
(1971) 03 PAT CK 0011
In the Patna High Court
Case No : C.W.J.C. No. 1777 of 1970

Satya Kinkar Chatterjee

APPELLANT

Vs

M.S. Gujral and Others

RESPONDENT

Date of Decision : 16-03-1971

Acts Referred:

Constitution of India, 1950 — Article 309, 310, 311, 311(1)

Citation : (1971) PLJR 371

Hon'ble Judges : S. Sarwar Ali, J;N.L. Untwalia, J

Bench : Division Bench

Advocate : B.C. Ghose, Pralay Kumar Sinha, Swaraj Kumar Ghose and S.K. Chattopadhyaya, for the Appellant; P.K. Bose, for the Respondent

Final Decision : Dismissed

Judgement

N.L. Untwalia, J.—The petitioner's case in this writ application is that he joined the service of the East India Railway on 4.12.37 as a Clerk in the Personnel Branch of the said Railway at Dinapur. He was confirmed as a Clerk in 1939 and was promoted from post to post until he was appointed as Office Superintendent, Personnel Branch, Divisional Superintendent's Office, Dinapur, in July, 1966. In connection with the cases in the High Court and Lower Courts at Patna, he had to attend the offices of the Advocates concerned. But when Shri M.S. Gujral joined as Divisional Superintendent, Dinapur, in December, 1969, he expressed his displeasure at the maintenance of the Centralized Section for conducting the cases, of which the petitioner was in charge. On 6th August, 1970, the Divisional Personnel Officer, respondent no. 2, issued a direction to the petitioner not to go to Patna to instruct lawyers in pending cases either in this Court or in the lower courts. According to the petitioner's case, this was done at the orders of respondent no. 1. The Advocates concerned made a grievance when the petitioner was prevented from going to them because the work was suffering. Some modification in the system of sending the petitioner to the Advocate concerned was made by an order issued by respondent no. 2 on 11th September,

1970, a copy of which is Annexure 3 to this writ application. But this was not sufficient, and accordingly the lawyers wrote to the Law Officer, Eastern Railway, Calcutta, requesting him to issue necessary instructions to respondents 1 and 2 (respondent no. 3 is the Union of India) asking for a general permission to the petitioner to attend the office of the counsel at Patna whenever required by him. The letters were written by them on 30th September, 1970 and 2nd October, 1970. This annoyed respondent no. 1 and enraged him against the petitioner. As a consequence thereof, he made an order on 17th October, 1970 and communicated the same to the petitioner on the same day at 4 P.M. purporting to retire the petitioner with effect from the forenoon of Sunday, the 18th October, 1970. A copy of the impugned order is Annexure 5 to the writ application. According to the petitioner's case, he had applied for leave with effect from 19th October, 1970 with permission to leave the station on the 17th and to avail of Sunday along with the same as part of the leave. Immediately on receipt of the impugned order (Annexure 5) he wrote to respondent no. 1 protesting against the said order (Annexure 5) and requesting him to revoke it. This letter is Annexure 6. According to the rules, the petitioner's age of superannuation was 60 years and his date of birth being 1st February, 1913, he would have superannuated on 1st February, 1973. He was allowed to continue in service on attaining the age of 55 years after 1st February, 1968. In the first instance he was granted extension for 3 years although under the rules it was not necessary to do so. In the writ petition, the petitioner stated that Rule 2046 of the Indian Railway Establishment Code, Volume II, which is equivalent to Rule 56 of the Fundamental Rules, was modified by the President of India under Article 309 of the Constitution by a circular letter dated the 7th February, 1967. The petitioner was appointed to officiate in a higher post whenever it fell vacant, the latest of which was on the 31st August, 1970 for a period of 32 days, that is to say, 16 days prior to the order of respondent no. 1 compulsorily retiring the petitioner. The main grievance in the petition was that even in pursuance of Clause (h) of Rule 2046 of the Indian Railway Establishment Code, Volume II, the impugned order did not give the petitioner statutory 3 months' notice, it gave him 3 months' salary in lieu of the notice, for which there was no provision in Clause (h) at the relevant time. The petitioner's grievance is that the order was mala fide and illegal. Upon these allegations, he obtained a rule against the respondents to show cause why the order dated 17th October, 1970 contained in Annexure 5 be not called up and quashed by grant of an appropriate writ.

