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CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No: O.A.No. 607/91

Transfer Application No: ~~xxxxxxxxxxxxxxxxxxxxxxxxx~~

DATE OF DECISION 11.06.1993

Dr. N.S. Bankar ---------- Petitioner

Mr.B. Marlapalle ---------- Advocate for the Petitioners

Versus

U.O.I. & 3 Ors. ---------- Respondent

Mr. R.K. Shetty ---------- Advocate for the Respondent(s)

CORAM:

The Hon'ble Shri Justice M.S. Deshpande, Vice Chairman

The Hon'ble Shri Ms. Usha Savara, 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

Vice Chairman

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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH, 'GULESTAN' BUILDING NO.6
PRESCOT ROAD, BOMBAY 1

O.A.NO. 607/91

Dr. N S Bankar
H-5/73 MHB Colony
Gokhale Nagar; Pune 16 — Applicant

V/s

Union of India
through Scientific Advisor to the
Minister of Defence and the
Director General,
Research & Development Organisation
Ministry of Defence
Sena Bhavan
DHQ PO, New Delhi 11 & 3 ors. — Respondents

Coram: Hon.Shri Justice M S Deshpande, Vice Chairman
Hon. Ms. Usha Savara, Member (A)

APPEARANCE:

Mr. Babu Marlapalle
Counsel
for the applicant

Mr. R K Shetty
Counsel
for the respondents

JUDGMENT: DATED: 11.6.93
(Per: M.S. Deshapnde, Vice Chairman)

The applicant by this application challenges the order dated 17.1.91 compulsorily retiring him under clause 'h' of Article 459 of Civil Service Regulation.

2. The applicant was working as Scientist E in the Explosives Research and Development Establishment, Pune in the Defence Research and Development Service, a cadre

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of Civilian Scientists and Technologists. Initially he was recruited as a Research Fellow in 1963 through the Union Public Service Commission, and was appointed in July 1984 as Scientist E. His contention is that he had several commendation certificates, citations and certificates recognising his outstanding merit. He attained the age of 50 years on 1.7.1989. The only adverse entry in his Annual Confidential Reports was that of an excess claim of TA/DA for the temporary duty at Khamaria which he had performed in August 1988. The applicant received a memorandum dated 4.7.89 from Respondent no.2 asking him to produce air tickets and the applicant found that there was a mistake due to oversight in preparing the TA/DA claim and expressed regret for the lapse and requested that he may be allowed to refund the amount due and excess claimed. A disciplinary enquiry was initiated against him and the punishment of withholding one increment was ultimately imposed upon him.

3. The grounds urged on behalf of applicant for questioning the order of compulsory retirement were that that the proceedings should have been initiated for taking action under clause 'h' of Article 459 of the Civil Service Regulation six months before his attaining the age of 50 years. The action had not been initiated as required, but was initiated much later and there was thus a procedural irregularity in initiating the proceedings. Had the proceedings been initiated earlier as required under the rules the Review Committee could not have taken into consideration the lapse committed by the applicant in October 1988 while submitting the TA/DA claim and it could not have formed the basis for compulsory retirement as in fact the charge sheet in respect of that lapse was sent on 31.10.1989. Secondly, the members who formed the Review Committee have not recorded a clear finding that it was necessary 'in public interest' to retire the applicant compulsorily and the action taken against the applicant was not a bonafide action.

4. While considering the first submission, it is necessary to remember that what is required under clause 'h' of Article 459 of Civil Service Regulation is that

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notwithstanding anything contained in this rule the appropriate authority shall, if it is of the opinion that it is in the public interest to retire a government servant prematurely, have absolute right to retire any government servant by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice: (i) if he is in Class I or Class II service or post and had entered Government service before attaining the age of 35 years after he had attained the age of 50 years; and (ii) in any other case after he has attained the age of 55. Elaborate provisions were made by the Department of Personnel by its memorandum dated 5.1.1978 for premature retirement of Central Government servants by consolidating various instructions which had been issued over a period of time. After stating the rule position, criteria, procedure and guidelines were prescribed. Clause 2 of Part II of the instructions provide that a Committee shall be constituted in each Ministry/Department/Office as shown in Annexure-II, to which all such cases shall be referred to for recommendation as to whether the Officer concerned should be retired from service in the public interest or whether he should be retained in service. Under clause 3, the criteria to be followed by the Committee in making their recommendations would be as follows: (a) Government employee whose integrity is doubtful, will be retired. (b) Government employee, who are found to be ineffective will also be retired. The basic consideration in identifying such employee should be the fitness/competence of the employee to continue in the post which he is holding. If he is not found fit to continue in his present post, his fitness/competence to continue in the lower post, from where he had been previously promoted, should be considered. The basic consideration in identifying such employees should be the fitness and competence of the employee to continue in the post which he is holding. If he is not found fit in the present post, his fitness and competence to continue in the earlier post from where he has been promoted should be considered.

