

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1638 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals?

RAMESHCHANDRA JIVANLAL BHATT

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 1638 of 1992
MR NK MAJMUDAR WITH MR SP MAJMUDAR for Petitioner No. 1
MS ARCHANA RAWAL, AGP for Respondents.

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 27/02/2004

ORAL JUDGEMENT

The petitioner has filed this petition under
Article 226 of the Constitution of India praying for

quashing and setting aside the order of compulsory retirement dated 31.05.1991 passed by Director General of Police, Gujarat State, Ahmedabad i.e. respondent No.2 herein. The petitioner has also prayed for reinstatement in service with all back wages and other consequential benefits and by way of an interim relief, the petitioner has prayed for keeping one post of Head Clerk vacant for the petitioner, during the pendency of the petition.

2. This petition was admitted on 11.03.1992. However, no interim relief was granted by this Court.

3. It is the case of the petitioner that the petitioner joined the Police department in the year 1956 as Junior Clerk. The petitioner was promoted as Senior Clerk in the year 1967 and thereafter, he was promoted as Head Clerk in due course in 1982. During this period, the petitioner had served in different Districts and has discharged his duties most sincerely and satisfactorily. The petitioner was subjected to departmental proceedings in the year 1982 for his mistake in posting incorrect entry in Petrol Book Account. The Inquiry Officer was appointed and he ultimately came to the conclusion that there was no malafide intention at all on the part of the petitioner and no defraction was made and it was simple mistake of account regarding posting of wrong entry. The petitioner was, however, compulsorily retired by an order dated 05.11.1988 on the said ground.

4. Being aggrieved by the said order, the petitioner has filed an appeal being Appeal No. 638 of 1988 before the Gujarat Civil Services Tribunal, Gandhinagar and the said appeal was partly allowed and the order of compulsory retirement was set aside and the punishment was reduced to stoppage of four increments for a period of two years. Pursuant to the aforesaid order of the Tribunal, the petitioner was reinstated and posted as Head Clerk at Ukai from 30.12.1989 in S.R.P. Group. The petitioner for the first time served with an adverse remark for the year 1987 - 88. Thereafter, again adverse remark was communicated to the petitioner in 1988 for the period from 1988 - 89 on 19.12.1989 and thereafter, by an order dated 03.09.1990, the said entry was registered in the service record of the petitioner. The said adverse entry was only in respect of the petitioner's attitude in delaying things and often he was required to be told for the said purpose. The petitioner has made representation for expunging the said adverse remark. However, the said representation was rejected. The petitioner, thereafter served with an order of compulsory retirement dated 31.05.1991.

5. Being aggrieved by the said order, the petitioner has again approached to Gujarat Civil Services Tribunal, Gandhinagar by way of an Appeal No. 255/1990. However, the Tribunal has not entertained the said appeal on the ground that the Tribunal has no jurisdiction to decide the said appeal. The petitioner has, therefore, filed the present petition challenging the aforesaid order of the respondent No.2.

6. Mr. Sharvil P. Majmudar, learned advocate appearing for the petitioner submitted that the order passed by the respondent No.2 of compulsory retirement is contrary to the statutory provisions and against the settled legal position. The respondent No.2 has acted in arbitrary manner and though there was no case at all for compulsory retirement, he has passed the impugned order in total disregard of the statutory provisions. He has invited my attention to Rule 161 of Bombay Civil Services Rules, 1959. Rule 161(1)(a) states that except as otherwise provided in the other clauses of this rule, the date of compulsory retirement of a Govt. servant other than a Class - IV servant, is the date on which he attains the age of 58 years. Sub-clause (aa) of Section 161(1) states that notwithstanding anything contained in Clause (a), An appointing Authority shall, if he is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant to whom clause (a) applies by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice. Sub-clause (2) of Section 161 (1)(a) says that if he is in any other service or post, the age limit for the purpose of direct recruitment to which is below 40 years, on or after the date on which he attains the age of 55 years.

7. On the basis of the above statutory provisions, Mr. S.P. Majmudar has submitted that the petitioner being a Class III employee, he attained the age of 55 years on 31.08.1991 whereas the order of compulsory retirement was passed on 31.05.1991 i.e. before he attained the age of 55 years and hence, the order passed by the respondent No.2 is in violation of this statutory rules. The petitioner being Class III employee, working as a Head Clerk, it cannot be said that his retention in the organisation is such that it is in the public interest to retire him prematurely and hence, on both these counts, the order under challenge is required to be quashed and set aside.

