THE STATE OF BOMBAY
v.
SAUBHAGCHAND M. DOSHI

1957
September 25.

(S. R. DAS C. J., VENKATARAMA AYYAR, B. P. SINHA, J. L. KAPUR and A. K. SARKAR JJ).

Government servant—Compulsory retirement—Whether amounts to dismissal or removal—Whether applicable to Art. 311(2) *of the Constitution—Bombay Civil Services Rules, as amended by the Saurashtra Government, R.* 165-*A—Whether* ultra vires—*Constitution of India, Art.* 311(2).

Rule 165-A of the Bombay Civil Services Rules, applicable to the State of Saurashtra, as amended, provided : Government retains an absolute right to retire any Government servant after he has completed 25 years qualifying service or 50 years of age, whatever the service without giving any reason, and no claim to special compensation on this account will be entertained. This right will not be exercised except when it is in the public interest to dispense with the further services of a Government servant such as on account of inefficiency or dishonesty............"

On October 30, 1952, the Government of Saurashtra passed an order compulsorily terminating the services of the respondent, acting under the above rule. The respondent filed a writ application in the High Court challenging the validity of the order on the ground that it was made without any notice to him of any charge of misconduct or inefficiency and without any enquiry and was, in consequence, in contravention of Art. 311 (2) of the Constitution of India. Though the respondent had completed the age of 50 on the date of the order, his contention was that in view of the fact that R. 165-A provided that the right to retire will not be exercised except on grounds of inefficiency or dishonesty, an order retiring an officer before the age of superannuation was in substance one of dismissal or removal and must satisfy the requirements of Art. 311(2), and that R. 165-A, in so far as it authorised the Government to terminate the services without any reason and without any enquiry, was repugnant to Art. 311(2) and therefore *ultra vires*.

Held, that R. 165-A is not violative of Art. 311(2) and is *intra vires*, and that the impugned order, dated October 30, 1952, is valid.

An order under R. 165-A is not one of dismissal or removal and Art. 311(2) is not applicable to such an order.

Shyam Lal v. *The State of Uttar Pradesh*, (1955) I.S.C.R. 26, explained and followed.

1957

The State of Bombay v. Saubhagchand M. Doshi

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 182 of 1955.

Appeal from the judgment and order dated February 26, 1954, of the former Saurashtra High Court in Civil Miscellaneous Application No. 52 of 1953.

R. Ganapathy Iyer, *K. L. Hathi* and *R. H. Dhebar*, for the appellant.

N. C. Chatterjee, *J. B. Dadachanji* and *Rameshwar Nath*, for the respondent.

1957. September 25. The Judgment of the Court was delivered by

Venkatarama Aiyar J.

VENKATARAMA AIYAR J.—This is an appeal against the judgment and order of the High Court of Saurashtra in a writ petition filed by the respondent, setting aside an order passed by the State of Saurashtra on October 30, 1952 retiring him from service.

The respondent was appointed in 1948 Memandari, that is, Superintendent of State Guest Houses, in what was the State of Junagadh when it was administered by the Government of India, and was, later on, confirmed in that appointment. In 1949, Junagadh became integrated into the State of Saurashtra, and, thereafter, the services of the respondent were continued by that State, and he was appointed from time to time to various posts. On June 15, 1950, he was appointed Sales Tax Officer, Madhya Saurashtra, Rajkot, and was confirmed in that post on April 16, 1952. On October 30, 1952, the Government of Saurashtra, purporting to act under Government Resolution No. 60 of 1948 as it then stood, passed an order compulsorily terminating his services. The respondent thereupon filed a writ application in the High Court of Saurashtra, challenging the validity of this order on the ground that it was made without any notice to him of any charge of misconduct or inefficiency and without any enquiry, and was, in consequence, in contravention of Art. 311(2). The learned Judges upheld this contention, and set aside the order in question on the ground that it was, in effect, one of dismissal, and that, as there has been no enquiry, it was illegal and void. This appeal

has been preferred against their judgment and order on a certificate under Art. 133(1)(c).

It will be convenient at this stage to refer to the relevent rules bearing on the question. Rule 161 of the Bombay Civil Services Rules, which Rules had been adopted by the State of Saurashtra with some modifications, runs as follows:

"Except as otherwise provided in the other clauses of this rule, the date of compulsory retirement of a Government servant, other than an inferior servant, is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement only with the previous sanction of Government, on public grounds which must be recorded in writing."

It may be stated that the respondent was not an inferior servant, and this rule was therefore applicable to him.

Then, there was R. 165-A, which was in these terms:

"A competent authority may remove any Government servant subject to these rules from Government service or may require him to retire from it on the ground of misconduct, insolvency or inefficiency:

Provided that, before any such order is issued, the procedure referred to in Note 1 to rule 33 of the Bombay Civil Services, Conduct, Discipline and Appeal Rules shall be followed."

Note 1 referred to above is as follows:

"For the procedure to be followed before an order of dismissal, removal or reduction in rank can be passed, see Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930, which has been reproduced in Appendix I to these Rules. The instructions issued by the Government for the guidance of officers in taking proceedings under that Rule are contained in Appendix II to these Rules".

