
(1999) 07 PAT CK 0021
In the Patna High Court
Case No : C.W.J.C. No. 3078 of 1994 (R)

U.D. Bhargava @ Umesh Datt Bhargava	APPELLANT
Vs	
Hindustan Copper Limited and Others	RESPONDENT

Date of Decision : 28-07-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1999) 3 PLJR 628

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Advocate : Tapan Sen and P. Kumar, for the Appellant; P.K. Sinha and Rajiv Ranjan and Mr. M.S. Ansvar for the State, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—In this writ application the petitioner has prayed for quashing the order dated 11.11.94, issued by the respondent No. 2, Chairman-cum-Managing Director, Hindustan Copper Ltd whereby in purported exercise of the terms and conditions contained in Clause 3 of the appointment letter the services of the petitioner were terminated with immediate effect and in lieu of notice a cheque equal to the sum of three months pay was enclosed therewith and further for quashing the office order dated 11.11.94, whereby in compliance of the order of termination the petitioner has been released and was advised to collect the dues. The petitioner's case is that he was appointed as a Mining Engineer in the scale of Rs. 1175-1525/- on the basis of appointment letter dated 16.9.72 issued by the General Manager of the Indian Copper Ltd. On 16.1.89 the office order was issued under the seal and signature of respondent No. 2, whereby Rule 10(17) of the National Mineral Development Corporation's Regulations as adopted by Hindustan Copper Ltd. was modified and it was inter alia laid down that for purposes of premature retirement, an employee shall retire from the services of the company on attaining the age of 58 years provided that the competent authority may require an employee to retire who is inefficient, corrupt or

medically unfit on attaining the age of 50 years on giving three months notice or pay in lieu thereof. The petitioner's further case is that during his service period there was nothing against him nor he has been ever given any notice calling him either inefficient, corrupt or medically unfit. The petitioner's date of birth is 10.7.1941 and was to retire on 10.7.1999 after attaining the age of 58 years. The petitioner states that he was shocked and surprised to receive office order dated 11.11.94 whereby his services were terminated with immediate effect in terms of clause 3 of the appointment letter and on the same day the respondents proceeded to release the petitioner on the basis of the said office order. The petitioner states that no power is vested to the respondent No. 2 to terminate the service of the petitioner in the manner as has been done. It is stated that action on the part of the respondents in terminating the services of the petitioner on the ground mentioned in the impugned order de hors the provisions of clause 10(2) of the National Minerals Development Corporation's Service Regulations as adopted by Hindustan Copper Ltd. The petitioner's further case is that in absence of any departmental proceeding having been done against the petitioner, the respondents cannot be allowed to terminate the services of the petitioner without following the rules and regulations.

2. In the supplementary affidavit the petitioner further stated that he was appointed as Mining Engineer and his service was confirmed after 6 months thereafter in April, 1973 an order was issued by which his post was designated as Sr. Mining Engineer. In 1979 the post of Sr. Mining Engineer was redesignated as Assistant Mining Superintendent. In 1983 the petitioner was promoted as Deputy Mines Superintendent which was subsequently renamed as Manager (Mines) in 1984. Subsequently an interview was held on 3.10.89 amongst the Managers (Mines) for being considered for promotion to the post of Sr. Manager (Mines). The petitioner was interviewed and the Director (Personnel) issued a letter dated 6.10.89 whereby the petitioner was promoted to the post of Sr. Manager (Mines). The post of Sr. Manager (Mines) was confirmed on 9.4.90 and post was redesignated as Chief Manager (Mines).

