
(1972) 01 OHC CK 0016
In the Orissa High Court
Case No : O.J.C. No. 668 of 1968

Sudhir Kumar Gupta

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 04-01-1972

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 309, 372
Foreign Jurisdiction (Extra Provincial Jurisdiction) Act, 1947 — Section 3, 4
Mayurbhanj Service Regulations — Article 45, 67, 68
Orissa Merged States (Laws) Act, 1950 — Section 5
Orissa Service Code, 1939 — Rule 2, 3, 71(a)

Citation : (1972) 38 CLT 200

Hon'ble Judges : G.K. Misra, C.J.; R.N. Misra, J.; B.K. Patra, J

Bench : Full Bench

Advocate : B.K. Pal, B. Pal and A. Mohanty, for the Appellant; A.G., for the Respondent

Judgement

G.K. Misra, C.J.—Petitioner's date of birth is 6th of May, 1913. On 2nd January, 1936 he entered into service in the ex-State of Mayurbhanj as Additional Deputy Jailor and was made permanent from that date. He was appointed to officiate as Jailor on 20th November, 1945 and was confirmed as a permanent Jailor on 3rd April, 1946. The Ex-State of Mayurbhanj merged with the State of Orissa on 1st January, 1949. The Petitioner claims that his age of superannuation is 60 years under Article 67 of the Mayurbhanj Service Regulations relating to pay, leave, pension and traveling allowances, 1939 (hereinafter to be referred to as the Regulations).

The Petitioner was made to retire with effect from 1st of August, 1968 on the completion of his 55th year on the basis of Resolution No. 3642/Gen. dated 19/20 February 1968 (herein after to be referred to as the 1968 Resolution). Petitioner's memorial that he should be allowed to continue in service till his 60th year was rejected on 26th July, 1968. The Petitioner avers in the writ application that the finance Department letter No. 11590 (88) F, dated 17th

August, 1950 (hereinafter to be referred to as the 1950 letter) was never intimated to him and he had no opportunity of exercising his option to continue in service or in the alternative to retire on payment of reasonable compensation in terms of that letter. The writ application has been filed under Articles 226 and 227 of the Constitution for issue of writ of mandamus or any other appropriate writ to direct the opposite parties to treat the Petitioner as continuing in service till his 60th year of age.

In the counter filed on behalf of the opposite parties, most of the facts are not disputed. Emphasis is laid on non-exercise of the option by the Petitioner as required in Finance Department Letter No. 11590 (38) F dated 17th August, 1950. It is said that the Petitioner did not take advantage of this circular and that the Regulations had not been recognised as the law in force after merger.

2. The only point for consideration is whether Article 67 of the Regulations is still in force to govern the case of the Petitioner in the matter of superannuation.

3. The aforesaid point necessitates examination of the following questions:

(i) Did the Regulations constitute law in ex-State of Mayurbhanj?

(ii) Do the Regulations still continue in force and govern the age of superannuation of the Petitioner?

(iii) Does Resolution No. 3642/Gen. dated 19/20-2-1968 supersede the Regulations in the matter of superannuation ?

(iv) Is the Petitioner precluded from relying on Article 67 of the Regulations for failure to exercise option under Finance Department letter No. 11590 (38) F, dated 17-8-1950?

4. Articles 67 and 68 of the Regulations run thus:

67. All state servants in superior service shall be compulsorily retired on attaining the age of 60 years, unless extension of service is granted to them by the State. In no case, however, shall the extension exceed five years.

68. Article 67 does not apply to the employees entering State service on or after 1st April 1938 xx xx xx

There is no dispute that the Regulations constituted law relating to the conditions of service in the Ex-State of Mayurbhanj. The same were framed in exercise of the sovereign legislative capacity of the Maharaja of Mayurbhanj. There is also no dispute that the Petitioner was a servant in superior service as defined in Article 45 of the Regulations. His age of retirement under Article 67 in the ex-State of Mayurbhanj was 60 years. If the ex-State of Mayurbhanj had not merged in the State of Orissa, the Petitioner would have continued in service till the completion of his 60th year.

