Orissa High Court
Dr. (Miss) Binapani Dei vs State Of Orissa And Anr. on 3 November, 1970
Author: G Misra
Bench: G Misra, B Das
JUDGMENT G.K. Misra, C.J.

1. The petitioner was the Assistant Director of Health Services (Maternity and Child Welfare), Government of Orissa. Her date of birth is 10th April, 1910. She completed her 55th year on 10th of April, 1965 and 58th year on 10th April, 1968. The State Government asked her to show cause why her date of birth should not be accepted, as 4th April, 1907. After some correspondence, Government by their letter dated 27th of June, 1963 determined her date of birth as 16th April, 1907 and declared that she should be deemed to have retired on 16th April, 1962 subject, however, to extension of service granted from 16th April, 1962 till afternoon of July 15, 1963. Thus the petitioner was deemed to have retired on 15th July, 1963 though she should have retired on 10th April, 1968, Against the order of the Government retiring her prematurely, the petitioner filed O. J. C. No. 254 of 1963 in the High Court.

The order was quashed by the judgment reported in AIR 1965 Orissa 81 (Dr. Miss Binapani Dei v. State of Orissa). The appeal filed by the State of Orissa against the judgment of the High Court was dismissed (AIR 1967 SC 1269 State of Orissa v. Dr. (Miss) Binapani Dei). In the Supreme Court Appeal No. 56 of 1964 filed by the State of Orissa, the State took the stand that they were entitled to leave being granted by the High Court as on the basis of its judgment the petitioner was to retire on 10th of April, 1968 whereby she would get a financial benefit to the extent of about Rs. 48,000/-. The valuation being more than Rs. 20,000/-, on the aforesaid basis leave was granted by the High Court under Article 133 of the Constitution. After the petitioner's success in the Supreme Court she was allowed to join her post. Sometimes thereafter, the notice (Annexure--1) (hereinafter to be referred to as the impugned notice) dated 11th August, 1967 was issued to her. It runs thus:--

"To, Dr. (Miss) Binapani Dei, Assistant Director of Health Services, (Maternity and Child Welfare), Directorate of Health Services, Orissa, Bhubaneswar.

Whereas you have completed the age of 55 years on 9-4-1965 (The Ninth April, Nineteen Hundred Sixty Five), the State Government therefore do hereby direct and require you to retire from Government service with effect from the date of expiry of three months from the date of service of this notice.

By order of the Governor Sd/-. U.C. Agarwal Secretary to Government."

This notice was served on the petitioner on 14-8-1967 and she was made to retire on 14-11-1967. Thus, the petitioner was superannuated about five months earlier. The petition averred that there were other employees in the Health Department in between age of 55 and 58 who were not served with similar notices, and thereby a discrimination was made and the impugned notice is hit by Article 14 of the Constitution. It was also stated that the impugned notice was mala fide and was issued vindictively as the petitioner had succeeded in the High Court and the Supreme Court in a

fight with the Government and that in view of the averment made by the State of Orissa in the application for leave to Supreme Court that the petitioner would continue in service till 10-4-1968 as of right, the Government is estopped from issuing the notice of termination. This writ application has been filed for quashing the impugned notice and for a declaration that the petitioner shall be deemed to be continuing in service from 14-11-1967 to 10-4-1968. No counter has been filed on behalf of the opposite parties.

2. Mr. Mohanty for the petitioner raises the following contentions:

(i) The petitioner by virtue of Resolution No. 7406-Gen. -- 2R/-1-23/63 dated 21st of May, 1963 (hereinafter to be referred to as the 1963 Resolution) of the Government of Orissa, Political and Services Department, had a right to continue in service till the expiry of her 58th year and the impugned notice is contrary to law.

(ii) In view of the stand taken by the opposite parties, in the application for leave to Supreme Court that the petitioner wag entitled to continue in service till the expiry of her 58th year, they are estopped from resorting to a plea that the services of the petitioner can be terminated earlier by issue of the impugned notice.

(iii) The impugned order is mala fide.

The aforesaid contentions require careful examination.

