

**(1983) 07 DEL CK 0007**

**In the Delhi High Court**

**Case No : Civil Writ Petition No. 1792 of 1982**

S.C. Mehta

APPELLANT

Vs

Union of India and Others

RESPONDENT

**Date of Decision : 13-07-1983**

**Acts Referred:**

**Citation :** (1984) CriLJ 1261 : (1984) 2 Crimes 5 : (1984) 26 DLT 1 : (1984) 6 DRJ 8 : (1984) 2 LLJ 354 : (1983) RLR 765 : (1984) 2 SLJ 336

**Hon'ble Judges :** A.B. Rohtagi, J

**Bench :** Single Bench

**Advocate :** P.K. Agarwal and Santosh Chatterjee, for the Appellant;

## Judgement

A.B. Rohtagi, J.

(1) This case concerns the Food Corporation of India (the Corporation). The Corporation was established by the Food Corporation Act 1964 (the Act). Section 45 of the Act empowers the Corporation to frame regulations. In exercise of this delegated power the Corporation framed the Staff Regulations in 1971.

(2) These corporate bodies exercise functions of a legislative nature delegated to them by legislative bodies. In essence they are subordinate legislative bodies, but in truth, they are what Lord Maugham described in *Rowell v. Pratl* (1938) A.C. 101 as domestic bodies which the legislature has thought fit in public interest to entrust with important statutory powers. The Food Corporation of India (Staff) Regulations 1971 have, Therefore, the force of a statute (See *Kailash Nath and Another Vs. State of U.P. and Others*, .

(3) S.C. Mehta. petitioner in this case, joined the service of the Government of India, Ministry of Food, as an Assistant analyser in 1952. In 1965, after the Corporation was established by the Act of 1964. he came to the Corporation on deputation and continued to work here In 1975, his services were transferred from the Central Government to the Corporation under Sec 12A of the Act. A gazette notification dated 18-3-1975 was published transferring his services with

effect from 1-3-1969 from the Government to the Corporation. So from 1-3-1969 the petitioner became a transferred employee of the Corporation. On 1-3-1969 he was working as Senior Assistant Manager (Quality Control) in the Corporation. On 6-6-1971 he was promoted in the Corporation as a Deputy Manager.

(4) On 15-1-1981 a chargesheet was issued to the petitioner by the Managing Director alleging that he, the petitioner, had written a pseudonymous letter purporting to be in the name of Jagmohan Verma, President of the Staff Union, making certain allegations against M.N. Kohli, another employee of the Corporation, with an intention to cause an injury and annoyance to him and was guilty of an act unbecoming of a Corporation employee and thus violated Regn. 32 of the Staff Regulations. The Commissioner for Departmental Enquiries was appointed as the inquiry officer. He held an inquiry into the charge. On 3-9-1981 he submitted his report. He held that the charge against the petitioner was proved. This was the first inquiry against the petitioner.

(5) Simultaneously with the first inquiry there was a second inquiry against the petitioner. Dharam Das Shastri, a member of the parliament, wrote a letter to the Home Minister requesting him to enquire if any harassment was being caused to the petitioner or if he was being victimised. The Home Minister sent this letter to the Corporation. On this the Managing Director issued another chargesheet to the petitioner. Here the charge was that the petitioner had sought to bring political pressure on the management of the Corporation and this was a violation of Regn. 50 of the Corporation. The Commissioner of Departmental Inquiry was the inquiry officer. On 4-8-1981 he held that the charge against the petitioner was proved.

(6) On 14-10-81 the Managing Director purporting to act under Regn. 56 read with App. 2 imposed the major penalty of compulsory retirement prescribed under Regn. 54(vii) on the petitioner concurrently on account of each of the above charges made against him. The petitioner appealed to the Chairman of the Corporation as provided under the regulations. The Chairman dismissed the appeal on 4-3-1982.