2. On 6.11.70 a supplementary affidavit sworn on 30.10.70 was filed, by which it was admitted that the provision for giving 3 months' pay in lieu of notice had been restored with effect from 15th March, 1969 when the rule was further amended hence that point would not be pressed. The amended rule was appended to this supplementary affidavit as Annexures 7 and 8.

3. A counter affidavit sworn by the Divisional Personnel Officer, respondent no 2, was filed on behalf of the respondents on 18.1.71. Very many facts stated by the petitioner in support of his writ application to show that the impugned order was

made mala fide have been controverted in this counter-affidavit. I shall briefly refer to a few. In the 7th Paragraph it is stated that the petitioner used to attend the office of the Advocates of the High Court and the District Court at Patna and make enquiries from them in regard to the cases generally and answer their questions with regard to service rule and the notifications. The dealing Assistants of the respective cases were, however, deputed to assist the Advocates of the High Court and of the District Court as they had more insight and knowledge about the details of the cases dealt with by them. The petitioner used to go to the Advocates suo motu and used to make queries from them. In another Paragraph it is stated that in 1967 a Centralized Court Case Section was opened in the Personnel Branch in the office of the Divisional Superintendent, Eastern Railway, on an experimental basis for better and more efficient handling of court cases. This Section was placed under a Head Clerk and not under the petitioner. The petitioner, however, as an Office Superintendent had an over all supervision of all the sections in the Personnel Branch. Subsequently, on experiment it was found that the Centralized Court Case Section was not producing results, as was expected, and it did not prove to be better in any way than the previous arrangement. It was, therefore, decentralized again on and from 20.7.70, as would appear from a copy of office order (Annexure C). It was also felt that other staff of the Personnel Branch should be trained in court cases of the Personnel Department and hence the petitioner was directed by respondent no. 2 not to go to Patna without prior permission from him. The Advocates concerned were not made aware about the abolition of the Centralized Court Case Section in the Personnel Branch and in that ignorance they wrote the letters to the Divisional Superintendent and the Law Officer. The order dated 11.9.70 (Annexure 3) was not brought to the notice of the Advocates and the letter written by them to the Law Officer was never forwarded either to respondent no. 1 or 2, and they were not made aware of it. The assertion in the counter-affidavit is that the order (Annexure 5) was made by the appointing authority, respondent no. 1, in public interest and not mala fide, as alleged by the petitioner. It is further asserted that it is not correct to say that any application for leave effective from 19.10.70 and permission to leave the headquarters and to avail of Sunday, the 18th October, 1970, was received either on or prior to 17.10.70.

4. The case of the respondents further is that petitioner was appointed as a Card Index Clerk on probation, which was a ministerial post, on 4.12.37 and he continued to be a temporary hand up to 23.8.39. He was confirmed with effect from 24.8.39, as would be evident from Annexures A and B to the counter-affidavit, the former being the appointment letter and the latter being a copy of the service record.

5. An affidavit in reply was filed by the petitioner only yesterday when the hearing of the case commenced. In this affidavit he has not been able to give any other letter of appointment and assert that he was holding any permanent post either on a provisional basis or on a permanent basis on the 31st of March, 1938. He has merely referred to the statement of facts in his petition in

connection with the alleged case that the impugned order was made mala fide. In 29th Paragraph of the affidavit in reply the petitioner stated that he was, on 31st March, 1938, holding a permanent post of a Clerk in the office of the Divisional Superintendent, Dinapur.

6. At the outset I am constrained to remark that it is unbelievable that the petitioner being the Office Superintendent in the Personnel Branch of the Eastern Railway at Dinapur was not aware of the latest rule contained in Clause (h) of Rule 2046. I am inclined to think that he deliberately made out a wrong case in the writ petition that the impugned order was bad, as instead of giving 3 months' notice, by it 3 months' pay in lieu thereof had been offered. After having obtained rule in this case on 20th October, 1970 the petitioner filed the supplementary affidavit, as stated above, on the 6th of November, 1970. Be that as it may, nothing turns upon that, and now I proceed to state and discuss one by one the only three points urged on behalf of the petitioner in support of the rule.

7. The points urged on behalf of the petitioner are--

(i) that the order (Annexure 5) is illegal as the petitioner being in service of the Railway Establishment from before the 31st of March, 1938, he could not be made to superannuate or compulsorily retire before the age of 60,

(ii) that the rule empowering the authority to make an order of compulsory retirement is bad, illegal and ultra vires, and

(iii) that the power was exercised by respondent no. 1 mala fide and not in public interest.

