



1984 Legal Eagle(Gau) 91

IN THE GAUHATI HIGH COURT

Equivalent Citations : 1984 (2) GLR 488

Before : S.Haque, T.N.Singh

**Girija Kr.Phukan
Versus
State of Assam & Ors.**

Case No. : Civil Rule No. 78 of 1983

Date of Decision : 04-Sep-1984

Advocates Appeared:

A.R.Paul Mazumdar, B.Agarwalla, B.Banerjee, B.K.Das

STATUTES REFERRED:

1. Assam Services (Pension) Rules, 1969, R.21

CASES REFERRED:

Mansaram v. S. P. Pathak (1984) 1 SCC 125
 Liberty Oil Mills v. Union of India, AIR 1984 SC 1271
 Sushil Kumar v. State of Assam; AIR 1984 Gau. 69
 Board of Trustees v. Dilip Kumar, AIR 1983 SC 109
 Dharendra Kr. Barthakur. v. State of Assam, (1983) 2 GLR 459
 Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 746
 Maneka Gandhi v. Union of India, AIR 1978 SC 597
 State of West Bengal v. Nripendra Nath, AIR 1966 SC 447
 State of Assam v. Padma Ram Bora, AIR 1965 SC 473
 Pratap Singh v. State of Punjab, AIR 1964 SC 72
 R. T. Rangachari v. Secy, of State, AIR 1937 PC 29

JUDGMENT/ORDER:

Dr. T. N. Singh, J.:-

For long 9 years, while the petitioner was in service, disciplinary proceeding drawn up against him continued to limp. To-day, when as a "pensioner" he should be enjoying much coveted fruit of his life's labour, it is still haunting him. The crucial point for our determination in this petition centres around an ambivalent provision of the relevant Pension Rules which threaten, the petitioner complains, to deny him the bounty due to him as a citizen from the welfare State.

2. First, a rough lay-out of the factual matrix. The petitioner joined service in 1949 in the Supply Deptt. Next year he switched over to the Transport Department as Assistant Station Superintendent in which post he was confirmed in 1956. He first came to hold a Gazetted Post, namely, that of Station Superintendent w. e. f. 1.4.55 and he was confirmed therein on 29.8.62. In the meantime he was deputed to the United Kingdom for training in "Operation and Management of Road Transport Organisation". He served as a Transport Officer (Pool) for two spells, first from 25.7.61 to 2.12.63 and then again from 23.5.64 to 14.9.65. He continued to climb the ladder and in 1965 held the post of Divisional Superintendent wherein he was confirmed w. e. f. 1.10.68. Another promotion came in 1968 when he was appointed as Deputy Director (General) and Chief Traffic Officer. In 1970 the State Transport Department underwent a transformation as it became Assam State Road Transport Corporation under the Board Transport Corporation Act. He became a Deputy General Manager in 1971 in the new set up. He was allowed to cross efficiency bar w. e. f. 30.8.72. Thereafter, he was promoted w. e. f. 19.1.74 to the post of Additional General Manager under the Corporation. He came to the top of the ladder in 1978 when he was allowed to hold the charge of the office of General Manager of the Corporation (vide Annexure VI). However, he was reverted to his original post w. e. f. 1.1.79 which aggrieved him wherefor he challenged his reversion in this Court. That matter is pending adjudication. These are some of the loose ends of his story we read in his writ petition.