(7) There as yet a third inquiry against the petitioner. On 27-1-1981 a chargesheet was issued to him alleging that in year 1970-71 he had ordered release of paddy stocks to M/s. Max Timer Traders, Mukarian for shelling over and above the financial arrangements, contrary to the instructions. This was said to be a gross irregularity and a failure to maintain absolute integrity and devotion to duty in the performance of duties and thus a contravention of Regns. 31 and 32. It was further alleged that as a result of Mehta's failure to safeguard its interests the Corporation suffered a loss of Rs. 2,34,143.50. One D.C. Gupta was appointed as the inquiry officer. On 17-9-1981 the inquiry officer submitted his report. He held that the charge was proved against the petitioner. The Managing Director again imposed the major penalty of compulsory retirement on the petitioner on 9-12-1981, though the petitioner had already been compulsorily retired by the earlier order of the Managing Director dated

14-10-1981. The long and short of all the three inquiries was that the petitioner was compulsorily retired from service.

(8) On 10-6-1982 the petitioner brought this writ petition under Art. 226 of the Constitution impugning the order of compulsory retirement on a variety of grounds.

(9) We have seen that the petitioner was a transferred employees. For such employees as are transferred from the Central Government to the Corporation the Act contains "special provisions" in Section 12A. We are here concerned in particular with Sub-section (5) of Section 12A. That sub-section says:- "(5) No officer or other employee transferred by an order made under Sub-section (1):- (a) shall be dismissed or removed by an authority subordinate to that competent to make a similar or equivalent appointment under the Corporation as may be specified in the regulations made by the Corporation under this Act ; (b) shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making a representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry ; Provided that this clause shall not apply (i) where an officer or employee is dismissed or removed or reduced in rank on the ground of conduct which led to his conviction on a criminal charge : or (ii) where the authority empowered to dismiss or remove an officer or employee or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry ; or (iii) to an officer or employee who, after transfer to the Corporation, is appointed to a higher post under the Corporation in response to an open advertisement and in competition with outsiders."

(10) It will at once be seen that such Government employees as are transferred to the Corporation enjoy the statutory protection contained in Subsection (5). When he was a Government employee the man was enjoying constitutional protection given to him by Art. 311 of the Constitution. When he is transferred to the Corporation he does not enjoy the constitutional protection because he ceases to be a Government employee. But Section 12A(5) gives a corresponding statutory protection to him. Otherwise he will be worse off when he joins the Corporation. So the legislature in its wisdom has converted the constitutional protection into statutory protection. What is of importance is that the Government employee when he joins the Corporation enjoys the same protection which he enjoyed as a Government employee under the Constitution. He continues to wear the same shining armour of protection which he wore under the Constitution as a Government employee. The only difference is that in the Government employment he was being protected by the Constitution. Now he is protected by the Act of 1964. This is why these provisions in Sub-section (5) have been bodily lifted out of the Constitution and enacted as "special provisions"

in the Act. The regulations, though they apply to transferred employees also, cannot whittle down the importance of these special statutory-provisions.

(11) Provision (iii) to Sub-section (5) makes the object of the legislature abundantly clear. It says that if an employee, after transfer to the Corporation, is appointed to a higher post under the Corporation in response to an open advertisement in competition with outsiders he will lose this protection because then he ceases to be a transferred employee. This contemplates a case of an open competition. So this protection is not available to a man who is appointed to a higher post in open competition. If he remains a transferred employees and does not compete with outsiders for a higher post in response to an advertisement, he continues to enjoy the protection given to him under Sub-section (5).

(12) Mr. Aggarwal, counsel for the petitioner, says that the order of compulsory retirement was made in utter disregard of the provisions contained in Sub-section (5). His case is that the petitioner was compulsorily retired by an authority subordinate to that competent to make "a similar or equivalent appointment" in the Corporation under the regulations. Secondly he submits that the petitioner was compulsorily retired without affording him the second opportunity of making a representation on the penalty proposed. He says that the order of compulsory retirement was in breach of S. 12A(5)(a) and (b). This in short is the petitioner's case.

