
(2012) 01 MP CK 0024

In the Madhya Pradesh High Court

Case No : Writ Petition No. 16274 of 2007

Ramjilal Burman

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 25-01-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2012) 133 FLR 894 : (2012) ILR (MP) 1538

Hon'ble Judges : K.K. Lahoti, J;J.K. Maheshwari, J

Bench : Division Bench

Advocate : M.B. Saxena, for the Appellant; K.N. Pethia for the Respondents No. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

J.K. Maheshwari, J.—Invoking the supervisory jurisdiction of this Court under Article 226/227 of the constitution of India by challenging the tenability of order dated 18.9.2007 (Annexure-P/10) passed by the Central Administrative Tribunal dismissing the Original Application No. 1210/2005 filed by the petitioner, assailing the order of compulsory retirement dated 26.8.2004 and also of rejection of representation after decision of review committee dated 26.8.2005 petitioner has filed the present writ petition. The facts in brief are that the petitioner was appointed as Monument Attendant on 11.10.1971. The benefit of Assured Career Progression Scheme (hereinafter it be called as "the ACP Scheme") was granted w.e.f. 9.8.1999 as per order dated 13.2.2001. Vide order dated 26.8.2004, in exercise of power u/s 56 (j) of Central Fundamental Rules, he was retired compulsorily in public interest on completion of 50 years of age and 33 years of service. Assailing the said order an OA No. 986/2004 was filed, which was disposed of as per order dated 1.4.2005 with the direction to the respondents to decide the representation of the petitioner dated 27.11.2004 and to pass the detailed, reasoned and speaking order within the period of two months from the date of receipt of certified copy of the order of the Tribunal.

Thereafter the respondents have rejected the representation on 26th of August, 2005 upholding the order of compulsory retirement dated 26.8.2004. Thus the Original Application was filed before the Central Administrative Tribunal inter-alia contending that petitioner was extended the benefit of the ACP Scheme in the year 2001 based upon the recommendation of scrutiny committee, examining the performance and the records, however no room left with the department to treat him to be a deadwood and to retire him compulsorily in public interest. It is further contended that the scrutiny committee has merely considered the period of unauthorized leave, which was sanctioned by the department, however it would have no impediment on a service career. If the allegation of absence from duties has been denied, it is required to be examined by initiating the departmental enquiry and the order of compulsory retirement ought not to be passed solely for the said reason, as nothing is adverse after granting him the benefit of ACP scheme. It is said that the action so taken by the department is discriminatory because many of the employees whose service record is worse but their cases have not been scrutinized to retire them compulsorily taking appropriate action. It was also stated that passing of an order in exercise of power under FR 56 (j) without completion of 55 years of age merely on the basis of 33 years of service is not in accordance to law, therefore, the order of compulsory retirement and rejection of representation may be quashed.

2. The respondents have filed their reply stating the fact that the entire service record of the petitioner was screened by the review committee. As per report of the review committee dated 14.6.2004, it was clear that in addition to absence of duty and availing half pay leave and without pay leave, while discharging the duty he was found consuming liquor for which his service was terminated. On reinstatement again he was found consuming the liquor and was not discharging the duties of Chowkidar with integrity on monuments and found absent. On account of his willful absence from duties and carelessness, his integrity was found doubtful, however the petitioner was found to be deadwood for the employment of respondents. It is said that on account of his willful absence and on receiving complaints various notices and warning have been given to him which were not replied and responded. It is further stated that mere grant of the benefit of ACP Scheme cannot be compared with the promotion because it is merely a financial upgradation which may be given to the employees on the basis of seniority-cum-merit, however it may not be a ground to retain an employee in service. It is said that during the period 1998-2004 more than 50 valuable sculpture were resulted into the loss due to inappropriate working of petitioner. In such circumstances the order of compulsory retirement, rejection of the representation has rightly been passed.

