

(1974) 07 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 170 of 1971

Ram Dayal Yadav

APPELLANT

Vs

State of Himachal Pradesh etc.

RESPONDENT

Date of Decision : 19-07-1974

Acts Referred:

Bilaspur State Service Rules — Rule 1.84, 35, 56, 58
Constitution of India, 1950 — Article 14, 16, 163, 166, 166(3)

Citation : (1974) 3 ILR HP 665

Hon'ble Judges : Chet Ram Thakur, J

Bench : Single Bench

Advocate : P.N. Nag, for the Appellant; Hari Krishan and B. Sita Ram, General, for the Respondent

Final Decision : Allowed

Judgement

Chet Ram Thakur, J.—The Petitioner who was working as an Assistant Engineer, H.P. P.W.D. was retired from service by orders PK, PL and PM, dated 15th October, 1971, on his having attained the age of 55 years. The Petitioner has prayed for quashing these orders and has also prayed for a declaration that he shall be deemed to have continued in service till the age of 60 years and be retired at that age in accordance with the collateral letters (Annexures PC and PJ).

2. The Petitioner joined the service in the erstwhile princely State of Bilaspur in July, 1946, and on the merger of the Bilaspur State into the Union of India on 1st September, 1948, the Petitioner was absorbed in the new set up of Bilaspur province Administration as Divisional Engineer by means of a notification, dated 28th January, 1949 (Annexure PB). The Petitioner continued to discharge the functions of the aforesaid post till he was transferred to Paonta. Sub-Division in Himachal Pradesh as a Sub-Divisional Officer by order, dated 25th May, 1950 (Annexure PG). The Petitioner represented against his transfer but he was dismissed by the Chief Engineer, Himachal Pradesh, with the consent of the Chief

Commissioner, Bilaspur, on 17th October, 1950. He filed a declaratory suit which was ultimately decided in his favour but he was not reinstated to the post till 21st March, 1960, when he was posted as Assistant Engineer, Killar Sub-Division, H.P. P.W.D. Chamba vide Annexures PH and PI. At the time of his employment in the erstwhile princely State of Bilaspur his age of retirement was fixed at 60 years. He was however given an option to retire after the age of 58 years if he so chose. In fact the terms and conditions governing the age of retirement of the Petitioner were got clarified from the Raja of Bilaspur and this clarification is contained in a letter, dated 16th February, 1947 (Annexure PJ). That on the merger of Bilaspur State into the Union of India the terms and conditions of the service of the Petitioner continued to remain as they were. The F.R. 56 was not applicable to the case of the Petitioner as he never opted for the same and the Petitioner was governed by the terms and conditions as contained in the collateral letter, dated 9th August, 1949, and he could have been retired legally and validly at the age of 60 years. The terms and conditions of the Petitioner could not have been changed by the department unilaterally without the Petitioner having opted for it as this was disadvantageous to the Petitioner. Because of the long litigation of the Petitioner with the Respondents the department got sore with him and wanted to get rid of him from the department as soon as possible and, therefore, by invoking public interest into the matter, the Respondent No. 3 managed to obtain the order from the Governor of the State retiring the Petitioner at the age of 55 years in the public interest. The order has been passed arbitrarily without assigning any reasons and without invoking any rules. The order retiring him could not be passed because that would amount to variation of such terms and conditions to his disadvantage which could not be done. Hence such an order deserves to be set aside. His retirement at the age of 55 years was violative of contractual terms and conditions. The order of the Chief Engineer, Respondent No. 3, who has tried to seek a way to get rid of the Petitioner by retiring him at the age of 55 years was mala fide. The order was not a speaking order. The authority concerned had to give reasons for compulsorily retiring the Petitioner from the service at the age of 55 years in the absence of which this order is unsustainable in the eye of law. He had not been afforded any reasonable opportunity to show cause against his compulsory retirement and this order violates the principles of natural justice. The order in disguise of retiring the Petitioner under F.R. 56 in fact seeks his removal from service without any justifiable cause and without giving any reasonable opportunity to the Petitioner to defend it and that this order casts a stigma on the Petitioner. He could not be retired unless a proper procedure under Article 311 of the Constitution of India was adopted. The Petitioner could not be retired under F.R. 56 as it gives naked, arbitrary and despotic powers to the Government without any guiding principle to retire him compulsorily from the service and as such it violates Articles 14 and 16 of the Constitution. The rules, therefore, being ultra vires and unconstitutional cannot be invoked by the Government to retire the Petitioner at the age of 55 years. Further that nothing adverse ever has been communicated to the Petitioner and that he has always

