IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

(5)

OA NO.2989/91 DATE OF DECISION: 03.04.1992.

SHRI JAI RAM LAL ...APPLICANT

VERSUS

UNION OF INDIA & OTHERS ...RESPONDENTS

CORAM:-

THE HON'BLE MR. JUSTICE RAM PAL SINGH, VICE-CHAIRMAN (J)
THE HON'BLE MR. I.K. RASGOTRA, MEMBER(A)

FOR THE APPLICANT : SHRI N.D. PANCHOLI, COUNSEL
FOR THE RESPONDENTS : SHRI G.R. NAYAR, COUNSEL

1. Whether Reporters of local papers may be allowed to see the Judgement?
2. To be Referred to the Reporter or not? Yes.

(I.K. Rasgotra)
Member(A)

(Ram Pal Singh)
Vice-Chairman(J)

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(JUDGEMENT OF THE BENCH DELIVERED BY HON'BLE MR. I.K. RASGOTRA, MEMBER (A))

Shri Jai Ram Lal, Driver, Employees' State Insurance Corporation (ESIC) has filed this Original Application under Section 19 of the Administrative Tribunals Act, 1985, challenging Order No.50 of 1991 (EI) dated 13/14.3.91, notifying that the applicant shall retire from service on 29.2.1992 on attaining the age of superannuation and office order dated 20.11.1991, rejecting his representation.

2. The short issue raised for adjudication is whether the applicant is entitled to serve upto the age of 60 years in accordance with F.R. 56 (.b) or should be retired at the age of 58 years under F.R. 56 (a).

3. The applicant has been working as an Ambulance Driver since 1960 and it is not disputed that his services are regulated under the Fundamental Rules. He, therefore, contends that he is entitled to retire on superannuation on 28.2.1994, when he attains the age of 60 years under F.R. 56(b). He further alleges that Shri Hari Singh another Ambulance Driver was retired after he attained the

age of 60 years in accordance with the order of the Delhi High Court in CW No.2885/84 wherein the High Court prima facie took the view that the petitioner Hari Singh was a workman within the meaning of the FR 56(b) and was entitled to be retired at the age of 60 years and, therefore, stayed the retirement notice served on the petitioner therein.

By way of relief the applicant has prayed that the respondents office order No. 50 of 1991 (EI) dated 13/14.03.1991, retiring him on attaining the age of 58 years on 29.2.1992 be declared as illegal, discriminatory and void ab-initio, as the same is in contravention of the FR 56 (b) and that he be declared to be entitled to be retired on attaining the age of 60 years on 28.2.1984 and that a mandamus be issued to the respondents.

4. The respondents in the short reply filed have taken the stand that the applicant is a Group 'C' employee in ESIC Hospital at Delhi and the retirement age for this category is 58 years and accordingly as per rules his due date of retirement is 29.2.1992. They have cited the cases of three Ambulance Drivers of Ram Manohar Lohia Hospital who have recently retired on attaining the age of 58 years. They further contend that the age of retirement for the employee of the Corporation is prescribed in the second schedule of the E.S.I.C. (Staff and Conditions of Service) Regulations, 1959 and corresponds to the corresponding category of Central Government employee. They contend that FR 56 (b) is not applicable to the applicants and that the judgement in the case of Shri Hari Singh Vs. E.S.I. is not relevant in the case of the applicant because in paragraph 6 of the said judgement, it has been held:-

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"We may clarify that it is not because we are holding expressly or impliedly that he is a workman."

The respondents also contend that the case of Telu Ram cited by the applicant is too of no help to him , as Telu Ram was a driver in the conservancy department of the municipal corporation and the said judgement is, therefore, distinguishable.

5. We observe that the petitioner in Hari Singh (supra) which the applicant has relied upon, was continued in service till the age of 60 years in accordance with an interim order of Delhi High Court. The said case on transfer from the Delhi High Court to the Tribunal under Section 29 of the Administrative Tribunals Act, 1985 was registered as T-40/87. The judgement in T-40 of 1987 was pronounced on June 28, 1988 wherein Shri Hari Singh was allowed to draw his retiral benefits, as he had by that time already attained the age of 60 years, having continued in service in terms of an interim order passed by the High Court. While allowing the petition against this backdrop the Bench observed that "it is not because we are holding expressly or impliedly that he is a workman." The case of Hari Singh (supra), therefore, does not constitute a precedent.

6. We may now consider the provisions of FR 56 in terms of which the retirement at the age of 60 years is claimed. The said F.R. 56 is reproduced hereunder:-

"56(a) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years.

