

(2009) 02 OHC CK 0042

In the Orissa High Court

Sri Subash Chandra Das

APPELLANT

Vs

Registrar (Amn.), Orissa High Court and Others

RESPONDENT

Date of Decision : 05-02-2009

Acts Referred:

Citation : (2009) 107 CLT 420 : (2009) 1 OLR 636

Hon'ble Judges : B.S. Chauhan, C.J.;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—This Writ Petition has been filed seeking a declaration that all Departmental Proceedings pending against the Petitioner and adverse entries made in the CCRs for the year 1994-1996 & 2005-2006 as false, based on mala fide intention and due to non application of mind and to declare the order of compulsory retirement (Annex.-6) as arbitrary and bad in the eye of law restoring the service of the Petitioner to its original position treating the service as on duty from the date of retirement.

2. The facts and circumstances giving rise to the case are that Petitioner was appointed as Munsif on probation vide notification dated 2.6.1980 and confirmed on the said post vide notification dated 26.7.1985. Petitioner claims to have been promoted vide Order Dated 30.1.1989 as O.J.S. Class-I (Jr.) and subsequently as Subordinate Judge on 10.8.1990. Petitioner was put under suspension, during the Departmental Proceedings between 1996-1998 and during this period large number of persons junior to him had been promoted as Chief Judicial Magistrates ignoring the claim of the Petitioner. On the representation made by the Petitioner, he was also promoted as Chief Judicial Magistrate vide Order Dated 1.6.2000 temporarily only to officiate. Subsequent thereto another departmental proceeding was initiated against him in 2004 wherein he was exonerated but he has been given the compulsory retirement vide Order Dated 29.11.2007. Hence this petition.

3. The Petitioner had earlier filed a Writ Petition being W.P.(C) No. 7791 of 2004 seeking a direction to the Opposite Parties to promote him as Chief Judicial Magistrate/Addl. District Judge and District Judge with effect from the date his juniors had been promoted. That Writ Petition came up for hearing on 22.12.2008. Petitioner was represented by Mr. G.A.R. Dora, Learned Senior Counsel and to examine his case in correct perspective entire service record of the Petitioner was summed by the Court and Court examined the same in his presence. However, Petitioner appeared on 24.12.2008 before the Court and asked the Court to adjourn his case as he wanted to argue his case personally. Thus the case was adpurned to 20.01.2009 for hearing and was dismissed vide Order Dated 22.01.2009.

4. The instant Writ Petition could not be heard along with the said Writ Petition as it was filed only on 16.01.2009 and was listed before the Court only on 28.01.2009. While arguing the earlier Writ Petition, Petitioner referred to most of the arguments which relates to the compulsory retirement as we have taken note of in the said Judgment. In this Writ Petition while arguing the case on 2nd February, 2009, Petitioner has challenged the findings recorded by us in the earlier Writ Petition. Petitioner has also insisted that he did not want the Court to wait further and no counter affidavit was required as the matter was to be decided on the basis of the record which this Court had already examined in detail and the matter should be disposed of on the first hearing.

5. At the request of the Petitioner in person we heard the matter finally at the stage of admission. Petitioner, who had an experience of 27 years as a Judicial Officer could not explained the delay and latches in filing the Writ Petition as admittedly the petition has been filed after expiry of more than 13th months of passing the order of compulsory retirement i.e. dated 29.11.2007 and during the course of hearing he filed an additional affidavit wherein he has referred to and challenged the findings recorded by us in his earlier Writ Petition decided on 22.1.2009. Certain new facts had been brought on record by him in this additional affidavit, which may also be referred herein at a later stage.

6. In this Writ Petition, basically two things have been mentioned; firstly that his C.C.Rs had been very good and secondly no adverse entries had ever been given to him and there were some adverse entries in 1984,1985,1986,1988 and 1989 which had been expunged as is evident from the letter dated 15.05.1993 (Annex.-39). The Petitioner could not explain as to why this letter dated 15.5.1993 could not be produced by him in the earlier Writ Petition. More so, it is evident that as the Petitioner had been promoted in 1990 this letter merely referred that the adverse entries have no force and would not stand in his way of further promotion. It is not a case that it could not be taken into consideration while considering the case of the Petitioner for compulsory retirement. Petitioner has given a chart of adverse entries which was prepared by his Counsel in the earlier case which is as under:

1981: Knowledge of law - needs improvement. General reputation needs

improvement.

