

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

TA 985/2009
RA 40/2012
MA 3522/2014

Reserved on: 7.09.2016
Pronounced on: 7.10.2016

Hon'ble Mr. P.K. Basu, Member (A)
Hon'ble Dr. Brahm Avtar Agrawal, Member (J)

1. Shri A.S. Talwar,
S/o Late Shri Harnam Singh
R/o 3261, Ranjit Nagar,
New Delhi-8
 2. Shri S.K. Gambhir
S/o Late Shri S.L. Gambhir
I-147, Ashok Vihar, Phase-I
Delhi-52
 3. Shri Tej Singh
S/o Shri Dayal Singh
R/o B-4/67-B, Ashok Vihar, Phase - II
Delhi-52
 4. Shri B.S. Ahluwalia
S/o Late Shri Kulwant Singh
R/o C-7/40A, Keshav Puram
Delhi-35
 5. Shri D.K. Shah
S/o Shri K.C. Lal Shah
175, Engineers Estate,
21, IP Extension, Patparganj
Delhi-92
 6. Shri R.C. Singh
S/o Shri Lalta Prasad Singh
C-8/8335, Vasant Kunj,
New Delhi-70
- ... Applicants

(Through Shri Rakesh Kumar Singh, Advocate)

Versus

1. India Tourism Development Corporation Ltd.
Through its Chairman
Core-8, Floor 6

Scope Complex, 7, Lodhi Road
New Delhi

2. Union of India through its Secretary,
Ministry of Tourism
Govt. of India,
Transport Bhawan, Sansad Marg,
New Delhi
3. Union of India through its Secretary
Ministry of Heavy Industries & Public Enterprises
Deptt. Of Public Enterprises
Public Enterprises Bhawan
Block No.14, CGO Complex,
Lodhi Road, New Delhi-3
4. Union of India through Cabinet Secretary
South Block, New Delhi
5. Mrs.Asha Murthy
Jt. Secretary
C&MD, ITDC,
Scope Complex,
Core 8, Floor 6
7, Lodhi Road, New Delhi-3
6. Shri M.D. Kapoor,
Functional Director (C&M)
ITDC Core 8, Floor 6, Scope Complex
7, Lodhi Road, New Delhi-3 ... Respondents

(Through Shri Ujjwal K. Jha and Shri T.A. Ansari, Advocates)

ORDER

Mr. P.K. Basu, Member (A)

Vide order dated 3.05.2011 in W.P. (C) 2891/2011 filed by the applicants in this case, the Writ was disposed of with a direction to the petitioners that they shall be at liberty to file an application for review. It was directed that the application for review shall be dealt with on merits and not thrown over board on the ground of limitation.

2. The original Transfer Application No.985/2009, which was filed challenging the action of the respondent - Indian Tourism Development Corporation (ITDC) rolling back the age of retirement from 60 years to 58 years, was disposed of vide order dated 5.11.2009 against which the applicants had filed a Writ Petition No. 2891/2011 before the Hon'ble High Court. The Hon'ble High Court in its order dated 3.05.2011 noted that the following two significant contentions raised before the Tribunal were not appropriately adverted in the order:

- (i) Office Memorandum dated 9.05.2000, though applicable, has not been appositely applied by the Tribunal in as much as the ITDC was not a sick/unviable company and, therefore, there was no question of rolling back of the age of superannuation;
- (ii) Even if the rolling back principle is attracted, there has to be a conscious decision by the Board of the Corporation, but the Corporation had not taken a decision in an apposite manner in as much as there had been forgery while passing the resolution and the said fact was pleaded in the Original Application.

3. Review Application (RA) No. 40/2012 was allowed on 6.05.2016. T.A. 985/2009 was heard on 7.09.2016.

4. We take up both the issues one by one.

5. Learned counsel for the applicants states that in the reply of the respondents filed on 4.07.2012, in para 17, sub para viii, xii and xvi, the respondents have mentioned that the decision taken by them for rolling back the age was pursuant to a meeting held on 19.06.2000 on the basis of OM dated 5.05.2000. There is no mention of the OM dated 9.05.2000, which relates to reduction in retirement age from 60 years to 58 years.

