
(2004) 01 CAL CK 0054
In the Calcutta High Court
Case No : Writ Petition No. 2313 of 2001

Sujit Kumar Roy

APPELLANT

Vs

Reserve Bank of India and Others

RESPONDENT

Date of Decision : 13-01-2004

Acts Referred:

Constitution of India, 1950 — Article 21, 311

Reserve Bank of India (Staff) Regulations, 1948 — Regulation 26

Citation : (2004) 2 CALLT 216 : 108 CWN 536 : (2004) 3 LLJ 641

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : L.K. Gupta and S. Dutt, for the Appellant; H.K. Mitter, Soumen Sew and S.N. Patrabhatta, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Lala, J.—This writ petition was filed by an ex-employee of the Reserve Bank of India praying inter alia as follows:

(a) A declaration that the third and fourth provisos to sub-Regulation (1) of Regulation 26 of the Reserve Bank of India (Staff) Regulations, 1948 is null and void as it confers absolute, arbitrary and unguided powers in the Reserve Bank of India and in thin ultra vires Articles 14 and 16 of the Constitution of India;

(b) A writ in the nature of Mandamus directing the respondents not to give any effect and/or further effect to the purported decision/order of premature retirement of the petitioner in the post of the Chief General Manager of Reserve Bank of India, at its Regional Office at Calcutta as in annexure "P/2" herein.

(c) A further writ in the nature of Mandamus commanding the respondents to cancel, to rescind the purported decision/order of premature retirement of the petitioner in the post of the Chief General Manager of Reserve Bank of India at its Regional Office at Kolkata as in annexure "P/2" hereto.

(d) A further writ in the nature of Mandamus commanding the , respondent not

to fill up the post of the Chief General Manager of Reserve Bank of India at its Regional Office at Kolkata.

(e) A writ in the nature of certiorari directing the respondents to certify and send up to this Hon'ble Court all records and proceeding culminating in the purported decision/order of premature retirement of the petitioner forwarded by the Chief General Manager in the charge as per his order dated 24th October, 2001 or other order or orders and all records relating thereto or in connection therewith for the purpose of rendering conscionable justice by quashing set aside the said purported decision/order of premature retirement of the petitioner in the post of the Chief General Manager, Reserve Bank of India at its Regional Office at Kolkata or other orders relating thereto and/or in connection therewith.

(f) Any other writ or writs to which your petitioner may be found entitled;

(g) A Rule NISI in terms of prayers (a), (b), (c), (d) and (e) above;

(h) An interim order of injunction restraining the respondents from giving any effect and/or further effect to the purported decision/order of premature retirement of the petitioner in the post of the Chief General Manager, Reserve Bank of India at its Regional Office at Kolkata as in annexure "P/2" herein, till the disposal of the rule as prayed for.

(i) A further interim order of injunction restraining the respondents from filling up the post of the Chief General Manager of Reserve Bank of India at its Regional Office at Kolkata till the disposal of the Rule as prayed for;

(j) Ad-interim order in terms of prayer (h) and (i) above; (k) Costs;

(l) To pass such other or further order or orders and/or direction or directions as Your Lordships may deem fit and proper.

2. Admittedly the age of retirement of the service is 55 years. The petitioner was directed to continue his service beyond such period. The date of retirement of the petitioner is 30th April, 2002. The Governor of the Reserve Bank of India which includes a Deputy Governor/Executive Director with the approval of the committee of Central Board decided to retire him in the public interest with effect from 27th October, 2001. Admittedly, the petitioner withdrawn all his retiral benefit immediately before filing of the present writ petition. No monetary loss was caused for such retirement to the petitioner even the retirement was made little earlier.