1982 : Knowledge of law - needs improvement. The officer lacks judicial outlook. He is hasty and some times his. Judgments are whimsical.

1983 : Knowledge of law - needs improvement.

1984 : He should exercise judicial discretion properly. Knowledge of law - needs improvement.

1988 : Should maintain punctuality.

1990 : Knowledge of law - needs improvement.

1991 : Out turn - Low. He should work hard and improve his out turn.

1992 : Should work hard and try to be industrious to cope with work.

1993 : Knowledge of law - needs improvement.

1994 : Knowledge of law - needs improvement. General reputation Bad. Assessed as a - poor officer.

1995 : Slow in work.

1996 : Work - needs improvement. Very strong rumour exist touching his integrity. Integrity - not free from doubt. General reputation poor. Assessed as a - poor officer

1996-98 : Under suspension/reinstated on 27.7.1998 2000 : Quality of Judgment-below average. Quality of work - below standard. Integrity - Doubtful, (reasons recorded for giving adverse entry regarding doubtful integrity). Assessed as a - poor officer.

2005 : Business of Court - Not good. Discussion of law -poor Assessment of the officer - poor Reputation - poor. Integrity - not good. (In the criminal cases relating to G.R. Case No. 151 of 2005, G.R. Case No. 245 of 1994 and 2(a) CC Case No. 57 of 1993, the Officer while posted at Boudh on 5.9.2005 and 6.9.2005 advanced the case and granted bail to the accused knowingly well that the Addl. Sessions Judge, Boudh has rejected the Bail. In that cases the accused persons absconded for a long time.

2006 : Conduct of business of the Court - He does no judicial work. General reputation - Not good. Punctuality - Not punctual nor regular. Assessed as, a - poor officer.

Petitioner did not dispute the said entries. He has taken the grounds challenging the same by filing the additional affidavit dated 2.2.2009 as under:

(1) So far as regarding knowledge in law needs improvement has been stated in C.C.Rs. of 1981,1982,1983,1984,1990 and 1993, these remarks are baseless as based on no evidence. CCRs from 1984-1989 have been declared as not in force

as per letter dated 15.5.1993.

(2) Petitioner has not committed any illegality in passing any Judgment or orders. But false departmental proceedings No. 11/2004 and D.P. No. 4/2006 had been initiated against him. The High Court of Orissa has destroyed the judiciary from within.

(3) The findings recorded by this Court in its earlier Judgment dated 22.01.2009 are not correct as Petitioner had not been promoted" to the rank of CJM on his representation, because the same was rejected by the High Court vide Order Dated 7.3.2000. He was subsequently promoted by the High Court on its own vide Order Dated 1.6.2000.

(4) There were adverse entries through out his career as mentioned by this Court in its earlier Judgment and particular that knowledge of law needs improvement is not correct and "it is important that the Hon"ble High Court of Orissa could not show a single Judgment or order of the Petitioner as below standard, illegal or knowledge of law needs improvement"

(5) Every day a judicial officer as a student of law requires to improve his knowledge. Therefore his knowledge of law is good.

(6) Adverse entries of the Petitioner relating to general reputation needs improvement is baseless and based on no evidence. The findings recorded by this Court in its earlier Judgment dated 22.1.2009

that his CCRs were not satisfactory is not true as except the adverse entries regarding knowledge of law needs improvement, there is no adverse entries touching his integrity.

(7) The Adverse entries touching his integrity were made out of grudge and it are whimsical, base less, false and based on no evidence. If the same are ignored, the CCRs of the Petitioner through out service career is good in all respect.

(8) In the earlier Judgment this Court has recorded that allegations of mala fide had been made, were after thought and they were alleged without impleading any person by name and after several years of filing the Writ Petition on the date of final hearing. Such a finding is not correct as the Petitioner had been advised by his Counsel Shri G.R. Dora as it was not necessary to allege the same in the petition.