8. With regard to the issue of age for the purpose

of compulsory retirement, he relied on the decision of the Hon'ble Supreme Court in the case of MURARI MOHAN DEB V/S. SECRETARY TO THE GOVT. OF INDIA AND OTHERS, A.I.R. 1985 SUPREME COURT 931 wherein it is held that "Where the relevant service rules fixed both an age of superannuation and an age of compulsory retirement and the services of a Government servant governed by the rules are terminated between these two points of time, the order of compulsory retirement could not be said to cast a stigma and would not attract Art. 311. But where there is no rule fixing the age of compulsory retirement or if there is one and the servant is retired before the age prescribed therein, then that can be regarded only as dismissal or removal within Art. 311(2)." Based on these observations, Mr. Majmudar has submitted that the age of superannuation is 58 years and age of compulsory retirement is 55 years in the case of the petitioner. However, the petitioner was ordered to be compulsory retired before he attain the age of 55 years and hence, the impugned order is a stigmatic order which requires compliance of provisions contained in Article 311 (2) of the Constitution of India. Since it was not done in case of the petitioner, the order is required to be quashed and set aside.

9. Mr. Majmudar has relied on the decision in the case of M.P. ELECTRICITY BOARD V/S. SHREE BABOO (2002) 9 S.C.C. 704 for the proposition that if the Screening Committee had come to a conclusion to retire the respondent in public interest on certain supposed misdemeanours and if that conclusion is not arrived at by the Committee on the basis of any materials, it is justiciable for the Court to interfere with such conclusion and when the High Court has set aside such order, there is no need for the Hon'ble Supreme Court to interfere in the said order while exercising power under Article 136 of the Constitution of India.

10. Mr. Majmudar has relied on the decision of the Hon'ble Supreme Court in the case of S. RAMACHANDRA RAJU V/S. STATE OF ORISSA, A.I.R. 1995 S.C. 111 for the proposition that "if the order compulsorily retiring the employee is based on solitary adverse report against him for one year, earlier and subsequent report showing that employee had meritorious service records was not taken into consideration, the said order is liable to be set aside. The Court has also held in this case that the entire service record, more particular, the latest should form foundation for opinion of Govt."

11. Mr. Majmudar has further relied on the decision

of the Hon'ble Supreme Court in the case of BRIJ MOHAN SINGH CHOPRA V/S. STATE OF PUNJAB, A.I.R. 1987 S.C. 948 for the proposition that while considering the question of premature retirement it may be desirable to make an overall assessment of the Government servant's record of last five years, and if the representation is made against such adverse remarks and the said representation is pending, such adverse remarks cannot be taken into consideration. It is also held in this case that it would be unjust, unfair and contrary to principles of natural justice to retire prematurely a Government employee on the basis of adverse entries which are either not communicated to him or if communicated, the representation made against those entries are not considered and disposed of.

12. Mr. Majmudar has further relied on the decision of the Hon'ble Supreme Court in the case of H.C. GARGI V/S. STATE OF HARYANA, (1986) 4 S.C.C. 158 for the proposition that the power of compulsory retirement can be exercised subject to the conditions mentioned in the rule, one of which is that the concerned authority must be of the opinion that it is in public interest to do so. There should be adequate material to show that the State Government could have formed an opinion on the basis of such material to the effect that it was in the public interest to compulsorily retire the Government servant. Adverse entries not showing the Government servant's integrity and test of public interest are the relevant criteria while taking the decision for the compulsory retirement for the Govt. servant.

13. Mr. Majmudar has further relied on the decision of the Hon'ble Supreme Court in the case of RAM EKBAL SHARMA V/S. STATE OF BIHAR AND ANOTHER, A.I.R. 1990 S.C. 1368 for the proposition 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 bonafide 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."

14. Mr. Majmudar has further relied on the decision of this Court in the case of ISHWARBHAI MARGHABHAI PATEL V/S. STATE OF GUJARAT AND ANOTHER, 2000 (4) 41 G.L.R.

3201 for the proposition that same material for which the departmental inquiries were held and punishment was inflicted upon the Govt. servant cannot be considered again for the purpose of compulsory retirement. The Court was of the view that such a course would amount to viewing the punishment under the guise of exercise of powers by the department under Rule 161 of the Bombay Civil Services Rules and it cannot be permitted to be adopted by the respondent as, otherwise, no Government servant would be safe in the hands of the authority.