5. The next question for consideration is whether the Regulations continue in force as law after the merger. The Mayurbhanj Merger Agreement (hereinafter to

be referred to as the Agreement) is to be found in Appendix XII at page 180 of the White Paper on Indian States. The Agreement was signed on 17th day of October, 1948 by Shri Pratap Chandra Bhanj Deo, Maharaja of Mayurbhanj, on one hand and Shri M.K. Vellodi, Secretary to the government of India, Ministry of State, on the other. Article 8(1) of the Agreement runs thus:

The Government of India hereby guarantees either the continuance in service of the permanent members of the Public services of Mayurbhanj on conditions which will not be less advantageous than those on which they were serving before the date on which the administration of Mayurbhanj is made over to the, Government of India or the payment of reasonable compensation.

A similar agreement was under consideration in Bholanath J. Thaker Vs. The State of Saurashtra, . Article 16(1) of the Covenants of United States of Kathiawar is in identical terms with Article 8(1) of the Agreement. Their Lordships held that the covenant could be looked at to see whether the new sovereign had waived his rights to ignore the rights given under the laws of the former Sovereign.

On 1st January, 1949 the Administration of Mayurbhanj State Order, 1949 (hereinafter to be referred to as the Order) was made. Paragraph 5(a) of the Order prescribed that certain enactments as specified in the first column of the schedule attached to the Order would apply to the merged State, and any provision of any law in force in the State, whether substantive or procedural and whether based on custom and usage or status which is repugnant to any provision or any of the said enactments, shall to the extent of the repugnancy, cease to have effect from the date of commencement of the Order. The proviso need not be referred to Paragraph 5(b) is important. So far as relevant it runs thus:

As respects matters which are not covered by the enactments applied to the State under Sub-paragraph (a), all laws in force in the said State prior to the commencement of this Order, whether substantive or procedural and whether based on custom and usage or status, shall subject to the provisions of this Order continue to remain in force until altered or amended by an order under the Extra-Provincial Jurisdiction Act, 1947 (XLVII of 1947) x x x x.

Explanation.-In this sub-paragraphs the expression "laws" includes rules, regulations, bye laws and orders.

The regulations clearly constitute laws within the meaning of Paragraph 5(b), Explanation of the order. The Regulations continue to remain in force until altered or amended. Law on the point is no longer res integra see Prabir Kumar Bhanj Deo v. State of Orissa ILR 1970 Cutt 794 paragraph 10 where reliance has been placed on Rajkumar Narsingh Pratap Singh Deo Vs. State of Orissa and Another, .

Paragraph 4 of the States Merger (Governor's Province) Order, 1949, which came into force on 1st August, 1949, is also to same effect. It says that all laws

in force in a merged State or in any part thereof immediately before the appointed day, including orders made u/s 3 or Section 4 of the Extra Provincial Jurisdiction Act, 1947 (XLVII of 1947), shall continue in force until repealed, modified or amended by a competent Legislature or other competent authority. Section 5 of the Orissa Merged States (Laws) Act, 1950 (Orissa Act IV of 1950) runs to the same effect. It runs thus:

If immediately before the commencement of this Act there is in force in any of the merged States an Act, Regulation or other law corresponding to an Act or Regulation specified in the Schedule, whether by virtue of an order under Extra-Provincial Jurisdiction Act, 1947, applying that Act or Regulation or by virtue of any of the other Legislative lower, such corresponding laws shall, upon the commencement of this Act, cease to have effect to the extent to which the law relates to matters with respect to which the State Legislature has power to make laws.

Thus the true legal position is that the Regulations which constituted law in the ex. State of Mayurbhanj continue in force under tile Administration of Mayurbhanj State Order, 1949 the State Merger (Governor's Provinces) Order, 1949, the Orissa, Merged States" (Laws) Act, 1950 and Article 372 of the Constitution of India, unless they have been modified or repealed by any other law passed by the Orissa Legislature.

