
(2015) 10 BOM CK 0161
In the Bombay High Court
Case No : Writ Petition No. 5123 of 2014

Reeta Harode

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 29-10-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 10 BOM CK 0161

Hon'ble Judges : B.P. Dharmadhikari and P.N. Deshmukh, JJ.

Bench : Division Bench

Advocate : S.W. Sambre, Advocate, for the Appellant; N.R. Patil, AGP, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—By this petition filed under Article 226 of the Constitution of India, the petitioner questions the judgment dated 27.08.2014 delivered by the Maharashtra Administrative Tribunal (MAT) in Original Application No. 324 of 2014. The petitioner approached MAT assailing her superannuation on reaching the age of 60 years and questioned refusal of State Government to grant her an extended age of superannuation beyond 60 years and up to 62 years. The date of birth, the date of retirement on reaching the age of superannuation or the date on which she completes 62 years of her age are not in dispute. She reaches 62 years of her age on 31.10.2015 and hence upon the request made by Shri Sambre, learned counsel for the petitioner on 07.10.2015, the petition was directed to be listed on 19.10.2015. That is how it is being heard finally today.

2. The petitioner reached the age of 60 years on 31.10.2013. On 29.10.2013, the State Government denied her extension for further two years on the ground that her Confidential Reports in proceeding five years did not satisfy norms prescribed by clause 11(4) of Government Resolution dated 05.03.2011. It is not in dispute that an incumbent has to possess minimum three "A" grade Confidential Reports and two "B+" grade Confidential Reports in those five years.

The Government found that the petitioner was having "B" grade only in said five years. Because of this decision, the petitioner stood superannuated on 31.10.2013. However, it appears that she filed a petition before this Court vide Writ Petition No. 5880 of 2013 under Article 226 of the Constitution of India for getting that communication quashed. The petition was looked into by this Court on 28.10.2013 and the parties were directed to maintain status quo. On 09.04.2014, this Court continued interim orders for a period of six weeks and permitted the petitioner to approach MAT. Thereafter, MAT was approached in O.A. No. 324 of 2014 and on 27.08.2014, that O.A. came to be rejected. The petitioner claims that though till rejection of her case by MAT, she continued to work, she has not been paid salary therefor.

3. Shri Sambre, learned counsel by inviting attention to these facts states that the only issue to be looked into by the MAT was, the grievance of non-communication of adverse entries in Confidential Reports. He has placed reliance upon the judgment of the Hon'ble Apex Court in the case of Dev Dutt Vs. Union of India (UOI) and Others, , to urge that any entry in Confidential Report which operates to the prejudice of the employee is rated as adverse and needs communication. Here, when clause 11(4) of Government Resolution expected an incumbent to possess three "A" and two "B+" grades, rating of the petitioner as "B" in those five years is nothing but an adverse action. As those adverse remarks are not communicated, the same would not have been looked into for this purpose and denial of extension up to 62 years is, therefore, arbitrary. He points out that the Government Resolution is the outcome of litigation before this Court and has been issued after its due approval of the court. The parameters prescribed therein are, therefore, binding and the petitioner is entitled to be considered in terms thereof. If in law, the case of the petitioner cannot be considered in terms thereof, denial of extension cannot be sustained. In the alternative and without prejudice, he has invited our attention to a corrigendum issued on 23.02.2012. He points out that there persons who did not possess Ph.D. degree were given certain relaxation and the norm prescribing Ph.D. as also norms about having Confidential remarks of particular grade have been relaxed. He argues that the petitioner already had Ph.D. degree and as such, the relaxed norms should have been applied even to her case. Indirectly, he argues that when norm prescribing parameters in relation to Confidential Reports can be relaxed for a non Ph.D. holder, the norms cannot be enforced in the case of a more meritorious candidate like the petitioner. He fairly points out that though MAT has referred to the judgment of the Hon'ble Apex Court in the case of Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, , the said judgment does not consider the question of grading of Confidential Report and its adverse impact as has been looked into in later judgment in the case of Dev Dutt vs. Union of India & Ors. (supra). He, therefore, seeks a direction to the respondents to extend the petitioner's service till she attains 62 years of age i.e. till 31.10.2015. He also relies upon two unreported judgments of this Court which follow Dev Dutt vs. Union of India &

Ors. (supra) and grant such an extension.