3. The 1963 Resolution has been couched in seven paragraphs. The material parts of paragraphs 2, 3 and 7 run thus:--

"2. After careful consideration, Government have now decided that the age of compulsory retirement for the State Government employees should be raised from 55 years to 58 years with effect from the 1st December, 1962. In other words, Government employees who attained or attain the age of 55 on or after the 1st December, 1962, will be entitled to the above benefit. xx xx xx xx

3. Notwithstanding anything contained in the preceding paragraph, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' previous notice, in writing without assigning any reason. The Government servants also may, after attaining the age of 55 years, voluntarily retire by giving three months' notice to the appointing authority. The power to retire a Government servant under this provision will normally be exercised to weed out unsuitable employees after they have attained the age of 55 years.

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7. Necessary amendments to the rules will be issued in due course."

This Resolution was subsequently clarified in Memo No. 1668(88)-Gen., dated the 5th February, 1964 and Office Memorandum communicated with P. & W Department Memo No. 12975(121)-Gen., dated the 20th August, 1964. The 1963 Resolution and the subsequent memoranda were all superseded by Resolution No. 17187-2R/1-2/65 Gen., dated 15th of September, 1965 (hereinafter to be referred to as the 1965 Resolution) of Government of Orissa, Political and Services Department. It is in 22 paragraphs. There was no substantial change with respect to the subject-matter in paragraphs 2 and 3 of the 1963 Resolution.

The material part of paragraph 3 of the 1965 Resolution runs thus:

"Notwithstanding anything contained in the foregoing paragraph, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' previous notice in writing without assigning any reason. This power shall be exercised in the case of Government servants who are found to be unsuitable or inefficient for retention in Government service. For this purpose the concerned authorities should keep constant vigilance on the work of a Government servant continuing beyond the age of 55 years.

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4. In Resolution No. 3462-Gen., dated 20-2-1968 (hereinafter to be referred to as the 1968 Resolution) the State Government superseded the 1965 Resolution, This Resolution is in five paragraphs. The material part of this Resolution runs thus:--

"1. The age of compulsory retirement of the State Government servants, excluding the Class IV servants, shall be fixed at 55 years instead of 58 years, with effect from the 1st August, 1968."

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5. In AIR 1968 Orissa 44 (Batahari Jena v. State of Orissa) it had been contended that the 1963 Resolution was not issued in exercise of the power under the proviso to Article 309 of the Constitution and as such had no effect of a rule under Article 309 and therefore the officers could not claim any right under the Resolution unless the same was made a part of the rule. This Court was of opinion that though the service rules were not amended as indicated in paragraph 7 of the Resolution, yet the Resolution was not an executive instruction but was a part of the service rule. This view no longer stands as good law in view of the observations made in AIR 1970 SC 1314 (State of Assam v. Premadhar Baruah).

Similar Resolutions of the State of Assam were under examination in that casa and their Lordships clearly observed that those Resolutions were executive instructions and were not rules under Article 309 of the Constitution (see para 11). Though a later Division Bench cannot declare the conclusion of an earlier Division Bench as being contrary to law without making a reference to a larger Bench, such a reference is not necessary in view of the pronouncements of the Supreme Court which declares the law. Thus the Resolutions of 1963, 1965 and 1968 are executive instructions and not rules framed under Article 309 of the Constitution. A similar view was also taken in AIR 1967 SC

1264 (I.N. Saksena v. State of Madhya Pradesh).

6. Position of law is well settled that Government can issue executive instructions supplementary to the rules framed tinder Article 309 of the Constitution provided the executive instructions are not inconsistent with the rules. It is not obligatory under the proviso to Article 309 of the Constitution to make rules of recruitment before a service can be constituted or a post created or filled. The State Government has got executive power under Article 162 of the Constitution in relation to all matters with respect to which the Legislature of a State has power to make laws. Article 309 does not abridge the power of the executive to act under Article 162 without a law. (See AIR 1966 SC 1942. B.N. Nagarajan v. State of Mysore and AIR 1967 SC 1910, Sant Ram Sharma v. State of Rajasthan).

