
(2001) 01 DEL CK 0040

In the Delhi High Court

Case No : Civil Writ Petition No. 2837 of 1995

Shri J.S. Chawla

APPELLANT

Vs

M/s. Haryana Minerals Ltd.

RESPONDENT

Date of Decision : 05-01-2001

Acts Referred:

Constitution of India, 1950 — Article 132, 226

Citation : (2001) 2 AD 90 : (2001) 89 DLT 584 : (2001) 57 DRJ 651

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. P.P. Khurana and Mr. M.K. Bhardwaj, for the Appellant; Mr. J.R. Das and Mr. D.P. Mohanti, for the Respondent

Judgement

A.K.Sikri, J.

1.This is the second round of litigation between the same parties. Petitioner had earlier filed writ petition No.2798 of 1993 challenging order dated 24th March, 1993 passed by respondent retiring the petitioner from services of the respondent with immediate effect. Admittedly, normal age of retirement in M/s. Haryana Minerals Ltd (hereinafter referred to as the respondent- Company, for short) was 58 years at the relevant time and as per the date of birth of the petitioner, in normal course, he would have retired on 29th February, 1996. Petitioner had not attained the age of 58 years when order dated 24th March, 1993 was passed. The said order was apparently passed compulsorily retiring the petitioner from service. Writ petition of the petitioner was allowed by the Division Bench of this Court by order dated 8th February, 1995 primarily on the ground that power to retire the petitioner compulsorily was not there with the respondents in its rules and regulations at the time when the impugned order dated 24th March, 1993 was passed. Infact Resolution dated 7th September, 1993 was adopted by Haryana State Industrial Development Corporation, Chandigarh, and the respondent-company also adopted the same vide its Resolution dated 7th January, 1994. While allowing the writ petition and

quashing order dated 24th March, 1993, Division Bench passed the following order:-

C.W. 2798/93

Rule D.B.

The petitioner has been compulsorily retired vide order dated 24th March, 1993. It is now not disputed before us that the power to retire the petitioner compulsorily was not there with the respondents in its rules & regulations and such power has now been conferred vide resolution dated 7th September 1993 adopted by Haryana State Industrial Development Corporation, Chandigarh which also was adopted by respondent vide resolution dated 7th January 1994.

In view of these facts, the counsel for the respondent states that respondent shall take now necessary steps in accordance with the powers now available with the respondent and he does not support the impugned order now.

In view of this, we make the rule absolute and quash the impugned order with liberty to the respondent to take whatever action in accordance with the rules and regulations. The parties are left to bear their own costs.

2. After the aforesaid order was passed and respondent was given liberty to take action in accordance with rules and regulations, the respondents passed another order dated 23rd February, 1995 retiring the petitioner prematurely as General Manager (Technical) w.e.f. 2nd September, 1993. As much depends on the language of this order it would be useful to reproduce this order:-

In view of the orders of the Hon'ble High Court passed on 8.2.1995, the premature retirement of Shri J.S. Chawla, General Manager (Technical) is reconsidered by the Board. There is no new material or change in the facts and circumstances. The Board of Directors of the Company has approved the premature retirement of Shri J.S. Chawla, General Manager (Technical) in the interest of the Company and in public interest as per regulation 3.5 of Service Bye Laws of Haryana State Industrial Development Corporation as amended from time to time and applicable to Haryana Minerals Limited.

Accordingly, the pre-mature retirement of Shri J.S. Chawla from the services of the Company as General Manager (Technical) is hereby ordered with effect from 2.9.1993. He is entitled for the salary for the difference of period. A cheque for Rs.21,275.00 (Rupees Twenty One thousand Two hundred Seventy five only) on account of his salary for the period as above is enclosed.

Encls: Cheque No.841167 dt.23.2.95

Sd/-Managing Director.