4. Shri Patil, learned Assistant Government Pleader, in reply submits that the petitioner has not discharged her duties for a single day after 31.10.2013, as such, there is no question of paying her any amount towards wages or back wages. He also invites our attention to the fact that the though judgment of the Hon''ble Apex Court in the case of Dev Dutt vs. Union of India & Ors. (supra) has been followed by Division Benches of this Court on 12.08.2014 while deciding Writ Petition No. 2178 of 2014 and on 27.01.2015 while deciding Writ Petition No. 4877 of 2014, here also the Court did not grant wages for the period during which the respective petitioners were out of employment. He attempts to distinguish the above mentioned two judgments of Division Benches of this Court and the judgment of the Hon''ble Apex Court in the case of Dev Dutt vs. Union of India & Ors. (supra) by submitting that the question of bearing of need to communicate the adverse remarks on grant of extension beyond the normal age of superannuation or then while passing an order of compulsory retirement was not required to be gone into in the case of Dev Dutt vs. Union of India & Ors. (supra). He submits that there, after finding that one Confidential Remark was not communicated to the employee, the Hon''ble Apex Court has remitted the matter to the employer to consider the said aspect by giving the appellant Dev Dutt an opportunity to make a representation against that adverse remark. He has invited our attention to the fact that the judgment in the case of Baikuntha Nath Das & Anr. vs. Chief District Medical Officer, Baripada & Anr.,(supra), is delivered by larger Bench and it is squarely on the issue to be looked into by this Court. He relies upon conclusion reached in para 34 of said judgment and submits that mere non communication is held not sufficient to interfere with the orders of present nature. He has also invited our attention to the judgment of the Hon''ble Apex Court in the case of S.D. Singh Vs. Jharkhand High Court, through R.G. and Others, , to submit that when there is some material available with the employer and that material is looked into, the order of employer cannot be interfered with while undertaking judicial review.

5. A perusal of judgment dated 27.08.2014 delivered by MAT shows that after considering relevant Government Resolutions, it has looked into the judgment of the Hon''ble Apex Court in the case of Baikuntha Nath Das & Anr. vs. Chief District Medical Officer, Baripada & Anr., (supra), and noted that non-communication of adverse Confidential Remarks cannot form the basis for interference by the Court in the matters of compulsory/ premature retirement. It has then looked into the facts at hand and ultimately found that there was no merit in the challenge in this respect. The question of relaxation given to incumbents by corrigendum dated 23.02.2012 is also gone into in para 17 to 20 of the judgment. It found that the argument of discrimination being advanced, was baseless.

6. In the matter before us, the requirement of possessing three Confidential Reports of "A" grade and two Confidential Reports of "B+" grade is not in

dispute. The petitioner possess Ph.D. degree but then in the impugned order the State Government has clearly mentioned that in the preceding five years of her service, grades earned were "B" only. This observation or correctness thereof is also not in dispute. The only submission is, these remarks are not communicated. A perusal of the Hon''ble Apex Court in the case of Baikuntha Nath Das & Anr. vs. Chief Medical Officer, Baripada & Anr., (supra), particularly para 34(v) shows that an order of compulsory retirement cannot be quashed by the Court merely on showing that while passing it, uncommunicated adverse remarks were taken into consideration. The Hon''ble Apex Court has clarified that such non-communication by itself cannot form a basis for interference and interference is permissible only on the ground mentioned by it in sub-para (iii) of para 34. In sub-para (iii), the Hon''ble Apex Court has held that principles of natural justice have no application in the context of an order of compulsory retirement. It has clarified that judicial scrutiny is not excluded but then the High Court or the Hon''ble Apex Court cannot examine the controversy as an appellate forum. They may interfere if the order is found to be passed malafide or is found based on no evidence or is found arbitrary.