5. According to the respondents the applicant's case fell within sub-clause (a) because his integrity

was doubtful and the other considerations did not fall for determination and the provisions of Clause 1 of Part II which require review to be undertaken six months before attaining the age of 50/55 years or complete 30 years service/30 years of qualifying service, whichever occurs earlier are only directory and non-compliance thereof would not vitiate the proceedings taken for compulsory retirement of the applicant.

6. It is noteworthy that the substantive provisions of Article 459 did not prescribe any procedure or guidelines and they were introduced by the letter dated 5.1.1978. Those instructions which came to be consolidated were merely procedural as is made clear also by the opening lines of Part II that in order to ensure that the powers vested in the appropriate authority are exercised fairly and impartially and not arbitrarily, it has been decided to lay down the procedures and guidelines for reviewing the cases of Government employees covered under the various aforesaid rules. It is no doubt open to the Government to lay down the guidelines and prescribe the procedure when the substantive provision is silent and those rules have to befollowed scruplously.

7. The learned counsel for the applicant, however, urged that since what was enough to take drastic action of compulsory retirement was merely subjective satisfaction of the Government the procedural safeguards must be strictly followed and any departure from procedure and guidelines prescribed would invalidate the action. It is difficult to accept this submission because ordinarily the procedure and guidelines are regarded as merely directory and not mandatory and since the action can be taken at any time after attaining the age of 50 years there is nothing in the context to justify the submission that the provision regarding initiating action six months before the date of attaining 50 years was mandatory. We are supported in the view that we are taking by the observations of this Tribunal in OA No. 81/90 (Bombay Bench), DR. RAJINDER SINGH CHANDHOKE V. UNION OF INDIA & ORS. decided on 5.2.92 where it was observed while considering the objection

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that the review should have taken place before the age of 50 years, though the notice was given to the applicant after he had attained the age of 50 years, those provisions are directory and even if there is some technical flaw in giving a notice either before or after 50 years or after 55 years, the same cannot take away the powers which vest in the Government to exercise the same in public interest.

8. The learned counsel for the applicant urged that the applicant was prejudiced because if the action were to have been initiated and the Review Committee were to have held its deliberations before the applicant attained the age of 50 years on 1.7.89, the Committee would not have considered the mistake occuring in the TA/DA claim. In fact the TA/DA claim had been submitted in October 1988, though the charge sheet was given on 31.10.89. The relevant proceedings before the Review Committee were placed before us on behalf of the respondents. In the note dated 29.9.89 prepared by Shri S. Loganathan, Joint Director (Pers.) in respect of 52 employees, wherein the applicant's name is at sr.no.2, he had observed that the disciplinary/vigilance case pending against the applicant for claiming false TA has been referred to Central Vigilance Commission for their first stage advice for initiating disciplinary proceedings against him. By that note he requested Dr.(Smt.) D.M. de Rebello, Joint Secretary, Ministry of Education, to record her recommendations regarding the retention of officers in para 2 beyond 50/55 years of age before the case is submitted to the Chairman of the Review Committee and this was in the context of the provisions of CSR 459(h) [F.R. 56(j)] and Rule 48 of CCS (Pension) Rules 1972 under which the appropriate authority shall, if it is of the opinion that it is in public interest to do so, have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice. Mrs. de Rebello's recommendations were sought, in view of the inflated claim of TA/DA

made by the applicant, viz., retiring the government servant in public interest if it is in the opinion of the appropriate authority necessary to do so. Mrs. de Rebello observed under note dated 2.7.90 that she had not recommended the applicant for retention in service beyond the age limit prescribed.