discharged his duties efficiently to the best satisfaction of his superiors.

3. The Chief Engineer filed his affidavit by way of reply on behalf of Respondents Nos. 1, 2 and 3. It was submitted that under F.R. 56 (j) the Governor, Himachal Pradesh, has the absolute right to retire any Government servant after he has attained the age of 55 years by giving him necessary notice. According to the Respondents the designation or nomenclature of the Petitioner after the merger of the State of Bilaspur was changed to that of Assistant Engineer and his pay scale was also changed. It was admitted that the Petitioner had been dismissed and that he challenged the dismissal order by a declaratory suit which was ultimately decreed in his favour. It was contended that in the appointment order of the Petitioner no retirement age was stipulated. However, from para 1.84 of Civil Service Regulations of Bilaspur State (Annexure B) it was clear that a State servant was required to retire on attaining the age of 55 years and that he could be retained in service after that age with the sanction of the Durbar on public grounds which were to be recorded in writing; but he was not to be retained in service after the age of 55 years except in very special circumstances. The contents of the Annexure PJ were not admitted to be correct. It was submitted that there was a provision in the State Service Rules of Bilaspur State whereunder a Government servant was required to retire at the age of 55 years, therefore, in view of the clear provision there was hardly any necessity for seeking clarification regarding retirement age of the Petitioner from the Raja. Once he was taken over in Himachal Administration he would be governed by the Fundamental Rules and any letter of the Raja of Bilaspur cannot be of any avail to the Petitioner even if proved to be genuine.

4. By his rejoinder to the written statement of the Respondents it was contended that the competent authority can only exercise their jurisdiction for retiring the employee at the age of 55 years if it is of the opinion that it is in the public interest to do so, otherwise the retirement age of the Government servant normally is 58 years. The appropriate authority has not applied its mind on the question of public interest and has acted on the guidance of Respondent No. 3 who has managed the premature retirement of the Petitioner mala fide and arbitrarily.

5. The Petitioner has based his case on Annexures "PC and "PJ." Annexure "PC" reads as:

Extract from the collateral letter dated 9th August, 1949 between the Raja of Bilaspur and the Ministry of States, New Delhi, dated 15th August, 1948.

Para (V)

It is intended that permanent members of the public services of the State will either be continued on conditions similar to those which they were entitled to before the 1st of April, 1948, or paid reasonable compensation pension and leave salaries sanctioned by competent authorities to permanent members of the public services of the State, who would have retired or proceeded on leave

preparatory to retirement prior to that date, will also be continued.

Sd/- M. Vellodi, Ministry of States, New Delhi.

His Highness Sir Anand Chand, K.C.I.E., Raja of Bilaspur, Bilaspur. Letter regarding fixation etc. from the Collector of the erstwhile States merged into Dominion of India.

This is merely an extract of some collateral letter and the authenticity of this letter has been challenged by the Respondents and I think rightly so unless the original letter to which it is stated to be collateral is produced in the Court. Moreover, it does not say anything except that on the date of merger of Bilaspur State it was intended that permanent members of the Public services of the State will either be continued on conditions similar to those to which they were entitled before the 1st of April, 1948, or they would be required, etc. Therefore, in these circumstances this document does not lend any assistance to the case of the Petitioner with regard to his retirement at the age of 60, because on the date of merger his services were not terminated or dispensed with, rather, he was permitted to continue in service on the same terms and conditions. However, according to the Petitioner, one of the terms and conditions of his services was that he was to retire at the age of 60 and for that he has placed reliance on Annexure PJ, which is to the following effect:

Bilaspur State. 16-2-1947.

