

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 19th October, 2012

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W.P.(C) No.3475/1999

M.P. VAISH

..... Petitioner

Through: Ms. Zeenat Masoodi, Adv. for Mr.
S.K. Dubey, Adv.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. Mr. S.K. Dubey counsel for the petitioner is not available. Adjournment is sought on his behalf. However considering that the writ petition is of the year 1999, it is not deemed appropriate to await his presence any further. The paper book has been perused.

2. The petitioner, born on 01.05.1940, was appointed as a Clerk in the Defence Accounts Department of the Government of India on 26.03.1962. He was in the year 1997 working as the Senior Auditor. Vide Circular dated 14.05.1997 published by the Office of the Controller of Defence Accounts (Army), Meerut Cantt., where the petitioner was posted, he was informed of his impending retirement on 30.04.1998 on attaining the age of superannuation of 58 years. The petitioner, in or about December, 1997

submitted his pension papers etc., again mentioning his date of impending retirement as 58 years.

3. The Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) in exercise of powers conferred by proviso to Article 309 and Clause (5) of Article 148 of the Constitution of India, vide Notification dated 13.05.1998 enhanced the age of retirement from 58 to 60 years. The petitioner, as aforesaid had retired prior thereto on 30.04.1998.

4. The petitioner contends that the same Notification also carried out the amendment in Fundamental Rule 56 whereby it was provided that the Government servants shall retire from service on the afternoon of the last day of the month in which they attain the age of sixty years; however a Government servant whose date of birth is first day of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years. The case of the petitioner is that the said Rule 56 is arbitrary in discriminating between those who are born on the first day of the month and those who are born on any other day of the month; while those born on the first day of the month are made to retire on the afternoon of the last day of the preceding month, those born on any other day including on the second day of the month are made to retire on the last day of that month. It is further the case of the petitioner that if those born on first day of the month, as the petitioner is, were to also retire on the last day of the month, the petitioner would not have been made to retire on 30.04.1998 and would have continued in employment till 31.05.1998 and

would have been the beneficiary of the enhancement in retirement age from that of 58 years to 60 years.

5. Rule was issued in the petition.

6. The respondent has filed a counter affidavit pleading that the petitioner was informed of his date of retirement much in advance and had submitted his pension papers on 08.12.1997 stating the date of his retirement as 30.04.1998 and did not raise any objection and cannot now make any challenge thereto. It is pleaded that the Government has to fix a cut-off date and so long as it is uniformly applicable, there is no question of discrimination. It is yet further pleaded that the said Rule has been upheld in *Prabhu Dayal Sesma Vs. State of Rajasthan* AIR 1986 SC 1948.

7. I have considered the matter on merits. Though the petitioner has portrayed that classification between those born on 1st day of the month and those born on remaining days of the month has been introduced only vide amendment dated 13.05.1998 to Fundamental Rule 56 but such version of the petitioner is obviously incorrect. Had the said provision come into existence for the first time on 13.05.1998, the petitioner thereunder could not have been retired prior thereto on 30.04.1998. The Fundamental Rule 56, since 05.04.1975, provides so. The petitioner appears to have portrayed that such classification came into being only with effect from 13.05.1998 perhaps, so as to be not accused of delay and laches in making the challenge to the Rule only post his retirement. It is thus clear that such classification exists since 05.04.1975 and the Notification dated 13.05.1998 only enhances the age of retirement from 58 years to 60 years.

8. I have however, in the absence of counsel for the petitioner proceeded to examine the challenge to the classification on the ground of discrimination, rather than deal with the plea of delay / laches / acquiescence.

9. *Prabhu Dayal Sesma* supra relied upon by the respondent in its counter affidavit was not concerned with Fundamental Rule 56 as pleaded by the respondent. The Supreme Court in that case was concerned with the Rules fixing the minimum and maximum age for recruitment and in that context also examined the Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955 framed by the Central Government in pursuance of Rule 7 of the Indian Administrative Service (Recruitment) Rules, 1954 and held:

“In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding, the anniversary of his birth day. We have to apply well accepted rules for computation of time. One such rule is that fractions of a day will be omitted in computing a period of time in years or months in the sense that a fraction of a day will be treated as a full day. A legal day commences at 12 o'clock midnight and continues until the same hour the following night. There is a popular misconception that a person does not attain a particular age unless and until he has completed a given number of years. In the absence of any express provision, it is well-settled that any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birth day.