Rule 55, referred to above, in so far as it is material, is as follows:

"Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member

1957

The State of Bombay v. Saubhagchand M. Doshi

Venkatarama Aiyar J.

of a Service (other than an order based on facts which led to his conviction in a criminal court) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so directs, an oral enquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof."
The sum and substance of these rules is that when it is sought to remove or retire a Government servant on account of misconduct, insolvency or inefficiency before the age of superannuation which was 55 years, there must be an enquiry as provided in R. 55. The complaint of the respondent is that he was only 50 on October 30, 1952, and that as there was no enquiry as required by R. 55, the order of retirement is illegal.

Rule No. 165-A, however was amended by the Saurashtra Government on September 28, 1950, and again on January 15, 1952, and on the relevant date, the rule, as amended and omitting what is not material, stood as follows:

"Government is pleased to direct that the proviso and the Note to Bombay Civil Services Rule 165-A

shall not apply to the servants of this Government. Government is further pleased to issue the following orders which shall be made applicable to such servants:

Government retains an absolute right to retire any Government servant after he has completed 25 years qualifying service or 50 years of age, whatever the service without giving any reason, and no claim to special compensation on this account will be entertained. This right will not be exercised except when it is in the public interest to dispense with the further services of a Government servant such as on account of inefficiency or dishonesty. Thus the rule is intended for use :

(i) Against a Government servant whose efficiency is impaired but against whom it is not desirable to make formal charges of inefficiency or against one who has ceased to be fully efficient (*i.e.*, when a Government servant's value is clearly incommensurate with the pay which he draws) but not to such a degree as to warrant his retirement on a compassionate allowance; and

(ii) in case where corruption is clearly established even though no specific instance is likely to be proved under the Bombay Civil Services Conduct, Discipline and Appeal Rules".

Under this rule, the Government had the power to terminate the services of an officer without assigning any reason, if he had completed 25 years of service or attained the age of 50. It was under this rule that the order was statedly made on October 30, 1952, and as the respondent had completed the age of 50 on that date, the order would be within the scope of the authority conferred on the State by that rule, and must be upheld, unless the rule itself is held to be *ultra vires*.

Now, the stand taken by the respondent in the Court below was that an order retiring an officer before the age of superannuation was in substance one of dismissal or removal and must, in order to be valid, satisfy the requirements of Art. 311(2) and that R. 165-A, in so far as it authorised the Government to terminate the service without any reason and without

1957

The State of Bombay
v.
Saubhagchand M. Doshi

Venkatarama Aiyar J.

any enquiry was repugnant to Art. 311(2), and was therefore *ultra vires*. This contention found favour with the learned Judges in the Court below.

Since the above decision was given, the question whether an order of compulsory retirement was one of dismissal or removal within Art. 311(2) came up for consideration in this Court in *Shyam Lal* v. *The State of Uttar Pradesh*(1), and it was held that such an order did not amount to one of dismissal or removal within the meaning of that Article, and was not protected by it. If this decision applies to the present case—and it is the contention of the appellant that it does—then there can be no question but that the order dated October 30, 1952, is valid, and that this appeal must succeed. Mr. N. C. Chatterjee for the respondent contends that that decision does not govern the present appeal, and his argument in support of this contention may thus be stated: The rule as to compulsory retirement embodied in Note I to art. 465-A, which was considered in *Shyam Lal's case*(1), was in these terms :

"Government retains an absolute right to retire any officer after he has completed twenty-five years' qualifying service without giving any reasons, and no claim to special compensation on this account will be entertained".

Rule 165-A differs from the above rule in a material particular, in that after incorporating the above rule, it proceeds on to state that the right will not be exercised except on grounds of inefficiency or dishonesty. An order of retirement under Note I to art. 465-A carries with it no stigma and no imputation against the character or the ability of the officer, whose services are terminated. But where the termination is under R. 165-A, it must reflect on the efficiency or the capacity of the officer, and where a person's services are terminated before the age of superannuation on grounds of inefficiency or dishonesty, that could be regarded only as dismissal or removal.

(1) [1955] 1 S.C.R. 26.

Support for this argument was sought in the following observations in *Shyam Lal's Case*(1) at p. 41 :

"There can be on doubt that removal—I am using the term synonymously with dismissal—generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer. There is no such element of charge or imputation in the case of compulsory retirement.....It is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be the real cause for taking the action but what is important to note is that the directions in the last sentence in Note I to article 465-A make it abundantly clear that an imputation or charge is not in terms made a condition for the exercise of the power. In other words, a compulsory retirement has no stigma or implication of misbehaviour or incapacity."

It was argued that the principle to be deduced from these observations was that where the retirement involved a stigma or imputation of misconduct or incapacity, then it must be treated as dismissal, and that, on that principle, an order of retirement under R. 165-A must be held to be one of dismissal or removal.

This argument proceeds on a misconception as to what was decided in *Shyam Lal's case*(1). There the point for determination was simply whether an order of retirement was one of dismissal or removal falling within the purview of Art. 311(2), and it was held that it was not. The *ratio decidendi* of that decision is this: Under the rules, an order of dismissal is a punishment laid on a Government servant, when it is found that he

(1) [1955] 1 S.C.R. 26.

