

(2004) 01 PAT CK 0114
In the Patna High Court
Case No : L.P.A. No. 673 of 2003

The Magadh University

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 05-01-2004

Acts Referred:

Bihar and Orissa General Clauses Act, 1917 — Section 8

Citation : (2004) 1 PLJR 417

Hon'ble Judges : R.S. Garg, J; Nagendra Rai, J

Bench : Division Bench

Advocate : J.S. Barnwal, for the Appellant; Ram Balak Mahto as Amicus Curiae and Mr. U.K. Shukla, for the Respondent

Final Decision : Dismissed

Judgement

1. The University-appellant has challenged the order dated 25.6.2003 passed by the learned Single Judge in C.W.J.C. No. 2047 of 2003, [Reported in Shri Niwas Dubey Vs. State of Bihar and Others,] by which he has quashed the order dated 5.2.2003, whereby the writ petitioner-respondent was informed that he would retire from service on reaching the age of 60 years, the age of superannuation, on 28.2.2003 and further directed that he would continue in service till the age of 62 years. The factual matrix for disposal of the present appeal are that the writ petitioner-respondent was appointed as Cashier in T.P.S. College under the Magadh University (for short "the University") on 27.10.1976, in pursuance of which he joined on 1.11.1976. His date of birth entered into the Service Book is 5.2.1943. While he was in service, by order dated 5.2.2003 (Annexure 2 to the writ petition), the concerned authority of the appellant. University informed that his date of retirement was 60 years and as such he would superannuate on 28.2.2003 on attaining the age of 60 years.

2. The case of the writ petitioner-respondent is that the Bihar State Universities Act (Bihar Act 23 of 1976) (for short "the Act") came into force on 16.5.1977 and according to the first proviso to section 67 of the said Act, a non-teaching

employee, who is in service of the University from a date prior to the commencement of the Act, would retire on completing the age of 62 years and as the writ petitioner-respondent was appointed on 27.10.1976 prior to coming into force of the Act, he would retire on completion of age of 62 years and the appellant-University has wrongly retired him on completion of 60 years of age by taking recourse to the main provision contained in section 67 of the Act.

3. The case of the appellant-University is that prior to the enactment of the Act, two Ordinances were promulgated. The Act was preceded by the two successive Ordinances; one being ordinance No. 145 of 1976 (Bihar State Universities Ordinance, 1976), which came into force on 11.5.1976 and the other being Ordinance No. 207 of 1976 (Bihar State Universities Ordinance, 1976), which came into force on 16.8.1976 and, thereafter, the Act was enacted, which came into force as stated above on 16.5.1977.

According to the said provision, the retirement age of non-teaching staff was 60 years, but in case of non-teaching staff, who was in employment of the University prior to coming into force of the ordinances as well as the Act, the same was 62 years. Section 81 of the Act contains a provision with regard to Repeal and Savings. Ordinance no. 207/76, along with other Acts and Ordinances, was repealed and sub-section (2) of section 81 of the Act provided that notwithstanding such repeal, anything done or any action taken under the Ordinances, shall be deemed to have been done or taken in exercise of the powers conferred by or under this Act, as if this Act was in force on the date on which such thing was done or action taken. In view of the aforesaid provision, the appointment of the writ petitioner-respondent will be treated to have been made under the provisions of the Act as the Act will be deemed to be in force by fiction and, accordingly, the first proviso to section 67 of the Act will not apply and the date of superannuation of the writ petitioner-respondent would be 60 years and as such the appellant-University has rightly passed the impugned order.

5. To appreciate the point, it is relevant to refer to the relevant provisions of the Ordinances and the Act. Section 63(1) of Ordinance No. 145/76 contained provision with regard to retirement from service, which, inter-alia, provides that after promulgation of the Ordinance, the age of superannuation of the teaching and non-teaching staff would be 60 years. However, proviso to the said section provided that the age of retirement of those non-teaching staff, who were in service of the University prior to coming into force of the Ordinance, shall be 62 years. Under the subsequent Ordinance i.e. Ordinance no. 207/76, the said provision was contained in section 67 and in the said provision also, the date of retirement of non-teaching staff was 60 years but an exception was made with regard to those non-teaching staff, who were in employment of the University prior to coming into force of the Act and their age of retirement was 62 years.

6. The relevant provision of section 67 of the Act (retirement from service), as originally stood, contained the similar provision. The first proviso to section 67 of the Act provided, inter-alia, that such non-teaching employees, who are in

service of the University prior to the commencement of the Act, shall retire after attaining the age of 62 years, whereas, in case of other non-teaching employees appointed after coming into force of the Act, the age of superannuation will be 60 years. Section 67 of the Act went to the process of amendments several times. According to the relevant provision, as stands today, the same is as follows:-

"67. Retirement from service.-(a) Notwithstanding anything to the contrary contained in any Act, Rules or any judgment or decree of a Court, the date of retirement of a teaching employee of the University or of a College shall be the date on which he attains the age of sixty years. The date of retirement of non-teaching employee (other than the inferior servants) shall be the date on which he attains the age of sixty years;

Provided that the date of retirement of such non-teaching employee. who is in the service of the University prior to the commencement of the Bihar State Universities Act, 1976 (Bihar Act 23, 1976) shall be the date on which he attains the age of sixty-two years.

Provided further...."

According to the said provision, the earlier provision with regard to superannuation has continued and age of superannuation has been fixed to be 60 years except in cases of those non-teaching employees. who were in the service of the University prior to the commencement of the Act.