(9) High Court failed to take any action against the District Judges, particular Smt. Madhuri Pattnaik and Shri J.P. Mishra, who had made false adverse entries against the Petitioner and the earlier Writ Petition has been dismissed by the Court without applying its mind and without going through the documents.

7. Be that as it may scandalous allegations have been made in the petition against the District Judges who have retired long back without substantiating the same, which has been filed at a belated stage after knowing the fate of the

earlier Writ Petition as the same had been heard earlier on 22.12.2008 and 24.12.2008 In the earlier Writ Petition we have held that if the Petitioner makes allegations of mala fide, it is necessary to file the documentary evidence substantiating the same and make them party. At the cost of repetition we have to reiterate the same.

8. It is settled legal proposition that in case allegations of mala fide are made against any person he is to be impleaded by name, otherwise the allegations cannot be considered. (Vide State of Bihar and Another Vs. P.P. Sharma, IAS and Another, ; Dr. J.N. Banavalikar Vs. Municipal Corporation of Delhi and another, ; All India State Bank Officers' Federation and Others Vs. Union of India (UOI) and Others, ; and I.K. Mishra Vs. Union of India and Others, .)

9. In Federation of Railway Officers Association and Others Vs. Union of India (UOI), , the Apex Court has held that the allegation of mala fide has to be specifically made and the person against whom such allegations are made has to be impleaded and in his absence such allegations cannot be taken into consideration.

10. More so, it is not the case of the Petitioner that he was not aware of the adverse entries given to him from time to time. Further the letter dated 15.5.1993 which has been filed by the Petitioner only on 2.2.2009, was not a part of the record in the earlier petition for the reason best known to him, which speaks that adverse entries for the years 1984 to 1989 have lost force and would not stand in his way of further promotion. Whatever its effect may be, the said order did not wash away the entries so far as consideration of the Petitioner's compulsory retirement is concerned.

11. In Union of India (UOI) Vs. Col. J.N. Sinha and Another, , the Apex Court held that an employee compulsorily retired does not lose any right acquired by him before retirement, as the compulsory retirement is not intended for taking any personal action against the government servant, and the order so passed can be challenged on the ground that either the order is arbitrary or it is not in public interest. No other ground can be available to the government servant who is sought to be compulsorily retired from service. However, it may be subject to the conditions provided under the statutory provisions.

12. In Union of India (UOI) Vs. M.E. Reddy and Another, , the Hon'ble Supreme Court examined the issue involved herein and held that it is an absolute right of an employer to compulsorily retire its employee from service if he falls within the zone of consideration as it may be necessary to weed out the dead wood or remove a person having doubtful integrity and his retirement is in public interest. There may not be material on record to show that the employee is dishonest, but those who had the opportunity to watch his performance from close quarters and are in position to know the nature and character not only of his performance but also his reputation that he enjoys.

In such a case the principles of natural justice are not attracted. The removal

does not cast any stigma as it is not a punishment.

13. In *Brij Mohan Singh Chopra Vs. State of Punjab*, , without noticing the Judgment in *M.E. Reddy (supra)* the Apex Court held that the principle of natural justice would apply while giving compulsory retirement to a government employee on the basis of adverse entries which were neither communicated nor representation against the same was considered.

14. In *Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another*, , the Supreme Court has laid down certain criteria for the Courts, on which it can interfere and they included mala fide, order if based on no evidence, order is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material, i.e. if it is found to be a perverse order. The Hon"ble Apex Court observed that the order of compulsory retirement is not a punishment, it implies no stigma nor any suggestion of misbehaviour; the order should be passed in public interest on subjective satisfaction of the Authority and while reviewing the service record, the entire service record is to be considered. However the record of the later years should be given more importance and even uncommunicated adverse entries may be taken into consideration. The Apex Court held as under:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government servant compulsorily. The order is passed on the subjective satisfaction of the Government. (iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an Appellate Court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or " that it is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material: in short, if it is found to be a perverse order.