6. Learned counsel for the applicants stated that on 19.05.1998, Department of Public Enterprises (DPE) issued an OM by which instructions were issued that every employee at below board level in the Central Public Enterprises whose age of retirement is currently 58 years shall now retire from service on attaining the age of 60 years, subject to certain conditions. On 26.05.1998, an office order was issued by ITDC in pursuance of DPE's OM dated 19.05.1998 communicating that the age of retirement for below board level employees of ITDC shall be 60 years in place of existing 58 years. On 21.08.1998, DPE issued an office order referring to their earlier OM dated 19.05.1998 stating that in case any administrative ministry or PSU does not want to increase the age of retirement of its employees, specific exemption from operation of the said decision would be necessary. On 5.05.2000, an OM was issued by DPE regarding introduction of a revised Voluntary Retirement Scheme (VRS). Through this OM, the existing VRS Scheme was revised in order to make it more efficacious in the interest of the employees and the need to enable PSEs to rationalize their surplus manpower.

Enterprises that make marginal profits or loss-making enterprises could adopt this Scheme, the details of which were explained in the OM.

7. It is contention of the learned counsel for the applicants that in the 209th meeting of the Board of Directors held on 19.06.2000 under the heading "Introduction of revised Voluntary Retirement Scheme", the following was recorded:

"209.2.2 At the time of discussion, the issue relating to roll back of retirement age from 60 to 58, as it was done in the case of a few other PSUs was raised by JS&FA. He felt that this should be given priority over introduction of a Voluntary Retirement Scheme. The Board deliberated at length the issue of rolling back the retirement age. It was considered that it would be prudent to go in for such a measure. Accordingly, the Board accepted in principle the concept of rolling back the retirement age. The Chairman & Managing Director was authorized to move the Government for necessary permission, work out the details and get back to the Board."

8. It is the contention of the learned counsel that the basic discussion was on Voluntary Retirement Scheme. However, in agenda papers, the decision to roll back was apparently in reference to OM dated 5.05.2000 and not OM dated 9.05.2000, which related to age of retirement. In fact, it is stated that nowhere in the minutes also, the date of 9.05.2000 has been mentioned. The DPE issued OM dated 9.05.2000 on the subject of "Age of retirement of employees of Public Sector Enterprises". We quote below the text of the OM for easy reference:

"The undersigned is directed to refer to this Department's O.M. No.18(6)98-GM dated 19.05.1998 and No.18/9/98-GM dated 21.08.1998 on the subject mentioned above and to say that there has been proposals for rolling back the age of retirement in the case of some sick/ unviable PSUs for which rehabilitation/ revival packages are under consideration. The procedure to be followed in such cases was considered and it has now been decided that in such cases the Board of the concerned company should review its decision on the raising of the age of retirement and make suitable recommendations to the administrative Ministry/ Department concerned for taking the approval of the Cabinet.

All the administrative Ministries/ Departments are requested to follow the above procedure in case the age of retirement of employees of sick/ unviable PSU for which rehabilitation/ revival packages are under consideration, is to be rolled back to 58 years. The PSUs under their administrative control may also be apprised of this procedure."

9. Learned counsel for the applicants pointed out that the provision was meant for sick and unviable PSUs i.e. in case of a sick and unviable PSU, the PSU could decide not to raise the age of retirement from 58 to 60 years and roll it back.

10. The learned counsel appearing for the applicants stated that ITDC was neither a sick nor unviable PSU as per definition of Sick Industrial Companies (Special Provisions) Act 1985 (SICA 1985). The learned counsel emphasized that it was wrong on the part of the Tribunal, while disposing of this matter earlier vide order dated 5.11.2009, to refer to the 'Dictionary' meaning of sick and unviable; rather the Tribunal should have gone by the definition of SICA.

11. On the question of viability of ITDC, the learned counsel referred to the fact that as per SICA Act, an industrial company would be treated as sick only if at the end of any financial year, accumulated losses equal to or exceed its entire net worth. It is stated that as per the audit balance sheet of ITDC for the year 1998-99, the net worth of ITDC as on 31.03.1999 worked out to Rs.264 crores and, therefore, it was not a sick company. Secondly, it is stated that ITDC can also not be termed as unviable company as it has been making profit right from its inception till 31.03.1999.

12. Our attention was also drawn to the minutes of 210th meeting of the Board of Directors held on 31.07.2000, in which the following is recorded:

"The comments received from Shri RK Aggarwal, Shri M.D. Kapoor and those of Shri KK Sud (who could not attending the meeting on 19th June 2000), vide their letter dated 30th June 2000, 5th July 2000 and 26th July 2000 respectively, were read out by the C&MD. After discussion, the minutes of the Board meeting held on 19th June 2000 were confirmed except that in regard to para 209.2.2 these members and Shri Namgyal desired further discussion on the issue of roll back of retirement age in the Board when detailed information like number of employees likely to be affected by the roll back etc, is presented before the Board."

