

(1965) 10 AHC CK 0009
In the Allahabad High Court

Sridhar Prasad Nigam

APPELLANT

Vs

State of Uttar Pradesh and Another

RESPONDENT

Date of Decision : 22-10-1965

Acts Referred:

Constitution of India, 1950 — Article 14, 309, 311

Citation : (1968) 1 LLJ 38

Hon'ble Judges : W. Broome, J; Jagdish Sahai, J

Bench : Division Bench

Judgement

Jagdish Sahai, J.—Writ Petition No. 1882 of 1964 has been filed by Sridhar Prasad Nigam, while Writ Petition No. 3054 of 1964 has been filed by Hashmat Ali Khan. In the first writ. petition the respondents are the State of Uttar Pradesh and the Collector of Kanpur. In the second writ petition the sole respondent is the State of Uttar Pradesh. Since common questions of law have been raised in both the petitions, they may conveniently be disposed of together.

2. Sridher Prasad Nigam (hereinafter referred to as Nigam) was a member of the Uttar Pradesh Provincial Civil Service (Executive), His date of birth, as alleged in the petition, is 14 January 1909. On 16 January 1964. Sri Nigam received an order dated 13 January 1964, which reads as follows:

In exercise of the powers under Para, (f) of proviso 1 to Clause (a) of Fundamental Rule 56. Financial Handbook, Vol. II, Parts II to IV, as amended by the notification No. G-1. 194A/X 534 (19) 57, dated 19 October 1963, the Governor of Uttar Pradesh is pleased to order that Sridhar Prasad Nigam, Deputy Collector, Kanpur, shall retire from service on the expiry of three months from the date of service of this order on him.

And than, by means of letter dated 7 March 1964, Sri G.S. Singhal, Assistant Secretary to the Uttar Pradesh Government, conveyed to the Accountant-General, Uttar Pradesh, the sanction of the Governor

to the retirement of Sridhar Prasad Nigam, Deputy Collector, Kanpur, with effect

from the forenoon of 17 April 1964.

By means of Writ Petition No. 1882 of 1964 it is prayed that a writ of certiorari issued quashing the notice dated 13 January 1964, as amended by the order dated 7 March 1964. It is further prayed that a writ of mandamus, order or direction be issued directing the respondents not to interfere in any manner with the petitioner performing his duties until he attains the age of 58 years.

3. Hashmat Ali Khan was initially in the employment of erstwhile State of Rampur, on the merger of Rampur in this was taken over in the Uttar Pradesh Provincial Civil Service (Executive) as a Deputy Collector with effect from December 1949. According to the averments made in the petition, his date of birth is 9 June 1909. On 10 April 1964 Government issued G. O. No. 3042/II-A-79/1963. It reads:

Whereas under G. O. No. 9393/11-A/1963, Hashmat Ali Khan, Deputy Collector, Kanpur, should retire from service on attaining the age of 55 years or on the expiry of three months from the date of the service of that order on you, whichever is later;

And whereas the said order was issued before 1 January 1964 and double have arisha about its legality on the ground that it was issued before the said date;

Now, therefore, the Governor has, in super session of the said order, ordered under Para. (1) of proviso 1 to Clause (a) of Fundamental Rule 56, contained in the Financial Handbook, Vol. II, Parts II to IV, as amended from time to time, that you be required to retire from service on the expiry of three months from the date of service of this notice on you, and you are hereby required to retire from service accordingly.

On 8 July 1984 another order was issued conveying

the sanction of the Governor to the retirement of Hashmat Ali Khan with effect from 16 July 1964.

The Government Order and the order mentioned above were communicated to Hashmat Ali Khan. In Writ Petition No. 3054 of 1964, it is prayed that a writ in the nature of certiorari or like writ or direction may issue to quash the order of retirement dated 10 April 1964. There is also a prayer for the issue of a writ in the nature of mandamus to the respondent to treat the petitioner as continuing a member of the Uttar Pradesh Civil Service (Executive Branch) as heretofore. In addition, it has been prayed that any other relief as this Court may deem fit and proper be granted to the petitioner.

4. With a view to amend Fundamental Rule 53, on 19 October 1963 the notification re-produced below was published in the State Gazette:

MISCELLANEOUS 19 October 1963

No. G-1-1794-A/X 531 (19)-57--Whereas the Governor of Uttar Pradesh has, in

pursuance of the decision of the Government of India raising the age of compulsory retirement from 55 to 58 years of Central Government servants, decided, to similarly raise the age of retirement of Government servants to whom Fundamental Rule 56 applies;

Now, therefore, in exercise of the powers conferred by the proviso to Article 309 of the Constitution and all other powers in that behalf the Governor of Uttar Pradesh is pleased to make the following amendment in Fundamental Rule 66 as last amended under Finance Department notification No. G 1-1233/X-534 (19)-57, dated 25 May 1961:

