MUNASINGHE
v
VANDERGERT

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
DISSANAYAKE, J.
RAJA FERNANDO, J.
FR 333/2005
SEPTEMBER 21, 2006
JANUARY 8, 11, 2007
APRIL 4. 2007

Fundamental Rights violation – Retirement and deduction of pension – Article 12(1) unreasonable unfair, irrational? – Establishment Code Clause 33.1 – Equality – Arbitrariness.

The petitioner alleged that, the decision to retire him from service, on account of general inefficiency and recommending that 1% of his pension be deducted is in violation of Article 12(1).

The respondents contends that, the petitioner had not shown progress of 100% in his performance although warned in writing in 1989, and the petitioner's progress during 1997-2000 was well below 100% and on three occasions his increments had been deferred.

Held:

(1) When the petitioner's conduct and efficiency is considered in the light of Clause 33.1 E code it is apparent that the petitioner had made satisfactory progress in his work and conduct during 1997-2000. The petitioner's progress which had been 0% in 1997 had arisen up to 64% in 2000.

(2) Taking into consideration the Survey-General's letter along with the sequence of events that took place, and the fact that the allegations set out, relate to incidents that had occurred more than 20 years ago at the time the petitioner was a cadet clearly indicates that decision to retire the petitioner on the basis of inefficiency without following the provisions of Clause 33 of Chapter XLVIII of the E code and Circular 6/97 read with the directive issued is arbitrary and unfair.

Per Dr. Shirani Bandaranayake, J.

"There is no doubt that it is necessary to confer authority on administrative officers to be used at their discretion. Nevertheless such discretionary authority cannot be absolute or unfettered, as such would be arbitrary and discriminatory which would negate the equal protection guaranteed in terms of Article 12(1)".

(3) Equality is a dynamic concept with many aspects and dimension and it cannot be cribbed cabined and confined within the traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies – one belong to the rule of law while the other to the whim and caprice of the absolute monarch.

APPLICATION under Article 126 of the Constitution.

Cases referred to:

1. *Arkansas Gas C.* v *Railroad Commission* 261 US 379.
2. *Ameeroonissa* v *Mahboob* 1953 SCR 404.
3. *Padfield* v *Minister of Agriculture Fisheries and Food* 1968 AC 997.
4. *Breen* v *Amalgamated Engineering Union* 1971 2 QB 175.
5. *E.P. Royappa* v *State of Tamil Nadu* 1974 AIR SC 555.
6. *Manekha Gandhi* v *Union of India* AIR 1978 SC 597.
7. *In International Airport Authority* AIR 1579 SC 1628
8. *Ajay Hasia* v Khahi. Miyib AIR 1981 SC 487.

Faiz Musthapha PC with *J.C. Weliamuna* for petitioner.
Sanjay Rajaratnam for respondents.

August 3, 2007

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, a 47 years old Assistant Superintendent of Survey, alleged that by the decision to retire him from service with effect from 07.07.2005, on account of general inefficiency and recommending that 1% of his pension be deducted, his fundamental rights guaranteed in terms of Article 12(1) of the Constitution were violated for which this Court granted leave to proceed.

The petitioner's case, as submitted by him, *albeit* brief, is as follows:

The petitioner had joined the Surveyor-General's Department as an apprentice on 01.11.1978. After joining the said Department, he had successfully completed a Diploma in Survey Technicians Course by 25.09.1983 (P2). Thereafter the petitioner was made permanent as a Surveyor – Class III by letter dated 10.10.1983 to be with effect from 01.11.1978 (P3). Since then, the petitioner had received his promotions and he had also completed the 'Survey Department Junior Examination' in 1988 (P6). Thereafter in 1991 he was promoted to Class III Grade I (P7).

In 1997 on annual transfers, the petitioner was released to the 'Title Registration Pilot Project' in which he served until May 2001 (P8). This project had required the use of modern equipment and familiarity with 'high tech devices' and precise digital measuring instruments. Accordingly Field Staff Circular 24/92 was issued requiring the Staff to be trained in the use of such devices. However, the said training had not been provided (P9).