(13) I will deal with these two grounds separately. Sub-sec, 5(a) says that the transferred employee shall not be dismissed or removed by an authority subordinate to that competent to make a similar or equivalent appointment under the Corporation as specified in the Regulations. The question at once arises which is the competent authority under the Corporation. It is not in dispute that the petitioner was appointed as an assistant analyser in the Central Government. In the Corporation he was appointed as Senior Assistant manager on 1-3-1969, the date on which he became a transferred employee. Nor is this in dispute that at the relevant point of time in 1969 the Executive Committee of the Corporation was the authority competent to make "a similar or equivalent appointment" to that of an assistant analyser in the Corporation under the regulations. If that is so the petitioner says that only the Executive Committee could have made the order of compulsory retirement and not the Managing Director. He questions the authority of the Managing Director to compulsorily retire him on the ground that he was not the competent authority to make "a similar or equivalent appointment" i.e. equal to his appointment in the Central Government under the regulations at the material time.

(14) Mr. Chatterjee on behalf of the Corporation says that this Sub-section (5) does not apply to the petitioner at all because the penalty of compulsory retirement is not included within the scope of this Sub-section. In other words, his main contention is that unless it is a case of dismissal or removal of the petitioner he cannot complain of infraction of Sub-sec, (5)(a). I have no

hesitation in rejecting this argument. If I accept this interpretation the statutory protection will become illusory. I have to see the substances of the order and not its form for the purpose of seeing whether the case is covered by Sub-section (5) or not. In my opinion compulsory retirement is a species of removal if it is inflicted as a measure of punishment. It is in that generic sense that the framers of the Act have used the term "dismissed or removed" in Sub-sec, (5(a) and (b). If the effect of termination of service is that the petitioner loses his job because of his unfitness whether by removal or compulsory retirement the result is the same. He is thrown out of employment with a stigma. In such cases he can claim the protection. He can say : "unless you follow the procedure prescribed in Sub-section (5) you cannot compulsorily retire me from service."

(15) The Act was framed in 1964. The regulations were framed in 1971. In Regn. 54 the penalties are mentioned. There are minor penalties. These are major penalties. Compulsory retirement, removal from service, dismissal are major penalties. The Act speaks only of dismissal or removal. But that does not mean that compulsory retirement will not come within its fold Whether the punishment of removal and dismissal takes one form or other that is wholly immaterial. What has to be seen is whether the man has in fact been removed from service as a measure of punishment. Whether it is compulsory retirement or removal is of no consequence to Sub-section (5). The frames wanted to protect him in his removal from service. Therefore, they used these two words : Removal and dismissal. Both are positive punishments. They are panel in character. For his acts of omission and commission the officer is awarded these penalties. If they are punitive in character, as they obviously are, the Corporation employees enjoys the statutory protection. Compulsory retirement is a species of removal. The man is removed from service though he does not loose the terminal benefits which he has already earned. This is merely softening the blow. But it is a removal nevertheless. If the regulation includes a third form of punishment, namely compulsory retirement having the effect of removal from service as a penalty. Sub-section (5) will at once be attracted. This is what the numerous Supreme Court decisions say. (See The State of Uttar Pradesh Vs. Madan Mohan Nagar, ).

(16) Mr. Chatterjee referred to regn. 22 and said that if there is an order of compulsory retirement under the regulation but in essence the object is to punish the employee, the courts have the power to go behind the order and see what is its effect. Is it innocuous or penal in nature ? Is it in a cloak or camouflage for an order based on a finding of misconduct? If it is innocuous the order is good. If it is punitive the order will be set aside because it was made without complying with the provision of Section 12A(5) {See Samsher v. State of Punjab Air 1974 Sc 2197 (7) judge decision). But to a case of Regn. 54((vii) which expressly mentions the penalty of compulsory retirement Sub-section (5) has no application, counsel says. I do not agree. It will be absurd to hold that where avowedly the master is inflicting the major penalty of compulsory retirement the employee cannot invoke Sub-section (5) but under Regn. 22 he

can if he shows that compulsory retirement was ordered as a measure of punishment. In my opinion Sub-section (5) was enacted mainly to protect the employee against the infliction of major penalties mentioned in that Sub-section. Whether it be an order of compulsory retirement " under Regn. 22 of under Regn. 54(vii) the transferred employee can invoke the provisions of Sub-sec, (5) (b) if he can show that the order of compulsory retirement was made in his case as a measure of punishment to him. If a stigma is attached the employee can justly complain that the provisions of Sub-sec, (5)(b) have not been followed.