Amendment

1. In Fundamental Rule 58--

(1) For the figure "55" wherever it occurs the figure "58" shall be substituted,

(2) For the existing proviso at the end of Clause (a) the following shall be substituted:

"Provided that:

(i) the appointing authority may require the Government servant to retire after he attains the age of 55 years on three months" notice without assigning any reason; or

(ii) the Government servant may, after attaining the age of 65 years, voluntarily retire after giving three months" notice to the appointing authority;

Provided further that:

(i) the notice of voluntary retirement given under proviso 1 by a Government servant against whom a disciplinary proceeding is pending or contemplated, shall be effective only if it is accepted by the appointing authority subject to the condition that, in case of a contemplated disciplinary proceeding, the Government servant is so informed before the expiry of the notice;

(ii) the notice once given by a Government servant under proviso 1 shall not be withdrawn by him except with the permission of the appointing authority."

* * *

The amended Fundamental Rule 56 came Into force with effect from 1 January 1964. We have heard Sri S.C. Khare for Nigam and Sri B.P. Srivatsava for Hashmat Ali Khan. The following three submissions have been made by learned Counsel for the petitioners:

(1) that the Fundamental Rule 66, as it now stands 1b hit by Article 14 of the Constitution of India;

(2) that the age of a Government servant"s superannuation being 68 years, Nigam and Hashmat Ali Khan had a right to continue In service until they

attained that age; and inasmuch as the services of both of them have been terminated for alleged misconduct on their part, they in effect have been removed from service and inasmuch as no opportunity was given to them of showing ones against the action proposed, as provided by Article 311(2) of the Constitution, the orders terminal log their services are invalid;

(3) that the orders passed by the State Government are mala fide.

5. We now proceed to deal with the submissions made by learned Counsel seriatim;

6. It is contended that the Fundamental Rule 66, as it now stands after the amendment (hereinafter referred to as Rule 56), does not give any guiding principle to the Government or the retiring authority to decide which Government servants to retain after the age of 55 years and which to retire. Learned counsel also submitted that the provision that

the appointing authority may require the Government servant to retire after he attains the age of 55 years on three months" notice without assigning any reason.

is an arbitrary one and can result in discrimination. It is true that if only Clause (1) of Rule 53 is read, an impression may be created that the age of retirement is 58 years, but if all the clauses are read harmoniously together, it is clear that the intention of the rule-making authorities was to fix the age of superannuation at 55, leaving it to the Government to permit, with their consent, good officers to continue in service until they attained the age of 58 years. It is clearly provided in the rule that after a Government servant has attained the age of 55 years, the Government cannot force him to continue in service and he cannot force the Government to retain him in service, until he attains the age of 58 years. It is true that normally a Government servant can expect to serve until he attains the age of 58 years, but after 55 years he has no legal right to continue nor can the Government force him to continue. Rule 66 had to be drafted in that manner so as to bring it in line with the rules of the Central Government relating to the superannuation of its employees. Nothing turns upon the manner in which a provision is drafted, nor is the use of the words" age of compulsory retirement" in connexion with 58 years conclusive. It is the duty of the Courts to find out the real intention of the legislature or the rule-making authority, however in artistically a provision may have been drafted. In view of our finding that the effect of Rule 58 is to fix the age of superannuation at 55 years, leaving to the Government the option to let ft Government servant, with his consent, continue in service until he attains the age of 58 years, it is not possible to hold that there is an element of discrimination in Rule 56. In any case the guiding principle on which the Government is expected to act is implicit in the provision. The guiding factor is whether or not the Government servant concerned is fit to be kept in service after he has attained the age of 55 years. Even if we hold that the rule fixes the age of superannuation at 58 years, we are unable to hold that the

provision is discriminatory. As the opening words of the notification dated 19 October 1963 would show, the change was made in view of

the decision of the Government of India raising the age of compulsory retirement from 55 to 58 years of the Central Government servants.

As said earlier, a Government servant in the, employment of this State would normally continue in service until he attained the age of 58 years, but the Government servant and the Government have an option in the matter which may or may not be exercised. Nothing has been shown to as to Justify the conclusion that the Government cannot frame rule under which while retaining the age of retirement at 58 years, they have the option to retire Government servants three years earlier. We, in our Judgment in *State v. Ram Bharose Singh Chauhan* [Special Appeal No. 847 of 1964 decided on 19 October 1965] after discussing a number of authorities, came to the conclusion that the Government can validly frame a regulation in exercise of the powers conferred upon it by Section 173(2) of the Uttar Pradesh District Boards Act which may have the result of reducing the age of superannuation in respect of employees who joined service at a time when the rules provided for a higher age of superannuation. It is not necessary to refer to all those authorities again in this Judgment. It is enough to refer to *Ram Autar Pandey Vs. State of Uttar Pradesh* and *Another, and Bishun Narain Misra v. State of Uttar Pradesh* 1968 I L.L.J. 145. We are satisfied that a rule can be framed so as to reduce the age of superannuation of a Government servant. Inasmuch as that can be done by means of a separate rule, on principle we see no reason why in the same rule there cannot be a provision keeping the age of retirement at 58, yet giving the Government and the public servant the option to retire at 65 years. That being the position, we are of the opinion that there is no force in the first submission of the learned Counsel for the petitioners and hold that Rule 56 is not hit by Article 14 of the Constitution.

