
(1995) 07 BOM CK 0055
In the Bombay High Court
Case No : Writ Petition No. 276 of 1991

Shri Kamalakar Kamulkar

APPELLANT

Vs

The District and Sessions Judge, North Goa and Others

RESPONDENT

Date of Decision : 11-07-1995

Acts Referred:

Constitution of India, 1950 — Article 309
Evidence Act, 1872 — Section 115
Goa Daman and Diu (Class IV) Recruitment Rules, 1966 — Rule 56

Citation : (1997) 4 BomCR 255

Hon'ble Judges : T.K. Chandrashekhara Das, J; D.R. Dhanuka, J

Bench : Division Bench

Advocate : F. Rebello, for the Appellant; R.M.S. Khandeparkar and H.R. Bharna, A.G.A. for respondent Nos. 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

D.R. Dhanuka, J.—This petition raises an interesting question of law regarding the due date of retirement of the petitioner as a bailiff working in the subordinate courts in the State of Goa. The petitioner was born on 1-1-1932. It is the petitioner's case that the petitioner was due for retirement only on 31-12-1991 on completion of the age of 60 as on that date. The petitioner's case is duly supported by letters dated 16-4-91 and 16-5-91 addressed by respondent No. 2 to the learned District and Sessions Judge, North Goa, Panaji. It is the case of respondent No. 1 that the petitioner was due for retirement on 31-12-1989 on completion of age of 58 years. The petitioner however continued to be in actual employment of the Court until 31-10-1990.

2. On 31-10-1990, the District and Sessions Judge, Panaji, Goa passed the impugned order (Exhibit "A" to the petition) stating therein that the petitioner stood retired from service with effect from 31-12-1989 on attaining the age of super-annuation i.e. 58 years. By this petition, the petitioner has impugned the said order dated 31-10-1990 passed by respondent No. 1. It was stated in the

said order that the petitioner had attained the age of super-annuation on attaining the age of 58 years on 31-12-1989 even though the impugned order was passed by respondent No. 1 on 31-10-1990. A sum of Rs. 27,498/- was deducted from the earned leave/commuted leave and gratuity amount payable to the petitioner on account of the recovery in respect of the wages already paid to the petitioner for the period 1-1-1990 till 30-9-1990. It is the case of the petitioner that no salary has been paid to the petitioner for the month of October 1990.

3. By this petition, the petitioner has sought issue of a writ of certiorari or a writ in the nature of certiorari so as to quash the impugned order dated 31-10-1990 and has also sought issue of a writ of mandamus for refund of the amount of illegal deductions made on account of the illegal deductions made from the terminal dues of the petitioner as aforesaid along with interest and for various other consequential reliefs.

4. The question as to whether the petitioner was due to retire on completion of age of 60 years or on completion of age of 58 years will depend upon interpretation and application of rules, orders and circulars referred to hereinafter.

5. Having regard to the nature of the controversy, it is necessary to set out the facts in detail.

6. On 7-3-1961 the petitioner was recruited as "official de diligences" which post was subsequently equated to the post of bailiff. The petitioner was an "absorbed employee" under the Goa, Daman & Diu (Absorbed Employees) Act, 1965 as the petitioner was holding the absorbed post immediately before 28-12-1961 under the former Portuguese administration of Goa, Daman and Diu.

7. On 12-5-1966, the rules called as The Government of Goa, Daman and Diu (Class IV Posts) Recruitment Rules, 1966 being rules dated 6-5-1966 framed by the Administrator, Goa, Daman and Diu in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India were earlier published in the Government Gazette. The said rules were made applicable to the posts specified in column 1 of the Schedule to the said Rules. The Schedule appended to the said Rules classified watchmen, peons, daftary, jamadar, bailiff and attendant as Class IV non-gazetted non-ministerial employees. In the schedule appended to the said rules, the post of bailiff is mentioned as class IV post. In the schedule to the said rules, the scale of pay pertaining to the post of bailiff is mentioned as Rs. 80-1-85-2-95-EB-3-110. The petitioner was undoubtedly discharging duties of a bailiff at all times. The petitioner was therefore classified as Class IV employee under the said Recruitment Rules. The petitioner was treated by all concerned as Class IV employee for quite some time.

8. On 5-8-1975, the Government of India issued a memorandum concerning the post of bailiff stating therein that the annexure to the letter of Government of India bearing No. 1-117/65-G.P. dated 15th January 1966 shall be substituted as set out therein. By the said memorandum, two different pay scales were

prescribed by the Government of India i.e. one for the existing incumbents and other for future entrants. Since the petitioner was the then existing incumbent for the post of bailiff, the petitioner was fitted in the scale of pay at serial No. 1 set out in the said memorandum i.e. Rs. 110-3-131-4-155-EB-4-175-5-180. As regards the future entrants the pay scale prescribed was Rs. 80-1-85-2-95-EB-3-110.