Mr. R.C. Yadav, State Engineer, Bilaspur State.

Reference your application dated 21-1-1947, I am directed by His Highness to inform you that you are required to retire on attaining the age of 60 years and after your attainment of the age of 58 years, may at your option, retire on a superannuation pension.

Yours faithfully, Sd/- Private Secretary to His Highness Raja of Bilaspur State, Simla Hills.

Copy to Mr. Claude Batley, Chartered Architect, Bombay.

This has been denied by the Respondents vide para 11 (c) of their reply. Moreover, in my opinion, after the merger of Bilaspur State into Himachal Pradesh the Petitioner Could not claim benefit or advantage under this letter, Annexure PJ. According to *Rajvi Amar Singh Vs. The State of Rajasthan*, it is well established that when one State is absorbed in another, whether by accession, conquest, merger or integration, all contracts of service between the prior Government and its servants automatically terminate and thereafter those who elect to serve in the new State, and are taken on by it, serve" on such terms and conditions as the new State may choose to impose. This is nothing more than an application of the principle that underlies the law of master and servant when there is a change of masters. It would also be pertinent to note here that the conditions in the new State were quite advantageous to Shri Yadav inasmuch as

in the erstwhile Bilaspur State he was appointed as a Divisional Engineer at Rs. 400/- per month without any scale, as would be apparent from Annexure PA. But in the new State after merger of Bilaspur State, Shri Yadav was designated as an Assistant Engineer and was placed in the pay scale of Rs. 225-25-500/25-750 (as for S.D.O's in Punjab and Himachal Pradesh) as would be apparent from Annexure PD which is an express letter from the Government of India, Ministry of States, dated 21-2-1951, whereunder the scales of Assistant Engineers were prescribed. Shri Yadav was transferred to Paonta in the Sirmur Sub-Division as a Sub-Divisional Officer, vide Annexure PG, dated 25-5-1950, passed by the Principal Engineering Officer, Himachal Pradesh, Simla, to the Chief Commissioner, Bilaspur, as under the arrangements then prevailing the Public Works Department of Bilaspur which was a separate Chief Commissioner's province, was placed under the Principal Engineering Officer of Himachal Pradesh. Therefore, by no stretch of imagination can it be said that Shri Yadav continued to enjoy the same status and under the same terms and conditions. His status had been changed from that of a Divisional Engineer to that of an Assistant Engineer or the Sub-Divisional Officer and the scale of pay was also raised from a fixed pay of Rs. 400/- to a pay scale of Rs. 250-750, which was, admittedly, a higher scale of pay. Therefore, these two documents, Annexures PC and PJ, in my opinion, will not be of any help to the Petitioner to contend that under the terms of these two documents he was entitled to continue in service till he attained the age of 60. Once it is held that he is not governed by Annexure PJ then necessarily it would follow that he is governed under F.R. 56.

6. Learned Counsel for the Respondents has also submitted that the Petitioner was governed in the State of Bilaspur by the Civil Service Regulations Annexure RB (in fact it is not RB, but it is only B), which reads as:

Extract of para Mo. 1.84 of Civil Service Regulations of Bilaspur State.

(COMPULSORY RETIREMENT AND RESIGNATION OF OFFICE)

Except as otherwise provided in this rule, a State servant is required to retire on attaining the age of 55 years. He may be retained in service, after that age with the sanction of the Durbar on public

grounds, which may be recorded in writing; but he must not be retained after the age of 60 years except in very special circumstances.

Attested. Sd/- Y.R. Kashyap, Executive Engineer, Bilaspur Division No. 1.