15. Mr. Majmudar has lastly relied on the decision of this Court in the case of MAHENDRA KIRPASHANKER JOSHI V/S. STATE OF GUJARAT AND ANOTHER, (2001) 42 (1) G.L.R. 174 for the proposition that if the order is passed on extraneous consideration without proper application of mind and also by not taking into consideration the relevant facts and circumstances, such an order is required to be struck down. The Court has further taken the view that remark "average" was not such by which it can be presumed that the petitioner was a 'dead wood' and it was in public interest not to continue him in Government service. The Court has also taken into consideration the fact that the order under challenge was passed before the petitioner had an opportunity to make effective representation against the adverse remarks and procedure prescribed by the Government for review is also not followed before passing the impugned order. On the basis of all these facts, the Court has struck down the order of compulsory retirement.

16. On the basis of the aforesaid judgments, Mr. Majmudar has submitted that the petitioner's service record was absolutely clear. The earlier adverse remarks were not to be taken into consideration as after those remarks, the petitioner was granted promotion of Clerk. The adverse remark which was made subsequently was also not of such a magnitude which would warrant the order of compulsory retirement. He has further submitted that though the order was passed by exercising powers under Rule 161 of the Rules, it was definitely in the nature of punishment for which regular inquiry was not held and the principles of natural justice were violated. The respondent has passed the impugned order only by way of vengeance, as the earlier order of compulsory retirement was interfered with by the Tribunal. The representation which was made by the petitioner against the adverse remarks was also not considered in its true spirit and no reason was assigned whatsoever by rejecting the said representation. The petitioner was only a Head Clerk and it could not be said that his retention in the

organisation could be contrary to the public interest. In this view of the matter, he has strongly urged that the impugned order is ex-facie illegal, nullity and in violation of the principles of natural justice and contrary to the settled legal position and hence, it deserves to be quashed and set aside.

17. Ms. Archana Rawal, learned AGP on the other hand supported the order passed by the respondent No.2. She has submitted that considering overall service record of the petitioner and in view of Govt. Circular dated 8.07.1987, the respondent No.2 was satisfied on the basis of materials and, therefore, he passed the impugned order dated 31.05.1991 under Rule 161(1)(aa)(i)(I) of B.C.S.R. and, therefore, there is no reason to interfere in the said order.

18. She has further submitted that on attainment of 55 years, the respondent No.2 was required to consider the service record of the petitioner from 1981 onwards and, therefore, after considering the same, the respondent No.2 found from the record that in 1982, charge of misappropriation was made against the petitioner in connection with petrol advance to the driver of the department's vehicle when the petitioner was serving as Cashier at D.S.P. Office, Baroda Rural. Pursuant to the said charge, departmental proceedings were initiated and charges of misappropriation were proved. Even while confirming the charges of misappropriation, the Tribunal has taken sympathetic view to reduce punishment from compulsory retirement to reduction of four years increment and the said order has been accepted by the petitioner. As per Government's guidelines, integrity is prime consideration in overall assessing service record of the concerned employee. She has further submitted that even in the year 1983 and thereafter in 1986 & 1987, adverse remarks were made against the petitioner and the same were communicated to the petitioner which were accepted and no representation was made by the petitioner. With regard to the year 1988 - 1989, adverse remarks were made in the service record against which representation was made by the petitioner which was not accepted. On the basis of this entire service record of the petitioner, the respondent No.2 on his subjective satisfaction, came to the conclusion that the petitioner was required to be prematurely retired and hence, the impugned order was passed by the respondent No.2 on 31.05.1991.

19. She has further submitted that for the year 1988 - 89 & 1989 - 90, the petitioner remained on leave for

406 days as petitioner was retired compulsorily from service on 08.11.1988 and pursuant to the order of the Tribunal, he was reinstated in service from 13.12.1989. Therefore, the said period was treated as leave and hence, during this period, there was no adverse remark against the petitioner as the petitioner was not in actual service.