7. Before us, there are no allegations of either malafides or of absence of material to support the remarks. The denial of extension is urged to be arbitrary only on the ground that uncommunicated remarks have been looked into. When the Hon''ble Apex Court rules out the application of or relevance of principles of natural justice and lays down that non-communication of adverse remarks by itself cannot be a ground for interference, we find that no exception can be taken to the findings reached by the MAT. The petitioner before us is not disputing the fact that in relevant previous five years, she has earned only "B" grade in Confidential Reports. She has not named any authority or officer evaluating her performance, as having any bias or ill-will & has not pleaded any deliberate downgrading with a view to victimize her. We, therefore, find that in limited scope while undertaking the judicial review available in law, the order of Government dated 29.10.2013 cannot be interfered with.

8. This brings us to the other contention about exemption or relaxation made in the case of certain incumbents. The relaxation has been ordered on 23.02.2012. The reasons therefor are given in para 2 thereof. While upholding clause 11(1), 11(3) and 11(4) of Government Resolution dated 05.03.2011, as constitutionally valid, the High Court directed an exception to be carved out for the period limited up to 31.03.2014. It directed to place the case of Assistant Professors who did not possess Ph.D. degree but have received the benefits of the Career Advancement Scheme before the Performance Review Committee and that Committee was directed to assess their performance as per the parameters set out for deciding their retention beyond the age of 60 years. Thus, relaxation or exemption from Ph.D. & prescribed grades of CRs. was made only in the case of few of those who could not procure Ph.D. till 31.03.2014 for no fault on their part. It is not an exception made to operate generally but restricts it to only those non-Ph.D. holders who had received benefit of Career Advancement

Scheme. The parameters with respect to which the case of the petitioner is evaluated are upheld by this Court. The Division Benches of this Court then has taken note of the fact that though the incumbent could not secure Ph.D degree, they had received benefit of Career Advancement Scheme. It is in view of this position that corrigendum has been issued and the requirement of possessing Ph.D. degree or then specific grades of Confidential Reports as imposed by Government Resolution dated 05.03.2011 read with later Government Resolution dated 23.11.2011 have been relaxed. The logic behind granting relaxation from specific grades of last 5 CRs is not assailed by the petitioner and hence, it has to be presumed to be valid. Fact that these non-Ph.D. incumbents have received benefit of Career Advancement Scheme may have prompted the State Government to relax the requirement imposed by clause 11(4) of GR dated 05.03.2011. The petitioner who already had a Ph.D. degree, therefore, cannot claim benefit of this relaxation.

9. The Hon''ble Apex Court in the case of Dev Dutt vs. Union of India & Ors., (supra) has considered grievance of an employee who was denied promotion as superintending engineer because he had earned "Good" entry as an executive engineer while the service rules prescribed the bench mark of "very good". Because of that entry, his juniors superseded him while he could not be promoted and the Hon''ble Apex Court, therefore, found that the nomenclature as "good" or "very good" was not decisive. The discussion in paragraphs 26, 33 and 36 shows that the Hon''ble Apex Court in said judgment has evolved a new principle of natural justice to instill fairness and transparency in public administration. But then in paragraph 44, the Hon''ble Apex Court directed the employer to communicate "Good" entry to the appellant within a period of two months and gave appellant Dev Dutt, an opportunity to make representation against it. If as a result of consideration of such representation, said entry was to be upgraded, the Hon''ble Apex Court also ordered the employer to consider him for promotion retrospectively. Thus, this judgment does not consider the relevance of Confidential Reports/ Remarks or the need of its communication in compulsory retirement matters & need of possessing a "legal right". The Hon''ble Apex Court had no occasion to look into larger Bench judgment delivered in the case of Baikuntha Nath Das and Anr. vs. Chief District Medical Officer, Baripada & Anr., (supra). The larger Bench has in turn held that such uncommunicated remarks can be looked into for the purpose of compulsory retirement and an order of compulsory retirement can not be set aside merely because the adverse remarks or CRs are not communicated to the concerned employee. There is no question of any compliance with the principles of natural justice.