The Petitioner in paragraph 6 of his rejoinder has admitted that Rule 1.84 of the Bilaspur State Service Regulation as annexed by the Respondents was applicable to him. However, his contention was that since no retirement age was given in the appointment letter, the Petitioner got a clarification and sanction from the Durbar, viz. Raja of Bilaspur about his age of retirement under Rule 1.84 of the Bilaspur State Service Regulation and that he was entitled to retire at the age of 60 years, vide Annexure PJ. But this submission of his does not appear to be

correct inasmuch as the age of retirement is already given in this Rule 1.84, Annexure B. According to this rule except as otherwise provided in this rule a State Government servant is required to retire at 55 years. It, however, states that he may be retained after that age with the sanction of the Durbar on public grounds which may be recorded in writing. Therefore, from this it would follow that the ordinary age of retirement was fixed at 55 and a Government servant was to retire on attaining this age and it was at the pleasure of the Durbar, i.e. the State Government, to retain him in service after that age on public grounds which were to be recorded in writing and could be retained in service even after the age of 60 in special circumstances. But from this it does not follow that the Petitioner could seek or claim this extension as a matter of right. The State has an absolute right to retire a Government servant at the age of 55 years unless his further retention in service was considered necessary on public grounds for reasons to be recorded by the State Government. Therefore, this would also go to show that this rule is quite identical to F.R. 56 (j) and the submission of the Petitioner that he is not governed under F.R. 56 (j) is totally untenable. The submission that he is governed by letter, Annexure PJ, which has fixed his age of retirement at 60 is also not correct because the rule under which he was governed provides the age of retirement and there was no question of any clarification. The letter issued by the Raja also stood superseded on his absorption in the Union of India after the merger of Bilaspur princely State, which did not keep alive this letter or recognise it specifically so as to give a right to the Petitioner for retirement not earlier than at the age of 60.

7. The F.R. 56 (j) reads as under:

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 Class II service or post and had entered Government service before attaining the age of thirty-five years after he has attained the age of fifty years;

(ii) in any other case after he has attained the age of fifty-five years:

Provided that nothing in this clause shall apply to a Government servant referred to in Clause (c) who entered Government service on or before 23rd July, 1966 and to a Government servant referred to in Clause (f).

From this it would follow that the case of the Petitioner falls under F.R. 56(j)(ii). Admittedly, the Petitioner had attained the age of 55 years on the date he was retired after giving him three months' notice, vide Annexures PK and PL. A perusal of this rule would go to show that the appropriate authority has got an absolute right to compulsorily retire a Government servant on his attaining the age of 55 years as contemplated under F.R. 56 (j). But the submission made by the learned Counsel for the Petitioner is that the order is illegal inasmuch as the

appropriate authority has not formed any opinion that it was in the public interest to retire the Petitioner and as such the order of retirement was without jurisdiction. Further that no material had been placed before the Court to show nor had been any communicated to the Petitioner that he is not entitled to be retained in service beyond the age of 55 years. The return of the Government showed that the Petitioner was retired because he was unsuitable and this cast a stigma and the Respondents should have complied with the requirement of Article 311(2). Having failed to do so the order is bad and liable to be set aside. It has also been contended that the retirement proceedings have been drawn up by the Departmental Promotion Committee, which is not a competent body to retire persons. Departmental Promotion Committee is only meant to judge the suitability or to assess the merits of persons for purposes of promotions and so the order is void. Further, that if the law requires a particular thing to be done in a particular manner it must be done according to that, that is, the Governor should form his opinion. Lastly, it has been contended that F.R. 56 (j) is ultra vires because it gives naked and arbitrary powers to Government to pick and choose and hence violates the provisions of Article 14. It had also been contended that the act is mala fide, inasmuch as there was a long litigation between the Petitioner and the Respondents and they wanted to get rid of him and, therefore, they availed of this opportunity in order to satisfy their whims by retiring him.