(17) I cannot accept Mr. Chatterjee's argument that in case of stigma, because according to him compulsory retirement is a penalty and involves stigma, it will not open to a delinquent officer to invoke the provisions of Sub- section (2) though under Regn. 22 he may be able to show that the order of compulsory retirement was not innocuous but was made infact as a measure of punishment to him. I cannot assent to the proposition that the Corporation can brand a transferred employee as unfit and he cannot even invoke Sec. 12A protection. With Regn. 22 I am not concerned in this case. The reason is that in the order of compulsory retirement it is expressly stated that the penalty of compulsory retirement is being inflicted because the charges were proved against the petitioner. The short question is whether a transferred employee is entitled to the protection of Sub-section 5 if an order of compulsory retirement is made against him as a measure of punishment, my answer is in, the affirmative. We have to see whether the petitioner is visited with any evil consequences.

(18) In the present case there was a termination of service on the ground of the employee's unfitness to continue in service on account of the violations of regulations 31, 32 and 50. He was held to be guilty of (1) conduct unbecoming of a Corporation employee, (2) of bringing political pressure and (3) failure to maintain integrity and devotion to duty. These constitute stigma. Aspersion or reflection on the conduct of the impugned order. This would adversely affect his future prospects relating to employment, even though the order in question does not impose any material penalty such as loss of salary, pension or the like. (See I.N. Saksena Vs. State of Madhya Pradesh, . Misconduct is the very foundation of the order. Imputations are expressly mentioned in the order of compulsory retirement. Compulsory retirement was ordered as a penalty in these disciplinary proceedings. After finding Mehta guilty of the charges in departmental proceedings the order of compulsory retirement was made. (See State of Bombay (Now Maharashtra) Vs. Narul Latif Khan, ).

(19) The test is : Does the order of compulsory retirement cast an aspersion or attaches a stigma to the officer when the corporation purports to retire him compulsorily. In the present case there is no doubt that the order does cast a stigma on the petitioner. We have an order which on the face of it makes certain imputations against him and casts an aspersion on his conduct and behavior. He was found to be undesirable to be retained in the Corporation service. Any person who reads the order would consider that there is something wrong with

him. The impugned order was passed by way of punishment. The charge of imputation against Mehta was made the condition of exercise of the power. The question is whether a termination of service brought about by compulsory retirement is tantamount to dismissal or removal from service so as to attract the provisions of Sec 12A of the Act. The answer to the question will depend on whether compulsory retirement was ordered as to a result of his being found guilty on a charge or misbehavior or incapacity. "Removal is but a species of dismissal." "Removal, like dismissal, no doubt brings about a termination of service but every termination of service does not amount to dismissal or removal." *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, per Das J). So I would say that compulsory retirement is a species of removal if it is ordered by way of punishment.

(20) Mr. Chatterjee then says that on the date of passing the order of compulsory retirement the competent authority to appoint category I officers under the amended regulations was the Managing Director. He has invited my attention to the 71st Amendment dated 10-2-1981 which makes the Managing Director as the appointing authority in case of all employees of category 1. The petitioner belonged to category 1. So with effect from 6-2-1981 when the amendment came into force the Managing Director was the appointing authority of all category I employees. Now counsel says that on 14-10-81 when the order of compulsory retirement was made the Managing Director was the competent authority to make an appointment such as that of the petitioner. In my opinion this argument is fallacious. The question is: what is the point of time with reference to which we have to find the authority's competence "to make a similar or equivalent appointment under the Corporation as may be specified in the regulations made by the Corporation under this Act." Mr. Chatterjee says that point of time is 1981 when the order of compulsory retirement was passed. Mr. Aggarwal, on the contrary, says that the point of time is 1969 when the petitioner's services were transferred to the Corporation and he was appointed as a Senior Assistant Manager.

(21) Under Art. 311(1) of the Constitution the words are that no civil servant "shall be dismissed or removed by an authority subordinate to that by which he was appointee." This refers to the past. This takes us back to the point of time when the civil servant was appointed. The test of equivalence has to be applied in the past and not in the future. The punishing authority has to ask itself the question : "Was it competent to appoint him to a similar or equivalent post under the Corporation ?" If the posts in the Central Government and the Corporation are similar there will be no difficulty. But if the post is not similar the test of equivalence has to be applied to find the competent authority under the regulations framed by the Corporation. In my opinion same interpretation should be placed on Sub-sec, (5)(a) as under the Constitution. Because the intention is the same here as was in the Constitution.