Due to the training facilities not being granted to the petitioner, he found it difficult to carry out the duties entrusted to him under the Pilot Project. The petitioner had requested the management on many occasions for such training and even in the performance appraisal form for the year 1998, it was reiterated that the petitioner should be provided with the training in modern technical equipment (P10). The petitioner had received three (3) letters withholding his increments for the period 1997 to 2000 on the basis that he is inefficient in his work (P11(a), P11(b) and P11(c)). Only in November to December 2000, the Surveyor-General's Department had conducted a training programme, which the petitioner had successfully completed (P12).

In April 2001, the petitioner was transferred to the Provincial Office in Kurunegala to serve as the Assistant Superintendent of Surveys (P13). While the petitioner was functioning at the said office, he received a show cause letter dated 26.02.2002, issued by the Public Service Commission, alleging that the petitioner had been inefficient during the period 1997 to 2000 (P14). The petitioner had requested that an inquiring officer be appointed and that he be permitted to peruse the documents, for which the Public Service Commission had responded by letter dated 10.06.2002 stating that there will not be a formal inquiry and for the petitioner to reply to the show cause letter within 3 weeks of the receipt of that letter (P15 and P15(a)). The petitioner replied to the said show cause letter by his letter dated 27.08.2002 (P16).

Thereafter the petitioner received a copy of the letter of 9th respondent dated 05.08.2005 addressed to the Secretary, Public Administration stating *inter alia* that,

(a) a decision had been taken to retire the petitioner with effect from 07.07.2005 on account of general inefficiency; and

(b) further recommending that 1% of his pension be deducted (P18 and P18(a)).

According to the petitioner, in terms of a Directive dated 16.07.1999, if a Surveyor is inefficient he should be transferred and be placed under the direct supervision of the Assistant Superintendent of Surveys (P21). Also when there were similarly placed surveyors, who had a progress less than 100%, he was singled out and treated differently.

In the circumstances, the petitioner alleged that the aforesaid decision to retire him with effect from 07.07.2005 on account of inefficiency and the recommendation to deduct 1% of his pension is unreasonable, unfair and irrational and is violative of his fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

Learned Deputy Solicitor-General for the respondents contended that the 9th respondent had clearly demonstrated the reasons for the decision contained in the document marked P18, which refers to the retirement of the petitioner on the basis of inefficiency.

In her objections, the 9th respondent had stated that,

> *"Since the petitioner was generally weak in his administrative functions and has not shown any improvement in performance of his duties, recommendation to retire him under Section 33 of Chapter XLVIII of the Establishments Code had been made by Secretary/Land and the Surveyor General."*

The contention of the learned Deputy Solicitor-General for the respondents was that the petitioner had not shown progress of 100% in his performance although he was warned so by letter dated 15.02.1999. It was also submitted that the petitioner's progress during the period of 1997 to 2000 was well below 100% and therefore on three occasions his increments had been deferred. Accordingly learned Deputy Solicitor-General for the respondents submitted that the petitioner's unenviable record of having his salary increments deferred for a continuous period of 03 years alone should clearly indicate the incompetency and inefficiency of the petitioner. He therefore contended that on the

aforesaid grounds the decision of the Public Service Commission to retire the petitioner prematurely could be justified.

The question that has to be addressed by this Court thus would be whether such decision to retire the petitioner and the deduction of 1% of his pension by the respondents was warranted.

On a perusal of the documents tendered by the respondents it is apparent that the progress of work during 1997 to 2000 of the petitioner had been taken into consideration for the aforementioned decision to retire the petitioner on the basis of inefficiency.

The contention of the learned Deputy Solicitor-General was two fold. Firstly, he stated that the petitioner's progress during the period 1997 to 2000 was below 100%. Secondly, he submitted that the petitioner's increments were deferred on three(3) occasions.

The 9th respondent, being the Secretary, Public Service Commission in her affidavit had averred that, clause 33.1 of Chapter XLVIII was strictly adhered to when proceeding with this matter.