3. The Central Administrative Tribunal after hearing him recorded the finding that the order passed in the case of N.P. Samadariya Vs. Union of India and Ors in OA No. 691 of 2003 dated 23.6.2004 relied upon by the petitioner is having no application to the facts of the present case. In view of the judgment of Apex Court in the case of Baikuntha Nath Das and another Vs. Chief District Medical

Officer, Baripada and another, and in the case of Post and Telegraph Board and others Vs. C.S. No. Murthy, 1993 SCC (L & S) 710 and after examining the ACP Scheme it was held that extending the benefit of financial upgradation, which is based upon the seniority-cum-fitness and not upon the merit, it is of no help to the petitioner. The Tribunal while dealing with the issue of not attaining the age of 55 years after referring FR 56(j) has observed that the case of the petitioner falls under sub clause (ii) and not under sub clause (i) of FR 56(j), therefore the order has rightly been passed. In addition thereto, it has been observed that he has completed 30 years of service which has not been denied, however considering the service record of the petitioner, he can be retired under rule 48 of the CCS (Pension) Rules, 1972. The Tribunal found that the order retiring the petitioner compulsorily is after following the procedure laid down and as per the recommendations of the Committee which do not appear to be mala fide or suffer from vice of arbitrariness.

4. Shri Saxena, learned Counsel representing the petitioner contends that after extending the benefit of ACP Scheme in the year 2001, no adverse material was available to the respondents to retire him compulsorily treating him to be a deadwood. In support of such contention reliance has been placed on judgments of J.D. Srivastava Vs. State of M.P. and Others, Ram Ekbal Sharma Vs. State of Bihar and Anr, reported in 1992 SLR 673, State of Gujrat Vs. Umedbhai M. Patel 2001 AIR SCW 862, Sayed Mubark Ali Vs. State of Rajasthan and another, reported in 2000 (4) SLR 581, Chandu Lal Vs. Management of M/s Pan American World Airways Inc., 1985 SCC (L&S) 535, M.S. Bindra Vs. Union of India and Others, and G. Vallikumari Vs. Andhra Education Society and Others, .

5. It is further contended that the order of compulsory retirement has been passed in exercise of power under FR 56 (i) but as the petitioner has not completed 55 years of age, therefore, order of compulsory retirement cannot be passed in exercise of such power and the Tribunal committed an error in rejecting the aforesaid plea. In the rejoinder plea has been taken that the rectification of the mistake on the note-sheet (Annexure R/1) is an outcome of manipulation to treat the order of retirement passed under rule 48 of CCS (Pension) Rules, 1972 instead of FR 56(j). It is submitted that the reasoning specified by the Review Committee is based upon no material, to which explanation of his working without demand of extra remuneration on the monuments at remote areas since 1971 to 2004 has been pleaded. It is further submitted that during the discharge of the duties, there was no loss to valuable sculptures, therefore the order impugned may be set aside.

6. Per contra, Shri K.N. Pethia, learned Counsel representing the respondents has argued in support of the findings as recorded by the Tribunal and contends that looking to the recommendations of the review committee, it is apparent that the petitioner was consistently found absent from duty and also found consuming liquor again and again on the duty place of monuments. His integrity has been found doubtful due to carelessness, however rightly recommended to retire him

in public interest compulsorily. So far as non-completion of age of 55 years as required under FR 56 (j) is concerned, it is submitted that the said matter was reconsidered by the committee as apparent from the note sheet (Annexure R/1) and looking to the recommendations it was found his order of retirement may be passed in public interest under Rule 48 of Central Civil Services (Pension) Rules, 1972. It is further contended that merely mentioning a wrong provision in the order would not invalidate the order once the criteria to retire an employee compulsorily, either under FR 56 (j) or under rule 48 of Pension Rules is the same. The reliance has been placed on the judgment of the Apex Court in the case of Baikuntha Nath Das (supra) and Hukumchand Mills Ltd. Vs. The State of Madhya Bharat and Another, . In the said facts and circumstances, it is prayed that the petition filed by the petitioner may be dismissed.

7. After having heard learned Counsel for the parties, it is to be seen whether the order of compulsory retirement Annexure-A/2 and rejection of representation Annexure-A/1 attached with O.A as Annexure-P/1 is based upon sufficient material available on record and the findings recorded by the Tribunal upholding the aforesaid order is in conformity to law or not?