3. According to Mr. Lakhi Kanta Gupta, learned senior counsel appearing for the petitioner the order impugned is malicious, punitive and colourable exercise of the power. Relevant part of Rule 26 of the Reserve Bank of India (Staff) Regulations, 1948 is as follows:

"26.(1) An employee shall retire at 60 years of age but no extension shall be given to any employee beyond 60 years of age;

provided that an employee who attains the age of superannuation on any day other than the first during a calendar month, shall retire on the last day of that month; provided further that in the case of an employee in class-IV who has reached the age of 55 years the Bank may, in its discretion, retire him after giving two months" notice in writing if in discretion, retire him after giving two months" notice in writing if in the opinion of the competent authority his efficiency if found to have been impaired;

provided further that the Bank may, in its discretion, retire in public interest an employee, other than an employee in class-IV, at any time after completion of 50 years of age;

provided further in the case of an employee in class-III and class-I, who has attained the age of 55 years, his continuance in service upto the age of 60 years shall be subject to his being found suitable to be retained in service.

(2)

(3)

(3A)

(3B)

(3C)"

4. If the veil of premature retirement, which is as good as compulsory retirement, is lifted, it will be seen that it is a punishment.

5. According to the petitioner on 25th October, 1965, he was appointed as an Officer in Grade "A" of the Reserve Bank of India. He was promoted to Grade "B", thereafter from Grade "B" to Grade "C", Grade "C" to Grade "D" and from Grade "D" to Grade "E". Even thereafter he became the Chief General Manager being Grade "F" officer with effect from 1st March, 2001. He had always performed his duty as a responsible officer. However, he has drawn attention to this Court in respect of a past litigation whereunder a reduction of pay to the minimum in the incremental scale of the substantive Grade "E" from the date of passing the final order was effected and the appellate authority confirmed such order. According to me, the scope of the writ petition cannot be enlarged by going back to the earlier incident. Definitely it may create a circumstantial evidence to come to a conclusion but the writ Court is not the fact finding Court. Therefore, the scope and ambit of the writ Court is hereby restricted only on two points:

(a) inspite of acceptance of the order of retirement and enjoying all benefits thereunder whether the petitioner can still be able to challenge the same?

(b) Whether the order of premature retirement is malicious, punitive and colourable exercise of power?

6. According to Mr. Gupta, right to get a service is not a fundamental right but continuous of service after getting it is fundamental right. Such fundamental

right cannot be waived by acceptance of notice of premature retirement and benefit in connection thereto. In *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, a Five Judges Bench of the Supreme Court held that whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by his constitutional mandate directed to the State. In *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, again a Five Judges Bench of the Supreme Court held the conferment of absolute power to dismiss a permanent employee is antithesis to justness or fair treatment. The exercise of discretionary power wide of mark would breed arbitrary, unreasonable or unfair actions and would not consistent with reason and justice. The provisions of a statute, regulations or rules that empower an employer or the management to dismiss, remove or reduce in rank of an employee must be consistent with Just, reasonable and fair procedure. It would, further, be held that right to public employment which includes right to continue public employment till the employee is superannuated as per rules or compulsorily retired or duly terminated in accordance with the procedure established by law is an integral part/or right to livelihood which in turn is an integral facet of right to life assured by Article 21 of the Constitution. Any procedure prescribed to deprive such right to livelihood or continued employment must be just, fair and reasonable procedure. In other words an employee in a public employment also must not be arbitrary, unjustly and unreasonably be deprived of his/her livelihood which is ensured in continued employment till it is terminated in accordance with just, fair and reasonable procedure. Otherwise any law or rule in violation thereof is void. Conferment of power of a high rank officer is not always an assurance, in particular when the moral standards are generally degenerated that the power would be exercised objectively, reasonably, conscientiously, fairly and justly without in built protection to an employee. Even officers who do their duty honestly and conscientiously are subject to great pressures and pulls. Therefore, the competing claims of the "public interest" as against "individual interest" of the employees are to be harmoniously blended so as to serve the societal need consistent with the constitutional scheme. In 1993 CRILJ 74 (*Deputy Commissioner of Police, Special Branch and Ors. v. Bhupen Chandra Karanjai & Moti Ranjan Bhattacharya*) a Three Judges Bench of this High Court held that in service jurisprudence, the principal of estoppel cannot be strictly applicable so as to debar a person from coming forward with correct facts and figures so as to enable the authority concerned from correcting the same to take a decision thereof. In *Madamsetty Satyanarayana Vs. G. Yelloji Rao and Others*, it was held that the expression "waiver" in its legally accepted sense, means that "waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right". In *Lady Dinbai Dinshaw Petit and Others Vs. The Dominion of India and Another*, says that there is no estoppel against the statute. No person can be precluded from pleading that certain orders are illegal or invalid, because the question as to whether the orders are illegal or invalid is a pure question of law and there can be no estoppel against

