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CAT/J/12

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

NEW BOMBAY BENCH

~~O.A. No.~~
T. A. No. 521/86

198

DATE OF DECISION 15.9.1989

Shri O.P. Gupta Petitioner

Applicant in person Advocate for the Petitioner(s)

Versus

Union of India and others. Respondents

Shri M.I.Sethna Advocate for the Respondent(s)

CORAM

The Hon'ble Mr. M.B.Mujumdar, Member (J)

The Hon'ble Mr. P.S.Chaudhuri, Member (A)

1. Whether Reporters of local papers may be allowed to see the Judgement? *Yes*
2. To be referred to the Reporter or not? *Yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *No*
4. Whether it needs to be circulated to other Benches of the Tribunal? *No*

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[Signature]

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(105)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW BOMBAY BENCH, NEW BOMBAY 400 614

T.A.No. 521/86

Shri D.P.Gupta,
R/o.M-19/2 Zojila Marg,
Devlali, Dist. Nasik.
Pin. 422 401.

.. Applicant

v/s.

1. Union of India
through the Secretary,
Ministry of Defence,
New Delhi.
2. The Scientific Adviser to
Minister of Defence and
Director General of Defence
Research & Development Orgn.,
Ministry of Defence, New Delhi.. Respondents

CORAM: Hon'ble Member (J) Shri M.B.Mujumdar
Hon'ble Member (A) Shri P.S.Chaudhuri

Appearances:

Applicant in person

Mr. M.I.Sethna
Advocate
for the Respondents

Oral Judgment

Dated: 15.9.1989

(PER: M.B.Mujumdar, Member (J))

The applicant is M.Sc in Physics of Sagar University. In 1964 he was appointed as Senior Scientific Officer Gr.II (subsequently designated as Scientist 'B') in the Defence Science Service through the Union Public Service Commission. In 1968 he was promoted as Senior Scientific Officer Gr.I, (subsequently designated as Scientist 'C'). On 1.7.1981 he was promoted to the higher post of Scientist 'D' on the recommendations of the Assessment Board. He did not get further promotion. As his birth date is 10.11.1928, he was to retire on superannuation on 30.11.1986, i.e. the last day of the month in which he attained the age of 58 years. But he was given two extensions in service. The first was upto

31.12.1986 and the second was upto 15.1.1987. On 18.12.1986, i.e. before the expiry of the first extension, he filed this application in ^{the} Principal Bench of this Tribunal and it was subsequently transferred to this Bench by the ~~Hon'ble~~ Chairman of the Tribunal by his order dated 23.12.1986.

2. The applicant has challenged the proviso to para 1 of the Office Memorandum dated 24.12.1985 issued by the Department of Defence Research and Development in the Ministry of Defence of the Government of India as being unconstitutional. Suffice it to state at this stage that if the proviso is struck down the applicant would have retired on superannuation on 30.11.1988, i.e. the last day of the month in which he attained the age of 60 years.

3. In 1978 the Defence Science Service was reorganised and redesignated as the Defence Research & Development Service which is governed by the Defence Research & Development Rules, 1978 made by the President under the proviso ^{to} Article 309 of the Constitution. These rules (for short, the 1978 Rules) were promulgated on 30.12.1978. The only rule which is relevant in this case is sub-rule 2 of rule 8 of these rules. The heading of that rule is "Future Maintenance of the Service". Sub-rule 2 thereof is regarding promotions. That sub-rule is as under :-

"(2) Department promotions shall be made from amongst the officers possessing the broad educational qualifications as given in Schedule III and serving in the next lower grade. Selection of officers for promotion shall be made in accordance with the following manner on the basis of individual's merit or accomplishments in the particular grade as assessed by the Assessment Board constituted as at Schedule-I and not based on seniority consideration only.