9. In Halsbury's Laws of England. 3rd edn., vol. 37, para 178 at p. 100, the law was stated thus:

In computing a period of time, at any rate, when counted in years or months, no regard is generally paid to fractions of a day, in the sense that the period is regarded as complete although it is short to the extent of a fraction of a day.... Similarly, in calculating a person's age the day of his birth counts as a whole day; and he attains a specified age on the day next before the anniversary of his birth day."

Reference was also made to Section 4 of the Indian Majority Act, 1875 and it was held:

"The Section embodies that in computing the age of any person, the day on which he was born is to be included as a whole day and he must be deemed to have attained majority at the beginning of the eighteenth anniversary of that day. As already stated, a legal day commences at 12 o'clock midnight and continues until the same hour the following night. It would therefore appear that the appellant having been born on January 2, 1956, he had not only attained the age of 28 years but also completed the same at 12 o'clock on the midnight of January 1, 1984. On the next day i.e. on January 2, 1984, the appellant would be one day more than 28 years. The learned Judges were therefore right in holding that the appellant was disqualified for direct recruitment to the Rajasthan Administrative Service and as such was not entitled to appear at the examination held by the Rajasthan Public Service Commission in 1983. We affirm the view taken by the learned Judges as also the decisions in G. Vatsala Rani's case, (supra). 14. It is rather unfortunate that the appellant should upon the construction placed on r. 11-B of the Rajasthan State and Subordinate Services (Direct Recruitment by Competitive Examination) Rules, 1962 fail to secure entry into the Rajasthan Administrative Service and allied services of the Government of Rajasthan merely because he exceeds the upper age limit just by one day. The Government ought to consider the question of relaxing the upper age limit in the case of the appellant in order to mitigate the hardship, if otherwise

permissible. There is need for a provision like the proviso to Rule 4 of the Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955, conferring the power of relaxation on the State Government under certain conditions without which a deserving candidate would be rendered ineligible for appointment.

15. The result is that the appeal must fail and is accordingly dismissed.”

However the present is not a case of recruitment but of retirement and the question of hardship thus does not arise.

It would thus be seen that it is only the principle of the aforesaid judgment which can be applied, but the judgment cannot be said to be upholding the provision of Fundamental Rule 56.

10. The judgment of the Supreme Court in *Achhaibar Maurya Vs. State of Uttar Pradesh* (2008) 2 SCC 639 is also relevant in this regard. The appellant therein was born on 01.07.1943 and as per the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 by which he was governed, he was to retire in the afternoon of the last day of the month in which he attained the age of 60 years. However the Rule further provided that a teacher retiring during an academic session July 1 – June 30 shall continue to work till the end of academic session i.e. June 30. Thus, if the appellant was to be said to retire on 30th June, he was not to be entitled but if he was to be held to retire on 1st July, he would be entitled to work till the end of the next academic session i.e. till June 30th of the next year. The Supreme Court held the appellant to be retiring of 30.06.2003 and held that the legislature is

entitled to fix a cut off date and a cut off date fixed by a statute may not be struck down unless held to be arbitrary. It was further held that though it may seem unfortunate as some people may miss the extended period of service by a day but for that reason a valid provision cannot be said to be invalid on the touchstone of Article 14 or 16 of the Constitution of India. The Supreme Court further held that a statute cannot be declared unconstitutional for conferring benefit to a section of the people.

11. I find the same question to have arisen before the High Court of Karnataka also in *Union of India by its Secretary, Ministry of Defence Vs. Col. Bhupinder Singh (Retd.)* MANU/KA/0632/2009 Rule 16(a) of the Army Rules, 1954 *para materia* to Fundamental Rule 56 was under consideration therein. There also, merely for the reason of one day, the benefit of 5th Pay Commission was being denied. It was however held that the respondent in that case, born on 01.01.1944 would retire on 31.12.1995 and not on 01.01.1996 when the benefits of 5th Pay Commission came into force.

12. It would thus be seen that the question raised in this petition is no longer *res integra*. There is rationale in law, as discussed in *Prabhu Dayal Sesma*, in putting those born on the first day of the month in one category and those born on the other days of the month in the other category for the purposes of computing the date and time of retirement. This classification cannot be thus said to be discriminatory, as held in *Achhaibar Maurya* supra.

13. No merit is thus found in the petition; the same is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

OCTOBER 19, 2012

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