Clause 33.1 of the Establishments Code reads as follows:

> *"Where warnings, reprimands and other punishments imposed on an officer over a long period of time on various occasions during his period of service for acts of misconduct or misdemeanor or negligence or inadvertence have failed in improving his conduct and efficiency, the Disciplinary Authority may, if he determines that his continuation in the service is detrimental to the efficiency of the Public Service, retire the officer for general inefficiency."*

A careful examination of the aforesaid clause reveals that in order to take steps under clause 33.1, it is necessary to have proof that the officer in question had failed to improve his conduct and efficiency for a continuous period of time.

It would be pertinent in these circumstances, to refer to the submissions made by the learned Deputy Solicitor-General for the respondents, indicating that the petitioner's conduct at work had not shown any progress,

According to the learned Deputy Solicitor-General the progress of work performed by the petitioner during the period of 1997 to 2000 was as follows:

"9R1 H - Reveals that the salary increment cannot be approved, as his grading for the year 1999 is 62.5%

9R1 I - It is the confidential report for the period covering 01.01.1999 till 30.08.1999. The reasons for non-granting of promotion/increment is disclosed in cages 14 and 16 thereof.

9R1 J - Reveals salary increment withheld. In 1998 scored 33% and in 1999 scored 64%.

9R1 L - Confidential Report from 01.09.1999 till 31.12.1999 reveals progress is very poor, increment not recommended.

9R1 M&O - Reveals that in 2000 obtained 64%, increment not recommended.

9R1 P - Confidential Report from 01.01.2000 to 22.06.2000 reveals progress very poor, increment deferred.

9R1 R- Reveals increment deferred in view of poor progress.

9R1 S- Confidential Report from 23.06.2000 till 31.12.2000 reveals poor progress and increment deferred."

It is to be noted, as referred to earlier, that in 1997 the petitioner was released to the 'Title Registration Pilot Project', where he had served until May 2001. That project needed the use of modern equipment and the knowledge to use high tech device' and precise digital measuring instruments. The circular issued for such purpose had clearly identified the staff training as one of the requirements for the successful implementation of the project (P9). It is not disputed that such training was not provided for the petitioner at the time he was released to the 'Title Registration Pilot Project'.

Notwithstanding the absence of training, the petitioner's progress for the years 1998, 1999 and 2000 had been 33%, 63% and 64% respectively (9R1 to 9R7). Although in terms of the

assessments made by the respondents, a progress of 60% is unsatisfactory, it cannot be disputed that the petitioner had shown a remarkable improvement as his progress has risen upto 64% from, what it had been earlier. It is also interesting to note that the immediate Supervising Officer of the petitioner had recommended the petitioner's increments for the period 01.01.1999 to 30.08.1999 (P17a), 01.09.1999 to 31.12.1999 (P17b) and from 01.01.2000 to 22.06.2000 (P17c). Recommending his increments, the Supervising Officer had stated that the petitioner had served satisfactorily during the time he functioned under his supervision.

Accordingly, when the petitioner's conduct and efficiency is considered in the light of clause 33.1 of the Establishments Code, it is apparent that petitioner had made satisfactory progress in his work and conduct during the period 1997 to 2000. In fact, the petitioner's progress, which had been 0% in 1997 had risen upto 64% in 2000.

In the light of the aforesaid circumstances I would now turn to examine the petitioner's grievance before this Court.

The petitioner's allegation was that the decision to retire him in terms of clause 33 of the Establishments Code was arbitrary and that it is violative of Article 12(1) of the Constitution. Article 12(1), which deals with the right to equality is in the following terms.

> *"All persons are equal before the law and are entitled to the equal protection of the law."*

Thus the constitutional provision in terms of the right to equality embraces both the non-discrimination as well as the wider concept of equality that would include the right to equal treatment of all classes without any discrimination.