20. In support of her submission, she relied on the decision of the Hon'ble Supreme Court in the case of BAIKUNTHA NATH DAS AND ANOTHER V/S. CHIEF DISTRICT MEDICAL OFFICER, BARIPADA AND ANOTHER, (1992) 2 S.C.C. 299 for the proposition that in case of compulsory retirement, uncommunicated adverse remarks can be considered and the opinion of the authority regarding compulsory retirement is his subjective satisfaction which has to be formed on the basis of entire record of service and that the order of compulsory retirement does not amount to punishment and hence, principles of natural justice are not required to be observed in passing of the order of compulsory retirement and that judicial review of the order is open only on grounds of mala fides, arbitrariness and perversity.

21. She has further relied on the decision of the Hon'ble Supreme Court in the case of PRABODH SAGAR V/S. PUNJAB STATE ELECTRICITY BOARD AND OTHERS, (2000) 5 S.C.C. 630 for the proposition that "there cannot be any set of guidelines for proving mala fides. It has to be ascertained from facts and records of a case. Mere averment of mala fides is not enough. It must be supported by facts and the court after scanning the facts must come to its own conclusion."

22. She has further relied on the decision of the Hon'ble Supreme Court in the case of JUGAL CHANDRA SAIKIA V/S. STATE OF ASSAM AND ANOTHER, (2003) 4 S.C.C. 59 wherein the Hon'ble Supreme Court has held that order of compulsory retirement in public interest should be based on subjective satisfaction of competent authority. It is open to court's interference only when order is based on no evidence or is totally perverse. Order of compulsory retirement passed against appellant on the basis of recommendations of Screening Committee consisting of high govt. officials which submitted its report having regard to entire records including report of one-man committee constituted to enquire into a scandal in which appellant and others were allegedly involved. It was held on these facts that compulsory retirement of the appellant could not be assailed as arbitrary and unreasonable on the ground of being based only on the one-man committee

report.

23. Lastly, she relied on the decision of the Hon'ble Supreme Court in the case of STATE OF PUNJAB V/S. GURDAS SINGH, A.I.R. 1998 S.C. 1661 for the proposition that before the decision to retire a Government servant prematurely is taken the authorities are required to consider the whole record of service. Any adverse entry prior to earning of promotion or crossing of efficiency bar or picking up higher rank is not wiped out and can be taken into consideration while considering the overall performance of the employee during whole of his tenure of service whether it is in public interest to retain him in the service. The whole record of service of the employee will include any uncommunicated adverse entries as well.

24. Based on the aforesaid authorities, she strongly urged that the order of compulsory retirement passed by the respondent No.2 is perfectly valid and legal and no interference is called for by this Court and the petition be dismissed.

25. After having heard learned advocates appearing for the respective parties and after having gone through the pleadings of the parties contained in the memo of petition as well as in the Affidavit-in-reply and after considering the authorities cited before the Court and after having given my anxious thoughts to all these submissions and contentions raised before the Court, the Court is of the view that here is a case where the petitioner was subjected to compulsory retirement on earlier occasion which was challenged by him before the Tribunal and the said order was interfered by the Tribunal by reducing punishment from compulsory retirement to stoppage of four increments for two years. However, the Tribunal has observed in his earlier order that even though the concerned Government employee is innocent and is free from the intention to defraud Govt. money for his personal purposes, the very fact of his retaining Govt. money without authority constitutes temporary misappropriation and the disciplinary authority is bound to take a serious view of such an occurrence. Thus, temporary misappropriation of Rs.500/for the period from 28.05.1982 to 12.02.1984 by the petitioner is proved. After considering the over all facts and circumstances of the case and keeping in mind a chance of turning a new leaf in his professional life, the Tribunal has reduced the punishment from compulsory retirement to stoppage of four increments for two years. The main argument of Mr. Majmudar is that once the petitioner has been subjected to compulsory retirement and met with the

punishment, the same fact cannot be pressed into service while passing the impugned order of compulsory retirement once again based on the same set of facts and circumstances. It is true that adverse remarks which were made subsequently against the petitioner were not of serious nature and on the basis of such adverse remarks, the order of compulsory retirement could not have been passed. However, it is not the solitary base of the order of compulsory retirement passed on 31.05.1991.