7. It is well-settled law that there is a difference between termination of service by means of an order of compulsory retirement and termination of service by means of an order of removal or dismissal for a fault or by way of punishment under Rule 49 of the Civil Services (Classification, Control and Appeal) Rules--see *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, and *The State of Bombay Vs. Saubhagchand M. Doshi*, . In the present Case the petitioners have been retired or compulsorily retired after attaining the age of 55 years without being given the benefit of being allowed to continue until they attained the age of 58 years. Retirement, under these circumstances, cannot be considered to be by way of punishment, nor can the order retiring the petitioners be considered to be an order removing or dismissing them from service within the meaning of Article 311 of the Constitution of India. In respect of Nigam it was strenuously contended that he was retired on the ground that he was not enjoying good health. Admittedly, Nigam was suffering at one time from tuberculosis and had to undergo long medical treatment for that disease.

Whenever a person is compulsorily retired, there is some motive behind the decision. It is obvious that a person whom the Government considers a good officer would not be retired; the mere fact that the decision of the Government to retire Nigam after he had attained the age of 55 years was based on the consideration of his bad health would not convert the order retiring him into one of removal or dismissal. In *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, referred to above not only charges had been framed against him, but an enquiry was started. While dealing with this point, their lordships said that the Government having decided to compulsorily retire him for whatever motive and not having punished him, the order of compulsory retirement could not be treated to be an order of dismissal or removal. Their lordships observed:

In the present case there was no doubt some imputation against the appellant which he was called upon to explain but it was made perfectly clear by the letter of 4 January 1950 that the Government was not holding any formal enquiry under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules and that before taking action for his compulsory retirement the Government desired to give him an opportunity to show cause why that action should not be taken.

In other words, the enquiry was to help the Government to make up its mind as to whether it was in the public interest to dispense with his services. It follows, therefore, that one of the principal tests for determining whether a termination of service amounts to dismissal or removal is absent in the case of compulsory retirement.

In the case of the petitioners no charges were framed against them. Nigam was not called upon to explain as to whether he was in good health or not. The Government retired him after he had attained the age of 55 years because they did not consider him suitable in view of the diseases from which he had suffered. Under Rule 59 Government is the sole Judge to decide as to whether or not it would continue a Government servant in service after he had attained the age of 55 years. In *Parshotam Lal Dhingra Vs. Union of India (UOI)*, the Supreme Court approved of the view taken by the Bombay High Court in *Shrinivas Ganesh Chandorkar v. Union of India 1951 II L.L.J. 189* and observed as follows:

It is true that the misconduct, negligence, inefficiency or other disqualification may be the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service, the motive operating on the mind of the Government is, as Chagla, C.J., has said in *Shrinivas Ganesh Chandorkar v. Union of India 1967 II L.L.J. 189* (vide supra) wholly irrelevant.

There is no manner of doubt that under Rule 56 the Government had the right to retire Nigam from service after he had attained the age of 55 years. Therefore, even if it be assumed that the reason behind the order was the ill-health of

Nigam, that would not Invalidate the order passed by the Government. We are, therefore, unable to agree that Nigam had been removed or dismissed from service by way of punishment or within the meaning of Article 311 of the Constitution of India.

8. Some documents have been tiled to show that Hashmat Ali was considered to be good public servant by some of his superior officers, but it is clear from the averments made in the counter-affidavit that the Government did not consider him fit enough to be allowed to continue in service after he had attained the age of 55 years. We have already said earlier that no Government servant as of right can insist upon being retained in service after he had attained the age of 55 years. We have also held above that the Government could frame a rule by which it could reduce the age of superannuation. That being the position, we are unable to agree with the learned Counsel that the order retiring Hashmat Ali from service is an order in the nature of removal or dismissal. The second submission of the learned Counsel, therefore, also falls.

9. There is nothing to show that the orders of the Government are mala fide. Neither of the two officers can be said to be of exceptional merits. At best they are just average and if considering all these circumstances, the ill-health of Nigam and the general impression about Hashmat Ali, the Government decided not to let them continue in service after they had attained the age of 55 years, it cannot be said that the power has been exercised colourably or that it amounts to a fraud on the statute. Learned counsel contended that there is no evidence of the ill-health of Nigam. This is not correct. Admittedly Nigam was suffering from tuberculosis for which, on his on admission, he had under gone a protracted treatment. We, therefore, find no merits in the third submission of the learned Counsel also.

10. For the reason mentioned above we have come to the conclusion that there are no merits in these petitions. They are accordingly dismissed with costs.