3. Petitioner has filed the instant writ petition impugning Order dated 23rd February, 1995.

4. Facts in brief, relevant for the purpose of the present writ petition, may now be

stated:-

5. Petitioner was appointed as General Manager (Technical) by appointment letter dated 9th March, 1984 and he joined the services of respondent-Company w.e.f. 5th June, 1984. He was confirmed in service, after the expiry of one year probation period, w.e.f. 5th June, 1985 vide Office Order dated 26th July, 1985. In August 1992, petitioner was transferred from Narnaul to Delhi Corporate Office. In October 1992, one Shri Chander Singh was appointed as Managing Director of the respondent-Company and it is the case of the petitioner that relations between him and the petitioner were far from cordial as they could not see eye to eye on many aspects of management and administration of the respondent-Company. It is further averred by the petitioner that in connivance with the Managing Director a conspiracy was hatched against the petitioner by the corrupt officials and directors to harass and cause physical harm to the petitioner. The powers of the petitioner were withdrawn and he was again transferred (within 4 months) to Narnaul by order dated 3rd December, 1992. Even the official car provided to the petitioner after office hours was withdrawn while private use of a Government vehicle is allowed to an officer on Government approved rates, thus causing further hardship to him. Between 7th December, 1992 to 10th December, 1992 a safe week for inspection in Himachal Pradesh and Uttar Pradesh mines was organized by Directorate General of Mines Safety (Ghaziabad Region) and petitioner was directed to attend the same. Petitioner obeyed the orders and went to Ponta Sahib and Dehradun to attend the conference by bus as official car, although entitled as per terms of appointment, was refused by the Managing Director. Journey by bus caused hardship to the petitioner and was another instance of harassment to the petitioner. Petitioner was transferred to Narnaul again vide letter dated 31st December, 1992 stating that on his failure to resume duties there, his name will be struck off from the rolls and he was asked to join latest by 8th January, 1993. The petitioner went to resume duties at Delhi Corporate Office on 8th January, 1993 at 11.00 a.m. but the Managing Director refused his entry to office and ordered that he should first join duties at Narnaul, the same day. Petitioner in faithful compliance of Managing Director's orders travelled by bus and reported for duty at Narnaul as official car was not provided to him. Petitioner was refused station leave permission for 9th January, 1993 (being a holiday) to come to Delhi to collect his clothes, medicine, etc. besides other necessities of life as he came to Narnaul bare handed. It is the further case of the petitioner that no accommodation was provided to him and he was living at different guest houses at his own cost for more than two months. On 24th February, 1993 the Managing Director made a noting on the leave application of DME Shri N. Garg stating "General Manager (Technical) shift to Kund till further orders and supervise the working of Kund and Behali Mines". According to the petitioner, this order of supervision of mines was grossly inconsistent with the petitioner's terms of appointment as General Manager (Technical). Petitioner again faithfully obeyed this order and kept on shuttling between Kund and Behali daily in addition to attending other duties.

6.This was followed by order dated 24th March, 1993 by UPC on 30th April, 1993 conveying that petitioner was retired from service of the respondent Company with immediate effect. Rest is history as already narrated above.

7.The impugned Order dated 23rd February, 1995 is challenged by the petitioner on the following grounds:-

1. The impugned order is retrospective in nature inasmuch as it is passed on 23rd February, 1995 but the petitioner is compulsorily retired from a back date i.e. 2nd September, 1993. There is no power with the respondent to pass order of compulsory retirement from a retrospective date. The Rule under which it is passed do not give any such power.

2. By the impugned order respondents had tried to unsettle the judgment dated 8th February, 1995 passed by Division Bench of this Court whereby the earlier order of compulsory retirement of the petitioner was quashed and set aside. The effect of this Order was that petitioner would be treated as in service on the date of passing of the Order i.e. 8th February, 1995 and, Therefore, fresh order could not have been passed retiring the petitioner compulsorily from a back date i.e. 2nd September, 1993. It also amounted to reviewing of the judgment passed by the Division Bench.

3. After the judgment dated 8th February, 1995 was rendered by the Division Bench in Civil Writ Petition No. 2798 of 1993 filed by the petitioner and liberty granted to the respondents, fresh exercise was to be done by the respondents in determining whether the petitioner should be compulsorily retired or not. However, without any meeting of the Board and passing a Resolution by circulation, the impugned order was passed and it clearly depicted non application of mind as well.

4. In any case there was no material on record to justify the Order of compulsory retirement or to show that petitioner was a "dead wood" and the impugned Order was arbitrary actuated with malafides.

8.In support of the aforesaid arguments, Mr.P.P. Khurana learned Senior counsel appearing on behalf of the petitioner also relied upon the following judgments:-

i. East India Commercial Co. Ltd.,Calcutta and Another Vs. The Collector of Customs, Calcutta, .

ii. The Oriental Insurance Co. Ltd. and Another Vs. Gokulprasad Maniklal Agarwal and Another, .