26. As far as the contention of Mr. Majmudar regarding non-completion of 55 years on the date when the notice for compulsory retirement was issued on the petitioner is concerned, the Govt. has prescribed certain guidelines for the purpose of deciding the issue of compulsory retirement of a Government servant. It is true that a combined reading of Rule 161(1)(a) with the relevant Provision of Rule 161(1)(aa) makes it clear that normally a Government servant other than a Class - IV servant retires at the age of 58 years. However, the Government has considered the question as to what criteria and procedure should be prescribed to ensure uniform and equitable application of this provision and it has been decided, amongst others, that six months before a Government servant attains the age of 50 years or 55 years, as the case may be, his record should be carefully examined by the authority competent to make an appointment to the post which he is holding and the question whether he should be retained in service or retire on his attaining the said age, should be placed before the review committee. Such committee is normally consisting of head of the department concerned and a Senior Class I Officer and from the Administrative Secretary Department concerned if whether the committee comes to the conclusion, as a result of examination of Government Servant's record, that he should be retired prematurely, it should record reasons for such conclusion. It is necessary that this process should be completed in each case in about three months time so that in the event of retirement being finally decided upon, it is possible to serve a notice on the Govt. servant concerned at least three months before the date on which he attains the age of compulsory retirement. Precisely for this reason, the notice for compulsory retirement was issued on the petitioner on 31.05.1991 and three months salary was paid to the petitioner and the compulsory retirement was to come into force with effect from 31.08.1991. This Court is, therefore, of the view that there is no much substance in the contention of Mr. Majmudar that the impugned action of the respondent in compulsorily retiring the petitioner by virtue of an

order dated 31.05.1991 is contrary to the provisions contained in Rule 161 of the B.C.S.R.

27. There are plethora of decisions which hold that while considering the case of a Government servant for compulsory retirement, the over all service record of the Government servant is required to be looked into. It is also an important aspect of the matter that in the case of a Government servant whose integrity is in doubt, it would be proper to consider him for premature retirement, irrespective of assessment of his ability or his efficiency in work. As far as the petitioner's integrity is concerned, the Tribunal has in terms held that the petitioner's retaining Government money without authority constitute temporary misappropriation and the disciplinary authority is bound to take a serious view of such an occurrence. If the respondent authority takes into consideration this observation of the Tribunal along with the subsequent adverse remarks which were made against the petitioner and also disciplinary actions taken against him prior to his promotion, it cannot be said that the respondent authorities have not taken into consideration the relevant aspects and have taken an incorrect decision in the case of the petitioner.

28. It is well established position in law so far as the issue regarding compulsory retirement is concerned that the opinion of the authority in respect of compulsory retirement is the subjective satisfaction of such authority and the same has to be formed on the basis of entire record of service and such order of compulsory retirement can never be termed as punitive order which requires the observance of the principle of natural justice. The important criteria laid down in Rule 161 is as to whether the retention of a Government servant on attaining the age of compulsory retirement is in public interest or not. In the case of the petitioner, the order was passed by the respondent authority on the basis of the recommendations of the Screening Committee consisting of high Govt. Officials who have taken into consideration the entire service records of the petitioner. Even the Hon'ble Supreme Court in the case of STATE OF PUNJAB V/S. GURDAS SINGH, A.I.R. 1998 S.C. 1661 (SUPRA) has held that any adverse entry prior to earning of promotion or crossing of efficiency bar or picking up higher rank is not wiped out and can be taken into consideration while considering the overall performance of the employee during whole of his tenure of service whether it is in public interest to retain him in the service. Since the charge against the petitioner of temporary misappropriation was established against the

petitioner, his retention in the Government Service beyond the age of compulsory retirement is certainly adverse to public interest and hence, necessary criterias laid down in Rule 161 of B.C.S.R. are completely satisfied.

29. In view of the foregoing discussion, this Court holds that there is no infirmity in the order of compulsory retirement passed against the petitioner and no interference of this Court is called for while exercising its extra ordinary writ jurisdiction under Article 226 of the Constitution of India. This Court, however, inclines to show some leniency to the petitioner looking to his age and financial condition that confirmation of the order of compulsory retirement by this Court would not deprive the petitioner from availing of the pensionary benefits as this order of compulsory retirement would operate only in respect of wages and salaries for which the petitioner was not entitled to, after the completion of 55 years being the age of compulsory retirement. However, for the purpose of calculation of pensionary benefits, the petitioner's normal retirement age i.e. 58 years would be required to be taken and accordingly, the calculation of such pensionary benefits should be made as if he retired on completion of the normal retirement age i.e. 58 years.

30. Subject to the aforesaid clarification and direction, the petition is dismissed. Rule discharged without any order as to costs.

[K.A. PUJ, J.]

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