

(1974) 04 OHC CK 0027
In the Orissa High Court
Case No : O.J.C. No. 194 of 1972

Tabarak Ali

APPELLANT

Vs

Transport Controller and Others

RESPONDENT

Date of Decision : 15-04-1974

Acts Referred:

Orissa Service Code, 1939 — Rule 71

Citation : (1974) 40 CLT 1036

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

Bench : Division Bench

Advocate : S.B. Nanda and J.K. Tripathy, for the Appellant; Standing Counsel (Transport) and Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—The Petitioner was appointed as a Driver in the State Transport Service, a Government undertaking, in 1956, having been born on 20th of February, 1912. He was confirmed in his post with effect from 23.2-1958. On 17-2-1968, three months notice of retirement in terms of Book Circular No. 40 was given to him under Annexure-1. On 19.5.1968, the Petitioner was superannuated. In Prafulla Kumar Dutta Vs. State of Orissa and Others, , this Court decided that a motor driver was a workman within the meaning of Rule 71 of the Orissa Service Code and therefore would ordinarily be retained in service up to the age of sixty years as per the second proviso to Rule 71(a) of the Code. On a representation by the Petitioner relying on the decision of this Court, the opposite parties called upon him to appear for a medical test. The Chief Medical Officer of Cuttack who examined the Petitioner recommended that he was fit enough to drive heavy vehicles. On 15-11-1971, the Petitioner was directed to resume duties. The period he was out of service was treated to be duty and he was to be paid the salary for that period on production of the necessary certificate that during that period he had not been employed elsewhere. The Petitioner alleges that he submitted his joining report on 16-11-1971 and

submitted a certificate of nonemployment on 23-11-1971. On 15.12.1971, he was informed that the earlier order treating him to be in service was recalled. This writ application challenges the last order recalling the direction dated 15-11-1971.

2. It is not disputed before us that as decided by this Court in *Prafulla Kumar Dutta v. State of Orissa and Ors.* a motor driver like the Petitioner would ordinarily continue in service until he attains the age of sixty. The second proviso to Rule 71(a) of the Orissa Service Code is to the following effect:

Provided further that a workman who is governed by these rules shall ordinarily be retained in service up to the age of 60 years. He may however be required to retire at any time after attaining the age of 55 years after being given a month's notice or a month's pay in lieu thereof, on the ground of impaired health or of being negligent or inefficient in the discharge of his duties. He also may retire at any time after attaining the age of 55 years by giving one month's notice in Writing Book Circular No. 40 which incorporates the resolution of the Political & Services Department dated 15th September, 1965, had no application to the case of the Petitioner. Under that resolution the age of superannuation was enhanced from 55 till 58. Under Clause 3 of the resolution, a Government servant could be retired after he attained the age of 55 on three months' previous notice in writing without assigning any reason. The relevant records in this case which were produced before us by learned Standing Counsel clearly show that the notice was given relying upon the aforesaid resolution. In fact, Annexure-1 is the notice provided under the resolution.

The Petitioner was entitled to continue in service until he attained the age of sixty unless the authorities were of the view that on grounds of impaired health or negligence and inefficiency in the discharge of duties, the workman had to be retired from service earlier after attainment of 55 years of age. Annexure-1 the notice of termination does not specify any of the grounds indicated in the Proviso. The Transport Controller never referred to the Proviso to Rule 71(a) of the Orissa Service Code while deciding to terminate the service of the Petitioner. On the other hand, Book Circular No. 40 was relied upon though it had no application to the Petitioner's case.

3. In the Full Bench decision of this Court in *Lirngaraj Patnaik v. District Judge of Cuttack and Ors.* 37 (1971) C.L.T. it has been authoritatively laid down that unless the appropriate authority exercised the power vested in it by necessary application of mind, the order of termination cannot be sustained. The principle laid down therein has full application to the facts of this case. While, it was competent" on the facts for the Transport Controller to require the Petitioner to go out of employment upon one month's notice by acting under the Proviso referred to above, that power was not exercised on the other hand, three months' notice as contemplated under Book Circular No. 40 was issued.

The learned Standing Counsel relied upon two decisions In support of his

contention that the mistake having been detected by the appropriate authority it was open to him to rescind the earlier order permitting the Petitioner to report to duty. In the case of State of Punjab Vs. Jagdip Singh and Others, , orders of confirmation had been passed under the assumption that permanent vacancies existed. It transpired that there were no vacancies. Some officers who had been confirmed were accordingly deconfirmed. Deconfirmation was upheld. We do not find any support for the learned Standing Counsel's contention on the facts of the present case from the ratio of the aforesaid decision. The learned Standing Counsel also relied upon the case of Sunder Lal v. State of Punjab 1970 S.L.R. 59. According to us this decision does not support the contention of the learned Standing Counsel.

4. The date of birth of the Petitioner is not in dispute. The Petitioner was, therefore, entitled to continue in service until February, 1972. The order dated 15-11-1971 appears to have been passed in realisation of the mistake but it was again cancelled without any justification. The stand taken in the counter affidavit is not at all tenable and in fact it has not satisfactorily explained as to under what circumstances the order dated 15-11-1971, had been made and why it was recalled.

5. We are satisfied that the Petitioner was asked to go out of employment before he was due to retire and the termination of his service was therefore, not in accordance with law. We accordingly allow the writ application quash the notice dated 17-2-1968 as also the order dated 15-12-1971. The Petitioner must be taken to have continued in service until 19-2-1972 and shall, therefore, be entitled to all service benefits on that footing. The opposite parties are directed to settle the Petitioner's claims on that footing in accordance with law. The Petitioner shall have his costs. Hearing fee rupees Fifty.

B.K. Patra, J.

6. I agree.