8. It is well settled that under F.R. 56 (j) the appropriate authority has got a right to retire any Government servant if it is of the opinion that it is in the public interest to do so and this right conferred on the appropriate authority is absolute. If authorities are needed, I may quote with advantage *Union of India v. Col. J.N. Sinha and Anr.* 1970 S.L.R. (S.C.) 748, and *Dr. N.V. Puttabhatta v. State of Mysore and Anr.* 1972 S.L.R. 525. In both these authorities it is laid down that powers can be exercised subject to the conditions mentioned in the rule, one of which is that the concerned authority must be of the opinion that it is in the public interest to do so. If that authority bona fide forms that opinion the correctness of that opinion cannot be challenged before the Courts. However, it is open to an aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that it is an arbitrary decision.

9. The first point contended by" the learned Counsel for the Petitioner is that the impugned order has not been made by the appropriate authority, i.e. the Governor, who is the appointing authority of the class of people to which the Petitioner belongs and that the order, Annexure PK, is also issued by an Under Secretary and it does not show that it has been passed by the appropriate authority. According to the learned Counsel, the order should have been made by the Governor after having formed an opinion as it is a matter exclusively within his discretion, as contemplated under Article 163 of the Constitution. Learned Counsel for the Respondents, on the other hand submits that the Governor in his own discretion is not the appointing authority in the case of the class of people to

which the Petitioner belongs but it is an executive action of the Government of the State which shall be expressed to be taken in the name of the Governor, as contemplated under Article 166. Under Article 166(3) the Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under the Constitution required to act in his discretion. So, the submission is that under the Rules of Business of the Government of Himachal Pradesh, made under Clause (3) of Article 166, the Governor may allocate all his functions to Ministers except those which he is required by or under the Constitution to exercise in his own discretion. But I have not been able to find if this appointment and the matter of retirement is a matter which is required by or under the Constitution to be exercised by the Governor in his own discretion.

10. The authority *Longmal and Others Vs. Superintendent of Police and Others*, is not helpful to the Petitioner in his endeavor to show that this matter of compulsory retirement fell within the exclusive exercise of discretion of the Governor. In fact in the case referred to above the rules provided that the Governor may on his own motion or otherwise after calling for the records of the case review any order which is made or is appealable under the rules and, therefore, the power was to be exercised by the Governor in his own discretion as is envisaged under the rules. The rules there made a distinction between the powers of the Government and the powers of the Governor and it was in view of the specific provision in the rules that the Court held that any act which is to be performed by the Governor in his discretion by or under the Constitution is, to be performed by him alone and that the powers under Rule 35 could not be exercised by the Government as Governor's delegate.

11. The further authority *Nanak Saran Srivastava v. State of U.P. and Ors.* 1971(1) S.L.R. (All.) 168, also does not assist the Petitioner. In this case, compulsory retirement order under F.R. 56 was made by a superior authority than the appointing authority and it was held that, "it is well settled that if a thing is required to be done in a particular manner it must be done in that manner alone. Inasmuch as Fundamental Rule 56 provides that it is the appointing authority alone which can terminate the services of a Government servant by means of a notice on his attaining the age of 55 years, there is no scope for the argument that the superior authority can also issue that notice".

12. In the instant case, as has rightly been pointed out by the learned Counsel for the Respondents, under Article 166(3) the Governor has framed rules for transaction of the business of the Government of the State and it is clear that he has made the rules, known as "the Rules of Business of the Government of Himachal Pradesh, 1971" by a notification, dated 25th January, 1971, allocating among Ministers of the said business in so far as it is not business with respect to which he is by order or under this Constitution required to act in his discretion. Therefore, it is wrong on the part of the learned Counsel for the Petitioner to

contend that it is the Governor who was to act in his discretion in passing the order. The order is authenticated by the Under Secretary and it purports to have been made in the name of the Governor and as such no challenge can be made against it in so far as the authentication is concerned or in so far as the order is not issued by the appropriate authority.

13. Rule 58 of the Rules of Business mentions the class of cases which shall be submitted to the Chief Minister before the issue of orders. Clause (v) of this rule mentions one of such classes of cases; as the proposals for the prosecution, dismissal, removal or compulsory retirement of any Gazetted Officer. Therefore, from this it would follow that the cases of compulsory retirement of Gazetted Officers have got to be submitted to the Chief Minister before orders in such cases are passed. In the instant case it is stated by the Advocate-General that the case was not submitted to the Chief Minister and, therefore, there was admittedly a breach of Rule 58(v) of the Rules of Business.