9. The submission on behalf of the applicant was that it was necessary to record that it was necessary in public interest to compulsorily retire the applicant. Support was sought to be drawn for this submission from clause 4 of part II of the memorandum dated 5.1.78 under which the appropriate authority is required to take further action for the recommenations of the committee. In every such case where it is proposed to retire a Government servant in exercise of the powers conferred by the said rules, the appropriate authority should record in the file that it has formed its opinion that it is necessary to retire the Government servant in pursuance of the aforesaid rules in the public interest. Clause 2 of Part II under which that reference is to be made for recommendation to the committee as to whether the officer concerned should be retired from service in public interest or whether he should be retained in service does not require the committee to record on the file that it is necessary to retire the government servant in public interest, though that is the requirement under clause 4 for appropriate authority to do. In fact clause 4 is based on the observations of the Supreme Court in UNION OF INDIA V. COL. J.N. SINHA, that the appropriate authority should bona fide form an opinion that it is in public interest to retire the officer in exercise of the powers conferred by that provision and this decision should not be an arbitary decision or should not be based on collateral grounds. There are two stages in which the action is to be taken. The initial stage being reference to the Committee and its recommendations as in clause 2 of Part II and the further action to be taken by the appropriate authority on the recommendations of the committee. Clause 6 says that in case the appropriate authority, after the relevant

review, comes to the conclusion that the officer is not fit for being retained in the present post, but could be retained in the next lower post from which he was promoted, a notice in the prescribed form should be served in such a case on the employee retiring him from service in pursuance of the provisions of the relevant rule. We have already observed under sub-clause (a) of clause 3 the government employee whose integrity is doubtful, will be retired and the consideration whether he should be reverted to a lower post can arise only when the employee is found to be ineffective. The other member who constituted the Committee Dr. V.S.Arunachalam recorded a positive opinion that the applicant neither appears to be doing well in his job nor his integrity is beyond doubt and his retention may not be in public interest and he may be retired immediately.

10. Learned counsel for the applicant urged that since the Review Committee acted as one body and was constituted by only two members, the recording of the opinion by only one member that he should be retired in public interest was not sufficient and it was necessary that Mrs. de Rebello should also have made a similar recommendation. He relied on the observations of this bench in SHASHIKANT ANANT APTE V. UNION OF INDIA, OA No.170/91 (Bombay Bench) decided on 12.1.93 to the following effect:

> "The authority concerned has the sole discretion to terminate the services by adopting the mode of premature retirement. Such an absolute power is subject to two limitations so far Article 459 goes. One of them is the formation of the requisite subjective opinion. That opinion is the only in-built safeguard of the rights of a Government servant. Therefore, the state of mind of a person alleged to have formed the opinion must be patent and not latent. It must be apparent and not to be speculated. The word or expression used by the person concerned alone can be and should be treated as a mind-reader to judge as to what was in his or her mind.

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> Afortiori strict compliance of the requirement of Article 459 of the Regulations must be insisted upon and no argument invoking the doctrine of assumption or presumption should be countenanced."

These observations, to which one of us [Ms. Usha Savara, Member (A)] was a party, came to be made for construing whether the requisite opinion that it was necessary to retire S A Apte in public interest had been formed. That was an inference raised on the facts of that case and in the absence of a ratio which would bind us in the present case it would be open for us to consider the entire correspondence and ascertain whether Mrs. de Rebello had formed the requisite opinion while reviewing the applicant's case. As we have already indicated in his note Shri Loganathan had placed before the review committee the purpose for which the recommendations were sought and the fact that a vigilance inquiry was pending against the applicant. It was in this context that Mrs. de Rebello found that the applicant should not be retained. We do not read the decision in SHASHIKANT ANANT APTE's case as requiring the repetition of the exact words in Article 459 or chanting as a 'Mantra' the words that it was necessary in public interest to retire the person. All that the judgment indicated was that it should appear from the record that the members of the Review Committee had formed the opinion that it would not be in public interest to retain the officer. We are clear Mrs. de Rebello had formed such an opinion here after considering all the relevant factors.