9. By letter dated 11-9-1975, the Government of Goa, Daman and Diu inquired from the Government of India as to whether the bailiffs whose pay was fixed in the revised pay scale of Rs. 110-180 were to be considered as Class III employees or whether they will still continue to be Class IV employees. By letter dated 2-2-1976, the Government of Goa, Daman and Diu circulated letter dated 28-1-1976 issued by Deputy Secretary to the Government of India stating therein that "the incumbents of the post of bailiff who had been fixed in the pay scale of Rs. 110-180 may be re-classified as Class III employees which status they still carry as personal to them. In the said letter it was further stated that the future entrants to the grade of bailiff who are appointed to that grade in the scale of Rs. 80-110, will, however, be classified as Class IV.

10. On 20-3-1974, the Central Civil Service (Revised Pay) Fifth Amendment Rules, 1974 were published. The said Rules came into force on 1-1-1973. The Schedule to the said Rules is silent in respect of the bailiffs who were fitted in the pay scale of Rs. 110-180.

11. On 29-11-1975, the President of India issued an order inter alia to the effect that the existing classification of Government employees in Class I to Class IV shall be now classified as Group A to Group D employees. Para 2 of the said Presidential order is of some significance. The said para. reads as under :-

"2. Subject to reclassification of posts as indicated above, and also subject to such exceptions as Government may, by any general or special order, make from time to time, all Central Civil posts created subsequent to the issue of this order shall be classified as follows:

"Provided that posts created subsequent to the issue of this order as specific additions to existing cadres shall have the same classification as posts in the cadre to which they have been added."

It is obvious that the post of bailiff was not created subsequent to the issue of the said order dated 29-11-1975

12. On 22-5-1976, the Goa, Daman and Diu Government Subordinate Courts Group "C" (ministerial and non-ministerial non-Gazetted) Posts Recruitment Rules, 1976 framed in exercise of the powers conferred on the Administrator of Goa, Daman and Diu by the proviso to Article 309 of the Constitution of India. The Schedule to the said Rules does not refer to the post of bailiff. The pay scale of Rs. 110-180 was revised to Rs. 260-400 vide Government Order dated 12-5-1979.

13. On 23-1-1980, the learned, Judicial Commissioner issued a circular stating therein as under :

"It has further been clarified that those bailiffs whose pre-revised scale of pay was Rs. 110-180 be given a fresh option now either to retain the scale of Rs. 260-400, in which case their retirement age would be 58 years, as stated above or to switch over to the revised scale of Rs. 210-270 in which case they would superannuate at the age of 60 years."

This circular was issued by the Court of Judicial Commissioner on the basis of its own understanding in respect of the interpretation of letters addressed by the Government of India presumably letter dated 28-1-76 addressed by the Deputy Secretary to the Government of India to which we have already made a reference in the earlier part of this judgment even though the said letter by itself did not re-classify the petitions from Class IV to Class III.

14. On 1-2-1980, the petitioner exercised his option to retain his existing pay scale of Rs. 260-400 which pay scale was already revised from the pay scale of Rs. 110-180 with effect from 12-5-1979. In the writing signed by the petitioner on 1-2-1980, the petitioner declared that the petitioner was fully aware of the above referred circular dated 23-1-1980 and the petitioner was also aware of the fact that in view of the petitioner retaining his existing scale of Rs. 260-400, the retirement age of the petitioner would be 58 years. The said pay scale of Rs. 260-400 was once again revised on the recommendation of the Fourth Pay Commission. The revised pay scale of Rs. 950-20-1150-EB-25-1500 came into force with effect from 1-1-1986.

15. We shall now refer to four most crucial documents which have the direct and substantial bearing on the subject matter of this petition. The said documents are summarised hereinafter.

(a) On 13th September 1990, an order was made by and in the name of Governor of Goa duly published in the official gazette stating therein that the various civil posts within the pay range specified therein shall stand re-classified as Group A, Group B and Group C and Group D posts. The relevant portion of the operative part of the said Government Order made under Article 309 of the Constitution of India reads as under :

"3. A Civil post carrying a pay or a scale of pay with a maximum of over Rs. 1,150 but less than Rs. 2,900 ..Group "C"

Provided that posts created on or after 1st January, 1986 as specific additions to existing cadres shall have the same classifications as posts in the cadre to which they are added.

2. Accordingly, posts, if any, carrying the classification other than the one specified above shall stand reclassified as per the per range indicated above.

The said Government Order shall have to be read along with the clarificatory

Government order issued by and in the name of the Governor of Goa on 5-4-1991 to which we shall now make a reference. By the said clarificatory order dated 5-4-1991 it was provided as under :

"It is therefore clarified with reference to the proviso to the Government order dated 13-9-1990 that in case of posts which existed prior to 1-1-1986, they will continue to have the same classification which was in existence prior to 1-1-1986."

