram Ekbal Sharma Vs. State of Bihar and another*, , he submitted that as the order was not bonafide and was passed with oblique motive, the Court can lift the veil or cloak and examine the order. The apex Court in the said Judgment of *Ram Ekbal Sharma Vs. State of Bihar and another*, has held that even though the order of compulsory retirement is couched in innocuous language without making any imputations against the Government servant who is directed to be compulsorily retired from service, if challenged, the court, in appropriate cases can lift the veil to find out whether the order is based on any misconduct of the Government servant concerned or the order has been made bonafide and not with any oblique or extraneous purposes. In support of this contention the Petitioner has relied upon some instances in para 9. They are all directed against Respondent No. 3 Chief Judge of the Court of Small Causes Court. It is alleged that in or about May or June 1993 one Mrs. V. S. Vaidya wanted transfer from Dhobi Talao Court to Bandra Court on medical grounds. She submitted an application. Respondent No. 3 wanted that she should be transferred. However the petitioner pointed out that she has annexed medical certificate from private medical practitioner and not from Government hospital, and therefore she should not be transferred. This has annoyed Respondent No. 3. Then it is pointed out that there were 2 lady employees which Respondent No. 3

wanted that they should not be transferred from his office. However, the petitioner included their names in the general proposal of transfer. This was not liked by the Respondent No. 3 and he treated this as an arrogance on the part of the petitioner. The learned counsel for the Respondents pointed out that all these allegations are very vague and unsatisfactory in nature. There was nothing made by the petitioner on the application of Mrs. Vaidya. There was no recording of his objection or putting the papers before Respondent No. 3. Similarly in the case of those two lady employees there was no question of disliking on the part of the Respondent No. 3 as they came to be transferred. He invited our attention to the affidavit in reply filed by Shri V. R. Datar, Additional Registrar (Legal), High Court, Appellate Side, Bombay. In the said affidavit he has pointed out that all those allegations only exist in the mind of the petitioner. The allegations regarding personal vendetta or malafides came to be denied. It is also denied that Respondent No. 3 made any report against the Petitioner to Respondent No. 2 (Registrar, High Court, Bombay) because of those incidents. There is also affidavit in reply filed by Respondent No. 3 denying the alleged personal vendetta against the petitioner. It has been further pointed out that allegations relating to Mrs. Vaidya were totally irrelevant and her transfer was routine matter and was approved by the High Court though there was no certificate from Government Hospital. It was denied that there was any annoyance. Similarly in the case of 2 other lady employees, innuendo was denied. It was not for the petitioner to submit any proposal for transfer and therefore there was no question of linking the same or not. In our opinion, the allegations made by the petitioner alleging malafides against the Respondent No. 3 are absolutely vague and baseless. The petitioner has failed to support the same. It is not possible to accept that impugned order was malafide or was passed for any oblique motive.

7. The learned Advocates for the Appellant then submitted that impugned order is irrational, arbitrary and no reasonable person would have reached to such a conclusion on the basis of the material. He submitted that it is perverse order.

8. Both sides cited various judgments of the apex Court, i.e.,

(i) AIR 1965 280 Shivchandrana Singh v. The State of Mysore,

(ii) Gian Singh Mann Vs. High Court of Punjab and Haryana and Another, .

(iii) Baldev Raj Chadha Vs. Union of India (UOI) and Others,

(iv) Anoop Jaiswal Vs. Government of India and Another, ,

(v) Brij Mohan Singh Chopra Vs. State of Punjab, ,

(vi) J.R. Raghupathy and Others Vs. State of A.P. and Others, .

9. However, we do not want to burden our judgment with consideration of all those cases in view of latest judgment of the apex court reported in Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, .

"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 could not examine the matter as an appellate Court, they may interfere if they are satisfied that the order is passed (a) mollified 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 favorable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remark lose their sting, more so, 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 circumstances by itself cannot be a basis for interference. Interference is permissible only on the ground mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above.

Therefore interference with such orders is possible in 3 cases and one of them is when the order is arbitrary or perverse in nature or if no reasonable person can reach to such a conclusion then it can be reviewed.

It is necessary to note that service record since April 1967 of the petitioner is made available to us and we have gone through it. The record is absolutely good till April 1990. It has been mentioned that his work was satisfactory and he is good worker. He was promoted to the post of Additional Registrar on 25-7-1990. It is the case of the Respondents that his record since then was only taken into consideration. For the period from 25-7-1990 till 30-9-1990 the Chief Judge of the Court of Small Causes, Bombay has mentioned that he is shaping well as Additional Registrar. He is industrious and fit and good in all other respects. His service record for 1-10-90 to 31-3-91 shows that another Chief Judge of Small Cause Court has praised his work. He has not only mentioned that he is good and very efficient and pains-taking, but excellent. It is reported that petitioner is a very efficient and competent officer and he is indeed an asset to this Court. It is for the period from 1-3-1991 to 31-3-1992 the present incumbent of Respondent No. 3 has mentioned regarding his capacity of work etc. as good and

finally remarked that he is in habit of putting off work or action unit later. The same authority for the period of 1-4-1992 to 31-1-93 has mentioned that the work of the petitioner was average and he is in habit of keeping work in arrear, he pays no heed to reminders, in habit of keeping his papers without attending for long time, he has not shown any improvement since last confidential report orders are not obeyed, I have to keep constant watch on his official and administrative actions. This was dated 20-5-1993. Admittedly neither adverse remarks dated 3-4-1992 nor dated 20-5-1993 were communicated to the Petitioner.