An allegation of mere inequality will not be sufficient in terms of Article 12(1) of the Constitution to hold that equal protection has been denied. In order to hold that there had been a violation of equal treatment it is necessary to show that the alleged decision was 'actually and palpably unreasonable and arbitrary' (*Arkansas Gas Co.* v *Railroad Commission*[1]). When a decision against the executive and-or administrative action is challenged before Court, It is necessary to point out that the decision in question is

unreasonable and arbitrary and has no rational basis to the main object in order to come within the scope of Article 12(1)of the Constitution. This position has been clearly stated in *Ameeroonissa* v *Mahboob*(2) where it was stated that,

> "*Mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any rational basis having regard to the object which the legislation has in view.*"

The decision of the Public Service Commission to retire the petitioner due to inefficiency had been based on the show cause letter, the petitioner's reply to the said show cause letter and the recommendation of the Secretary to the Ministry of Lands. The said recommendation of the Secretary to the MInistry of Lands appears to have been based on the letter of the then Survey-General. The said letter is dated 17.10.2002 (9R7).

The Public Service Commission had thereafter in June 2003, (9R4) made inquiries from the Secretary, Ministry of Lands referring to the Surveyor-General's letter of 17.10.2002 (9R7), the reasons for the **decision of the Surveyor-General** to retire the petitioner on the basis of inefficiency. In fact the said letter of the Surveyor-General (9R7) repeatedly states that **arrangements are being made to retire the petitioner on the basis of inefficiency**.

The Public Service Commission had responded to this letter by its communique dated 20.06.2003 addressed to the Secretary of Ministry of Lands. This letter, which is reproduced below, is most revealing as it discloses not only the progress of the petitioner and the reluctance of the Public Service Commission, quite rightly to take any action against the petitioner, but also the interest the then Surveyor-General had shown in order to retire the petitioner on the basis of inefficiency (9R4).

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ඉඩම් අමාත්‍යාංශය.

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නිලධාරී- එස්. පී. මුණසිංහ මහතා

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ඔබේ සමාංක හා 2002.11.13 දිනැති ලිපිය හා බැඳේ.

02. මිනින්දෝරු මුණසිංහ මහතා විසින් ඉදිරිපත් කර ඇති 2002.08.27 දිනැති නිදහසට කරුණු හා ඒ පිළිබඳ නිර්දේශ ඉදිරිපත් කරන ලද මැනුම්පතිගේ 2002.10.17 දිනැති ලිපියේ සඳහන් කරුණු අනාවරණය විය.

I. මිනින්දෝරු ව්‍යවස්ථාවේ 8.1 ඇ වගන්තිය අනුව මුණසිංහ මහතා සහකාර මිනින්දෝරු අධිකාරී වශයෙන් ඉහල තනතුරකට සර්වේයර් ජනරාල්ගේ 2001.04.18 දිනැති ලිපියෙන් කුරුණෑගල කොට්ඨාශයේ තුරුණෑගල ප්‍රාදේශීය කාර්යාලයට අනුයුක්ත කර ඇති බව (නිලධාරියාගේ පෞද්ගලික ලිපිගොනුවේ 137 පිටුව)

II. 2000 වර්ෂය සඳහා වන ඔහුගේ කාර්ය සාධන ඇගයීම පිළිබඳව බස්නාහිර පළාතේ මිනින්දෝරු අධිකාරී විසින් වාර්තා කර ඇති පරිදි 75% ක පතුටුදායක ප්‍රගතියක් ලබාගෙන ඇති බව (පෞද්ගලික ලිපිගොනුවේ 139-ඒ පිටුව).

III 2001.05.29 සිට 2001.12.31 දක්වා කාලය සඳහා වූ නිලධාරියාගේ රහස්‍ය වාර්තාවෙහි 12 වෙනි ඡේදයෙහි කුරුණෑගල මැනුම් අධිකාරි විසින්, ඔහුගේ කාර්ය සාධනය සම්බන්ධයෙන් විශේෂ කරුණු දක්වා ඇති අතර, කාර්යසාධනය 82.65% දක්වා වර්ධනය වී ඇති බව හා ඒ අනුව වැටුප් වර්ධකද නිර්දේශ කර ඇති බව (පෞද්ගලික ලිපිගොනුවේ 163-ඒ පිටුව).