The said document dated 5-4-1991 is headed as "Circular". It however appears from the operative part of the said circular dated 5-4-1991 that the said circular was issued as and by way of clarification of the order dated 13th September 1990 by order and in the name of the Government of Goa.

In view of the said circular dated 5-4-1991 referred to hereinabove, posts which existed prior to 1-1-1986 continue to have the same classification which was in existence prior to 1-1-1986. It appears that by its order dated 5-4-1991, the same language in substance was adopted as was used in the Presidential order dated 29-11-1975 to which we have made reference in the earlier part of the judgment. Even in the order dated 29-11-1975 all central civil posts created subsequent to the issue of the said order alone were to be classified according to the range of the pay scale specified in para 2 thereof. At this stage there was a difference of opinion between the respondent No. 1 and the Government of Goa in respect of age of retirement of the petitioner. The petitioner was contending that in view of the provisions of law contained in Fundamental Rule 56(e) the petitioner was liable to retire from service on the afternoon of the last day of the month in which he attains age of 60 years. The Government of Goa endorsed this stand of the petitioner as would be shown by referring to the letters addressed by the Government of Goa to the learned District and Sessions Judge. The learned District and Sessions Judge however was of the view that in view of the option having been exercised by the petitioner on 1-2-1980 in terms of the circular issued by the Court of Honourable Judicial Commissioner on 23-1-1980, the petitioner was bound to retire at the age of 58 years. The respondent No. 1 had however recommended at all times that the services of the petitioner for the period 1-1-1990 until 31-10-1990 be regularised. We shall now refer to the two letters addressed by respondent No. 2 to respondent No. 1 which endorse the case of the petitioner in specific terms.

(b) By letter dated 16-4-1991, the Government of Goa informed the learned District and Sessions Judge, North Goa, Panaji, as under :

".....and it has been found that even though the pay scales of the posts of bailiffs have been revised after the Fourth Pay Commission, the cadre of Bailiff will continue to be of Group "D" employees in terms of Department of Personnel, Circular No. 2-1-89-PER dated 5-4-1991 and hence they will retire in normal course on attaining the age of 60 years.

Hence the period of retirement of Shri Kamalakar should be considered after

attaining the age of 60 years."

(C) By letter dated 16-5-1991, addressed to the learned District and Sessions Judge, Panaji, the Government of Goa reiterated its same stand.

16. The respondent No. 2 has not filed any affidavit-in-reply to the petition.

17. We shall now proceed to decide the principal controversy between the contesting parties as to whether the petitioner was reclassified from Class IV (Group "D") to Class III (Group "C") on the basis of range of pay scale as set out in the impugned order dated 31-10-90 Exhibit "A" to the petition.

18. It is obvious from the Government of Goa, Daman and Diu (Class IV Posts) Recruitment Rules, 1966 dated 6th May, 1966 and the contents of letter dated 11-9-1975 addressed by the Government of Goa to the Deputy Secretary to the Government of India that the petitioner was classified as Class IV employee at least till 11-9-1975 even though the petitioner was placed in the pay scale of Rs. 110-180. By the said letter dated 11-9-1975, the Government of Goa raised a query to the effect as to whether in view of the petitioner having been fixed in the revised pay scale of Rs. 110-180, the petitioner should now be considered as Class III employee or as to whether the petitioner still continued to be Class IV employee. By letter dated 28th January 1976, the Government of India did express an opinion to the effect that the post of the bailiff in the pay scale of Rs. 110-180 may be re-classified as Class III employee. This letter by itself does not amount to reclassification of the petitioner from Class IV employee to Class III employee. Moreover, the said letter dated 28th January 1976 cannot be considered in isolation. The letter shall have to be considered alongwith the subsequent Government orders in order to find out the true legal effect of the various Government orders. It is of considerable significance that by Presidential Order dated 29-11-1975, reclassification of posts according to the range of pay scale was to be made applicable only in respect of central civil posts created subsequent to the issue of order dated 29-11-1975. The post of the bailiff was not a post created subsequent to the issue of the said order.

19. We have no doubt in our mind that by order dated 13th September 1990 issued by and in the name of Governor of Goa, the posts were reclassified as per the pay range set out therein. The said order dated 13th September 1990 cannot be considered as redundant. The said order shall have to be read along with the clarificatory order/circular dated 5-4-91. By the said clarificatory circular/order issued by and in the name of the Governor of Goa it was clarified that in the case of posts which existed prior to 5-1-86 they will continue to have the same classification which was in existence prior to 1-1-1986. In our opinion, the petitioner was classified as Class IV (Group "D") employee prior to 1-1-86 and at all relevant times and the petitioner was never transferred to Class III (Group C) under any of the rules made under Article 309 of the constitution or otherwise.