One of the Directors, Shri M.D. Kapoor had objected that the Board's decision of 19.06.2000 regarding rolling back of retirement age was hurriedly taken without proper feedback to the Members. However, the Department of Tourism prepared a

Cabinet Note proposing reduction of retirement age from 60 years to 58 years, which was supported by DPE vide OM dated 8.09.2000. Finally, the rolling back order was issued on 27.11.2000.

13. In 213th meeting of the Board of Directors held on 31.10.2000, the minutes of the meeting held on 16.10.2000 were confirmed. On 16.10.2000, the Board noted the following fact:

"It may be recalled that the Board in its meeting held on 9 Jun 2000, while considering the proposal for introduction of Voluntary Retirement Scheme in ITDC, also deliberated on the issue relating to roll back of retirement age from 60 to 58 years. The Board felt that this should be given priority over introduction of Voluntary Retirement Scheme (VRS) and it is considered prudent to go in for such a measure and accordingly the Board accepted, in principle, the concept of rolling back the retirement age. The Government was, accordingly, moved for roll back of retirement age and also for introduction of VRS in the ITDC.

2. At the time of confirmation of the minutes in the Board Meeting held on 31 Jul 2000, some Members had desired further discussion on the issue of roll back of retirement age from 60 to 58 years when detailed information like the number of employees likely to be affected by the roll back was presented before the Board. The Ministry was also apprised of the position on 21st August 2000.

3. The information regarding employees who would be affected by the roll back of retirement age is given at Annexure I. It will be seen therefrom that a total of 423 employees (73 executives and 350 non-executives) will retire in the next 12 months if the retirement age is reduced to 58 years. The savings to the Corporation on immediate implementation of roll back would be of the order of Rs.8.83 crores per annum.

4. During the year 1999-2000, the Corporation has incurred a net loss of Rs.24.03 crores. Due to

lower occupancy and higher wage cost, the financial position of the Corporation has been deteriorating over the years. Presently, the Units are not generating enough funds to meet their requirements and their fund requirements are met from the Headquarters. For payment of salary to staff payment of tax etc. also, most of the units ask funds from Hqrs. Owing to severe resource crunch, the Corporation will have to avail overdraft facility from the Bank. While a number of steps have been initiated to effect economy in expenditure and also to improve the performance of its Units, it is felt that at this juncture, reduction in wage cost will go a long way in improving the financial position of the Corporation.

5. It may be relevant to mention that the Department of Public Enterprises vide their OM dated 21 Aug 98 (Annexure II) have allowed proposals for specific exemptions from operation of their earlier decision of 19 May 98 (Annexure III). Some other public sector undertakings have already reverted to the retirement age of 58 years with the approval of the Government.

6. For consideration."

14. Vide letter dated 23.11.2000, Department of Tourism informed ITDC that the government has decided to revert the age of retirement of below board level employees/ board level employees of ITDC from 60 to 58 years and ITDC thereafter issued office order dated 27.11.2000 communicating that the age of retirement shall be 58 years with immediate effect. It is to be noted that Member Shri M.D. Kapoor, who had raised objection earlier, was part of the meeting dated 31.10.2000.

15. The argument of the learned counsel is threefold:

- (i) the decision taken on 19.06.2000 was a hurried decision, which was without proper intimation to the members and circulation of

agenda papers. The minutes would show that the topic for discussion was Voluntary Retirement Scheme based on OM dated 5.05.2000 and the topic of rolling back of retirement age was introduced all of a sudden with no reference to OM dated 9.05.2000. In fact, Member Shri M.D. Kapoor objected to this kind of procedure and wrong recording of minutes. Therefore, it is contended that this decision of rolling back of retirement age from 60 to 58 years was taken fraudulently by the Board and hence needs to be quashed;

- (ii) In their reply to the RA, as pointed out earlier, the respondents have made mention of OM dated 5.05.2000 only and nowhere has the OM dated 9.05.2000 been mentioned. It is stated that OM dated 5.05.2000 has nothing to do with retirement age and the respondents are trying to mislead this Tribunal; and
- (iii) OM dated 9.05.2000 was only meant for sick and unviable PSUs and that ITDC was neither sick nor unviable as per provisions of SICA. ITDC not being a sick organization, OM dated 9.05.2000 would not be applicable in their case.