3. A counter affidavit has been filed by the respondents stating, inter alia, that the petitioner was appointed on 16.9.72 as Mining Engineer on the terms and conditions, inter alia, that he will be on probation for six months. It is stated that there is a provision under regulation for premature retirement of an employee and the impugned order of termination (Annexure 3) was issued by the Chairman-cum-Managing Director in exercise of power conferred upon it under Rule 10(17)(c)(1) read with Rule 10(17)(c)(11). Accordingly, the competent authority while issuing the said order of termination offered the three months pay in lieu of notice. The respondents further case is that considering the appraisal report and the past services of the petitioner, it revealed that the petitioner was proved to be inefficient in performing his duty and shouldering responsibilities during his employment in the company. It is further stated that during fatal accident of the workers he did not inspect the site of accident on the date of occurrence. Moreover, the petitioner did not have coordination with Mines

Managers in the matter of safety and during his period 10 serious and 4 fatal accident took place. The competent authority taking into cumulative effect of this fact and relevant consideration took a decision that services of the petitioner in the company is not desirable for the public purpose. Accordingly, in exercise of power, the competent authority after application of mind and awarding no punishment thought it best to terminate the service of the petitioner simpliciter with immediate effect under Rule 10(17)(c)(11) of the Rules.

4. In reply to the rejoinder, the respondents further stated that from the appraisal report the petitioner appears to be inefficient and the performance of the petitioner is found very poor. Accordingly the impugned order was passed. Copies of the appraisal report of the petitioner have been filed and annexed as Annexure D to the reply.

5. Mr. Tapen Sen, Learned Counsel appearing on behalf of the petitioner, assailed the impugned order of termination as being illegal, arbitrary and suffers from vice of extreme high handedness. Learned Counsel firstly submitted that the action on the part of the respondents in terminating the services of the petitioner on the ground mentioned in the impugned order goes to show that the same is against the provisions of clause 10(12) of the National Minerals Development Corporation's Service Regulation as adopted by Hindustan Copper Ltd. as also the provisions of clause 23(VI) of the said Regulation. Learned Counsel has drawn my attention to several annexures and submitted that the provision under which the services of the petitioner was terminated relates to premature retirement. Learned Counsel then submitted that on the face of counter affidavit it appears that the termination letter was issued on the basis of alleged allegation of charges against the petitioner which will amount to stigma and therefore, order of termination is bad in law. Learned Counsel then submitted that the respondents have, for the first time, made out a case in the counter affidavit that the petitioner was compulsorily retired. Learned Counsel seriously disputed the correctness and genuineness of the appraisal report filed by the respondents (Annexure F) and submitted that such adverse report was never communicated to the petitioner. Learned Counsel lastly submitted that in view of the matter the impugned order of termination is illegal and mala fide.

6. On the other hand, Mr. P.K. Sinha, learned Sr. counsel appearing on behalf of the respondents, has drawn my attention to various paragraphs of the counter affidavit and submitted that the petitioner was compulsorily retired from the service which is not punishment. Learned Counsel submitted that on the face of the appraisal report and seeing the past performance of the petitioner the concerned authority of the respondents came to an opinion that continuation of the petitioner in service would not be in the interest of the company. According to the Learned Counsel, such opinion cannot be challenged before this Court under Article 226 of the Constitution of India. Learned Counsel relied upon a decision of the Apex Court in the case of R.L. Butah Vs. Union of India (UOI) and Others, and Baikuntha Nath Das and another Vs. Chief District Medical Officer,

Baripada and another, .

7. Before coming to the main issue, I would first like to discuss the admitted facts of the case. By letter dated 16.9.72 (Annexure 1), the petitioner was appointed on the post of Mining Engineer. The relevant portion of the offer of employment reads as under :?

Offer of employment

We refer to your interview with our Mines Superintendent on 22.7.1972, and wish to offer you the post of a Mining Engineer in our organisation as per the following terms and conditions :

(1)

(2) ...

(3) Probation : You will be on probation for 6 months. During the period of your probation, you will be on a month's notice in the event of your wishing to resign or the Company wishing to terminate your services. On completion of your probationary period, a notice period of 3 months is required from both sides.

8. In 1973 the petitioner's service was confirmed by letter dated 2.4.73 (Annexure 5), which reads as under :

Confirmation

Please refer to our letters HCL/ICC/GM/A-1.19 dated 16.9.1972 and HCMCC/GM/UDB dated 23.3.73 when you handed us a duplicate copy of the letter dated 22.3.73, signifying your re-affirmation of your acceptance of the terms offered.