8. It would be convenient to refer to the rules not from the annexures given by the petitioner in his supplementary affidavit but from the annexures to the counter-affidavit, which were more accurate. It would appear from Volume II of the Indian Railway Establishment Code published in 1966 that Sub-rule (2) of 2046 stood in or before the year 1966 as follows:

(a) A ministerial servant, who is not governed by Sub-clause (b), may be required retired at the age of 55 years, but should ordinarily be retained in service, if he continues efficient up to the age of 60 years. He must not be retained after that age except in very special circumstances, which must be recorded in writing, and with the sanction of the competent authority.

(b) A ministerial servant,

(i) who has entered Government service on or after the 1st April, 1938, or

(ii) who being in Government service on the 31st March, 1938 did not hold a lien or a suspended lien on a permanent post on that date,

shall ordinarily be required to retire at the age of 55 years. He must not be retained after that age except on public grounds which must be recorded in

writing and with the sanction of the competent authority and he must not be retained after the age of 60 years except in very special circumstances.

Various amendments in the rule were made from time to time in exercise of the power of the President under Article 309 of the Constitution. On the 11th of January, 1967, Clause (b) was introduced which appears from Annexure DI quoted as follows:

(b) A ministerial railway servant who entered Government service on or before the 31st March, 1938 and held on that date,

(i) a lien or suspended lien on a permanent post, or

(ii) a permanent post in a provisional substantive capacity under Clause (d) of Rule 2008 and continued to hold the same without interruption until he was confirmed in that post,

shall be retained in service till the day he attains the age of sixty years.

It would also be advantageous to quote Clause (a) of the said rule which was introduced on that very date (11.1.67)--

Except as otherwise provided in this rule, every railway servant shall retire on the day he attains the age of fifty-eight years.

Clause (h) which was introduced on that date read as follows:

Notwithstanding anything contained in this rule the appointing 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 railway servant on attainment of the age of fifty-five years or thereafter by giving him notice of not less than three months in writing.

In note 1 "appointing authority" was defined to mean the authority competent to make the first appointment to the grade which the railway servant for the time being holds. Then came the further amendment on 15.3.69 and the amended Clause (h) now reads as follows:--

Notwithstanding anything contained in this Rule, the appointing 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 railway servant on attainment of the age of fifty-five years or thereafter by giving him notice of not less than three months in writing or three months' pay and allowance in lieu of such notice.

9. It would thus be seen that according to Clause (b) of Sub-rule (2) of Rule 2046, as it stood in the year 1966 or before, the age of superannuation of the petitioner was 55 years, because he did not come in exception (ii) as he did not hold a lien or suspended lien on a permanent post. Nowhere the petitioner has asserted that he was holding a permanent post on a permanent basis. The post to which he was appointed in December, 1937 may be a permanent one. His appointment, as it appears to me, undisputedly was a temporary one may be temporary appointment on probation. But he was made permanent after 31st

March, 1938. Under amended Clause (b), as amended on 11.1.67, the petitioner's age of superannuation could be taken as 60 provided on 31st of March, 1938 he held a Hen or a suspended lien on a permanent post or a permanent post in a provisional, substantive capacity under Clause (d) of Rule 2008. On the facts stated by me, he was holding neither. That being so, his case is covered by Clause (a) as amended on 11.1.67 and his age of superannuation was 58 years.

10. But I must hasten to add that whether his age of superannuation was 58 or 60 years, in either view of the matter, the power was exercised against him making him compulsorily retire. It could be exercised under Clause (h) in either view of the matter. I confess that I could not understand the argument of Mr. Ghose that because of Clause (b) power of compulsory retirement could not be exercised against the petitioner. In other words, the argument was that power of compulsory retirement cannot be exercised before the age of superannuation is reached. This is an argument so obviously wrong that I need not detain myself to discuss it any further.