(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a Government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

15. Similar view has been reiterated by the Hon''ble Apex Court in Posts and Telegraphs Board and others Vs. C.S.N. Murthy, ; Sukhdeo Vs. Commissioner Amravati Division, Amravati and Another, ; I.K. Mishra Vs. Union of India and Others, ; Prabodh Sagar v. Punjab State Electricity Board and Ors. AIR 2000 SC 1684; and Ramesh Chandra Acharya Vs. Registrar, High Court of Orissa and Another, , observing that power of the employer to give compulsory retirement to its employee is absolute on the basis of unsatisfactory performance, in public interest.

16. In Rajat Baran Roy and Others Vs. State of W.B. and Others, , the Supreme Court held that there is a very limited scope of judicial review in a case of compulsory retirement and it is permissible only on the grounds of non-application of mind and want of material particulars.

17. In State of Gujarat and Anr. v. Suryakant Chunilal Shah (1999) 1 SCC 529, the Supreme Court held that while considering the case of an employee for compulsory retirement, the public interest is of paramount importance. A dishonest, corrupt and dead-wood deserves to be dispensed with, how much efficient and honest an employee is, it is to be assessed on the basis of material on record which may also be ascertained from confidential reports. However, there must be some tangible material against the employee warranting his retirement.

18. In State of U.P. and Another Vs. Bihari Lal, , the Apex Court held as under:

It is now settled law that the entire service record should be considered before taking a decision to compulsorily retire a government servant it is not necessary that adverse remarks should be communicated or every remark, which may sometimes be categorised as adverse, be communicated. It is on an overall assessment of the record, the authority would reach a decision whether the government servant should be compulsorily retired in public interest. In an appropriate case, there may not be tangible material but the reputation of officer built around him could be such that his further continuance would imperil the efficiency of the public service and would breed indiscipline among other public servants. Therefore, the Government could legitimately exercise their power to compulsorily retire a government servant." (Emphasis added).

19. In Swatantar Singh Vs. State of Haryana and others, , the Hon''ble Supreme Court observed as under:

It is sad but a bitter reality that corruption is corroding, like cancerous lymph nodes, the vital veins of the body politic, social fabric of efficiency in the public service and demoralizing the honest officers.... The reputation of being corrupt would gather thick and unchaseable clouds around the conduct of the officer and gain notoriety much faster than the smoke. Sometimes, there may not be concrete or material evidence to make it part of the record. It would, therefore, be impracticable for the reporting officer or the competent controlling officer writing the confidential report to give specific instances of shortfalls, supported

by evidence, like the remarks made by the Superintendent of Police. More often, the corrupt officer manipulates in such a way and leaves no traceable evidence to be made part of the record for being cited as specific instance.... It is seen that the officers made the remarks on the basis of the reputation of the Petitioner. (Emphasis added)

20. In *M.S. Bindra Vs. Union of India and Others*, , the Hon"ble Supreme Court considered the case of compulsory retirement on the basis of "doubtful integrity" and observed that there must be preponderance of probability for reasonable man to entertain doubt regarding the possibility of doubtful integrity and therefore such factor should be taken into consideration by the Reviewing Committee while assessing an officer/employee for retiring him compulsorily.

21. In *Jugal Chandra Saikia Vs. State of Assam and Another*, , the Apex Court held that where the screening committee is consisting of responsible officers of the State and they have examined/assessed the entire service record and form the opinion objectively as to whether any employee is fit to be retained in service or not. In absence of any allegation of mala fide, there is no scope of a judicial review against such an order. While deciding the said case, reliance had been placed upon a large number of Judgments, particularly, upon Judgments in *Section S. Ramachandra Raju Vs. State of Orissa*, ; and *M.S. Bindra v. Union of India and Ors.* (Supra).

22. In *Nawal Singh Vs. State of U.P. and Another*, , a similar view has been reiterated, observing that formation of an opinion regarding compulsory retirement by the authority is in the nature of a subjective satisfaction. However, it should be based on assessment of the service record. In case of adverse entry regarding the officer is concerned, it should be entertained on the basis of the opinion of a higher officer who had an opportunity to watch the performance of the officer concerned and to form an opinion with regard to overall reputation enjoyed by him.