law. In P.R. Deshpande Vs. Maruti Balaram Haibatti, a Three Judges Bench of the Supreme Court held that a SLP under Article 136 of the Constitution of India cannot be dismissed as not maintainable on the mere ground that the appellant has given an undertaking to the High Court on being so directed, in order to keep the High Court's order in abeyance for some time. Mr. Gupta added that right to petitioner herein is constitutional right and stand on a higher side.

7. In merit he contended that justifiable order of compulsory retirement has to be taken into account. In 1990 (suppl) SCC 771 (R.P. Malhotra v. Chief Commissioner of Income Tax, Patiala and Ors.) it was held by the Supreme Court that Annual Confidential Report (ACR) as well as the order of the Screening Committee was looked into by the Court. The Court was not satisfied as to the loss of utility in service of the appellant and become a deadwood and so in public interest he was required to be compulsorily retired before the age of superannuation. In view of the matter, for the same fair play and justice the order of compulsory retirement was set aside. However, the Court was pleased to direct to pay the salary and allowances as entitled to under the Rules for the period of compulsory retirement till his attaining the age of superannuation. In Baldev Raj Chadha Vs. Union of India (UOI) and Others, it was held by the Supreme Court that the whole purpose of Fundamental Rules is to weed out worthless without the punitive extremes covered by Article 311 of the Constitution. But under the guise of "public interest" if unlimited discretion is regarded acceptable for making an order of premature retirement, it will be the surest menace to public interest and must fail for unreasonableness, arbitrariness and disguised dismissal. The exercise of power must be bona fide and promote public interest. In concluding this part Mr. Gupta contended that Court is entitled to look into the documents for the purpose of coming into the appropriate conclusion. He contended that question of insubordination will come out if the veil of compulsory retirement is lifted. In Ram Ekbal Sharma Vs. State of Bihar and another, it was held by the Supreme Court that even if an order of compulsory retirement is couched in innocuous language without making any imputations against the Government servant who is directed to be compulsorily retired from service, the Court, if challenged, in appropriate cases can lift the veil to find out whether the order is based on any misconduct of the Government servant concerned or the order has been made bona fide and not with any oblique or extraneous purposes. Mere form of the order in such cases cannot deter the Court from delving into the basis of the order if the order in question is challenged by the concerned Government servant. In High Court of Punjab and Haryana Through R.G. Vs. Ishwar Chand Jain and Another, the Supreme Court held that compulsory retirement will be considered by the Court to the extent whether it is punitive or simpliciter by lifting of veil of an innocuously worded order. In The State of Gujarat and Another Vs. Suryakant Chunilal Shah, it was held that public interest in relation to public administration means that only honest and efficient persons are to be retained in service while services of dishonest or corrupt or those who are almost dead wood, are to be dispensed

with. In order to find out whether any Government servant has outlived his utility and is to be compulsorily retired in public interest for maintaining an efficient administration, an objective view of overall performance of that Government servant has to be taken. Performance of a Government servant is reflected in annual character roll entries and, therefore, one of the methods of discerning efficiency, honesty or integrity of the Government servant is to look to his character roll entries for the whole tenure from inception to the date on which decision for his compulsory retirement is taken. If character roll is studded with adverse entries or overall categorisation of employee is poor and there is material also to cast doubts upon his integrity, such Government servant cannot be said to be efficient. Efficiency is a bundle of sticks of personal assets, thickest of which is the stick of "integrity". If this is missing, whole bundle would disperse. A Government servant has, therefore, to keep his belt tight.

