
(1970) 03 AHC CK 0026

In the Allahabad High Court

Case No : Special Appeal No. 66 of 1969

State of U.P. and Others

APPELLANT

Vs

Vishweshwar Dayal

RESPONDENT

Date of Decision : 16-03-1970

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : AIR 1971 All 129

Hon'ble Judges : V.G. Oak, C.J.; J.M. Lal, J

Bench : Division Bench

Advocate : K.S. Varma, for the Appellant; S.D. Misra, for the Respondent

Final Decision : Allowed

Judgement

Oak, C.J.—The question for consideration in this special appeal is whether appellant No. 1 was entitled to retire the respondent from service compulsorily. Vishweshwar Dayal respondent joined as a temporary Overseer in the year 1937. In 1963 he was promoted as a temporary Assistant Engineer. He held that post till December 1967. On 11-12-1967 the State Government passed an order compulsorily retiring him from service under Note 1 to Article 465 of Civil Service Regulations. The order was challenged by Vishweshwar Dayal by filing a writ petition. The writ petition has been allowed by a single Judge of this Court. He has quashed the State Government's order dated 11-12-1967. The State of U. P., and two others have therefore filed the present special appeal.

2. Appellant No. 1 took action under Note 1 to Paragraph 465 of Civil Service Regulations. Note 1 is in these terms:

"Government retains the right to retire any government servant after he has completed 25 years" qualifying service without giving any reasons".

The petitioner raised the question of validity of Note 1 to Paragraph 465 of Civil Service Regulations. The learned single Judge held that the provision in question is valid. This position was not disputed before us on behalf of the petitioner-

respondent.

3. The learned single Judge however allowed the writ petition on another point. It has been found that a good deal of leave was due to the petitioner in his leave account in December, 1967, The result of the order dated 11-12-1967 was that the petitioner was unable to avail of that leave. This position is now disputed on behalf of the appellants.

4. In paragraph 16 of the writ petition it was stated that the petitioner earned leave preparatory to retirement amounting to 180 days. On this point, it was stated in the counter-affidavit that earned leave of the petitioner amounted to 120 days, while leave on private affairs was due to him for 90 days. Be that as it may it is clear that in December 1967 leave amounting to several months was due to the petitioner. The question for consideration is whether loss of that earned leave vitiates the order dated 11-12-1967.

5. Rules regulating leave are to be found in Fundamental Rules printed in the Financial Handbook. Rule 67 lays down that leave cannot be claimed as of right. Similarly, Rule 81 lays down that leave may be granted at the discretion of the authority competent to grant the leave.

6. Rule 86-A states:

"A government servant recruited on or after January 1, 1936, shall not be granted any leave beyond the date on which he must compulsorily retire;

Provided that the authority empowered to grant leave may allow any government servant, who has been denied in whole or in part on account of the exigencies of the public service the earned leave which was due to him pending retirement under Rule 81-B, the whole or any portion of the earned leave so denied even though it extends to a date beyond the date on which such government servant must compulsorily retire:.....".

7. The first paragraph of Rule 86-A lays down the general rule that leave cannot extend beyond the date of retirement of an officer. The first proviso to the Rule contains an exception to the Rule. If an officer has applied for leave and leave has been refused, leave may extend beyond the date of retirement. It was conceded for the petitioner-respondent that the petitioner's case is not covered by the first proviso to Rule 86-A, because the petitioner did not apply for leave. So, there was no occasion for refusing leave.

8. Mr. S. D. Misra appearing for the petitioner urged that the matter was rushed through so that the petitioner had no time to apply for leave. The State Government passed the order of retirement on 11-12-1967. A copy of the decision was sent to the petitioner by the Executive Engineer on 22-12-1967. Annexure 8 to the petition is a copy of the Executive Engineer's letter, dated 22-12-1967. In that letter the petitioner was asked to hand over charge of his duties immediately to Sri Shukla, Assistant Engineer. We understood that the petitioner actually handed over charge on 18-1-1968. It was conceded for the

petitioner that at no time between 11-12-1967 and 18-1-1968 did the petitioner apply for privilege leave, which had accrued to him up to December 1967.

9. It was however, urged that the mere act of retirement deprived the petitioner of leave, which had accrued to him. Such a decision is virtually punishment. For this contention, reliance was placed upon *Parshotam Lal Dhingra Vs. Union of India (UOI)*, . In *Parshotam Lal Dhingra Vs. Union of India (UOI)*, S. R. Das, C. J. elaborately discussed the question how certain orders constitute punishment, although the orders do not purport to inflict punishment. It was observed on page 49:

"..... The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty. The use of the expression "terminate" or "discharge" is not conclusive. In spite of the use of such innocuous expressions, the court has to apply the two tests mentioned above, namely (1) whether the "servant had a right to the post or the rank or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to?"

10. In the instant case the petitioner was not visited with evil consequences of the kind mentioned in the passage quoted above. The petitioner's grievance is that he could not avail of the leave, which had accrued to him up to December, 1967. Loss of earned leave cannot be considered an evil consequence as contemplated by the Supreme Court in *P. L. Dhingra's* case.

11. As explained in Rule 86-A of Fundamental Rules, ordinarily, leave cannot extend beyond the date of retirement. If an order of retirement is otherwise valid, the order does not become invalid merely because the officer could not avail of leave which had accrued to him. The petitioner's grievance relating to leave has to be rejected for two reasons. Firstly, he never applied for leave between the date of the order passed by the State Government and the date on which he handed over charge. Secondly, normally, leave cannot extend beyond the date of retirement.

12. Annexure 7 to the writ petition is a copy of the impugned order, dated 11-12-1967. On the face of it, the order did not impose any punishment on the petitioner. Secondly, the order of retirement was not accompanied by any evil consequence of the nature described by the Supreme Court in *P. L. Dhingra's* case. The result is that the order terminating the services of the petitioner did

not attract Article 311 of the Constitution. The order dated 11-12-1967 could not be challenged by the petitioner.

13. The special appeal is allowed with costs. The writ petition is dismissed with costs. The stay order, dated 7-7-1969 is vacated.