(22) Mr. Chatterjee says that Sub-sec, (5)(a) makes a radical departure from Art.

311(1). I do not agree. The only difference between the two provisions is that in Sub-sec, (5)(a) (i) the draftsman knew that a difficulty may arise because when a person's services are transferred from the Government to the Corporation there may not be the same post available under the Corporation Regulations which he was holding under the Government department. So the words "similar or equivalent appointment under the Corporation as may be specified in the Regulations" were used. In the Ministry of Food the petitioner was an Assistant Analyser. But here he was a senior assistant manager. Therefore the point of time will be when this appointment was given to the petitioner in the framework of the Corporation. That is the appointment to which the statute refers. It is the original appointment. The Constitution also talks of the original appointment. It does not say that if there is a promotion later on or there is a change in the regulations or a change in the competent authority then the amendment will apply. The original position as it stood at the time of the appointment in the Government under Art. 311(1) or in the Corporation in a similar or equivalent appointment has to be seen. On the facts there is no dispute that the Managing Director became competent only under the amended regulations on 10-2-1981. As things stood in 1969 it was the Executive Committee which was the competent authority of the petitioner. So in my opinion only the Executive Committee had the power to dismiss or remove or compulsorily retire the petitioner. The Managing Director was not the competent authority within the meaning of Sub-sec, (5)(a). So his order of compulsory retirement is null and void. This is my conclusion on this part of the case.

(23) I now turn to Sub-section (5)(B). For all practical purposes this is a verbatim reproduction of the provision of Art. 311(2) of the Constitution. It is well known that substantial changes to the detriment of the delinquent public servants were made by 1976 Amendments of Art. 311 of the Constitution. Prior to 1976 an opportunity to be heard or to make representation had to be offered to the delinquent officer at two stages-(1) At the inquiry into the charges, and (ii) at the conclusion of the charges, before imposing punishment on the basis of the findings at the inquiry. The 1976 amendment eliminates the second opportunity before imposing punishment, but retains the safeguard that the punishment must be founded on the basis of the findings at the inquiry, and not anything extraneous thereto.

(24) The Act in so far Section 12A is concerned was amended by the Food Corporation (Amendment) Act of 1982 (No. 53 of 1982) which came into force on 21-10-1982. Here also the second opportunity was abolished. But the petitioner was compulsorily retired on 14-10-1981. So his case will be covered by the unamended Act. The Amendment Act of 1982 has no application to him. It is true that after the amendment of Section 12A this provision has been brought in line with the Constitution. The second opportunity was done away with. But to the petitioner the amended Act does not apply. I have, Therefore to interpret and apply the provisions of the unamended Act.

(25) There is another reason also Mr. Chatterjee argued that the three departmental inquiries are not invalid as they were duly instituted under Reg. 57(2) I am inclined to agree with him. If the Corporation wants to save the inquiry reports so as to make them fresh starting points of further proceedings in case I decide this case against them, I must put the clock back and relegate the parties to the stage before the amendment of the Act on 21-10-1982. It is always open to the Corporation to start de novo disciplinary proceedings. In that case the amended Act will apply.

(26) Under Art. 311 as it stood before 1976 after the inquiry was over, the disciplinary authority had a two fold obligation, with corresponding rights in favor of the delinquent public servant: (a) Communication of the punishment proposed, if any. (b) Reasonable opportunity of making a representation on the penalty proposed.

(27) There was a plethora of decisions under each of the foregoing heads according to which, the punishment imposed was liable to be quashed if either of the foregoing requirements were violated by the disciplinary authority : See Khem Chand Vs. The Union of India (UOI )and Others, , State of Mysore Vs. K. Manche Gowda, , Union of India (UOI) and Others Vs. K. Rajappa Menon, and State of Madras Vs. A.R. Srinivasan, .