We have pleasure in informing you that your service is confirmed with effect from 30.3.1973 in accordance with the terms and conditions enumerated in our letter dated 16.9.1972, except that, with effect from 30.9.72, your designation is revised from Mining Engineer to Senior Mining Engineer and your salary scale is revised from Rs. 1175-50-1525 + Rs. 100/- DA P.M. to Rs. 1375-60-1675-100-1975 + Rs. 100 p.m.

9. In 1983 the petitioner was promoted as Deputy Mines Superintendent by letter dated 29.4.83 and was put on probation for a period of one year from the date of his taking charge. In 1984 the post of Deputy Mines Superintendent was redesignated as Manager (Mines). In 1984 the service of the petitioner was confirmed in the post of Manager (Mines) by letter dated 3.12.84 (Annexure 6/1), which reads as under :?

My dear Bhargava,

I am glad to inform you that on the basis of your performance during the probationary period it has been decided to confirm you in the post of Manager (Mines) with effect from 16.1.1984.

I wish you a long, purposeful and rewarding career in Hindustan Copper Limited.

Yours sincerely, Sd/ A.K. Ghosh.

10. In the year 1989 the petitioner qualified in the interview for the post of Sr. Manager (Mines) and the respondents, by letter dated 6.10.89 (Annexure 7), promoted the petitioner as Sr. Manager (Mines). In 1990 the petitioner was confirmed in the post of Sr. Manager (Mines) in terms of letter dated 23.8.90 (Annexure 8), which reads as under :?

Dear Shri Bhargava,

I am glad to inform you that on the basis of your performance during your probationary period, it has been decided to confirm you in the post of Senior Manager (Mines) with effect from 9th April, 1990.

I wish you a long, purposeful and rewarding career in Hindustan Copper Limited.

Yours sincerely, Sd/ VED LEEKHA

11. In 1991, by letter dated 25.3.91 (Annexure 9), the petitioner was placed in the revised scale of pay and redesignated as Chief Manager (Mines). The petitioner continued in the said post as Chief Manager (Mines). However, in 1994 the Chairman cum Managing Director issued an order terminating the service of the petitioner with immediate effect. A copy of the termination order is annexed as Annexure 3, which reads as under :?

ORDER

In terms of Clause-3 of his appointment letter No. HCL/ICC/GM/A-1. 19 dated 16.09.72, employment of Shri U.D. Bhargava, Chief Manager (Mines), with the Company is hereby terminated with immediate effect. A cheque equal to the sum of three months' pay in lieu of notice period is enclosed.

Sd/ Ved Leekha Chairman-cum-Managing Director.

12. The petitioner challenged the impugned order of termination as being illegal, arbitrary and unconstitutional and in violation of service regulation. It is the specific case of the petitioner in the writ petition that the termination order was issued without initiating any departmental proceeding and without following the rules and regulations and the action of the respondents was totally unilateral, mala fide and arbitrary.

13. In the counter affidavit the respondents have made out a case that the impugned order of termination was issued in exercise of power under Rule 10(17)(c)(1) read with Rule 10(17)(c)(11). It is stated that while issuing the said order of termination three months' pay in lieu of notice was paid. It is stated that the competent authority has applied its mind with regard to retention of the petitioner in the respondent-company and for public purpose and interest the said decision was taken. The respondents' further case is that considering the appraisal report and past services of the petitioner it revealed that the petitioner

was proving to be inefficient in performing his duties and shouldering responsibility during his employment in the company. Various instances have been mentioned in the counter affidavit showing the inefficiency of the petitioner in discharging his duties. In reply to the rejoinder the respondents have annexed copies of the appraisal report with regard to the performance of the petitioner and it is stated that the appraisal report of the petitioner was placed before the reviewing committee who examined the performance and made endorsement that the performance was poor during the relevant period.

14. Having regard to the facts of the case, the first question falls for consideration is whether the order of termination is by way of simple termination or it is an order of compulsory retirement from service. The amended provision of Rule 10(17) of NMDC Service Regulations as adopted by HCL reads as under :?

10(17)(a)?An employee shall retire from the service of the company on attaining the age of 58 years provided that the Competent Authority may require an employee to retire who is inefficient, corrupt or medically unfit on attaining the age of 50 years on giving three months notice or pay in lieu thereof.