Under Rule 71 (a) of the Orissa Service Code the date of compulsory retirement of a Government servant in superior service is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of the State Government on public grounds, which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances. The Resolutions of 1963 and 1965 are not inconsistent with Rule 71 (a) and were valid.

7. Under the Resolutions of 1963 and 1965 Government retained to itself the power to terminate the services of Government servants without assigning any reason. It, therefore, follows that no right of the Government servants can be founded upon the Resolutions to continue till the completion of 58th year contrary to three months' previous notice given in writing by the Government. In AIR 1970 SC 1314 (State of Assam v. Premadhar Baruah) on an analogous provision in the 1963 Notification of the Assam Government a similar view was taken. Their Lordships observed:

"The Government has also the discretion to withdraw such retention in service because the retention does not confer any right on the Government servant." (See Para 20).

8. It was next contended that the provision in para 3 of the 1963 Resolution is discriminatory. The relevant provision is that the power to retire a Government servant under this provision will normally be exercised to weed out unsuitable employees after they have attained the age of 55 years and that no reason is to be assigned in the notice of termination.

The power conferred upon the Government to weed out unsuitable employees is not unguided. The underlying policy is that only unsuitable employees will be weeded out. Obviously, efficiency of the Government servant and exigencies of public service would be the paramount considerations in exercising the power of termination of service. In AIR 1970 SC 1314 a similiar provision in the Assam Notification was held not to be discriminatory. Reliance was placed on the following passage in AIR 1965 SC 1567 (Bishnu Narain Misra v. State of Uttar Pradesh);

"Now it cannot be urged that if Government decides to retain the services of some public servants after the age of retirement it must retain every public servant for the same length of time. The retention of public servants after the period of retirement depends upon their efficiency and the exigencies of public service."

In para 13 their Lordships also expressed, the view that if an order contained a power to retire a person after the age of 55 years without assigning any reason such a power was valid and defensible.

In 1970 SCC 458 = (AIR 1971 SC 40) (Union of India v. Col. J.N. Sinha), a similar view was also taken. Their Lordships observed thus:

"In some cases, the Government may feel that a particular post may be more usefully held in public interest by an officer more competent than the one who is holding. It may be that the officer who is holding the post is not inefficient but the appropriate authority may prefer to have a more efficient officer. It may further be that in certain key posts public interest may require that a person of undoubted ability and integrity should be there. There is no denying the fact that in all organisations and more so in Government organisations, there is a good deal of dead wood. It is in public interest to chop off the same. Fundamental Rule 56 (j) holds the balance between the rights of the individual Government servant and the interests of the public. While a minimum service is guaranteed to the Government servant, the Government is given power to energise its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest."

Thus, the policy underlying the 1963 Resolution is that Government would exercise its discretion in not allowing inefficient and corrupt officers to continue after the attainment of 55th year. The policy underlying the Resolution is not unguided. It would be governed and controlled by the dominant consideration of exigencies of public service and efficiency of the Government servant.

9. Law is also well settled that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the Government and not in a minor official (see AIR 1956 SC 44, Matajog Dobey v. H.C. Bhari and AIR 1958 SC 538, Ram Krishna Dalima v. Justice Tendolkar). The Court is however not powerless if the law is administered by the Government with an evil eye and an unequal hand or for an oblique or unworthy purpose. That is however something different from saying that the impugned provision in the Resolution is invalid. On the aforesaid analysis, the 1965 Resolution is also valid.