16. Learned counsel for the applicants relied on the following judgments in support of his contentions:

- (i) **K. Rajamouli Vs. A.V.K.N. Swamy**, (2001) 5 SCC 37; **Board of Control for Cricket, India Vs. Netaji Cricket Club**, (2005) 4 SCC 741; **State of West Bengal Vs. Kamal Sengupta**, (2008) 8 SCC 61; **Maria Margarida Sequeria Fernandes Vs. Erasmo Jack De Sequeria (Dead) through LRs**, AIR 2012 SC 1727; **Jagjit Singh Vs. State of Haryana**, (2006) 11 SCC 1, **Indian Bank Vs. M/s Satyam Fibers (India) Private Limited**, (1996) 5 SCC 550; **President Panchayat Union Council Vs. P.K. Muthusamy**, (2009) 14 SCC 651; **Hardeep Singh Vs. State of Punjab**, (2014) 3 SCC 92; **A.C. Arulappan Vs. Ahalya Naik**, (2001) 6 SCC 600 – From a reading of these judgments, we are of the opinion that none of these judgments are applicable in the present case as the facts and circumstances and issue before the Hon’ble Supreme Court was completely different;

- (ii) **Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others**, (1993) 2 SCC 279 – The learned counsel specifically drew our attention to the finding that “State Financial Corporations should not function merely as a profit earning concern but should so function as to promote

business potential of the country for the benefit of the people.”

(iii) **P.C. Agarwala Vs. Payment of Wages Inspector, M.P. and others**, (2005) 8 SCC 104 – This is regarding lifting the corporate veil. The Hon’ble Supreme Court held as follows:

“At present the judicial approach in cracking open the corporate shell is somewhat cautious and circumspect. It is only when the legislative provision justifies the adoption of such a course that the veil has been lifted. In exceptional cases where the courts have felt “themselves able to ignore the corporate entity and to treat the individual shareholder as liable for its acts”, the same course has been adopted. However, it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly, where fraud is intended to be prevented, or trading with the enemy is sought to be defeated, the veil of the corporation is lifted by judicial decision and the shareholders are held to be persons who actually work for the corporation.”

From the facts of the present case, it would appear that there is no case of lifting the corporate veil. Decision has been taken in several meetings of the Board after considering the objections raised by three Directors of the Board and finally with the consent of those Directors, the decision for rolling back has been taken. In our view, the judgment in P.C. Agarwala (supra) is of no consequence in the present OA.

- (iv) **Kerala State Electricity Board Vs. Hindustan Construction Co. Ltd. and others**, (2006) 12 SCC 500 – In this case, the Hon'ble Supreme Court held that decision taken at the earlier meeting of the Board should be given effect to even if the minutes of the earlier meeting are not confirmed in the later meeting. We, however, feel that this is not relevant in this case at all.

The learned counsel for the applicants has just placed a compilation without referring to which part of the judgment is relevant in the present case. However, we have gone through the judgments and we find that the facts and circumstances are completely different and are not relevant to the instant OA.

17. Per contra, the learned counsel for the respondents stated that it would be clear from the minutes of the meeting that the Board took a decision regarding para 209.2.2 that it required further discussion, which would take place after detailed information is presented before the Board. These details were presented later before the Board when the Board took a decision to roll back. In fact, in the 213th meeting of the Board of Directors, the minutes of the meeting held on 16.10.2000 were confirmed. It is the contention of the learned counsel for the respondents that, therefore, for the applicants now to say that some fraud has been played in getting the Board of Directors to

take this decision on roll back from 60 years to 58 years, is not based on facts and should be rejected outright.

18. As regards mentioning of only OM dated 5.05.2000 and not 9.05.2000 by the respondents in their reply, it is stated by the learned counsel that in the reply dated 17.07.2001 to the original CWP, the respondents had correctly mentioned about the OM dated 9.05.2000 and, therefore, it is incorrect for the applicants to try and take advantage of the insignificant issue as to why 9.05.2000 has not been mentioned in reply to the RA.

19. As regards ITDC not being a sick unit, the respondents have stated that ITDC was not a viable unit at that point of time. The total wage cost was 43% of the total turn over as a whole and the wage cost of hotel division was 59.6% of its turn over as compared to industry norm of 16% to 20%. It is argued that it is not necessary for the government to strictly go by the definition as described in SICA to declare whether a particular PSU is viable or not.