10(17)(b)?Notwithstanding the provisions of regulations 10(17)(a) above, the service of an employee who has completed the age of 58 years may be extended by the Company, on public grounds which should be recorded in writing, but not more than one year at a time.

10(17)(c)(1)?The criteria for judging the medical fitness, inefficiency or doubtful integrity of employees proposed to be prematurely retired under Regulation 10(17)(a) shall be as under :

15. This regulation further provides that inefficiency shall be evaluated on the basis of the appraisal reports. According to this, an employee, who has secured consecutively "fair" and "poor" rating for three years in his appraisal reports may be deemed as a fit case for premature retirement.

16. From perusal of the impugned order of termination, it is abundantly clear that the order was issued in terms of clause 3 of the letter of appointment. There is nothing in the order by which it can be inferred that the order was passed in purported exercise of power under Rule 10(17) of the Regulation as alleged by the respondents. There is no iota of evidence or any material to show that the respondents ever intended to require the petitioner to retire on any ground. The impugned order, on the face of it, is an order of termination under clause 3 of his initial letter of appointment. The termination order, therefore, is illegal and arbitrary and violative of principles of natural justice and also against the service regulation. As noticed above, although, the petitioner was initially appointed in 1972 in the post of Mining Engineer on the condition, inter alia, that he will be on probation for six months. From 1973 to 1991 the petitioner was time to time promoted and confirmed to the higher post and because of his efficiency and performance he reached to the post of Chief Manager (Mines). From perusal of Annexure 6/1, it transpires that while confirming the petitioner in the post of

Manager (Mines) the performance of the petitioner was highly appreciated. Similarly in 1990, while confirming the petitioner in the post of Sr. Manager (Mines), similar complement was given for his purposeful and rewarding career. It is, therefore, manifest that during his 20 years of service the petitioner was rewarded for his high performance and he was confirmed in the post of Chief Manager (Mines). In such circumstances, the termination of the service of the petitioner on the ground of clause 3 of his original letter of appointment dated 16.9.72, in my opinion, is not only illegal and arbitrary but mala fide and vindictive.

17. For the first time the respondents came out with a case in the counter affidavit that the impugned order of termination was in fact an order of compulsory retirement which has been passed in exercise of power under Rule 10(17)(a) of the NMDC service regulation. The respondents, by filing additional affidavits in the shape of rejoinder and reply, further make out a case that the appraisal report of the petitioner was considered by the reviewing committee and it was found that in the public interest his services does not require any more and he should be relieved by way of compulsory retirement. It is sell settled that if any order is passed by an authority on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reason in the shape of affidavit or otherwise. At this stage I must quote the principle laid down by the Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , where their Lordships observed :

The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.

18. It is not disputed by the respondents that the petitioner was never communicated about his alleged poor performance at any time since the date of his appointment muchless for the period between 1991 to 1994. It is also not disputed that the petitioner was ever asked by the respondents to improve his performance or to correct any mistake that might have been done by him. It is rather obvious that because of his good performance he has been rewarded for excellence (sic?in ?) career.

19. Mr. P.K. Sinha, learned Sr. counsel appearing on behalf of the respondents, referring the case of R.L. Butail (supra) and Baikuntha Nath Das (supra), submitted that the order of compulsory retirement is not liable to be quashed by the court merely on the ground that while passing it, uncommunicated adverse remarks were also taken into consideration. Learned Counsel then submitted that these circumstances itself cannot be a basis for interference because principles of natural justice have no place in the context of an order of compulsory retirement.

In my opinion, the principle laid down by the apex court in the decision relied upon by Mr. Sinha does not apply in view of the fact that in fact the impugned order of termination does not appear to be an order passed by the respondents for compulsory retirement.

20. Even though the order of compulsory retirement is couched in innocuous language without making any imputation against the employee who is directed to be compulsorily retired from service, the court, if challenged in appropriate cases, lift the veil to find out whether the order is based on any misconduct of the government servant or the order has been made bona fide without any oblique or extraneous purpose. It is equally well settled that power of government to retire a government servant in public interest in terms of service rule is certainly absolute provided bona fide opinion is formed by the concerned authority. If the decision to compulsorily retire a government servant is based on collateral ground or is arbitrary, the High Court is competent to interfere under Article 226 of the Constitution. This principle, in my opinion, equally applies to other authorities, who intend to compulsorily retire an employee in terms of the service regulation.