11. Mr. Ghose strenuously urged the second point in support of the case of the petitioner. He submitted that the power of compulsory retirement has been held to be valid only if the power is given to the appropriate Government, the President, as a matter of that the Central Government, the Governor and as a matter of that the State Government, it cannot be given to a subordinate officer if that officer happens to be the appointing authority in case of a Government servant. No authority could be cited in support of these propositions of law. In Fundamental Rule 56 the expression used is "appropriate authority" and not "appropriate Government". Times without number the validity of Rule 56 has been upheld by the Supreme Court. Mr. Ghose referred to the leading case of (1) Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI), and the case of (2) T.G. Shivacharana Singh and Others Vs. The State of Mysore, to lend support to his argument that an appointing authority cannot have the power to compulsorily retire a Government servant. In reply Mr. Bose referred to the decisions of the Supreme Court in (3) Kailash Chandra Vs. Union of India (UOI), and (4) Union of India (UOI) Vs. Col. J.N. Sinha and Another, . Since the point has not been canvassed and decided in any of the decisions aforesaid, I need not discuss them in any detail. The principles which could be deduced from these cases are these (i) that at a certain late stage of the service a Government servant may be compulsorily retired in public interest even before he reaches the age of superannuation, (ii) that no reasons need be stated in support of the order of compulsory retirement, (iii) that no show cause notice need be given to such a Government servant and principles of natural justice are not violated for failure to give such a notice and (iv) that the rule empowering an authority to compulsorily retire, a Government servant can be well supported with reference to the pleasure doctrine engrafted in Article 310 of the Constitution and Article 311 does not come into play in such a case.

12. In the background of these principles. I am inclined to think that a Government servant holding civil post during the pleasure of the President or the Governor, as the case may be, is liable to be compulsorily retired. If he is dismissed or removed from service then Article 311(1) provides that it cannot be so done by an authority subordinate to that by which he was appointed. Taking the due from the said provision, it would follow logically that a Government servant holding a civil post during the pleasure of the President or the Governor can be made to compulsorily retire at the instance of the appropriate authority (not appropriate Government) as mentioned in Fundamental Rule 56, which, to my mind, would be the appointing authority, as mentioned in Clause (h) of Rule 2046 of the Railway Establishment Code, or may be any higher authority. The pleasure of the President or the Governor cannot mean that the power of compulsory retirement must necessarily rest in the Central or the State Government. The exercise of the power is not judicial, as was contended on behalf of the petitioner, it is purely an administrative act. And, if the power is conferred on the appointing authority, that authority, in my opinion, is the appropriate authority for exercise of the power in public interest. Therefore, on principle also I have no difficulty in rejecting the argument put forward on behalf of the petitioner.

13. Coming to the attack on the order on the ground of the power having been exercised mala fide by respondent no. 1 I may state here that the facts stated in the petition do not establish that the power was exercised by respondent no. 1 mala fide. It is difficult to imagine that respondent no. 1 who is a sufficiently high officer in the Railway Administration would have exercised the power against the petitioner for the reasons stated by him in his petition. Further, I am inclined to accept the statements in the counter-affidavit on questions of fact. To my mind, the order made in September, 1970 by respondent no. 2 was not brought to the notice of the Patna Advocates nor is there anything to show that either respondent no. 1 or respondent no. 2 felt annoyed with the petitioner because of the Advocate's writing letters to the Law Officer in Calcutta. The Law Officer did not make any grievance against either of the respondents in that regard. Very likely, as asserted on their behalf, nothing was brought to their notice that the Advocates had written letters to the Law Officer. I have no doubt in my mind that respondent no. 1 must have formed his opinion bona fide that it was not in the public interest to retain the petitioner any longer in service. No enquiry could be held in this case as to on what basis such an opinion was formed. If there was something against the petitioner due to which it was not in public interest to retain him any longer in service, such a thing cannot be examined in a matter of compulsory retirement as disclosure of any such matter against the petitioner may give him an opportunity to say that stigma has been attached while making him compulsorily retire. To avoid that, in my opinion, the respondents have been well advised not to disclose facts and reasons which formed the basis of the opinion of respondent no. 1 in coming to the conclusion that it was not in the public interest to retain the petitioner in service after he had attained the age of

55 years. The fact that he had been given extension up to the age of 58 years could not stand in the way of the appointing authority to compulsorily retire the petitioner. I have always felt difficulty in holding that an impugned order of the kind contained in Annexure 5 has been made mala fide merely because the petitioner has found out some facts to indicate (although not accepting them as correct) that the appointing authority might have made the impugned order out of some alleged animus against the Government servant compulsorily retired. Such allegations, in my opinion, even if they could be accepted on their face value, are not sufficient to show that the order has been made mala fide. For the reasons stated above, the application fails and is dismissed with cost--hearing fee Rs. 100/- only.

S. Sarwar Ali, J.

I agree.