8. To answer the aforesaid question guidelines framed by the Apex Court in the case of Baikuntha Nath Das (supra) are referred and still holds the field, which are reproduced as under:

(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 would not examine the matter as an appellate Court, they may interfere if they are satisfied that the order is Passed (a) mala fide, 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 favourable and adverse. If a government servant is promoted to higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, 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 circumstance by itself cannot be a basis for interference.

9. In the case of Post and Telegraph Board (supra) the Apex Court has held as under:-

As has already been pointed out, an order of compulsory retirement is not an order of punishment. Fundamental Rule 56 (j) authorises the Government to review the working of its employees at the end of their period of service referred to therein and to require the servant to retire from service if, in its opinion, public interest calls for such an order. Whether the conduct of the employee is such as to justify such a conclusion is primarily for the departmental authorities to decide. The nature of the delinquency and whether it is of such a degree as to require the compulsory retirement of the employee are primarily for the Government to decide upon. The courts will not interfere with the exercise of this power, if arrived at bona fide and on the basis of material available on the record.

10. In view of foregoing it is clear that the order of compulsory retirement is not an order of punishment. If the authority competent is of the opinion that the compulsory retirement of an employee is required in the public interest, the principles of natural justice, having no application because it is not the punishment. The order ought to be passed by authorities without having any malafide based on sufficient material after subjective satisfaction by due application of mind. The order ought to have been passed, after considering the entire service record giving more importance to the service record of last 5 years. If a person is promoted the adverse remarks lose their sting if promotion is based upon merit-cum seniority, and the un-communicated adverse remarks may also be taken note of. The Court while making the judicial scrutiny of the recommendations would not examine the matter as an appellate court. On the anvil of the touchstone of the aforesaid legal position, the recommendation of the review committee so made is required to be seen, which is reproduced as under:-

MINUTES OF THE REVIEW COMMITTEE MEETING HELD ON 14/6/2004

Today i.e. 14/6/2004, a meeting of the Review Committee was held under FR 56, in the chamber of Dr. N. Vyas, Dy. Superintending Archaeologist to review the service performance of Sri Ramji Lal Barman, Monument Attendant, Tigwa, who has joined in the Survey on 5/10/71, completed the 33 years of service and attained 50 years of age. In this meeting the following were present to review the performance:

1. Dr. N. Vyas, Dy. SA,
2. Sri M.S. Chauhan Dy. SA
3. Sri R.K. Sinha, ASA
4. Sri G. Ramchandani, ASAE

5. Sri D.S. Sood, ASAE

The performance of Sri Ram Ji Lal Barman was reviewed with a view, whether he should continue in service or awarded compulsory retirement. The following lapses have been noticed on part of Sri Ram Ji Lal Barman:

1. He was absent from duty for 727 days for which he has been treated on LWP.
2. He has availed EL for 534 days.
3. He has availed ML for 201 days.
4. HPL for 32 days.
5. Total leave period 1493 days.
6. He has been warned for proceeding on leave without permission and without handing over the charge.
7. He is used to sign the duty register while on leave.
8. He has been warned several times for remaining willfully absent from his duty.
9. He has been issued show cause notice for not found on duty and remaining absent from his duty place, consuming liquor and due to these lapses why the services not be terminated.
10. He has been found consuming liquor and not giving duty at the monument.
11. He has been found irregular during Govt. duty.

After going through his performance after assessing the personal records of the above mentioned employee it has been observed that

1. His integrity is doubtful due to willful absence and carelessness in duty.
2. He is ineffective for the Government.

Hence it has been decided that he may be given compulsory retirement:

Submitted to Superintending Archaeologist for orders please.

Agreed with the decision of the Review Committee Sd/- 22.6.04.