14. Next the opinion has to be formed, as is the intention of F.R. 56 (j), by the appropriate authority. In the case in hand under the Rules of Business the appropriate authority is the Chief Minister. Now we have to see whether any opinion was formed and by whom and what was the material.

15. The department has placed on record the personal file No. 1-209/69-PWD of Shri Yadav. This file starts with a note of the dealing Assistant, dated 13-4-71, and no record preceding this has been made available to the Court. It shows that the matter initiated at the instance of the Chief Engineer and the note was put up by the dealing Assistant. Thereafter there are office nothings which ultimately culminated in the constitution of a Departmental Promotion Committee, consisting of Shri U.N. Sharma, Secretary (P.W.D.) as Chairman, Shri H.C. Malhotra, Chief Engineer (II) and Shri R.C. Singh, Chief Engineer (I) as members and it appears from para 3 of the proceeding of the meeting of the D.P.C. held on 14-6-1971 that the committee considered the cases of three persons including the Petitioner for assessing their suitability for retention in service beyond the age of 55 years. The relevant portion of para 3 of the minutes reads as under:

Shri Jagdish Chander Sharma and Shri Kartar Singh should be retained in service beyond age of 55 years as provided in F.R. 56(a). Shri R.C. Yadav whose record has been consistently unsatisfactory should be given three months' notice in August, 1971, in order to retire him from service at the age of 55 years.

The minutes reveal that the committee examined the confidential records of these three Assistant Engineers pertaining to the period of three years immediately preceding the attainment of age of 55 years and thereafter the committee made the aforementioned recommendations, resulting in the issue of the impugned order, Annexure PK. The submission made by the Petitioner therefore, is not acceptable that there was no material on the basis of which the opinion was formed. The question is whether the opinion was formed by the Departmental Promotion Committee or by the appropriate authority. Note No. 12,

dated 14-6-71, shows that the minutes of the D.P.C. were put up before the Finance Minister, who, it appears, was also in charge of the P.W.D., for his approval, and his note No. 13 is to the following effect:

Secy. P.W.D. may kindly discuss.

Sd/- Karam Singh 3/7/71.

and then note No. 14 runs like-

Discussed with the F.M. Notice may be issued now.

Sd/- Secretary 16-9-71.

It is thereafter on the 15th September, 1971, that the notification, Annexure PK, was issued.

16. Consequently, it follows that the case was not put up before the Chief Minister, who for purposes for a case of compulsory retirement was the appropriate authority under the Rules of Business and the matter was disposed of at the end of the Finance Minister, who also did not form any opinion. What to talk of the material, the case was not at all sent to the Chief Minister. Therefore, for breach of Rule 58(v) of the Rules of Business this order is without jurisdiction and is liable to be struck down on this very ground.

17. The opinion in the present case was formed by the Departmental Promotion Committee, which cannot be said to be a delegate of the appropriate authority. The Chief Minister as the appropriate authority had to apply his mind and then to pass necessary orders, as contemplated under Rule 58(v) of the Rules of Business.

18. In the light of above, I, therefore, hold that the order has been passed in violation of Rule 58(v) of the Rules of Business, which enjoined that the case should have gone to the Chief Minister as it related to the case of compulsory retirement of a Gazetted Officer, that not having been done, the order is bad. In view of this I think it is not necessary for me to go into the other matters whether the order cast a stigma or the order is mala fide or that it is discriminatory.

19. Hence I accept this petition and quash the order, Annexure PK. In so far as the other orders are concerned they are only notices, which consequently become ineffective and the result, therefore, is that the Petitioner shall be deemed to have continued in service and he shall be entitled to all the benefits accruing from the quashing of this order. Petitioner shall get his costs from Respondent No. 1, assessed at Rs. 100/-.