(28) There is no dispute that no second opportunity was afforded to Mehta in the present case. The Managing Director instituted the inquiry against him. The inquiry officer submitted the inquiry report. The Managing Director without giving any notice to the petitioner made the order of compulsory retirement. This is a fatal law in the petitioner was not heard on the penalty which was proposed to be imposed on him. He was straightaway compulsorily retired. Therefore, there is a clear violation of the provisions of Section 12A(5)(b) of the Act. The order must be quashed on this short ground alone.

(29) Mr. Chatterjee at this stage repeated his earlier argument and said that the provisions of Sub-section (5)(b) do not embrace an order of compulsory retirement. According to him, the petitioner, if he had been dismissed or removed or reduced in rank, he would have been entitled to a second opportunity on the penalty proposed. Sub-sec.(5) does not apply to the petitioner. This is Mr.Chatterjee's broad contention. He contends that the inquiry and the order of compulsory retirement were in conformity with the provisions of the regulations. As I have held that a case of compulsory retirement is covered by the provisions of Sub-see, (5)(a), I must .hold likewise that there is a violation bf Subsection (5}(b) in as much as no opportunity was given to the petitioner of making a representation on the penalty which was proposed to be inflicted upon him.

(30) The next question is : What ought to be the order in this case ? There is no doubt that the order of compulsory requirement has to be quashed and set aside. But will that render the entire enquiry commencing from the chargesheet

till the submission of the inquiry report by the inquiry officer invalid ? The answer to this is contained in Regn. 57(2) which says :

"A disciplinary authority competent under these regulations to impose any of the penalties, specified in clauses (i) to (iv) of Regulation 54 may institute disciplinary proceedings against any employee of the Corporation for the imposition of any of the penalties specified in clauses (v) to (ix) of Regulation 54 notwithstanding that such disciplinary authority is not competent under these regulations to impose any of the latter penalties."

(31) The Managing Director was competent to impose the penalties specified in clauses (i) to (iv) of Regulation 54. They are all minor penalties. Minor penalties he could inflict. So the Managing Director was competent to institute the disciplinary proceedings though he had no power to impose any of the penalties specified in clauses (v) to (ix) of Regulation 54. I have, . Therefore come to the conclusion that the institution of disciplinary proceedings is not bad. What, is bad is the infliction of the major penalty of compulsory retirement by the Managing Director. He had no power to compulsorily retire the petitioner. Only the Executive Committee could do it. The proceedings after the completion of the report by the inquiry officer in each of the three inquiries are vitiated. The vice is that the Managing Director considered the report of the inquiry officer in each of the three cases and inflicted the punishment of compulsory retirement on S.C. Mehta. This he could not do. From that stage the Executive Committee comes on the scene. The report had to be considered by them. They had to deal with the matter. They have to determine the guilt of the man. They may agree with the report. They may disagree with it. The disciplinary authority is free to differ from the findings of the inquiry officer and come to its own conclusions on the evidence on record. It may direct a fresh inquiry if it finds that the inquiry has been defective. On the matter of punishment the punishing authority may award a lesser punishment if it finds that the punishment of compulsory retirement is too excessive and harsh in the circumstances of the case. The Executive Committee may decide to proceed with these cases. They may not. If they find the man guilty they have to give him a second opportunity and ask him to say what he has to say on the penalty which they propose. Both matters guilt and punishment are in their domain. They are outside the powers of the Managing Director. This is the fatal flaw in this case.

(32) For these reasons I set aside all three orders of compulsory retirement dated 14-10-81 and 9-12-1981 as well as the appellate order dated 4-3-82. This order will not preclude the Corporation from holding the proceedings from the stage of the inquiry reports afresh and in accordance with law. This is the course which the Supreme Court adopted in State of Mysore (supra) in a case where there was flaw in the case as no second opportunity was given. I adopt a similar course. The petitioner will be entitled to show to the Executive Committee that he had wrongly been found guilty and that he does not merit any punishment. The Executive Committee will give him full opportunity and hear him on the

whole case.

(33) I make this clear that the effect of this order is that the orders of compulsory retirement dated 14-10-1981 and 9-12-1981 as well as the appellate order dated 4-3-1982 have no effect on his status. He continues to be in the service of the Corporation till such time as the Executive Committee chooses to act otherwise in accordance with law.

(34) The writ petition is allowed to the extent indicated above. The parties are left to bear their own costs.