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(b) A workman who is governed by these rules retires from service on the afternoon of the last day of the month in which he attains the age of sixty years.

Note:- In this clause, a workman means a highly skilled, skilled, semi skilled or unskilled artisan employed on a monthly rate of pay in an industrial or work-charged establishment."

In accordance with the above, following are the conditions precedent to get the benefit of age of retirement at 60 years. The applicant should be i) a workman, i.e., an artisan ii) employed on monthly rate of pay in an industrial or work-charged establishment. Before we discuss the conditions obtaining in the case of the applicant, we also observe that according to the recruitment rules filed by the respondents the post of Ambulance Driver is classified as Group 'C' non-ministerial. Further the E.S.I.C. (Staff and Conditions of Service) Regulations, 1959, which have been framed in exercise of powers conferred by Sub-section 1 of Section 97 of the Employees State Insurance Act, 1948 provide that "the regulations relating to the grant of leave benefit of gratuity and provident fund to the employees and the age at which they shall retire or shall be retired from service shall be set out in the

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second schedule (Regulation 7(2)). In the second Schedule the age of retirement stipulated is "as may be prescribed from time to time by the Central Government in respect of corresponding category of Central Government servants in Rule 56 of the Fundamental Rules." Thus the classification of the post of Driver as Group 'C' under the E.S.I.C. (Staff & Conditions of Service) Regulations, 1959 does not come in conflict with the provisions made in F.R. 56. The age of retirement of the employees in the E.S.I.C. is, therefore, undisputedly regulated in accordance with the age of retirement as prescribed by the Central Government from time to fime in FR 56. This brings us back to the question whether the applicant fulfils the conditions of being a workman employed on a monthly rate in an industiral or work-charged establishment.

7. Shri N.D. Pancholi, learned counsel for the applicant in this context submitted that according to the definition under Section 2 (i) of the Industrial Disputes Act, 1947 the 'appropriate Government' in relation to the industrial disputes includes the Employees State Insurance Corporation and, therefore, the E.S.I.C. is undisputedly an industry and the applicant a workman. Since the applicant is a workman he is entitled to retire at the age of 60 years in terms of F.R. 56 (b).

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To fortify his case the learned counsel referred us to the following judgements of the Hon'ble Supreme Court:-

i) **Bangalore Water Supply & Sewerage Board v. A.Rajappa & Ors. AIR 1978 SC 969.**

ii) **State of Bombay Vs. Hospital Mazdoor Sabha & Ors. AIR 1960 SC 610.**

iii) **Bhupinder Kumar v. Delhi Admn. & Anr. 1990 (2) ATJ CAT 68.**

On the other hand, the learned counsel for the respondents, Shri G.R. Nayar submitted that the hospital and dispensaries have been excluded from the purview of Section 2 (j) of the Industrial Disputes Act, 1947 that defines the 'industry'.

8. We have heard the learned counsel for both the parties and perused the record carefully. The law on the Industrial Disputes Act has been declared by the Hon'ble Supreme Court in **Des Raj & Ors. v. State of Punjab & Ors. reported in 1988 (2) SCC 537**, after taking into consideration the evolution of law through the various pronouncements made earlier by the Apex Court. Referring to a Five-Judge Bench decision in **D.N. Banerji v. P.R. Mukherjee, AIR 1953 SC 58** and three-Judge Bench decision in **State of Bombay vs. Hospital Mazdoor Sabha** (supra) the Apex Court observed that:-

> "It would be possible to exclude some activities from Section 2(j) without any difficulty. Negatively stated the activities of the government which can be properly described as regal or soverign activities are outside the scope of Section 2(j). These are functions which a constitutional government can and must undertake for governance and which no private citizen can undertake. This position is not in dispute. An attempt is, however, made by the appellant to suggest that in view of the Directive Principles enunciated in

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Part IV of the Constitution and in view of the ideal of a welfare State which has been placed before the country, governments, both at the level of States as well as at the Centre, undertake several welfare activities; and the argument is that the field of governmental or regal activities which are excluded from the operation of Section 2 (j) should be extended to cover other activities undertaken by the government in pursuit of their welfare policies. In our opinion, this contention cannot be accepted. The activities which do not fall within Section 2(j) and which are described as governmental or regal or sovereign have been pithily described by Lord Watson as "the primary and inalienable functions of a constitutional government..."; and it is only these activities that are outside the scope of Section 2(j). It sounds incongruous and self-contradictory to suggest that activities undertaken by the government in the interests of socio-economic progress of the country as beneficial measures should be exempted from the operation of the Act which in substance is a very important beneficial measure itself."

and held that the J.J. Group of hospitals came within the definition of **industry.** This was followed by the **Safdarjung Hospital v. Kuldip Singh Sethi 1970 (1) SCC 735.** In Safdarjung Hospital (supra) case the decision in **Hospital Mazdoor Sabha** (supra) was analysed and the Apex Court came to the conclusion:-

"In our judgement the Hospital Mazdoor Sabha case took the extreme view of the matter which was not justified."