9.Learned counsel for the respondents countered the aforesaid arguments of the petitioner by submitting that Order dated 23rd February, 1995 was not retrospective in nature. Infact, his submission was that the Division Bench of this Court which passed earlier Order dated 8th February, 1995 was convinced that Order of compulsory retirement was rightly passed. However, only because there was no rule of compulsory retirement in the respondent-Company at the relevant

time i.e. when the earlier Order dated 24th March, 1993 was passed, the same was set aside vide order dated 8th February, 1995. But at the same time liberty was given to the respondent to pass fresh order in accordance with rules. For this reason, learned counsel for the respondent submitted that in Order dated 8th February, 1995 petitioner was not granted reinstatement or salary for the intervening period. It was also submitted that the position "once a dead wood would remain a dead wood" did not change. For this reason earlier Order of compulsory retirement was only confirmed by subsequent Order dated 23rd February, 1995 and was passed with effect from 2nd September, 1993 as the power of compulsory retirement as per the Rules was made effective from 1st September, 1993. This exercise was permissible and it would not make the impugned order retrospective in operation and for this purpose reliance was placed on the judgment of the Supreme Court in the case of U.P. Jal Nigam and Another Vs. Syed Khadim Waris, .

10. It was alternatively submitted that in any case post of General Manager (Technical), which the petitioner occupied, stood abolished on 28th October, 1993 as is stated by the respondents in its additional affidavit and Therefore even if the impugned Order is invalid, petitioner cannot claim the salary beyond 28th October, 1993 as there was no such post to which he can be reinstated after 28th October, 1993.

11. I have considered the submissions of both the parties and have also perused the record of the writ petition. In order to decide the controversy raised in this writ petition it would be necessary to first examine the effect of Order dated 8th February, 1995 passed by Division Bench of this Court in Civil Writ Petition No. 2797 of 1993 wherein petitioner had challenged the Order dated 24th March, 1993 compulsorily retiring him prematurely from services. It is clear from the reading of the Order dated 8th February, 1995 that there was no power to retire the petitioner compulsorily when Order dated 24th March, 1993 was passed. In view thereof the impugned order was quashed with liberty to the respondent to take action in accordance with rules and regulations. This Order dated 24th March, 1993 of compulsorily retiring the petitioner was quashed primarily because this order was ultra vires. There was inherent lack of jurisdiction in passing this order. Such an order was Therefore a nullity.

12. The Division Bench in its Order dated 8th February, 1995 noted that power to retire the employees compulsorily was conferred vide Resolution dated 7th September, 1993 (in fact it is 1st September, 1993) adopted by Haryana State Industrial Development Corporation, Chandigarh which was also adopted by respondent vide Resolution dated 7th September, 1994. Respondent follows the rules and regulations of Haryana State Industrial Development Corporation, Chandigarh. Power was conferred in these rules and regulations for the first time in 1993. The Division Bench, Therefore, gave the liberty to the respondent to take action in accordance with rules and regulations. In exercise of powers conferred by these rules and regulations petitioner has been retired compulsorily

again by impugned order dated 23rd February, 1995. However, the retirement is effected from 2nd September, 1993. Petitioner challenges this order as retrospective and Therefore bad in law whereas respondent submits that the order is not retrospective. Once it is found that the earlier order dated 24th March, 1993 was ultra vires, without jurisdiction and a nullity, respondent was supposed to undertake the exercise afresh to deal with the case of the petitioner. This exercise, for whatever worth, was undertaken only in February 1995. The order of compulsory retirement Therefore could be passed only from the date when the fresh order was passed and not from a retrospective date i.e. 2nd September, 1993 it clearly becomes retrospective and Therefore is not sustainable. Learned counsel for the respondent tried to argue that order is not retrospective because respondent had already passed the order dated 24th March, 1993 compulsorily retiring the petitioner which order was set aside only on the ground that there was no power. The reading of the Division Bench's order dated 8th February, 1995 would make it clear that Order was quashed because of lack of jurisdiction to pass such Order and Therefore the Court did not go into the aspect as to whether the petitioner was a dead wood and needed to be compulsorily retired. It may be stated at the cost of repetition that once there was no power to retire the petitioner compulsorily on 24th March, 1993 and the order was a nullity, the exercise undertaken by the respondent at that time was of no consequence at all. Therefore, when the Division Bench by Order dated 8th February, 1995 directed the respondent to take action in accordance with rules and regulations the obvious inference is that a fresh exercise should be undertaken and any order which is to be passed has to be made effective from the date when it is passed and could not have been passed with retrospective effect viz. 2nd September, 1993.