3. We turn, however, to the more vital aspect of the case having material bearing on the lis in the instant case. In the year 1969 Govt. of Assam appears to have detected some cases of "misappropriation of Govt. money in the Pool Transport". On 14.11.69 the Director, State Transport, Assam, was asked (vide Annexure VIII) to draw up proceeding against one M. N. Pujari, Transport Officer (Poll). In the same letter it was further mentioned that the petitioner was also holding the office of Transport Officer (Poll). Had he been vigilant the defalcation of Govt. money would not have taken place. Show cause notice was required to be issued to him also asking why disciplinary action should not be taken against him. Accordingly, on 20.12.69 petitioner was asked to show cause why action should not be taken against him in respect of defalcation of Govt. money to the tune of Rs. 32,321.94 between the periods, 13.1.63 to 2.12.63 and 23.5.64 to 14.9.64. It was alleged in the letter that he had not been vigilant and that he had not exercised necessary checks and scrutiny as Drawing and Disbursing Officer according to rules and procedure due to which the defalcation could take place. A copy of the concerned audit report was also furnished to the latter. On 22.2.70 petitioner submitted his explanation denying all charges and there was no further action on this matter. The nub of the matter, however, springs up in Annexure-XI by which on 8.4.75 another or a first disciplinary proceeding as such, for the purpose of resolution of the supposed controversy was drawn up against the petitioner which is impugned in the instant petition. He was asked to show cause under Rule 9 of the Assam Services (Discipline and Appeal) Rules 1964, for short the Rules or Service Rules, read with Article 311 of the Constitution why any of the penalties prescribed in Rule 7 of the aforesaid Rules should not be inflicted on him on the charges based on the statement of allegations annexed. From a perusal of the allegations it appears that the main charge of "negligence and dereliction of duty amounting to gross misconduct" was related to his duties and responsibility as Drawing and Disbursing Officer in which capacity he is said to have failed to exercise strict supervision and control on his subordinate including the Cashier Romesh Borthakur who had misappropriated several amounts on several dates. It appears that a criminal case was instituted against the said Romesh Borthakur which ended in his acquittal and he was re-instated in service w. e. f. 7.11.82. However, the proceedings drawn up against the petitioner continued, after he showed cause on 6.6.75. denying all charges. Those proceedings are in animated suspension. The petitioner was superannuated on 31.3.83 but the proceedings are lingering. In this application he has challenged the right of the respondents to continue the proceedings after his superannuation.

4. It is not disputed and indeed it cannot be that master and servant relationship between the petitioner and the respondent State of Assam, has ceased on and from 1. 4. 83. It is also not disputed that no positive and affirmative action has been taken by the State Govt. to continue the said proceedings by invoking any statutory power under which they could be continued. Law is well settled that a disciplinary proceeding can be taken and can continue against a Govt. servant while he is still in service. This is axiomatic. This follows from the constitutional as also the statutory provisions. Art. 311 refers to a person "who is a member of civil service" or "holds a civil post ". Indeed, Rule 9 in terms contemplates an enquiry without prejudice to the provision of Public Service (Inquiries) Act 1850 against a "Govt. servant" for the purpose of imposing any of the penalties specified in Rule 7 of the Rules. The term "Govt. Servant" is defined in Rule 2(a) to mean a person who "holds a civil post" and any person who is "in the service of a State Govt." According to Section 2 of the Public Service (Inquiries) Act, 1850 Govt. may hold a "formal and public inquiry into truth of any imputation or misbehaviour by any person in the service of the Govt.....". In R. T. Rangachari's case (AIR 1937 PC 29) their Lordships encapsulated in a single sentence the legal position in this regard. They observed :

"It seems to require no demonstration that an order purporting to remove the appellant from the service at a time when, as their Lordships hold, he had for some months duly and properly ceased to be in the service, was a mere nullity and cannot be sustained".

There must exist, ex hypothesi power in Govt. under the law to take any action against any person who has ceased to be in its service. And, when such power is found in law the Govt. must act within the four corners of the legal provision. This position is also expressed in several decisions of their Lordships of the Supreme Court, (see, Partap Singh, AIR 1964 SC 72; State of Assam vs. Padma Ram Bora, AIR 1965 SC473; State of W.B.vs. Nripendra Nath, AIR 1966 SC 447).

5. Faced with this situation, learned Govt. Advocate Mr. A. R. Paul Mazumdar relied on the provisions of Rule 21 (a) of the Assam Services (Pension) Rules 1969, for short the Pension Rule. Indeed, this stand is also taken by the State of Assam in its counter at para 22. Rule in the instant case was issued on 4. 2. 83 before the petitioner was superannuated on 31. 3. 83 and the return by the State was filed on 6.6.83. Several reasons are stated by the State in its return to explain why the proceedings initiated as far back as on 9. 4. 75 could not be completed, though we are not convinced that they are reasonable or acceptable. The deponent who is Under-Secretary to the Govt. of Assam in the Department of Transport and Tourism has averred in the return that though the proceeding is still pending 4th respondent had since been appointed as Inquiry Officer who is expected to complete the enquiry soon and "petitioner's case will be covered under Rule 21 of the Assam (Services) Pension Rule 1969. Records were also

called for by this Court. From a perusal thereof it appears that no progress has been made save and except appointment of different Inquiry Queers from time to time.