1957

The State of Bombay
v.
Saubhagchand M. Doshi

Venkatarama Aiyar J.

has been guilty of misconduct or inefficiency or the like, and it is penal in character, because it involves loss of pension which under the rules would have accrued in respect of the service already put in. An order of removal also stands on the same footing as an order of dismissal, and involves the same consequences the only difference between them being that while a servant who is dismissed is not eligible for re-appointment, one who is removed is. An order of retirement differs both from an order of dismissal and an order of removal, in that it is not a form of punishment prescribed by the rules, and involves no penal consequences, inasmuch as the person retired is entitled to pension proportionate to the period of service standing to his credit.

Now, the policy underlying Art. 311 (2) is that when it is proposed to take action against a servant by way of punishment and that will entail forfeiture of benefits already earned by him, he should be heard and given an opportunity to show cause against the order. But that consideration can have no application where the order is not one of punishment and results in no loss of benefits already accrued, and in such a case, there is no reason why the terms of employment and the rules of service should not be given effect to. Thus, the real criterion for deciding whether an order terminating the services of a servant is one of dismissal or removal is to ascertain whether it involves any loss of benefits previously earned. Applying this test, an order under R. 165-A cannot be held to be one of dismissal or removal, as it does not entail forfeiture of the proportionate pension due for past services.

Does it make any difference in the position, as is contended by the respondent, that R. 165-A provides, unlike Note I to art. 465-A in *Shyam Lal's case*(1) that the power is not to be exercised except in cases of misconduct or inefficiency ? When the Government decides to retire a servant before the age of superannuation, it does so for some good reason, and that in general would be misconduct or inefficiency. Indeed, in *Shyam Lal's case*(1), the Government did give to the

(1) [1955] 1 S.C.R. 26.

officer concerned, notice of charges of misconduct and inefficiency and called for his explanation, though a formal enquiry was not held. In providing that no action would be taken except in case of misconduct or inefficiency, R. 165-A only made explicit what was implicit in Note I to art. 465-A. The fact to be noted is that while misconduct and inefficiency are factors that enter into the account where the order is one of dismissal or removal or of retirement, there is this difference that while in the case of retirement they mearly furnish the background and the enquiry, if held—and there is on duty to hold an enquiry—is only for the satisfaction of the authorities who have to take action, in the case of dismissal or removal, they form the very basis on which the order is made and the enquiry thereon must be formal, and must satisfy the rules of natural justice and the requirements of Art. 311(2). It should be added that questions of the above character could arise only when the rules fix both an age of superannuation and an age for compulsory retirement and the services of a civil servant are terminated between these two points of time. 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).

Now, the provision in R. 165-A on which the respondent relies does not, on its true construction, impose any fetter on the power previously conferred on the State in terms absolute, to terminate the services of its servant without assigning any reason. It is really in the nature of departmental instructions to be followed when action is proposed to be taken under that rule, and makes it clear that the enquiry into the charges is only for the satisfaction of the authorities. We are accordingly of opinion that R. 165-A is not violative of Art. 311(2) and is *intra vires*, and that the impugned order dated October 30, 1952, passed in exercise of the power conferred thereby is valid.

A contention was also raised for the respondent that under the rules of service in force in the State of

1957

The State of Bombay
v.
Saubhagchand M. Doshi

Venkatarama Aiyar J.

Junagadh, the age of superannuation was 60, that art. XVI of the Instrument of Accession provided that the permanent members of the public services in the several States should be continued on conditions not less advantageous than those on which they were holding office at the date of accession, and that under this Covenant, the respondent was entitled to continue until he attained the age of 60. The decision in *Bholanath J. Thaker* v. *State of Saurashtra*(1) was relied on in support of this position. But no such claim was put forward in the writ petition, and it is now too late to raise it.

In the result, the appeal is allowed, the order of the lower Court is set aside, and the petition of the respondent is dismissed. The parties will bear their own costs throughout.

Appeal allowed.

1957

September 26

THE STATE OF MADRAS
v.
A. VAIDYANATHA IYER

(B. P. SINHA, GOVINDA MENON and J. L. KAPUR, JJ.)

Appeal by special leave—Order of acquittal by the High Court—Power of Supreme Court—Presumption—Prevention of Corruption Act. (II of 1947), *s.* 4—*Constitution of India, Art.* 136.

Respondent, an Income-tax Officer, called an assessee to his house and took a sum of Rs. 800 from him. Immediately afterwards a search was made and the respondent, after some evasion produced the money. The respondent's defence was that he had taken the money as a loan and not as illegal gratification. The Special Judge who tried the respondent found him guilty under s. 161, Indian Penal Code, and sentenced him to six months simple imprisonment. On appeal, the High Court acquitted the respondent. The State obtained special leave and appealed.

Held, that the words used in Art. 136 of the Constitution show that in criminal matters no distinction can be made as a matter of construction between a judgment of conviction and one of acquittal. The Supreme Court till not readily interfere with the findings of fact given by the High Court but if the High Court

(1) A.I.R. (1954) S.C. 680.