20. Learned counsel for the respondents relied on the following judgments:

- (i) **Balco Employees' Union (Regd.) Vs. Union of India and others**, (2002) 2 SCC 333 – Basically, the ratio laid down here is that the Court cannot examine relative merits of different economic policies and cannot strike down a policy merely on ground

that another policy would have been fairer and better. The contention is that the policy decision to roll back the retirement age cannot be gone into in view of this judgment;

- (ii) **All India ITDC Workers' Union and others Vs. ITDC and others**, (2006) (10) SCC 66 – The ratio laid down by the Hon'ble Supreme Court in this case is that government employees have no absolute right under Articles 14, 21 and 311 and government can abolish the post itself. In the present case, the applicants are not government employees but merely employees of PSU. The employees of the Company registered under the Companies Act do not have any vested right to continue to enjoy the status of the employee of an instrumentality of the State;
- (iii) **B.J. Shetty and others Vs. Air India Limited and another**, 1999 (4) ALLMR 559. The Hon'ble High Court of Bombay held as follows:

“(iii) Legitimate expectation – Increase of retirement age from 58 to 60 years by first staff notice gave rise to legitimate expectation amongst employees that age of superannuation would be 60 years – whether legitimate expectation could be frustrated by unilateral action of first respondent by way of second staff notice – legitimate expectation permits Court to find out if change in policy which is cause for defeating legitimate expectation is irrational or perverse – action of first respondent was not unreasonable – decision is purely commercial and cannot be faulted by Court.”

(iv) **M.P. Vidyut Karamchari Sangh Vs. M.P.**

Electricity Board, (2004) 3 SCALE 383 – In this

case, the Hon'ble Supreme Court held as follows:

"Whether Board justified in reducing age of retirement from 60 to 58 years of Class III employees by notification dated 26.12.2000 issued in exercise of powers under Section 79 (c) of Electricity (Supply) Act – Held, yes – No merit in appeal."

(v) **Kerala State Electricity Board Vs. Hindustan**

Construction Co. Ltd. and others, 2006 (12)

SCALE 338 – The Hon'ble Apex Court held as follows:

"Electricity – Minutes – Non-confirmation – Respondents submitted that the Board's decision was taken unanimously and the effect of non confirmation of minutes cannot in any way affect the decision which had already been taken – held , In order to test the rival submissions the only thing that needs to be considered is the effect of non confirmation of the minutes – High Court's view that the decision taken has to be given effect to cannot be faulted – As rightly submitted by Counsel for the respondents non confirmation of minutes does not have any effect on the decision taken at the earlier meeting – Appeal dismissed."

(vi) **I.T.I. Ltd., Naini Officers Vs. Union of India and**

another, 2002 (4) AWC 3162 – Hon'ble Allahabad

High Court held as follows:

"The petitioners, therefore, became aware in May, 2000 that the benefit of enhancement in the age of superannuation would not last long and it could revert back to its original position. It is stated in paragraph 25 of the writ petition that many Public Sector Undertakings such as Air India, National Textile Corporation, U.T.I. Ltd., Hindustan Steel Corporation Ltd. and others have rolled back the age of retirement

of their employees from 60 to 58 years. The petitioners, therefore, cannot contend that the impugned circular is either unjust or unreasonable in any manner.”

21. We have heard the learned counsel for the parties, gone through the pleadings available on record and perused the judgments cited.

22. We have given the matter our considered thought and our view is as follows:

- (i) Regarding the applicants allegation that the Board’s minutes were fraudulently drafted, we find no evidence of that. When three Members raised certain objections, the Board decided to defer decision on 209.2.2 and only after all the facts were placed before the Board, it took decision on 16.10.2000 to roll back the retirement age. These minutes were later confirmed in presence of these very Members of the Board who had objected earlier. Therefore, it is a conscious decision of the Board and no case of a hurried decision or fraud is made out;
- (ii) The objection raised by the learned counsel for the applicants that in reply to the RA, the respondents have mentioned about OM dated 5.05.2000 and not 9.05.2000, the argument is only noted to be rejected. This is a frivolous argument. As has been clearly demonstrated by the respondents, they had

indeed referred to OM dated 9.05.2000 in their original reply;

- (iii) As regards the contention of the learned counsel for the applicants that whether ITDC was sick or unviable, should be strictly tested within the definition of SICA, firstly, this is not mentioned in OM dated 9.05.2000. Secondly, as indicated by the data, ITDC being an unviable Company is apparent from the fact that it was incurring huge cost on wages, which was far far worse than the settled norms. It started running into losses from 1999-2000 onwards, which increased further in later years. The definition of sick unit under SICA is for a specific purpose. That does not mean that government, as a policy decision, cannot come to the conclusion that a particular PSU is unviable. It is for this reason that the Tribunal had relied on the general understanding of the term 'sick and unviable' at the earlier hearing. From the data placed before us, there is no doubt that ITDC was unviable. Therefore, we reject this argument of the applicants as well.

23. In view of above discussion, the TA does not succeed and is dismissed. No costs.

(Dr. Brahm Avtar Agrawal)
Member (J)

/dkm/

(P.K. Basu)
Member (A)