- (a) Assessment Boards shall be convened at least once a year or at such intervals as may be prescribed by the Director General. These Boards may meet as a whole or in parts in one or more establishments as may be decided by the Director General for the purpose of assessing merit of persons serving in different Establishments or Laboratories or Headquarters for promotion to the higher grade.
- (b) The specific qualification requirements (QR) for promotion to the posts of Scientists 'F' and above shall be determined by the Director General on each occasion in the light of qualifications required for the particular post keeping in view the job requirements for the same.
- (c) In ~~the~~ evaluating the suitability of the officers for promotion, the Assessment Board shall take into consideration their qualifications, performance, merit, seniority, etc. The selection shall be on the basis of confidential Reports and interview. However, the Assessment Board may, at their discretion, consider in absentia the candidature of such officer(s) who are unable to present themselves for the interview. The Assessment Board shall draw up a list of officers who are assessed as fit for promotion to the next higher grade.
- (d) The Assessment Board shall consider the cases of all officers, who have completed five years regular service in the grade to assess their suitability for promotion to the next higher grade. However, if an officer has earned three successive 'Outstanding' reports or four successive 'Very Good' reports in the same grade, he shall also be assessed for promotion to the next higher grade.
- (e) Recommendations of the Assessment Boards held at different Establishments, Laboratories or Headquarters, after approval by the Commission, shall be implemented from the date to be arrived at in consultation with the Commission. This date shall be treated as the date of selection for purposes of determining their seniority in the grade in respect of all officers cleared for promotion provided they are on duty on that date. However, officers who are away from their Establishments, Laboratories or Headquarters on leave on that date, shall assume charge in the grade to which they are promoted with effect from the date they resume duty in their Establishment, Laboratory or Headquarters but this shall not affect their 'date of selection' or their interse seniority in the higher grade vis-a-vis the other officers cleared for promotion by the same Assessment Board. In so far as persons undergoing training in India or abroad

(under FR 51) are concerned, they shall be promoted to the next higher grade with effect from the date they would have been so promoted had they not proceeded on training subject to the following conditions being fulfilled :-

- (i) The period of such training is treated as duty under FR 9(6)(b);
 - (ii) They have been approved for promotion to the next higher grade;
 - (iii) All their seniors, except those regarded as unfit for promotion to the particular grade, available have been promoted to that grade.
- (f) In regard to promotion of officers to the grades of Scientists 'C', Scientists 'D' and Scientists 'E', officers promoted from one grade to the next higher grade on the recommendation of the Assessment Board shall as far as possible, be granted in-situ promotion in the same Establishments, Laboratories or Headquarters. For this purpose, the required number of posts in the grade shall be upgraded, under the powers of the Director General, within the budgetary ceilings sanctioned for that Establishment, Laboratory or Headquarters subject to the proviso that the number of posts of Scientists 'D' and Scientists 'E' shall not exceed one-third of the total number of posts of Scientists 'B', Scientists 'C', Scientists 'D' and Scientists 'E' put together and provided further that the number of posts of Scientists 'E' shall not exceed one-third of the total number of posts of Scientists 'D' and Scientists 'E' put together. However, the Director General, may transfer an officer from one Establishment, Laboratory or Headquarters to another, on his promotion or in the same grade, if considered necessary in the interests of the Service."

4. By rule 4 of these rules, the posts of Scientists were redesignated as shown in Schedule II. Thus the posts of Senior Scientific Officer Gr.II, Senior Scientific Officer Gr.I, Principal Scientific Officer, Deputy Chief Scientific Officer, Director Gr.II and Director Gr.I were redesignated as Scientist 'B', Scientist 'C', Scientist 'D', Scientist 'E', Scientist 'F' and Scientist 'G', respectively. The authorised number of posts of these grades were also given in Schedule II as being 512, 378, 118, 19, 11 & 12, respectively. Above the post of Scientist 'G' there were

two higher posts, namely, the Chief Controller of Research & Development and the Scientific Adviser to Raksha Mantri & Director General, Research and Development.

5. It may be pointed out that till December 1985 the age of superannuation of all the Scientific & Technical personnel (Gazetted) of the Defence Research & Development Service was 58 years. By Office Memorandum dated 24.12.1985 issued by the Department of Defence Research and Development in the Ministry of Defence of the Government of India, the age of superannuation of all these personnel was raised to 60 years except ~~that there was a specific provision~~ in respect of a few scientists like the applicant. As that memorandum is very material in the case, it is quoted below:-

"Subject:- Enhancement of age of superannuation of scientific & Technical personnel (Gazetted) of the Defence Research & Development Service.

Having regard to the specialised nature of work that is being carried out by the Department of Defence Research and Development and taking into account the present shortage of talented and experienced personnel in the advanced technology areas with which defence science and technology is concerned, Government have had under consideration the question of enhancing the age of retirement on superannuation of scientific and technical personnel of the Defence Research & Development Service. Notwithstanding the provisions of Civil Service regulations, Fundamental Rules or any other rules or orders on the subject, the President is pleased to decide that scientific and technical personnel (Gazetted) of the Defence Research & Development Service in the grade of Scientist 'E' and above shall retire at the age of 60 years and those in the lower grades for which flexible complementing scheme is applicable shall also retire at the age of 60 years provided they have been promoted to the grades they are holding at the time of attaining the age of 58 years within the preceding 5 years.