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Then came the case of **Bangalore Water Supply & Sewerage Board Vs. A. Rajappa** (supra) before a Seven Judge Bench. "This judgement undertook a review of the entire law. Krishna Iyer, J. spoke for himself, Bhagwati and Desai, JJ. In paragraph 139 of the judgement it was stated:

'Banerjee, amplified by Corporation of Nagpur, in effect met with its Waterloo in Safdarjung. But in this latter case two voices could be heard and subsequent rulings zigzagged and conflicted precisely because of this built-in ambivalence. It behoves us, therefore, hopefully to abolish blurred edges, illumine penumbral areas and overrule what we regard as wrong....

So we proceed to formulate the principles, deducible from our discussion, which are decisive, positively and negatively, of the identity of "industry" under the Act..."

The final position that emerged from the above Seven Judge Bench is summarised in **Des Raj** (supra) as under :-

"The ultimate position available from the seven Judge Bench decision, therefore, is that while three learned Judges delivered their view through Krishna Iyer, J., Beg, C.J. spoke somewhat differently, yet agreed with the conclusion reached by Krishna Iyer, J. Chandrachud, C.J. also agreed with the majority while the remaining two learned Judges looked for legislative clarification to meet the situation.

8. Perhaps keeping in view the observations of the learned Judges constituting the seven Judge Bench, the definition of industry as occurring in Section 2(j) of the Act was amended by Act 46 of 1982. Though almost six years have

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elapsed since the amendment came on to the Statute Book, it has not been enforced yet..."

The ultimate position that emerges from the above case law briefly referred to is that hospital continues to come within the definition of 'industry' and the hospitals under E.S.I.C. shall, therefore, constitute an industrial establishment till the amending Act 46 of 1982 comes into force.

In **CA No 4689 of 1990 Prithipal Singh v. UOI decided on 19.9.1990** the Supreme Court while remanding the case of Prithipal Singh v. UOI (Supra) vide its decision dated 19.9.1990 held that "A driver of staff car is undoubtedly a skilled or semi-skilled person. He has to use his whole body specially his hands and feet to drive the vehicle. The definition of work'artisan' is wide enough to include a driver of a car."

The case of **Prithipal Sin**gh (supra) has since been decided by the Principal Bench of the Tribunal on 12.2.1992 wherein it has been held that the Ministry of Surface Transport, the office where the applicant was working, is neither an industrial establishment nor a workcharged establishment and, therefore, he was not entitled to the benefit of provisions made in FR 56(b). **Prithipal Singh** (supra) case, however, is distinguishable from the facts of the case before us. As indicated above the hospital comes within the purview of the definition of industry and would constitute an industrial establishment in accordance with the law declared by the Hon'ble Supreme Court. Further Driver has been held to be a 'workman' by the Hon'ble Supreme Court in **Prithipal Singh** (supra) case. In that view of the matter the applicant being a workman and employed in an industrial establishment shall be entitled to retire at the age of 60 years in accordance with the provisions made in FR 56(b). The office order No.50 of 1991 (EI) dated 13/14.3.1991 purporting to retire the applicant at 58 years of age is, therefore, not sustainable in law. The said order is, accordingly set aside and quashed.

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The applicant shall be deemed to have continued in service without break from 29.2.1992 onwards till he attains the age of 60 years in terms of FR 56(b). We order accordingly. We further direct that the above order shall be implemented most expeditiously but preferably within 8 weeks from the date of communication of this order. The applicant shall be entitled to the salary and allowances for the period he has been compelled to remain out of service subject to his certifying that he was not gainfully employed during this period. No costs.

(I.K. RASGOTRA)
MEMBER (A)

3.4.92
(RAM PAL SINGH)
VICE-CHAIRMAN(J)

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Pronounced by me today in the Open Court.

3.4.92
(RAM PAL SINGH)
VICE- CHAIRMAN(J)
03.04.1992.