10. In D.C. Aggarwal (Dead) by LRs. Vs. State Bank of India and Another, , Hon''ble Apex Court relies upon its earlier ruling to point out that in State Bank of Bikaner and Jaipur and others Vs. Jag Mohan Lal, , it had occasion to point out that a rule under which extension of service can be granted beyond the normal age of retirement, does not invest a legal right in the employee to be granted such an extension. It further observes in paragraphs 30 & 31 that :-

"30. If the bank considers that the continuance of services of an officer is desirable in the interest of the bank, it may allow him to continue beyond the age of superannuation. If the bank considers that the service of the officer is not required beyond the age of superannuation, that is the end of the matter. Further, non-extension of service is no reflection on the calibre of the officer and it carries no stigma.

31. It appears to us that these principles were not kept in mind by the learned Single Judge when he interfered with the discretion of the respondent Bank not to grant an extension to the appellant. The Division Bench has, however, rightly applied the legal principle stated in Jag Mohan Lal and found that there was no such right vested in the appellant to demand an extension beyond the age of fifty-eight years. Further, in the facts and circumstances of the case, the Division Bench found that the extension had been refused for good reasons and was not liable to be interfered within its writ jurisdiction. We agree with this reasoning of the High Court.

Similarly in Rajendra Singh Verma (Dead) through L.Rs Vs. Lt. Governor of NCT of Delhi and Another, :, Hon"ble Apex Court accepts and points out the relevant norms for grant of extension. It observes in paragraph 172 that :--

"172. In view of the direction contained in All India Judges. Assn. (1) case Rule 31-A was inserted in the DJS Rules with effect from 1-1-1996 providing that the normal age of retirement of the Delhi judicial officers governed by the DJS Rules would be 60 years. The potential for continued utility was to be assessed and evaluated at the age of 58 years because the benefit of the increase of the retirement age to 60 years was not available automatically to all judicial officers irrespective of their past records of service. Though this Court observed that the standard of evaluation for determining the potential for continued utility should be the same as for compulsory retirement but it was specifically made clear that the assessment directed was for evaluating the eligibility to continue in service beyond 58 years of age and was in addition to and independent of the assessment for compulsory retirement that might have to be undertaken under the relevant service rules at the earlier stage(s)."

It may be noted that here the Hon"ble Apex Court also refers to the judgment in case of Dev Dutt (supra.)

11. The employer can order compulsory retirement before employee reaches normal age of superannuation. Thus, by order of compulsory retirement, employee's otherwise normal tenure, which could have been up to his reaching the prescribed superannuation age i.e. 58 or 60 years, as the case may be, stands curtailed. In the case of present nature where issue is of further extension, the employee continues till he or she reaches the particular age & then one has to find out suitability for further continuation. The question is of retention of such an employee for a particular period after reaching that age. When principles of natural justice are held not applicable in the matter of

compulsory retirement which event occurs before reaching the normal age of superannuation, it is obvious that the same can not be relevant while considering the retention beyond age of 60 years in the present matter. This extension is not automatic & principles which regulate compulsory retirement are also germane while considering the case of an employee for his further retention. We, therefore, find that the analogy laid down by the Hon''ble Apex Court in para 34 of its judgment in the case of of Baikuntha Nath Das and Anr. vs. Chief District Medical Officer, Baripada & Anr., (supra) is squarely attracted & can be safely made applicable here.

12. The Division Benches of this Court which decided Writ Petition Nos. 2178 of 2014 and 4877 of 2014 (supra) had no reason to look into the judgment of the Hon''ble Apex Court in the case of of Baikuntha Nath Das and Anr. vs. Chief District Medical Officer, Baripada & Anr., (supra). Thus, various facets of controversy, which are pressed into service by the learned AGP before us and have also been looked into by the MAT, did not surface before those Benches. Those Division Benches, therefore, proceeded on presumption that grant of an extended age of retirement is automatic & mere non-communication of adverse remarks by itself is sufficient to vitiate the order denying such an extension. We have noted that this militates with the conclusions reached by the Hon''ble Apex Court in para 34(v) of its larger Bench judgment in the case of Baikuntha Nath Das and Anr. vs. Chief District Medical Officer, Baripada & Anr., (supra).

13. In this situation, we find no case made out warranting interference. Writ Petition is accordingly dismissed. Rule discharged. However, in the facts and circumstances of the case, there shall be no order as to costs.