11. On examination of the instructions of the ACP Scheme, it is apparent that the benefit of ACP Scheme was granted to the petitioner on the basis of seniority-cum-fitness, however while extending the benefit of the second career advancement and financial upgradation, the merit consideration to extend the said benefit was not the criteria. In such circumstances, considering the recommendation of the review committee, it is apparent that the petitioner remained absent consistently, even after warning. On duty he was found in drunken position to which disciplinary action was taken, even thereafter he was again found consuming liquor consistently on duty place however his integrity was found doubtful. The performance of the petitioner was also not found

satisfactory becoming to a government employee as expected by the officer while recording subjective satisfaction. Thus in the opinion of this Court, it is not a case, in which no material is available or sufficient material is not available to reach a conclusion as arrived by the committee, recommending the petitioner to retire compulsorily in public interest. In the opinion of this Court, the sufficient material is available before the Committee to form an opinion against the petitioner to pass the order of compulsory retirement. It is to be observed here that the power so exercised by the authorities is after due application of mind and on satisfying with material so available before them. As per the instructions of the ACP scheme, such recommendations are based upon seniority-cum-fitness, the merit consideration is subsidiary, therefore such argument loses the strength in view of the legal position discussed herein above. It is to be further observed that in the facts of the present case, specific allegation of mala fide has not been alleged except to say the subsequent change of provisions from FR 56(j) to rule 48 of CCS (Pension) Rules, 1972 is by way of manipulation. In the opinion of this Court, the explanation put forth by respondent that wrong provision was referred in earlier order which is rectified subsequently appears to be a plausible explanation and liable to be accepted because the recommendation was made by committee after going through the entire service record, which do not suffer from vice of arbitrariness warranting interference by this Court, and also looking to the fact that the employer vests with the absolute power and the discretion to chop off the employees who are deadwood and not fit to continue further in the employment.

12. In view of foregoing facts, the judgments relied upon by petitioner is required to be analyzed. In the case of J.D. Shrivastava (*supra*) the facts were different wherein the consideration to recommend the judicial officer was made as per the entries of about 20 years before from the date of decision though the said officer was promoted subsequently relying upon the same entries. While in the present case, the petitioner was granted the benefit of ACP scheme on the basis of criteria of seniority-cum-fitness and not on consideration of merit, however such judgment is of no help to the petitioner. In the judgment of Ram Ekbal Sharma (*supra*), the Apex Court found that the order so passed making the allegation of financial irregularities committed by the officer concerned without following due process of law, which was punitive, however quashed the order of compulsory retirement. While in the present case, the competent authority has applied its mind on the basis of material available on record and the order is not punitive, therefore, it is of no help. In the case of Umedbhai M. Patel (*supra*), the Apex court found that the order of compulsory retirement was passed against an employee against whom disciplinary enquiry was initiated and he was under suspension without having adverse entry in the confidential record even after crossing efficiency bar, and merely two years were remained in his retirement, however the order was set aside. While in the facts of the present case, the position is entirely different as apparent from the discussion made herein above. In the case of Syed Mubarak Ali (*supra*) which is a case of Jaipur

Bench of Rajasthan High Court where no material was placed to form an opinion to retire an employee compulsorily although it is not binding but the reasoning so assigned to quash the order of compulsory retirement in the said case is entirely different and distinguishable on facts, therefore the petitioner cannot derive any benefit of such judgment. The cases of Chandu Lal (supra) and Ms. G. Vallikumari (supra) are the cases of the penalty, however the principles in a case of penalty are different than the order of compulsory retirement passed in public interest, however those cases are of no help to the petitioner.

13. The reliance so placed in the case of M.S. Bindra (supra) of the Apex Court is also to be seen wherein after going through the entire record the Apex Court found that the recommendations made was found inappropriate in a judicial scrutiny and not based on the sound principles while in the present case in view of the foregoing discussions, it is apparent that the scrutiny made by the authority competent is based on material available and with subjective satisfaction. In view of the foregoing, we are of the considered opinion that the power so exercised by the authorities to retire the petitioner compulsorily is in public interest with bona fides.

14. Now to dwell upon the argument so advanced by learned Counsel Shri Saxena that the petitioner had not completed 55 years of age at the time of passing the order of compulsory retirement, however issuance of impugned order under FR, 56(j) is unsustainable in law, and amounting to commit the illegality, to issue subsequent corrigendum Annexure R-1. It may also be seen that interpretation of the provisions of FR 56(j) (i) and (ii) made by the Tribunal is innocuous and contrary to the spirit of FR 56(j).