13. From the aforesaid discussion it is also clear that the manner in which the power is exercised second time and resulting into order dated 23rd February, 1995 is also erroneous. There should have been a fresh application of mind without being influenced by the exercise which was undertaken earlier. However, respondent admit that same decision which was taken in 1993 was followed and Resolution was passed by the Board of respondent by circulation on 23rd February, 1995. From this it becomes crystal clear that no material whatsoever was placed before the Board and there was no application of mind by the members. There was no discussion as the Resolution was passed by circulation. The present order dated 23rd February, 1995 has to be judicially reviewed by taking into consideration the circumstances and material which became the basis of this order and the procedure adopted in passing this order without being influenced by the earlier order dated 24th March, 1993 which was a non-est. judgment of the Supreme Court in the case of U.P. Jal Nigam (supra) would not help the respondent on the facts of the present case. In that case respondent had the power to compulsorily retire the employee. What was found that power was not exercised properly. It was thus a case of irregular exercise of power. However, in the instant case first order of compulsory retirement dated 24th

March, 1993 was passed without there being any power vested with the respondent and Therefore it is a case of inherent lack of power. The distinction between irregular exercise of power and inherent lack of power, which is obvious in both the cases, makes all the difference. As already mentioned above, when it is a case of inherent lack of power and doctrine of ultra virus becomes applicable, the order would be nullity and nonest. The effect would be as if no such order existed.

14. In view of the foregoing discussion order dated 23rd February, 1995 cannot be sustained in the eyes of law and warrants to be quashed on this ground alone. As the Order stands quashed on this ground it is not necessary to go into another aspect as to whether there was any material on record to justify the order of compulsory retirement.

15. Let me now advert to the question of relief. Admittedly, in the normal course petitioner would have superannuated from service on 29th February, 1996. Therefore, if the impugned order of compulsory retirement stands quashed the petitioner would have become entitled to his salary and permissible allowances till the date of his superannuation. However, for this the petitioner is required to cross another hurdle. According to the respondent the post of General Manager (Technical) which the petitioner was occupying stood abolished by the Board of Directors of the respondent in its meeting held on 28th October, 1993. Additional affidavit dated 29th February, 1996 has been filed to this effect. This was filed on 1st March, 1996 and copy thereof was given to the counsel for the petitioner. Counter affidavit to the main petition was filed earlier on 29th September, 1995. Petitioner filed rejoinder affidavit on 8th October, 1998. Thus when this rejoinder affidavit was filed averments made on behalf of the respondent not only in its counter affidavit but also in the additional affidavit were available to the petitioner. However, in this rejoinder no comments are made regarding averments made in the additional affidavit. Therefore, the allegation that the post stood abolished w.e.f. 28th October, 1993 is not denied by the petitioner. The petitioner however attempted to overcome this plea by submitting that plea taken in the additional affidavit should not be considered at all. The submission was that the proper course for the respondent was to seek amendment of the counter affidavit and without incorporating such a plea in the counter affidavit, it could not have been raised by filing additional affidavit and in support of this submission learned counsel relied upon the judgment of the apex Court in the case of J. Jermons Vs. Aliammal and Others, . I am afraid judgment cited by the petitioner is not applicable in this case. That was a case relating to eviction petition filed under Rent Control Act against orders passed by Tribunal. Revision petition was pending before the High Court when by CMP landlord took additional ground for eviction of the appellant-tenant based on subsequent events, u/s 10(3)(c) of the T.N. Buildings (Land and Rent Control) Act, 1960. This application was allowed by the High Court. Before the Supreme Court one of the issues was as to whether High Court was correct in law in allowing the CMP filed by the respondent and in ordering eviction of the appellant u/s 10(3)(c) of the Act.