IV. කුරුණෑගල නියෝජ්‍ය සර්වේයර් ජනරාල් විසින් කාර්ය සාධනය සම්බන්ධයෙන් කර ඇති නිර්දේශ පරිදි සහකාර මිනින්දෝරු අධිකාරිවරයෙකු වශයෙන් මුණසිංහ මහතාගේ කාර්යසාධනය පතුටුදායක වී ඇති බව දක්වා ඇති අතර, ඒ අනුව වැටුප් වර්ධකයද අනුමත කර ඇති බව (පෞද්ගලික ලිපිගොනුවේ 163 පිටුව).

03. නිලධාරියාගේ කාර්ය සාධනයේ ප්‍රගතියක් පෙන්නුම් කර දැනි ඔට ඉහත කරුණු අනුව පෙනී යන අතර, එයේ තිබියදී මෙහු අකාර්යක්ෂමතාට මත විශ්‍රාම ගැන්වීම මැනුම්පති විසින් නිර්දේශ කර ඇත්තේ කුමන හේතුවක් මතද යන්න විමසිමටත්, ඒ පිළිබඳ නිරීක්ෂණ හා නිරීදේශ ඉදිරිපත් කරන ලෙස දැනුම්දිමටත් රාජ්‍ය සේවා කොමිෂන් සභාව නියෝග කර ඇත.

04. ....."

Taking into consideration the contents of the aforesaid letter along with the sequence of events that took place since February 2002, and the fact that allegations set out in the document dated 26.02.2002 (P14) relate to incidents that had occurred more than 20 years ago at the time the petitioner was a Cadet, clearly indicate that the decision to retire the petitioner on the basis of inefficiency without following the provisions of clause 33 of Chapter XLVIII of the Establishment Code and Circular 6/97 (P20) read with the Directive dated 16.07.1999 (P21) is arbitrary and unfair.

Considering the present day administrative functions, there is no doubt that it is necessary to confer authority on administrative officers to be used at their discretion. Nevertheless, such discretionary authority cannot be absolute or unfettered as such would be arbitrary and discriminatory, which would negate the equal protection guaranteed in terms of Article 12(1) of the Constitution. Examining the discretionary powers and stressing the importance of the well known House of Lords decision in ***Padfield* v *Minister of Agriculture, Fisheries and Food***[3] Lord Denning M.R. in *Breen* v *Amalgamated Engineering Union*[4] stated that,

> *"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this; the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v Minister of Agriculture, Fisheries and Food (supra) which is a landmark in modern administrative law."*

Article 12(1) of the Constitution strikes at arbitrariness and ensures fairness and equality in treatment. In a series of Indian decisions it was clearly laid down that the basic concept of the right to equality is not restricted to the doctrine of classification. **In *E.P. Royappa* v *State of Tamil Nadu*[5]**, Bhagwati, J., (as he then was) clearly defined equality in the following terms:

> *"Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch ...."*

The concept of equality explored in ***Royappa*** *(supra)* by Bhagwati, J. (as he then was) was 'reaffirmed and elaborated' in ***Manekha Gandhi* v *Union of India***[6]) and in *International Airport Authority*[7].

Thus it is well established and well settled law, as stated in the aforesaid decision that an action, which is arbitrary must necessarily involve negation of equlity.

Commenting on the applicability of equality clause in terms of Article 14 of the Indian Constitution Bhagwati, J. (as he then was) in ***Ajay Hasia Khalid Mujib***[8] stated that,

> *"Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution (emphasis added)."*

It is not disputed that there was no formal inquiry, which examined and considered the allegations that were leveled against the petitioner. It is also not disputed that no opportunity was given to the petitioner to respond to the allegations leveled against him. On a consideration of the totality of the circumstances in this

application it is apparent that the decision to retire the petitioner on alleged inefficiency without following the provisions of the Establishment Code and the relevant Circular and Directives, is not only arbitrary, but also unreasonable and unfair.

In the circumstances, for the reasons aforesaid I hold that the 1st to 10th respondents have acted in violation of the petitioner's fundamental right guaranteed in terms of Article 12(1) of the Constitution. I accordingly hold that the decisions contained in the document dated 05.08.2005 marked P18 are null and void.

I make no order as to compensation and costs.

DISSANAYAKE, J. - I agree.

RAJA FERNANDO, J. - I agree.

Relief granted.