15. Under Fundamental Rule 56(j) the Government is having power to retire their employees in public interest and also under Rule 48 of CCS (Pension) Rules, 1972. In Pension Rules an employee is also having a right to obtain retirement by giving a notice as prescribed. After going through the said rules and the various judgments produced by the parties, it is apparent that under FR 56(j) the appropriate authority has absolute right to retire an employee if it is necessary to do so in public interest to the employee of group A or B service or post and has entered in Government service before attaining the age of 35 years, after he has attained the age of 55 years; in any other case, after he has attained the age of 55 years provided that in the age of a Group D official such action can be taken if he entered in service after 23rd July, 1966. In other words, a government servant belonging to Group A and B who has entered government service after attaining the age of 35 years, and officers belonging to Group C and D can be prematurely retired after they have attained the age of 55 years with the exception of Group D officials, who entered into service on or before 23d July, 1966. In addition a Government servant in Group C service or post who is not governed by any Pension Rules can also be retired after he has completed 30 years service under FR 56(j). The identical provisions exists under Article 459 of Civil Services Regulations. Under the aforesaid Rules the recommendations may

be made by the Committee following guidelines. The criteria is required to be followed by the Committee, to a Government employee whose integrity is doubtful will be retired. If the employee was found ineffective will also be retired. The decisive consideration should be the fitness, competence of the employee to continue on the post which he is holding. The service record is also required to be considered as specified in the judgment of Baikunth Das Nath (supra). It is further to be observed that no employee should ordinarily be retired on the ground of ineffectiveness if in any event he would be retired attaining the age of superannuation within a period of one year from the date of consideration of his case. In view of the foregoing it is clear that either for issuance of order under FR 56(j) or under Rule 48 of the CCS (Pension) Rules, it shall be based upon the recommendation of the committee. If the committee has recommended that employee is fit to retire in public interest and completed the age or the qualifying service of 30 years on the date of recommendation, the orders to retire him compulsorily may be passed. If this Court assumes that the petitioner's case falls under category D employee and he has not attained the age of 55 years but the order was passed under FR 56(j) by wrongly quoting the provision in place of rule 48 of CCS (Pension) Rules, 1972, it would not invalidate or vitiate the recommendations of the Committee because he was not found fit to be continue in the employment looking to his past performance and conduct relates to his integrity. In view of the discussion made herein above, it is clear that the recommendations to retire the petitioner in public interest has rightly been made by the Committee after subjective satisfaction and on the basis of material, however in such circumstances if the order of compulsory retirement of the petitioner was passed under FR 56(j) which is subsequently corrected by issuing the corrigendum as per Annexure R/1, it would not invalidate the recommendations of the committee. In the opinion of this Court, the petitioner may be retired compulsorily in public interest under rule 48 of CCS (Pension) Rules, 1972 because he had already completed 30 years of service on the date of order. In the said context, reliance on the judgment of Privy Council in the case of AIR 1936 253 (Privy Council) contending that the power is given to do a certain thing in a certain way the thing must be done in that way or not otherwise, and per contra the judgment of the Apex Court in the case of Hukumumchand Mills Ltd. (supra) has been considered. In this context, it is to be observed that merely mentioning a wrong provision in order and subsequently amending the same referring correct rule would not vitiate the proceedings and consequential order. In such circumstances the rectification made by the respondent cannot be said to be the manipulation tainted with the mala fide, in fact, it is amounting to rectification of mistake which may amounting to the irregularity and not the illegality. In view of the foregoing discussion if the interpretation of FR 56(j) (i) and (ii) made by the Tribunal has not been found appropriate even then it would not change the result of the petition. Thus the argument advanced on the said issue by Shri Saxena is hereby repelled. In view of the foregoing discussions and for the reasons stated herein above we are of the considered opinion that the order passed by the authority retiring the

petitioner compulsorily in public interest is based upon the recommendations of the committee, made bona fide and after subjective satisfaction finding the petitioner to be a deadwood and required to be chopped off. Consequently the order of compulsory retirement of petitioner passed in public interest is in accordance with law. Accordingly, the order passed by the Tribunal dismissing the original application filed by the petitioner do not warrant any interference in this writ petition which is hereby dismissed. In the facts and circumstances of the case, parties are directed to bear their costs.