6. The rules in the Orissa Service Code (hereinafter to be referred to as the Code) have been framed under the Proviso to Article 309 of the Constitution. By Rule 2 the Code shall apply to an persons appointed to public services and posts in connection with the affairs of the State. The Code in terms would apply to ex. State of Mayurbhanj employees and if there is anything in, the Regulations which is repugnant to the Code, the Regulations unless otherwise saved would protan to stand repealed or modified to the extent of repugnancy.

7. Rule 3 of the code, however, runs thus:

Nothing in these rules shall operate either to deprive any person of any right or privilege to which he is entitled by or under any law or by the terms of any contract or agreement subsisting between" such persons and the Government or to confer on him any right or privilege in respect of any matter for which specific provision is made by the terms of any contract or agreement between himself and the Government.

Under Rule 71(a) of the Code the Petitioner's age of superannuation is 55 years. Role 3, however, lays down that if the Petitioner had any right or privilege to which he is entitled by or under any law, then the Code would not operate to his detriment. Thus by Rule 3 the age of superannuation prescribed under Article 67 of the Regulations is saved. Petitioner's age of superannuation shall therefore, be governed by Article 67 of the Regulations and not by the Code. In Bhagirathi Shaw v. Member, Board of Revenue and Anr. 197 (1) C.W. 8. 750 a Bench of this Court construed Rule 3 of the Code in the same way. The Regulations thus

continue to be law in force and would govern the age of superannuation of the Petitioner.

8. The point is directly covered by Bholanath J. Thaker Vs. The State of Saurashtra, . In that case the Petitioner continued to serve the Wadhwan State till the administration of the State was made over to the Saurashtra Government on 16th March, 1948. Section 5 of the Dhara (Act) No. 29 of St. 2004 promulgated by the Ruler of Wadhwan State fixed the superannuation age for the State civil servants at 60 years. The Ruler of Wadhwan State entered into a Covenant for the formation of United State of Kathiwar on 24th January, 1948. Under Article 16(1) of the covenant the United State of Kathiwar had guaranteed either the continuance in service of permanent members of the public services of each of the Covenanting State on conditions which would not be less advantageous than those on which they were serving before the date on which the administration of the State was made over to the Raj Pramukh or the payment of reasonable compensation. The Ruler of Wadhwan State made over the administration of the State to Saurashtra Government. By an order dated 29th June, 1918 the Petitioner in that case was retired by the Saurashtra State on the ground that he had passed the age of superannuation at 55 years.

On the aforesaid facts their Lordships held that when the Wadhwan State merged with the Saurashtra State, all the existing laws continued until repealed. The only way to defeat the rights of the Petitioner in that case was by legislation, if any. As there was in fact no such legislation, the rights of the Petitioner under the Dhara remained and were enforceable this decision was followed in T.S. Mankad v. State of Gujrat AIR 1970 S.O. US, on similar facts.

Reliance was placed by the learned Advocate-General on Sarat Chandra Das v. State of Orissa 22 C.L.T. 541, in support of the contrary view. Almost on identical facts a Bench of this Court refused to exercise jurisdiction under Article 226 of the Constitution with the following observations:

The Petitioner can enforce his right, if any, arising out of Merger Agreement or under the Mayurbhanj Service Regulations through the ordinary Courts, and this Court cannot, in exercise of its powers under Article 226, issue any direction to the opposite party to employ a particular person if his services are not considered necessary.

We are unable to subscribe to this view. There is no reason why our jurisdiction under Articles 226 and 227 of the Constitution should not be exercised if the order of retirement is passed contrary to law. Moreover the legal position discussed by us was not critically examined in that case. In our view, that case was not correctly decided.

9. On the aforesaid analysis we are clearly of opinion that the Regulations still continue in force and govern the age of superannuation of the Petitioner.

10. The next question is whether 1968 Resolution supersedes the Regulations.

Law is now when settled that the 1968 Resolution is an executive instruction and does not constitute Rules framed under Article 309 of the Constitution See Dr. Binapani Dei v. State of Orissa and Anr. ILR 1910 Cutt 224 paragraph 5 which relied on relevant Supreme Court decisions. The Executive Instructions cannot supersede the Regulations which have been continued in force as law.