11. In this context our attention was drawn on behalf of the applicant to S.R. SANT V. UNION OF INDIA [1990]12 ATC 851; MANGILAL GARA V. UNION OF INAIA, [1991]17 ATC 406 and STATE OF U.P. V. C.M. NIGAM 1978(1), Labour Law Journal 6. In S.R. SANT's case this Tribunal observed that the Review Committee not having reviewed the employees case during April to June 1986 when he had completed 30 years of qualifying service on November 6, 1986, an erroneous procedure has been followed that also impinges the order of compulsory retirement from service. The Principal Bench did not

decide
~~hold~~ whether the provisions or the instructions were directory or mandatory, as was done in OA 81/90 decided on 5.2.92, and the decision turned on the issue that doubtful integrity had not been reflected in the confidential report of the relevant period. In the present case in the confidential reports of the applicant submitted on 9.3.89 it was noted that the matter pertaining TA/DA claims was under examination/investigation. S.R. Sant's case would not, therefore, be of assistance to the applicant.

12. In MANGILAL GARG's case though it was the screening committee which was competent to pass the impugned order and had recommended the retention of the employee, the High Power committee did not consider the employee fit for retention and action based on the High Power committee's report, which was not one contemplated under the rules, was held to be fraught by serious procedural irregularities. Such is not the case here. In C.M. Nigam's case it was observed that the instructions issued by the Government were in the nature of the conditions of service and there was no warrant for a second Review Committee after the officer had challenged his compulsory retirement on the basis of the first Review Committee. This decision cannot be invoked in support of the applicant's case here.

13. From the file shown to us it is apparent that after the Review Committee had recommended that the applicant should be compulsorily retired, the matter was placed before the Prime Minister as Raksha Mantri by Director of Personnel on 24.12.90 for approval along with the recommendations of the Review Committee and it was approved. The applicant made a representation against this action and a Representation Committee was constituted by Secretary of Department of Education, as Chairman and Joint Secretary, Department of Power as Member and they, after considering all the aspects of the matter, were of the view that as the applicant lacked integrity, his retention in public service was not advisable and recommended that the representation of the appplicant should be rejected. The representation was rejected as it had no merit in it.

14. Clause 2 of Part III, of letter dated 5.1.78 the Administrative Ministry/Department/Office requires the representation committee to examine the representation to see whether it contains any new facts or any new aspects of a fact already known but which was not taken into account at the time of issue of notice/order of premature retirement. Under clause 6, notwithstanding anything contained in this rule the appropriate authority shall, if it is of the opinion that it is in public interest to do so, have the absolute right to retire any government servant by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice. This emphasises the directory nature of the instructions in the letter dated 5.1.78 while laying down the procedure and guidelines for ensuring that no arbitrary action is taken against the employee. We are not, therefore, impressed by the submission that the recording of the opinion expressly on the file that it was in the public intrest to compulsorily retire the government servant was mandatory.

15. With regard to prejudice, it was urged that the review committee would not have taken notice of the lapse regarding TA/DA claim, if the proceedings were to have been initiated on time i.e., six months before the applicant's attaining the age of 50 years, since the excess claim was made in October 1988 and it was reflected in the confidential report of 1988-89, there is no merit in the applicant's submission that if the department were to have taken timely action his lack of integrity would have gone unnoticed. In the circumstances we find that no prejudice was caused by the breach of directory provisions of the rules requiring initiation of action six months before the completion of the age of 50 years. The principle laid down in UNION OF INDIA V. J.N. SINHA, AIR 1971 SC 40, is that the authority has the absolute right to retire a government servant if it is of the opinion that it is in the public interest to do so and when that authority bona fide forms an opinion the correctness of the decision cannot be challenged before the court, though it is open to

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the aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that it is an arbitrary decision. This position has been reiterated in BAIKUNTHA NATH DAS & ANOTHER V. CHIEF DISTRICT MEDICAL OFFICER, BARIPADA & ANOTHER, 21(1992) ATC 649 by laying down that the judicial scrutiny is not excluded altogether and while the High Court or Supreme Court would not examine the matter as an appellate court they may interfere if they are satisfied that the order is passed (a) malafide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order. The remedy provided by Article 226 is no less an important safeguard. Even with its well known constraints, the remedy is an effective check against mala fide, perverse or arbitrary action. In the present case we are satisfied that there was material before the authority to take action against the applicant under Article 459 of Ceneral Civil Regulation and the procedureal safeguards were substantially observed.

16. We, therefore, see no merit in the application. The application is dismissed with no order as to costs.

(Ms. Usha Savara)
Member(A)

(M.S. Deshpande)
Vice Chairman

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