7. The learned Single Judge, as stated above, has held that as the Act came into force on 16.5.1977 and the appointment of the writ petitioner-respondent was made on 27.10.1976, he is entitled to continue in his service up to the age of 62 years in view of the first proviso to section 67 of the Act.

8. Learned counsel appearing for the parties, during the course of submission, reiterated their respective cases and relied upon the aforesaid provision in support of their stands.

9. Admitted fact is that the writ petitioner-respondent was appointed after coming into force of Ordinance No. 145/ 1976 and according to the proviso to section 63(1) of the said Ordinance, only those non-teaching employees, who were in employment of the University prior to 11.5.1976, were entitled to continue in service up to the age of 62 years and the said proviso, as stated above, continued as a part of section 67 of the Act also. If section 67 of the Act is read in isolation then it supports the stand of the writ petitioner-respondent as he was admittedly appointed prior to coming into force of the Act and as such his date of superannuation would be 62 years. But, in our view, the said provision cannot be read in isolation and that has to be read along with other relevant provisions including the provision dealing with the repeal and savings as contained in section 81 of the Act, which runs as follows:-

"81. Repeal and savings :- (1) The Bihar State Universities (Bihar, Bhagalpur and Ranchi University) Act, 1960 (Bihar Act 14 of 1960), the Magadh University Act,

1961 (Bihar Act 4 of 1962), the Kameshwar Singh Darbhanga Sanskrit University Act, 1962 (The Bihar Act 21 of 1965), the Lalit Narain Mithila University second Ordinance, 1976 (Bihar ordinance No. 87 of 1976), the Magadh University (Second Amendment) Ordinance, 1976 (The Bihar Ordinance No. 90 of 1976), the Bihar State Universities (Bihar, Bhagalpur and Ranchi University) (Second amendment) Ordinance, 1976 (Bihar Ordinance No. 89 of 1976), the Bihar State Universities Laws (Second amendment) Ordinance, 1976 (Bihar Ordinance No. 98 of 1976), and the Bihar State Universities second Ordinance, 1976 (Bihar Ordinance No. 207 of 1976) are hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken in exercise of the powers conferred by under the said Acts or Ordinances shall be deemed to have been done or taken in exercise of the powers conferred by or under this Act, as if this Act were in force on the date on which such thing was done or action taken."

10. The last Ordinance No. 207/1976 has been repealed and sub-section (2) of section 81 of the Act clearly says that the things done or action taken under Ordinance No. 207 of 1976 shall be deemed to have been done or taken in exercise of the power conferred by the Act by deeming fiction and the Act will be deemed to be in force on the date on which such things were done or action taken.

11. Section 8 of the Bihar and Orissa General Clauses Act, 1917, contains a provision with regard to effect of repeal, which runs as follows :-

"8. Effect of repeal.-Where any Bihar and Orissa Act (or Bihar Act) repeals any enactment hitherto made, or hereafter to be made then unless a different intention appears, the repeal shall not,-

(a) revive anything in force or existing at the time at which the repeal takes effect, or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed."

12. From the said provision, it appears that in case of repeal of an enactment,

the consequence, as mentioned in section 8, will follow unless a different intention appears from the repealing Act. In case of simple repeal, consequence, as mentioned in section 8 will follow. However, if repeal of the Act is followed by a new Act or legislation, this Court has to consider as to whether any different intention appears with regard to the effect of the repealed Act. The Court would make an enquiry to determine whether the new Act protects old rights and liabilities or it has destroyed them. The applicability of section 8 of the said Act is not ruled out only because there is a repeal of an enactment followed by a fresh legislation. Section 8 will be applicable unless a different intention appears from the provisions contained in the repealing Act. This has to be ascertained after taking into consideration the relevant provisions of the repealing Act. The saving clause i.e. sub-section (2) of section 81 of the Act, clearly shows that with regard to the things done or action taken under the repealed Ordinance, it has to be deemed by fiction that the things done or action taken under the Ordinance were taken under the provisions of this Act as if this Act was in force when those things were done or action taken. A bare reading of the repeal and savings clause shows that the intention of the legislature is that the things done or action taken under the repealed Ordinance will be deemed to have been done or taken under the repealing Act. In view of the said provision, the operation of the Act will relate back to the date on which the things were done or action taken under the repealed Ordinance.

13. The action with regard to the appointment of the writ petitioner-respondent was taken when Ordinance No. 207/1976 was in force (16.8.1976) as admittedly he was appointed on 27.10.1976, his appointment is to be deemed to have been made under the provisions of the Act and not prior to coming into force of the Act. Reading section 67, together with section 81 of the Act, thus, clearly shows that this Act will be deemed to have been in force when the action was taken (appointment of the writ-petitioner was made) i.e. on 27.10.1976 and, thus, the appointment of the writ petitioner-respondent will be treated to have been made under the provisions of the Act and not prior to that and, accordingly, he is not entitled to take the benefit of the first proviso to section 67 of the Act. It appears that the attention of the learned Single Judge was not drawn to the repeal and saving provision contained in section 81 of the Act.

14. Thus, after considering the matter, we are of the view that the writ petitioner-respondent is not entitled in law to take benefit of the provision contained in the first proviso to section 67 of the Act and his appointment will be treated to have been made under the provisions of the Act and, thus, his age of retirement would be governed by the main provision of section 67 of the Act and his age of superannuation will be 60 years, which has been the case of the appellant-University. In the result, this appeal is allowed, the impugned order passed by the learned Single Judge is set aside and the writ petition filed by the writ petitioner-respondent is dismissed.