12. Is there anything for the Special Review Committee to come to the conclusion that his service was not satisfactory or below average plus as mentioned in the report dated 13-12-1993 The Special Review Committee was formed pursuant to the High Court letter dated 18-8-1993 and meeting was held on 13-12-1993. The Committee consisted of Respondent No. 3 and one Mr. V. R. Patil, Additional Chief Judge of that Court. They considered 3 aspects for coming to the conclusion that services of the petitioner were not satisfactory or that it was not average plus.

13. The first relates to the enquiry conducted by Mr. N. H. Bagawade, Judge of the Court of Small Causes Court against some of the employees. He made a complaint on 9-10-1992 that Petitioner was asked to take out the copies of the charge-sheet which were to be served upon those delinquent employees as ordered by him, but the petitioner has not given the necessary xerox copies. The said complaint was repeated in April 1993. The explanation of the petitioner was called in that respect on 28-4-1993, but the petitioner has not submitted his explanation. This showed negligence and disobedience on his part. The affidavit filed in this Court by V. R. Datar, Additional Registrar (Legal) High Court, Bombay gives impression that the Petitioner was ordered two things by Judge Bagawade :

- (i) to make xerox copies, and;
- (ii) to serve the same on the delinquents.

The petitioner has filed a rejoinder and pointed out that petitioner was only asked to take out the xerox copies and he was not to serve the same on the delinquents. He has further pointed out that the xerox machine was out of order and he has orally apprised this position to the Respondent No. 3 and the matter was treated as closed. Again this came to be racked up in May 1993. The complaint made by Shri Bagawade dated 9-10-1992 itself shows that xerox machine was out of order and supports the case of the petitioner. It is clear that the petitioner has explained the reason for delay and Respondent No. 3 was satisfied.

14. The Special Review Committee then considered about the books which were sold by M. C. Rajiwala, a retired Judge from Gujarat, who has written book on Rent Act. This was in February 1992. The Special Review Committee considered that Mr. Rajiwala was not paid the amount of his bill because the petitioner has

failed in his duty in sending those books to the Librarian and taking action on the bill. Admitted position is that in October 1992 the petitioner from his own pocket paid the cash amount of Rs. 1200/- to Mr. Rajiwala and so far he has not been reimbursed. It is the case of the petitioner that Library Committee did not sanction the purchase of those books. Even record produced before us shows that Library Committee did not sanction such a purchase. Therefore there was no question of sending books to Library for entries in accession register. The learned counsel for the Respondents contended that Mr. R. D. Joshi, Judge of the Small Causes, who was heading the Committee approved the said purchase But the learned counsel in unable to produce any such approval. It is also necessary to note that no explanation was sought from the Petitioner in this respect nor any action was taken. The third aspect considered is that the Petitioner is in habit of misplacing documents, files etc. and takes lot of time for tracing out an hence the work and correspondence is delayed. Admitted position is that no even once he Petitioner was warned. It is absolutely vague. It has been mentioned by the Special Review Committee that Chief Judge of the Small Causes Court received one envelope from the high Court and it was not placed before him. Therefore, the High Court asked the Respondent No. 3 to be more careful and cautious in future. The Respondent No. 3 placed the blame in this respect on the petitioner. Petitioner in his rejoinder has pointed out that he was loaded with double work. He was given dual charge He was required to do additional duty to provide assistance to the Presiding Officer in the Departmental Enquiry proceedings during March 1992 to August 1993. The petitioner, therefore, prayed for redistribution of the work and accordingly in June 1993 it was redistributed. The Petitioner has pointed out that on an average 2/3 letters every day were received from the High Court and there was no reason from him to keep back a particular letter. This has happened sometime in 1992 and the report of Inward Clerk was called and petitioner was asked to give his own remarks in that respect. In June 1993 the petitioner has given his remarks that he has not receive many such letter. He has further pointed out that thereafter no action was taken. The Special Review Committee considered that file of one suit which was made time bound by High Court. The concerned party made a complaint against petitioner for that. This file pertained to the case of M. J. Bhagat. It is an admitted position that enquiry was conducted by Respondent No. 3 in that respect and it was found by him that there was no such complaint. It was a bogus one and report in that respect was made. However, this is conveniently twisted both by Special Review Committee in its report and the affidavit filed by Mr. R. V. Datara. A complete silence is maintained regarding such a report of the Chief Judge. In view of the report this ought not to have been taken into consideration at all.