21. The respondents took the plea in the counter affidavit that premature retirement on the rating of securing consecutively fair or poor for three years in the appraisal report cannot be said to constitute any misconduct and as such, no disciplinary proceeding is called for nor warrant for holding any enquiry nor charge is framed. This is a simpliciter cessation of employment, it is further stated in the counter affidavit that before issuing the impugned order of termination the petitioner was offered to take voluntarily retirement scheme benefit but he declined to accept the said offer and then the respondents have exercised power under Rule 10(17)(c)(1) of the Regulation. The respondents have further stated in the affidavit that in all fairness the respondents still offer voluntarily retirement scheme benefit if this Court thinks fit and proper that it should be offered to the petitioner. The respondent further stated that it still keeps the said offer open and agree to extend the said benefit to him. It is, therefore, clear that in order to support the termination order the respondents have tried to take inconsistent plea in the counter affidavit and the rejoinder. On the one hand the respondents say that since 400 employees have opted for voluntarily retirement scheme benefit and petitioner was also offered the same but he declined to accept the said benefit. On the other hand the respondents contend that although the order of termination was passed in terms of clause 3 of the original letter of appointment, it was in fact passed in exercise of power under Rule 10(17)(c)(1) of the Regulation. In support of the validity of the so called order of compulsory retirement, the respondents annexed copies of the appraisal report, from perusal of which it appears that most of the notices made therein are without any dates. The adverse entries made against the petitioner had not been communicated to him nor he was ever asked to improve his performance. It does not appear from the appraisal report that there is any adverse remarks of honesty and integrity. In my opinion, the remarks are

inconsistent and the reasons are self evident of lack of bona fide in making these remarks. The remarks does not appears to be bona fide made in the public interest but amounted to self serving statement to weed out the petitioner from service.

22. In similar circumstances, the Apex Court in the case of Sukhdeo Vs. Commissioner Amravati Division, Amravati and Another, , has observed :

In view of the above remarks made by the officer, the conclusion reached is obviously incorrect and it is not in public interest. A man does not become poor in public image when his relationship with the public and subordinates is good and he is a man of integrity and honesty and he has got the satisfactory intelligence for discharging his duties and is fit for promotion. How can in such circumstances his performance would be held unsatisfactory when he is capable of coordinating with subordinates and get the work done. How his technical ability is not satisfactory. The remarks are mutually inconsistent and reasons are self-evident of lack of bona fides in making these remarks. Under these circumstances, it could be characterised that the remarks were not bonafide made in public interest but was a self serving statement to weed him out from service.

23. In the case of Baidyanath Mahapatra Vs. State of Orissa and Another, the Apex Court held that when a government servant is promoted to a higher post on the basis of merit and selection, adverse entries if any contained in his service record lose their significance and those remain on record as part of past history. It would be unjust to curtail the service career of government servant on the basis of those entries in the absence of any significant fall in his performance after his promotion. It is well settled that purpose of the rule conferring power on the Government or the employer to retire government servant prematurely is to engage its machinery by chopping of the deadwood. But at the same time the reviewing committee will not be justified in making its recommendation on the basis of adverse entries awarded to the petitioner which were never communicated and specially when because of brilliant performance of the petitioner he reached at the level of the Chief Manager (Mines). Having regard to the entire facts and circumstances of the case and the discussion made above, I am of the definite opinion that the impugned order of termination is not an order passed by the respondents by way of compulsory retirement in exercise of power conferred by Rule 10(17)(c)(1) of the Regulation. It is in fact an order of termination passed in terms of clause 3 of the original letter of appointment of the year 1972, which is, on the face of it, illegal, arbitrary and mala fide. In my opinion, therefore, the petitioner is entitled to reinstatement with all consequential benefits. This writ application is accordingly allowed with exemplary cost quantified at Rs. 5,000/- recoverable from the respondents.