2. (a) Notwithstanding anything contained in para 1 above, the appointing authority shall, if it is of the opinion that it is in the public interest so to do have the absolute right to retire any scientific and technical personnel by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice.

(b) Any scientific and technical personnel may, by giving notice of not less than three months in writing to the appointing authority, retire from service after he has attained the age of 50 years provided that it shall be open to the appointing authority to withhold permission to a Government servant under suspension who seeks to retire under this clause.

3. These orders shall not apply to scientific and technical personnel appointed on contract or on deputation to the Defence Research & Development service from Universities, Institutes of Technology, research Institutions and other non-government bodies in India or abroad or Central or State Government departments.

4. These orders shall come into force with immediate effect.

5. These orders shall be reviewed after 5 years."

6. As the above Memorandum did not cover some Group 'B' and Group 'C' employees, in continuation of that memorandum another Office Memorandum dated 10.2.1986 was issued. According to this later Memorandum the President decided that the scientific and technical personnel holding the posts listed in Appendix 'A' to the memorandum shall also retire at the age of 60 years, notwithstanding the provisions of Civil Service Regulations, Fundamental Rules or any other rules and orders on the subject. The posts listed in Appendix 'A' are : (1) Junior Scientific Officer, (2) Senior Scientific Assistant, (3) Junior Scientific Assistant (Grade I & II), (4) Foreman, (5) Assistant Foreman, (6) Chargeman (Grades I & II), (7) Supervisor (Technical), (8) Chief Draftsman (9) Draftsman (Grades I, II & III), (10) Commercial Artist, (11) Senior Artist, (12) Artist-cum-Photographer, (13) Photographer Assistant, (14) Photographer (Grades I & II), (15) Chief Glass Blower, (16) Glass Blower, (17) Assistant Glass Blower, (18) Laboratory Assistant.

7. It is the case of the applicant that as he was promoted as Scientist 'D' on 1.7.1981, i.e. more than 5 years before attaining the age of 58 years on 10.11.1986 he was not eligible to continue in service upto the age of 60 years in view of the proviso at the end of para 1 of the Office Memorandum dated 24.12.1985. According to the applicant that proviso is unconstitutional being violative of Articles 14 & 16 of the Constitution.
8. He submitted a detailed representation to that effect dated 17.7.1986 to the Scientific Adviser, Defence Research and Development Organisation. As no reply was received, a reminder dated 21.8.1986 was sent by the applicant's office. As there was no reply, the applicant submitted three reminders dated 28.8.1986, 31.10.1986 and 11.11.1986. Finally he received a reply dated 19.11.1986 conveying the sanction of the President to his extension in service till 31.12.1986. But the points raised by him in his representations were not replied to by the respondents.
9. Hence, on 18.12.1986 he has filed the present application under Section 19 of the Administrative Tribunals Act praying (i) to strike down the proviso at the end of the first para of the Office Memorandum dated 24.12.1985 which reads as "provided they have been promoted to the grades they are holding at the time of attaining the age of 58 years within the preceding 5 years", (ii) to declare that Scientists 'B', 'C' & 'D' are entitled to go upto the age of 60 years without any condition including the condition mentioned in the proviso; (iii) to declare that the applicant is entitled to go upto the age of 60 years with all consequential benefits; and (iv) to restrain the respondents from retiring the applicant on 31.12.1986.

10. The respondents have resisted the application by filing the affidavit of Shri J.B.P. Dubey, Deputy Director (Personnel) in the Directorate of Personnel, D.R.D.O. in the Ministry of Defence. The applicant has filed a rejoinder to that reply. Both the sides have filed their written arguments. We have also heard the applicant in person and Mr. M.I. Sethna, learned Counsel for the respondents and Shri B.L. Mathuria, Director (R&D), under whose signature the two Office Memoranda dated 24.12.1985 and 12.2.1986 were issued.

11. As already pointed out, before the office memorandum dated 24.12.1986 was issued the age of retirement of all the Scientists was 58 years. However, by that Office Memorandum, the age of retirement of Scientists 'E' and above was raised to 60 years. Similarly, the age of retirement of Scientists 'B', 'C' and 'D' was also raised to 60 years, but with a proviso. That proviso lays down that the age of retirement of these Scientists will be 60 years provided they have been promoted to the grades they are holding at the time of attaining the age of 58 years within the preceding 5 years. It is the case of the applicant that this classification of Scientists 'B', 'C' and 'D' on the basis of their promotion within 5 years before attaining the age of 58 years does not further the object of the Office Memorandum but on the contrary frustrates the object and hence it is ultra-vires the doctrine ^{of} equality _^ enshrined in Articles 14 & 16 of the Constitution.