15. The report also shows in para 13 that remarks which were passed by Respondent No. 2 dated 3-4-1992, and 23-5-1993 from Confidential Record were only taken into consideration. There was no consideration of whatsoever regarding the contents of these reports and also 2 earlier reports i.e. dated 1-10-90 (for the period 25-7-1990 to 30-9-1990) and 5-4-1991 (for the period

1-10-1990 to 31-3-1992). They were all good.

16. In fact we find from report of Special Review Committee mention about the warning given to the petitioner while he was working as Additional Cashier and penalty of censure on 29-5-1967. Affidavit of Mr. R. V. Datar has not clarified that the said aspect was not taken into consideration. On the contrary it gives an impression that it was considered. However, the learned counsel for the Respondents pointed out that there is mentioned both in rapport and the affidavit of Mr. Datar that the Petitioner was promoted on 25-7-1990 as an Additional Registrar and consistent with settled position by the apex Court, it was not taken into consideration and hence there was no question of the said aspect influencing the Special Review Committee. We cannot also forget the fact that the petitioner has officiated as Registrar for one month in June 1991 and for a period of 17 days in May 1994. There was no complaint about him whatsoever. Therefore, in our opinion the impugned order as perverse and suffers from non application of mind. IT is arbitrary as no reasonable person could have come to such a conclusion on the basis of material before it. It was an irrational in nature inasmuch as it has taken into consideration certain aspect which were either irrelevant or that they were not at all in existence. Power conferred under Maharashtra Civil Service (Pension) Rules is a discretionary power to be used cautiously. It is to be exercised with the extreme care where the public interest is likely to suffer.

17. The learned Counsel for the Respondents contended that instances considered by the Special Review Committee showed that Petitioner was inefficient. Apart from the fact that no such mentioned is to be found in his service record and no notice regarding those cases or instances was given to the petitioner, we do not find any such allegation or adverse remark in his service record. It is not disputed that petitioner was burdened with work. He was given dual charge. He was looking after the work of 2 Additional Registrars for pretty long time i.e. for nearly 3 1/2 years. In para 4(c) of the petition, the Petitioner has pointed out that Mr. M. D. Vaidya, Additional Registrar, was suspended from service on 30-1-1991 and the Petitioner was given additional charge of the said post. The petitioner continued to hold the said charge till 20-5-1994 i.e. till his compulsory retirement. Mr. A. S. Jadhav, 4th Additional Registrar was transferred from Bandra Court to Dhobi Talao Court in March-April 1992. From 30-1-1991 till March-April 1992, for a period of 15 months the petitioner alone handled the entire office administration. In para 4(6) he has pointed out that though during the period of 7-12-1992 to 8-1-1993 he was on leave, he was attending the office and was required to discharge his duties. In reply filed by Shri V. R. Datar, Additional Registrar (Legal) High Court, Bombay, he has only stated that those duties mentioned in (a) to (j) were normal, for a person holding such a charge is required to perform the same. It is difficult to understand this. This cannot be a reply. Respondent No. 3 in his reply has stated nothing about this except saying his work was deteriorated and hence redistributed in June 1993. Delay in disposal depends upon burden of work. It is clear that there was no consideration

whatsoever in that respect. In the present case it does not reflect on the efficiency of the petitioner. The service record if considered after 23-7-1990 as contended by the learned Counsel for the Respondent, does not show that his services were unsatisfactory or below average plus as stated in the Special Review Committee report. We have pointed out that even for that period his record is good. The combine reading of Government Circular dated 1-9-1983 (Exh. B) and dated 12-5-1985 (Exh. C-1) shows that criteria for continuance of Government servant after 50 is physical fitness, undoubted integrity and not below good record. In the case of the petitioner, there is no question of his physical fitness and his integrity was not in doubt. His record cannot be said to be below good, though the Special Review Committee has applied the standard of "below average plus".

18. Hence in our opinion, the impugned order requires to be set aside and quashed.

19. The learned Counsel for the Respondents then contended that the petitioner has come to the Court with unclean hands as he has made baseless and unfounded allegations or malafides against Respondent No. 3 and therefore the impugned order should not be set aside. It is not possible to accede to this contention. This case clearly falls within one of the classes indicated by the apex Court in the judgment reported in Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, . and hence this requires to be set aside.

20. Hence the following order :-

In the result, petition is allowed. The order dated 13th May, 1994 (Annexure A) is set aside and the Rule is made absolute in terms of prayer (a) with further direction to the Respondents to reinstate the petitioner with his back wages and continuity of the service and all other benefits the petitioner is entitled for. The respondents are directed to reinstate the petitioner within 4 weeks from to-day.

The learned counsel Mr. Bharucha appearing for the respondents made an oral request for staying the operation of this order for four weeks.

Having regard to the facts and circumstances of this case, in our opinion, the Respondents will not be prejudiced and will not be caused any inconvenience if the directions of reinstatement were carried out. The petitioner is out of service since 13th May, 1994 will be great loss and facing great hardships and inconveniences. Therefore, we reject the request of Mr. Bharucha. However, the directions regarding payment of back wages and giving other benefits is stayed for four weeks from the date on which judgment is signed. In the facts and circumstances of the case there shall be no order as to costs.