8. From paragraph 3 of the Affidavit-in-opposition I find that the petitioner is accepted all his retiral benefits as set out in the annexure "B" to the Affidavit-in-opposition. He received such benefit as per calculation including the net amount of gratuity. Dates of encashment of such amounts are from 30th October, 2001 to 23rd November, 2001, on which date he filed this writ petition admittedly as stated before. In such paragraph of the affidavit it has been stated that petitioner after obtaining promotion adopted a strange and belligerent attitude and indulged the acts of insubordination. The higher authorities enquired into the matter and ultimately became compelled to take a decision of passing an order of compulsory retirement. In any event no stigma was cast upon the petitioner and there was no punitive action against him.

9. Mr. Hirak Kumar Mitter, learned senior counsel appearing on behalf of the Reserve Bank of India supported the action on the part of the authority. In *Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another*, I find a Three Judges Bench of the Supreme Court held that an order of compulsory retirement 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 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 or 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. There may be any number of remarks, observations and comments, which do not constitute adverse remarks, but are yet relevant for the purpose of the rule corresponding to it. 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." In paragraph 34 therein the following principles emerge from the above discussion;

(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 appellant 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 (c) 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 showing that, while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

10. In Posts and Telegraphs Board and others Vs. C.S.N. Murthy, another Three Judges Bench also followed such principles. In Jugal Chandra Saikia Vs. State of Assam and Another, I further find that ratio of Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, was relied on. However, the Supreme Court held that the passing of an order of compulsory retirement depends on the subjective satisfaction of the competent authority, of course on objective consideration. Unless it is shown that the order of compulsory retirement was passed arbitrarily and without application of mind or that such formation of opinion to retire compulsorily was based on no evidence or that the order of compulsory retirement was totally perverse, the Court cannot interfere. In Union of India (UOI) and Others Vs. Dulal Dutt, was also followed the above ratio of Baikuntha Nath Das's case. There I find the Three Judges Bench of Supreme Court held that an order of a compulsory retirement is not an order of punishment. It is actually a prerogative of the Government but it should be based on material and has to be passed on the subjective satisfaction of the Government. Very often, on enquiry by the Court the Government may disclose the material but it is very much different from saying that the order should be a speaking order. No order of compulsory retirement is required to be a speaking order. The Government had, before it, the report of the Review Committee yet it thought it fit of compulsorily retiring the respondent. The order cannot be called either mala fide or arbitrary in law. In Allahabad Bank Officers Association and

another Vs. Allahabad Bank and others, it was held that a Government servant who is compulsorily retired does not lose any part of the benefit that he was earned during service. Thus, compulsory retirement differs both from dismissal and removal as it involves no penal consequences. Therefore, compulsory retirement is not considered prima facie and per se a punishment and does not attract the provisions of Article 311. In Union of India (UOI) Vs. Col. J.N. Sinha and Another, it was held that compulsory retirement involves no civil consequences. It is not intended for taking any penal action. This is "pleasure doctrine" embodied in Article 310 of the Constitution. In The State of U.P. Vs. Sri Shyam Lal Sharma, it was held that if order of compulsory retirement does not contain and stigma, resort cannot be had to Government files to discover any remark amounting to stigma. In Central Warehousing Corporation and Others Vs. Pranab Kumar Guha, a Division Bench of our High Court held that the order of compulsory retirement cannot be equated with the disciplinary proceeding or to by pass it if it is passed for bringing probity in the administration and a Government servant is entitled to remain in service in his right up to the fixed period and not beyond that, subject to the periodical review of his candidature by the Review Committee.

11. Moreover suppression of material facts, is germane for the purpose of due consideration of the facts and circumstances of this case. Mr. Mitter relied upon two decisions as referred hereunder. In 1976(2) CLJ 162 (Administratrix in the Estate of late N.C. Goenka v. State of West Bengal and Ors.) a Bench of this Court held that there was a deliberate suppression of material facts with a view to mislead the Court in granting the Rule and injunction. It is well settled that if there has been a suppression of such material facts, which, if not suppressed, would have disinclined the Court to grant a Rules Nisi such suppression is a ground for discharge of the Rule in limine without going into the merits in the case. In 2001(3) CHN 396 (Paharpur Cooling Towers Ltd. v. Hong Kong & Shanghai Banking Corporation Ltd.) it was further held by this Court that in the case where a party is not coming with clean hands the interim order which was passed earlier ought to be Vacated.