20. The next question which arises for consideration of the Court is as to what is the effect of the circular issued by the Judicial Commissioner dated 23-1-80 and

exercise of option by the petitioner on 1-2-80 declaring that his retirement age would be 58 years. In our opinion the said circular dated 23-1-80 was issued by the learned Judicial Commissioner under a mistake of law and the declaration made by the petitioner in the option exercised by the petitioner on 1-2-80 is liable to be considered as irrelevant and is of no legal consequence. The question as to whether the petitioner was due to retire on completion of the age of 58 years or on completion of age of 60 years is a question of law. The said question shall have to be decided with reference to the relevant rules and orders. The petitioner was already in the pay scale of Rs. 260-400 with effect from 12-5-1979. The petitioner did not derive any advantage by exercise of the so called option on 1-2-80. It appears to be unnecessary to pursue this line of controversy in view of the contents of order dated 13th September 1990 issued by the Governor of Goa read with circular dated 5-4-1991. In view of the above, we are of the considered opinion that the petitioner was due for retirement on completion of the age of 60 years as set out in Fundamental Rule 56(e) of Fundamental Rules and the impugned order dated 31-10-1990 (Exhibit "A" to the petition) suffers from legal infirmity and from error of law apparent on the face of the record. The respondent No. 1 ought to have re-examined the matter in light of the Government order dated 13th September 1990 read with Government Order dated 5-4-1991 as interpreted by the Government of Goa by its letters dated 16-4-1991 and 16-5-1991 in proper perspective. The respondent No. 1 continued to hold the same opinion and thus the petitioner was not allowed to resume duty though requested by the respondent No. 2. It cannot be forgotten that an order, rule or notification or even a circular issued under Article 309 of the Constitution can be made operative with retrospective effect and the same can be even retrospectively amended.

21. It is unfortunate that the respondent No. 2 went to the length of recovering a sum of Rs. 27,498/- from the petitioner even though the said amount was paid towards salary for the work actually done by the petitioner from 1-1-90 till 31-9-1990. We do not appreciate this harsh attitude on the part of the respondent No. 2. The respondent No. 1 at all times had requested the respondent No. 2 to regularise the services of the petitioner for the period for which the petitioner had actually rendered service since there was a confusion about the date of retirement of the petitioner from service.

22. The learned Counsel for the petitioner has submitted that the classification of the petitioner as Class IV employee was for the first time sought to be altered by the above referred order dated 13th September 1990 but the said order was clarified and/or retrospectively corrected by circular/order dated 5-4-1991. The learned Counsel for the petitioner also relied upon the ratio of the judgment of the Full Bench of our High Court in the case of Chandrakant Sakharam Karkhanis and Others Vs. State of Maharashtra and Others, . The learned Counsel for the respondent No. 1 relied upon the ratio of the judgment of the Supreme Court in the case of Comptroller and Auditor General of India and others Vs. Mohan Lal Mehrotra and others, .

23. The learned Counsel for respondent No. 2 did argue that the petitioner was reclassified as Class III (Group "C") employee with effect from 28-1-76/2-2-76. We are not persuaded to accept this submission for more than one reason. The Government of India undoubtedly expressed its view to the effect that the post of bailiff who had been allowed the pay scale of Rs. 110-180 "may be reclassified" as Class III employee. The said letter by itself does not amount to reclassification of the petitioner. Assuming that, there is any ambiguity in the said letter, the said letter shall have to be read in conjunction with subsequent orders passed by the Government of India as well as by Government of Goa to which reference is already made in the earlier paragraphs of the said letter.

24. In our opinion, the Government of Goa was justified in addressing the letters dated 16-4-1991 and 16-5-1991 in view of the clarificatory order passed by and in the name of Governor of Goa on 5-4-1991 although described as a clarificatory circular.

25. In the result, the petition succeeds. We accordingly grant the following reliefs to the petitioner.

(a) It is hereby declared that the petitioner was liable to retire only on completion of age of 60 years as provided in Fundamental Rule 56(e). It is hereby declared that the petitioner was a Government servant in Class IV service at all times notwithstanding the revision of his pay scale.

(b) The impugned order dated 31-10-1990 (Exhibit "A" to the petition) is hereby quashed.

(c) The respondent No. 2 is directed to repay a sum of Rs. 27,498/- alongwith interest at the rate of 12% per annum from 15-4-1991 until payment.

(d) The respondent No. 2 is directed to pay the amount of salary and all other allowances and benefits to the petitioner for the period commencing from 1-10-1990 till 31-12-1991. The petitioner shall be entitled to all the terminal benefits including pension consequential to the order passed by this Court today in the above referred writ petition. The respondent No. 2 shall pay the above referred amount to the petitioner within three months from today, time being the essence of the obligation.

(e) Having regard to the facts and circumstances of the case, there shall be no order as to costs.