11. The last question is whether the 1950 letter (Annexure A) affects the Petitioner's rights under Article 67 of the Regulations and Article 8(1) of the Agreement. This letter is in seven paragraphs. Paragraph 1 quotes Article 8(1) of the Agreement. Paragraphs 2, 3 and 7 may be extracted:

2. Since Article 67 of the Mayurbhanj service Regulation prescribed 60 years as the age of compulsory retirement of a Mayurbhanj State employee in superior service (both gazetted and non-gazetted) who entered service of that State prior to the 1st April, 1938 and 55 years as the superannuation age: of those, who entered service on or after that date, it was represented to Government that the former class of the ex-Mayurbhanj employees Superior service should not be asked to retire before they attain 60 years of age, as that would constitute a breach of Clause 8(1) of the Agreement quoted above, Government have examined the matter very carefully and have come to the conclusion that the date of compulsory retirement of all ex-Mayurbhanj employees in Superior Service, including those, who entered service before 1st April, 1938, should be the date on which they attain the age of 55 years. Extensions of service may, however, be granted in suitable cases under Rule 71 of Orissa Service Code and not as following from Article 8(1) of the Agreement. Such cases should, therefore, be governed by the existing instruction on the subject of extension of service.

3. In coming to this conclusion, Government have been guided by the consideration that the intention of Article 8(1) of the Agreement is that the service conditions of the permanent ex-Mayurbhanj employees under the State Government should lot, as 80 whole, be worse than the conditions under which they were serving before the merger. Taking into account the several factors which generally determine the conditions of service of Government servants, Government do not consider that ex-Mayurbhanj employees have suffered any deterioration in their conditions of service taken as a whole. If, however, any individual is aggrieved by this decision and thinks that on the whole his conditions of service have been made less advantageous, he can at best ask for being released from service on payment of reasonable compensation and if such claim is made it will be considered on merits.

7. An officers subordinate to you may be informed accordingly.

The other paragraphs are not relevant.

The 1950 letter purported to give effect to Article 8(1) of the Agreement. The permanent ex-Mayurbhanj employees who were not prepared to continue in service on terms as indicated in the letter were given option to retire on payment

of compensation. The mere issue of such letter would not, however, affect the rights of the ex-Mayurbhanj employees. It was the duty of the Government to call upon the officers to exercise their option in terms. If the officers exercised their option to continue, they were liable to be retired at the age of 55 years and to that extent their right to continue till the 60th year under Article 67 of the Regulations read with the Agreement would have been curtailed. If the officers chose not to continue on the offered terms, they could have been retired on payment of reasonable compensation.

12. In the writ application as well as in the subsequent rejoinder filed by the Petitioner, there was averment on affidavit that the 1950 letter was never brought to the notice of the Petitioner and he was not called upon to exercise the option. The opposite parties were called upon to produce any document to show that the Petitioner agreed to continue in service accepting the contents of Annexure "A" that his age of superannuation would be 55 years. In the absence of proof of acceptance on the part of the Petitioner of the terms of Annexure "A" the Petitioner's affidavit that he was never so intimated or called upon to exercise option, stands unassailed. The result, therefore, is that Article 67 of the Regulations has not been repealed or modified by legislation or act of parties. It has not been proved that the Petitioner surrendered his right to continue in service till the year.

(i) The regulations constituted law in the ex-State of Mayurbhanj and continue in force and govern the age of superannuation of the Petitioner.

(ii) Petitioner's right to continue in service till the completion of 60th year under Article 67 of the Regulations has not been extinguished by any legislation or act of parties.

The result of the aforesaid analysis is that the notice terminating service of the Petitioner is invalid and is hereby quashed. The Petitioner shall be deemed to be continuing in service until his services are terminated in accordance with law.

14. The writ application is allowed with costs. A writ of mandamus be issued directing the opposite parties to treat the Petitioner as continuing in service. Hearing Fee of rupees one hundred only.

B.K. Patra, J.

15. I agree.

R.N. Misra, J.

16. I agree.