12. Then he argued the question of waiver in Shaw and Co. Vs. B. Shamaldas and Co., that a Bench of this High Court held that waiver is an intentional relinquishment of a known right. If a right is not known then a person cannot be said to waive it. In M/s. Sikkim Subba Associates Vs. State of Sikkim, it was held by a Three Judges Bench of this High Court that waiver involves a conscious, voluntary and intentional relinquishment or abandonment of a known, existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, the party would have enjoyed. Mr. Mitter added therein that right to remain service, in this present case, cannot be a fundamental right.

13. From 2003 (5) SC 604 (Bimlesh Tanwar v. State of Haryana and Ors.) I find that the Three Judges Bench of the Supreme Court held that many of the service rights are not fundamental right but civil right. However, there the case the

seniority was involved.

14. Remaining two Judgments which are very recent one are to be taken note of because the same are in relation to subject-matter in issue herein. In *Nar Singh Pal Vs. Union of India and Others*, it was held that fundamental rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of fundamental rights available under Constitution. In 2001(3) SCC 289 (*State of Uttar Pradesh and Anr. v. Lalsa Ram*) it was held by the Supreme Court that when the appointing authority upon consideration of the entire service record as required under the Rules formed its opinion that the compulsory retirement of the respondent was in public interest. Therefore, the question of any interference of the Court does not or cannot arise.

15. I have enjoyed valuable arguments advanced by the learned senior counsel appearing for the parties and gone through the respective judgments cited by them. I am of the view that each and every case has to be analysed on the basis of the true prospective of the same. The principles may be the guiding factors provided such principles are applied in the present case. Therefore, let me scrutinise the case serially first whether the present petitioner invoking the jurisdiction with clean hands or not. According to me, he has not invoked the jurisdiction with clean hands. There are two reasons for the same. First reason is that he enjoyed the full money value of the retiral benefit and the second one is the date of receiving the whole gratuity amount vis-a-vis date of filing application. He invoked the writ jurisdiction to nullify the order of compulsory retirement without any stigma in such circumstances. Therefore, the petitioner is not a bonafide litigant to get the natural justice made for the aggrieved under the Constitution. Therefore, hardly anything remain open for him to establish. Yet for the sake of complete justice I want to deal with the other part of the litigation. From the fact, in the light of the aforesaid judgment, one aspect is very clear that it was resolved by the appropriate committee of Central Board that the petitioner will retire from the service in the public interest. When it was a known fact to the petitioner and thereafter accepted the benefit out of such notice of compulsory retirement there is hardly any scope of going beyond such stage to investigate the background. Beneficial legislature should be attributed to such persons who can claim equity. For the purpose of equity one should come with clean hands. An unclean proposer is not proposer in the eye of law. The obligation of an employer is to give the service benefit up to the date of retirement. Till such time an employee is a privileged person under the Constitution on the principle of fundamental right. But such fundamental right cannot be said to be stretchable right beyond this scope. In the instant case, as per the regulation, the employee ceases to be employee after attaining the age of 55 years. Each and every dispute for such period cannot be construed as a fundamental right but a right conferred upon the contractual obligations between the parties. Moreover, an order of compulsory retirement cannot be said to be a violation of principles of natural justice provided the same is not passed as a punishment. In other words the order of compulsory retirement is not punitive in