Supreme Court decided the same in favor of the appellant-tenant on the ground that the original Eviction Petition was based on the ground in clause (a) of sub-section (3) of Section 10 of the T.N. Buildings (Land and Rent Control) Act, 1960 and if the landlord wanted to raise additional grounds the proper course was to allow the amendment of the Eviction Petition permitting the landlord to raise further ground or to remand the case to the Rent Controller for giving opportunity to the opposite party to file further pleadings and to adduce such evidence relevant to the issue, as they desire. However, we are dealing with the matter which is writ petition filed under Article 226 of the Constitution and is to be decided on affidavits. Nodoubt a party is not allowed to raise a new plea at the time of hearing of the matter, if it is not taken in the petition or in the counter affidavit. However, here the plea has been taken by filing the additional affidavit. There are judgments to indicate that the Court has discretion to allow any party to raise even a new point at a belated stage either by allowing the amendment of the petition or by filing additional affidavit or even at the time of hearing of the arguments. For this proposition one may refer to the judgment of the Supreme Court in the case of Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others, , A.S.T. Arunachalam Pillai Vs. Southern Roadways (Private) Ltd., , The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, , Burrakur Coal Co., Ltd. Vs. The Union of India (UOI) and Others, , Sri-La-Sri Subramania Desika Gnanasambanda Pandarasannadhi Vs. State of Madras and Another, . Moreover, in the present case the respondent had filed counter affidavit to the writ petition which was followed by additional affidavit wherein this plea was taken. It may be mentioned here that in its 95th Meeting held on 28th October, 1993 not only post of General Manager (Technical) was abolished but as many as nine posts were abolished. The rejoinder affidavit was filed by the petitioner after this additional affidavit. Therefore, petitioner had an opportunity to rebut the allegation made in the additional affidavit. He is not prejudiced or taken by surprise. The object of pleading is to bring the parties to a definite issues and diminish expense and delay and to prevent surprise at the hearing. A party is entitled to know the case of his opponent so that he can meet it. Moreover, the writ proceeding are not governed by the rules and procedures contained in CPC or rules of Evidence. There is essential distinction between the pleading under the CPC and a pleading under Article 132 of 226 of the Constitution of India whereas it is the requirement of Order VI Rule 1 of the Code that every pleading should state and state only the material facts but should not state the evidence; on the other hand, in a writ petition, the petitioner or in the counter affidavit the respondent himself not only state the material facts but also the facts in proof of such facts by annexing the necessary documents. The reason is simple and obvious. Ordinarily, the point of law is required to be substantiated by facts and Therefore a party raising such point must plead and prove by evidence which must appear from the petitioner if he is a petitioner or from the counter affidavit if he is a respondent (Ref. Bharat Singh Versus State of Haryana reported in 1998 (4) SCC 534). Therefore, while granting the relief the Court is entitled to take notice of

subsequent events. In appropriate cases, it is not only the power but the duty of the Court to consider the changed circumstances. Even after the pleadings are over in the writ petition, if the court considers that some facts may be necessary for adjudication of the matter, it can permit either parties to file affidavit stating those facts and give opportunity to the other party to file reply affidavit. After all the matter is to be decided only on the basis of affidavits and leading of evidence is not required.

16. Therefore when the respondent had filed the additional affidavit as early as in February, 1996 it was open to the petitioner to file reply to the same. Infact as already mentioned above rejoinder affidavit was filed subsequently. In the writ petition Court is required to do substantial justice in the matter and cannot be allowed to trap into the technicalities. Therefore, I am inclined to take into consideration the averments made in the additional affidavit dated 29th February, 1996, which have remained unrebutted.

17. The effect of quashing the impugned order dated 23rd February, 1995 retiring the petitioner compulsorily w.e.f. 29th September, 1993 is that petitioner is to be treated in continuous service. He would be deemed to be in service on 24th March, 1993 or 2nd September, 1993. However, since his post stood abolished w.e.f. 28th October, 1993 he can be given salary and allowances for this post till 28th October, 1993 and his services shall be deemed to have been terminated on 28th October, 1993 on abolition of the post of General Manager (Technical) which he was holding.

18. This writ petition is accordingly partly allowed. Impugned order dated 23rd February, 1995 is quashed. Petitioner is treated as in continuous service to the post of General Manager (Technical). He shall be paid the salary and allowances of this post till 28th October, 1993. He shall also be entitled to cost quantified at Rs. 5,000/-.