12. Before considering the validity of the arguments, we may state the legal position in this respect. We cannot do better than by quoting from the judgment of the Supreme Court in Harakchand v. Union of India, AIR 1970 SC 1453. In para 23 thereof the Supreme Court has pointed out as follows :-

"When a law is challenged as violative of Art. 14 of the Constitution it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it. Having ascertained the policy and object of the Act the Court has to apply a dual test in examining its validity (1) whether the classification is rational and based upon an intelligible differentia which distinguishes persons or things that are grouped together from others that are left out of the group and (2) whether the basis of differentiation has any rational nexus or relation with its avowed policy and object.

As mentioned in the preamble of the impugned office memorandum, the object of enhancing the age of retirement on superannuation of scientific & Technical personnel in the Defence Research & Development Service was two fold. First, to cater for the specialised nature of work that is being carried out by the Department of Defence Research and Development, and second, to overcome the present shortage of talented and experienced personnel in the advanced technology areas with which defence science and technology is concerned. The question that we are required to decide is whether the impugned proviso is in consonance with that object or whether, in reality, it frustrates that object.

13. After carefully considering the arguments advanced before us, we are of the opinion that the classification of Scientists 'B', 'C' and 'D' into those who were promoted to the grades they were holding at the time of attaining the age of 58 years within the preceding 5 years and those who were not promoted to the grades within the preceding 5 years has no rational relation to any of the objects sought to be achieved by the Memorandum. On the contrary, it is likely to have an adverse effect on these objects.



14. Take the case of applicant first. He was promoted to the grade of Scientist 'D' on 1.7.1981. As that was earlier than the preceding 5 years before the date of his attaining the age of 58 years, namely, 10.11.1986, he was required to retire on 30.11.1986, that is at the end of the month in which he completed 58 years. On the contrary if, for any reason including inefficiency, he had been promoted 5 months later, i.e. on 1.12.1981, then he would have been continued upto 60 years. We may also point out that if he had been found unfit for promotion by the Assessment Board in 1981 but had only been found fit for promotion later, i.e. in 1982 or later, then also he would have been continued upto 60 years. In other words, if his promotion had been postponed by a few months, he would have continued upto 60 years. For that matter, had he been inefficient for a year, then also he would have continued upto 60 years.

15. Take some other hypothetical case also. If a Scientist 'B' was found unfit and denied promotion upto the age of 53 years but was at last found fit and promoted as Scientist 'C' in the next year, he would automatically go upto 60 years. But on the contrary if he was promoted in or earlier than his 53rd year, he would be required to retire at the age of 58 years.

16. In our opinion, these two examples are sufficient to show that the classification made by the impugned proviso does not further any of the objects of the Memorandum, namely, specialised nature of work carried out by the scientists and the shortage of talented and experienced personnel in the advanced technology areas. In fact, by retiring such persons on attaining the age of 60 years would further both the objects because their services will be available to the department for two years more.

17. We may, in this connection, point out that by subsequent Memorandum dated 10.2.1986 the retirement age of about 18 categories of officials including Junior Scientific Officers is raised to 60 years without any restrictions. The restriction that is put by the impugned proviso is on Scientists 'B', 'C' and 'D' only and according to that restriction, they will retire on attaining the age of 58 years if they are promoted to the grades they are holding at that time earlier than the preceding 5 years. But on the contrary if they were promoted to the grades held by them only within the 5 years preceding their attaining the age of 58 years, then they would continue in service for 2 years more and would retire on attaining the age of 60 years. We are unable to find any justification for this discrimination. It is not at all rational and based upon any intelligible differentia nor has it any rational relation with the policy and object of the Memorandum dated 24.12.1984. Hence, we are inclined to hold that the impugned proviso is ultra vires Articles 14 & 16 of the Constitution.

18. Coming to the defence of the respondents, they have pointed out in their written submissions dated 19.8.1988 (para 6 & 7) that a proposal was submitted to the Government for enhancing the age of superannuation of scientific and technical personnel in the Defence Research & Development Organisation to 60 years in order to bring it on par with those in other scientific organisations, such as the Department of Atomic Energy and the Department of Space under the Govt. of India. The proposal was very carefully considered by the Government. It was felt that no deviation may be made from the general policy regarding age of retirement but scientists and technologists who have acquired specialised skills and vast experience of research and are still active in their fields of specialisation may be allowed to retire at 60 so that their services may be available for some more

time. At the same time it was decided that the dead wood need not be retained beyond 58 years. A question arose as to what should be the yard stick for determining the dead wood. After long consultations and deliberations, it was considered that the scientists who are not able to earn a promotion during the last 5 years of their service under the flexible complementing scheme may be treated as having outlived their utility and, therefore, may be retired at 58 years. But, as pointed out earlier, this object at least in some cases is likely to be frustrated. Apart from this, even para 2(a) of the Office Memorandum dated 24.12.1985 gives absolute power to the appointing authority to retire any scientific and technical personnel by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice of retirement, provided retirement is in public interest. In our opinion this power is sufficient to remove scientists who have outlived their utility.