nature. However, the Court called for the records to see the resolution of compulsory retirement taken by the committee which was, accordingly, supplied. It is confidential in nature. It was resolved therein that in view of very serious acts of insubordination/defiance of reasonable order of superior authority as pointed out in a particular memorandum the petitioner was treated not fit to continue in the service in the public interest and he has been given order of retirement under third proviso read with the fourth proviso sub-Regulation (1) of Regulation 26 of the Reserve Bank of India (Staff) Regulations, 1948. However, in the notice of retirement anything about confidential report is noted nor it has been treated as stigma against the petitioner. A clear case of insubordination during the extended period of the service of the petitioner was taken note by the employer and it has been decided to direct him not to continue in service three to four months before the retirement even in the extended period without any stigma which has been accepted by the petitioner and immediately thereafter raised a dispute to get higher benefit than the same. Insubordination at the superior level cannot be treated as a guilt to attract the principles of disciplinary proceedings. In certain cases, there might be problems of ego or jealousy in the superior level for various causes. But public interest should not be made to suffer for the same. Therefore, an appropriate decision is to be effected by the employer. I am not in a position to understand what else is that than the premature retirement without stigma in the extended period of service, making all benefits including the entire gratuity. Therefore, there cannot be any hidden cause before the Committee in giving effect of premature retirement excepting cause of public interest as reflected from the record. No one will be prejudiced by such cause of retirement nor any prejudice is really caused. The true principle in respect of premature retirement as also compulsory retirement is to be guided by the Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, The employer said that the order of retirement is not a punishment. No instance of misbehaviour has been incorporated in the letter of retirement. The order has been passed for public interest with the subjective satisfaction. Principles of natural justice cannot be applicable. From the judicial scrutiny I do not find that mala fide, arbitrary or without basis of any evidence the order is passed. The past records were definitely considered. However, the latter act became important for such step. The recording of serious acts of subordination/defiance of reasonable orders of the superior authority etc. was never made part and parcel of the order of retirement. Therefore, such well settled ratio appropriately followed in this case. However, in the recent judgment of Jugal Chandra Saikia Vs. State of Assam and Another, Supreme Court has shown its rigidity after following Baikuntha Nath Das's case that compulsory retirement depends on subjective satisfaction of the competent authority, of course on objective consideration. Unless it is shown that order of compulsory retirement was passed arbitrarily and without any application of mind or that such formation of opinion to retire compulsorily was based on no evidence or that the order of compulsory retirement was totally perverse, the Court cannot interfere. Therefore, the latest view is that the Court should follow the strictest

principle in the case of compulsory retirement unlike in the ordinary service dispute in between an employer and an employee. In addition to the above, according to me, following the ratio of the Three Judge's Bench of the Supreme Court in Union of India (UOI) and Others Vs. Dulal Dutt, a compulsory retirement cannot be held to be a punishment. It is a prerogative of the Government but such materials and subjective satisfaction of the Government is necessary. I do not find from the factual aspects of the matter that those elements are absent in this particular case. In the judgment reported in Allahabad Bank Officers Association and another Vs. Allahabad Bank and others, the Supreme Court says that compulsory retirement from a Government service is one of the facets of the doctrine of pleasure incorporated in Article 310 of the Constitution. There also I find that Supreme Court is taking a consistent view as available in Union of India (UOI) Vs. Col. J.N. Sinha and Another,

16. The only remaining point against this background is whether the principle of waiver will be applicable or not. According to me, the entire argument of Mr. Gupta is based on the fact that there cannot be any waiver of fundamental right following the principle that there cannot be any estoppel against the statute. But the well founded fundamental distinguishing feature is compulsory retirement cannot be a question of fundamental right more particularly when the service tenure is already over and extensions made periodically and Just before three months from such final extension retirement when the employer found certain grounds of public interest involved the same made applicable. Therefore, if the basic fundamental right is not applicable in case of the petitioner to get attracted by the word "waiver" the common law principle will be applicable. In a case of common law principle "waiver" is to be ascertained from the factual aspect of the matter as to whether the waiver had actually been effected by the petitioner or not. In the instant case, the "waiver" is made effective by acceptance of retiral benefits, even the entire gratuity amount applicable for whole time retirement and immediately thereafter this writ petition has been filed. Therefore, even the common law principle of "waiver" cannot also be applicable herein. Therefore, the petitioner is charged with the action of approbate and reprobate in addition to coming with unclean hands.

17. Therefore, the aforesaid facts and circumstances of the case clearly indicate that no relief could be granted to the petitioner under this writ petition. Therefore, the writ petition stands dismissed. Interim order, if any, stands vacated. However, no order is passed as to costs,

18. Xeroxed certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the order and certified copy of this judgment.

19. All parties are to act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the Officer of the Court in respect as above.