10. One next point was referred to in the writ application that the 1968 Resolution was to come into force with effect from 1-8-1968 and before that the petitioner's services could not be terminated by the impugned notice. This contention is misconceived. The 1968 Resolution came into existence on 20th of February, 1968. The impugned notice was on the basis of the 1965 Resolution. Consequently the 1968 Resolution has no application to this case. The 1965 Resolution became ineffective with effect from 20th of February, 1968 and prior to that it held the field and governed the case of the petitioner,

11. On the aforesaid reasoning we reject the contention that the impugned notice is contrary to law.

12. Mr. Mohanty next contended that Government is estopped from terminating the service of the petitioner in view of its averment in the leave application in the Supreme Court Appeal No. 56 of 1964 that the petitioner would continue as of right till she attained 58th year and would get a benefit of more than Rs. 20,000/- by such continuance. The application for leave was made in the year 1964

and the order of the Court (Annexure--2) was passed on 24-11-1964. By then the 1963 Resolution without being amended so far as the provision regarding notice is concerned was in force and the petitioner even did not attain her 55th year. There was no termination of her service by giving notice of three months. As things stood then, the petitioner was to continue in service till she attained her 58th year and the State advanced the right contention as was available in the facts and circumstances of the case at that time.

There was no change of jural relationship by such statement made by the State. The contention is wholly inadmissible in view of the fact that ultimately the Supreme Court Appeal filed by the State was dismissed. The State therefore derived no advantage by such statement and no detriment was caused to the petitioner. The contention that the State is barred by principle of estoppel in terminating the services of the petitioner is misconceived. AIR 1968 SC 718 (Union of India v. Anglo Afghan Agencies) on which reliance was placed by Mr. Mohanty is wholly inapplicable to the facts of this case. In that case the Government gave a promise and the party acted on the representation made by the Government. Even though the promise was not recorded in the form of a formal contract as required by Article 299 of the Constitution the Government was held to be bound to carry out the promise. The facts of that case bear no resemblance to the facts of the present case.

13. The last contention is that the impugned order is mala fide. It is said that there were many other officers in the Medical Department in between the age of 55 and 58 who were not served with similar notices and the petitioner was singled out. This contention is wholly frivolous. The object of the 1963 and 1965 Resolutions was to terminate the service of individual officers on examining each case separately. Obviously the Government was justified in exercising its discretion in allowing honest and efficient officers to continue till they attained 58 years. There is no mala fide in implementing the Resolutions in accordance with its pronounced policy.

14. The action of the Government is also attacked as being mala fide on the ground that the termination was vindictively done on account of previous litigation which went to the Supreme Court. The failure of the Government in the previous litigation does not debar it from exercising its power under the Resolution. The fact that there was a previous litigation, by itself is not enough to establish mala fides. No other materials have been pleaded or proved in support of the case of mala fide exercise of power. We find no substance in this contention.

Reliance is placed by Mr. Mohanty on AIR 1964 SC 72 (S. Partap Singh v. State of Punjab) in support of his contention that as the opposite parties have not filed any counter, the averment of the mala fide pleaded in the writ application stands unchallenged and the Court is bound to hold that the impugned notice was mala fide. In the aforesaid case the petitioner was a Civil Surgeon in the employment of the Punjab Government who had been granted leave preparatory to retirement. He was subsequently recalled to duty and was similtaneously placed under suspension pending the result of an inquiry in certain charges of misconduct.

The Civil Surgeon challenged every one of the orders as being mala fide having been passed at the instance of the Chief Minister of the Punjab who was personally hostile to him by reason of certain incidents and circumstances which were set out. He alleged that the impugned orders were

prompted by the desire on the part of the Chief Minister to wreak vengeance on the petitioner. No affidavit was filed by the Chief Minister. In the facts and circumstances of that case the majority of the learned Judges held that the mala fide was established and in so doing the absence of the affidavit was considered as a determining factor.

The facts of this case tell altogether a different story and are clearly distinguishable. Even if the allegations of mala fide in the writ application are accepted in toto, no case of mala fide is made out. All that the petitioner averred was that there was a previous litigation and the petitioner was singled out in the matter of termination of service. Even if both the facts are accepted, no mala fide is established. When the petition itself does not make out a case of mala fide the absence of a counter affidavit would not improve the matter and would not invest the petitioner with a right which she herself failed to make out. The absence of the counter affidavit does not assist the petitioner's case. The Supreme Court decision has no application to the facts of the case.

15. All the contentions fail. The writ application has no merit and is accordingly dismissed but in the circumstances without cost.

Das, J.

16. I agree.