19. Then, it was contended on behalf of the respondents that under the flexible complementing scheme every scientist of Group 'B', 'C' and 'D' is bound to be promoted if he is otherwise found fit for promotion. In our opinion this assumption is wrong and is not consistent with the provisions of rule 8(2)(f) of the 1978 Rules. We have already quoted that rule earlier and according to it, in regard to promotion of officers to the grades of Scientists 'C', 'D' and 'E', officers promoted from one grade to the next higher grade on the recommendations of the Assessment Board shall be granted in-situ promotion, i.e. in his own post, in the same Establishments, Laboratories or Headquarters. For this purpose, the required number of posts in the grade shall be upgraded under the powers of the Director General, within the budgetary ceilings sanctioned for that Establishment, Laboratory or Headquarters subject to the proviso that the number of posts

of Scientists 'D' and 'E' shall not exceed one-third of the total number of posts of Scientists 'B', 'C', 'D' and 'E' put together and provided further that the number of posts of Scientists 'E' shall not exceed one-third of the total number of posts of Scientists 'D' and 'E' put together. Thus, it is clear that the promotions of Scientists 'C' & 'D' are not purely on the basis of the recommendations of the Assessment Board. Two more conditions are required to be fulfilled. First is that there shall be no budgetary restraints and the second, it shall be within the ratios given in the provision. This shows that at least some Scientists 'C' & 'D' are liable to be denied promotion to the higher grade even though recommended by the Assessment Board in cases where one of the conditions is not fulfilled.

20. Lastly, it was urged on behalf of the respondents that no real injustice is caused to the applicant. It was pointed out that he was considered for promotion by the Advisory Board before he attained the age of 58 years and also during the period of extensions, but he was not found fit by the Advisory Board. In our opinion whether actual injustice is caused to an individual or not is not relevant while considering the constitutional validity of a rule. Moreover, if the impugned proviso is unconstitutional there is no point in saying that no harm or injustice is caused to the applicant by that proviso.

21. Considering all the arguments, we have no hesitation in holding that the impugned proviso is ultra vires Articles 14 & 16 of the Constitution. By striking down that proviso no harm or distortion is caused to the main provision. In fact, we had a feeling that the proviso was added as a result of deliberation and at the fag end. Initially, the intention was to raise the age of retirement of all the Scientists to 60 years as can be gathered from the reply given by the respondents on 19.8.1988.

22. In result, we pass the following order :-

- (i) Proviso at the end of para 1 of Office Memorandum dated 24.12.1985 which reads as, "provided they have been promoted to the grades they are holding at the time attaining the age of 58 years within the preceding 5 years", is hereby quashed and set aside as being ultra vires Articles 14 & 16 of the Constitution of India.

- (ii) The applicant should be deemed to have retired on 30.11.1988 (A.N.). His pay and pension and other retirement benefits should be refixed on that basis. If the applicant has received any pension and other retirement benefits on the basis that he had retired on 15.1.1987, then these should be adjusted towards the arrears which he would be getting on the basis of his retirement on 30.11.1988 (A.N.).

- (iii) By order dated 11.3.1988 we have restrained the respondents from evicting the applicant from the quarters till the disposal of this application. The applicant now agrees to vacate the quarter on or before 31.10.1989. He shall pay till that date the normal rent of the quarter, i.e. the rent which he would be paying for the last month of his service, i.e., November 1988.

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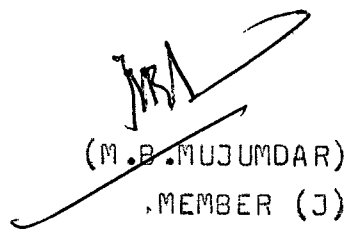
(iv) Respondents shall pay Rs.1,000/- as the costs of this application to the applicant.

(v) The directions in clauses (ii) and (iv) should be complied with within three months from the date of receipt of a copy of this order.

23. Mr. Sethna, at this stage, requested for staying the operation of this judgment and order for 8 weeks for bringing stay from the Supreme Court. In view of the facts of this case and the legal position, we reject his request.



(P.S. CHAUDHURI)
MEMBER (A)



(M.B. MUJUMDAR)
MEMBER (J)