23. In *Shiv Dayal Gupta Vs. State of Rajasthan and Another*, , the Apex Court dealt with a case where on perusal of the entire service record the High Court came to the conclusion that employee had been assessed as a poor officer, his integrity was found to be doubtful; Was advised to improve his Judgment writing; was kept under observation/watch for quite some time; and quality of casework was found to be unsatisfactory and refused to interfere. The deciding the said case, the Court placed reliance on its earlier Judgments in *State of U.P. and Another Vs. Lalsa Ram*, ; and *State of Gujarat Vs. Umedbhai M. Patel*, .

24. Thus, the law on the point of compulsory retirement can be summarized that the Authority must consider and examine overall entries of the officer concerned and not an isolated entry, as it may well be in some cases that in spite of satisfactory performance, the authority may desire to compulsorily retire an employee in public interest, as in the opinion of the said Authority, the post has to be manned by a more efficient and dynamic person and if there is sufficient

material on record to show that the employee "rendered himself a liability to the institution", there is no occasion for the Court to interfere in the exercise of its limited power of judicial review.

25. In *The State of Punjab Vs. Dewan Chuni Lal*, , a bench of two Judges of Supreme Court held that the adverse entries regarding dishonesty and inefficiency of the government employee in his ACRs have to be ignored if subsequent to recording of the same he had been allowed to cross the efficiency bar as it would mean that while permitting to cross the efficiency bar such entries had been considered and were not found of serious nature for the purpose of crossing the efficiency bar.

26. Similarly a Bench of two Judges in *Baidyanath Mahapatra Vs. State of Orissa and Another*, had taken a similar view on the issue observing that adverse entries awarded to the employee in the remote past and the fact that he had subsequently been promoted to the higher post loses significance, for the reason that while considering the case for promotion he had been found possessing eligibility and suitability and if such entry did not reflect deficiency in his work and conduct for the purpose of promotion, it would be difficult to comprehend as to how such adverse entry could be pressed into service for retiring him compulsorily. When a government servant is promoted to higher post on the basis of merit and selection, adverse entries if any contained in his service record lose their significance and remain on record as part of past history.

27. In *Union of India Vs. V.P. Seth and another*, , the Hon"ble Supreme Court held that adverse remarks against the employee and particularly of the integrity would not stand eclipsed by his subsequent promotion while considering the case of compulsory retirement.

28. However, a three Judge Bench of Supreme Court in *State of Orissa and others Vs. Ram Chandra Das*, had taken a different view and have held therein that, as such every entry in the CCR still remains part of the record for overall consideration to retire a government servant compulsorily, such entry do not lose significance, even if the employee has subsequently been promoted. The Court held as under:

Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that selfsame material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the government servant in service after he attained the required length of service or qualified period of service for pension.

29. Similar view has been reiterated in I.K. Mishra Vs. Union of India and Others, ; and The State of Punjab Vs. Gurdas Singh, .

30. In S. Prabhjeet Singh Johar Vs. Harjeet Singh and Others, , the Apex Court held that, vigour or sting of every entry in the CCR does not get wiped out by efflux of time, more particularly while considering the case of employee for giving him "compulsory retirement", as it is required to examine the entire service records including character rolls and confidential reports. It is on consideration of totality of the materials with emphasis later entries, the authority is expected to form its opinion whether an employee is to be compulsorily retired or not. "Vigour or sting of an adverse entry is not wiped put" merely it relates to a remote past while considering the case of compulsory retirement. There may be a single adverse entry of integrity which may be sufficient to compulsorily retire the government servant.

31. In view of the above, the law can be summarized that "washed off theory" does not have any universal application and it will have some relevance while considering the case of government servant for further promotion but certainly not in a case where the employee is being considered by the Reviewing Authority as to whether he is fit to be retained in service or require to be given compulsory retirement.

32. If the case of the Petitioner is examined in the light of the aforesaid settled legal propositions, it cannot be held that Petitioner had good service record which could make him worth retaining in service. Thus, his compulsory retirement cannot be held to be not in public interest.

Thus the Writ Petition lacks merit and is accordingly dismissed.

B.N. Mahapatra, J.

I agree.