6. We may now quote the crucial provision relied on by respondents in extenso:

21. The Governor of Assam reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Govt., if in a departmental or judicial proceeding the pensioner is found guilty of grave misconduct or negligence during the period of his service, including, service rendered upon re-employment after retirement provided that-

(a) such departmental proceeding, if instituted while the officer was in service, whether before his retirement or during his re-employment, shall, after the final retirement of the officer, be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the officer had continued in service :

(b) such departmental proceeding, if not instituted while the officer was in service, whether before his retirement or during his re-employment-

(i) shall not be instituted save with A the sanction of the Governor of Assam ;

(ii) shall not be in respect of any event which took place more than 4 years before such institution; and

(iii) shall be conducted by such authority and in such place as the Governor of Assam may direct and in accordance with procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the officer during his service ;

(c) no such judicial proceeding, if not instituted while the officer was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or an event which took place more than 4 years before such institution; and

(d) the Assam Service Commission shall be consulted before final orders are passed.

Explanation.-For the purpose of this rule-

(a) a departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the officer or pensioner, or if he has been placed under suspension from an earlier date, on such date; and

(b) a judicial proceeding shall be deemed to be instituted-

(i) in the case of a criminal proceeding, on the date on which the complaint or report of the police officer, on which the Magistrate takes cognizance, is made, and

(ii) in the case of a civil proceeding, on the date of presentation of the plaint in the Court.

Note. 1. This applies also to recoveries from death-cum-retirement gratuity and family pension sanctioned under-Chapter VIII.

Note. 2. Under the above rules, besides the right of ordering recovery from a pension of the amount of any pecuniary loss caused to Government, the Governor of Assam has also reserved to himself the right of withholding or withdrawing a pension or any part of it whether permanently or for a specified period. The authority which institutes proceedings of the nature referred to in the above rule, should without delay intimate the fact to the Audit Officer concerned.

It has also been decided that in a case in which a pension as such is not withheld or withdrawn but the amount of any pecuniary loss caused to Govt. is ordered to be recovered from the pension, the recovery should not ordinarily be made at rate exceeding one third of the gross pension originally sanctioned including any amount which may have been commuted.

7. What is the nature of the power conferred by Rule 21 ? What is the ambit and scope of the power ? How is the provision to be interpreted ? These indeed are the crucial questions which fall for determination in this case. We must, therefore first bear in mind the golden rule of interpretation that in construing any statutory provision the object of the enactment first and then that of the provision concerned should be evaluated for unravelling the legislative intent manifested in the language used by the legislature in the provision calling for judicial interpretation. Indeed, the concerned provision must be viewed in its context and setting for this purpose. Reference may, therefore, be made to some other

relevant provisions of the Pension Rules which may throw light on its object and also the objection of Rule 21 in particular. Section IV of Chapter V of the Rules deals with "superannuation pension" of which Rule 95 prescribes the "procedure". It appears from this rule that Head of the Department is required to prepare a list on the 1st of January in each year of all officers, Gazetted or Non-Gazetted, who will attain the age of superannuation in course of the next calendar year. As soon as the list is prepared an intimation shall be sent to every officer due to retire during the next year to enable him to submit a formal application for pension as required by Rule 184. From a perusal of Note-2 appended to Rule 184 it appears that authorities sanctioning pension should ensure in a case where Govt. dues are outstanding that officer concerned is apprised of the petition and is requested to pay up the dues before formally sanctioning the final pension. Indeed, Rule 95 itself contemplates that the attention of the officer has to be drawn to the provisions of Rules 184 to 188, Rule 183 cautions authority dealing with application for pension that "delay in payment of pension involves hardships" and it should be ensured that "an officer begins to receive his pension on the day on which it becomes due". Applications for pension by Gazetted Officers are to be submitted in prescribed form to the Head of the Department who is required under Rule 189 to certify the claim in the manner prescribed therein. Rule 191 authorises, among others, Head of the Department to sanction pension. He is required to have due regard to the provision of Rule 106 as to whether the service of the applicant had been "satisfactory" and if otherwise what reduction for that reason should be made from the full pension. Rule 106 provides, inter alia, that full pension admissible under the Rule is not to be given as a matter of course and that if the service of the applicant had not been "thoroughly satisfactory" the sanctioning authority should make a reduction as it thought proper.

8. We may now have a close view of the context and setting of the concerned rule. According to Rule 20 future good conduct is an implied condition of every grant of a pension and the Governor of Assam reserves to himself the right of withholding or withdrawing a pension or any part of it if the petitioner be convicted or found guilty of misconduct. According to Note-2 appended to the rule failure or refusal of a pensioner to pay any payment owed by him to Govt. is not "misconduct". However, according to the explanation reduction in pension about to be sanctioned may be made in the circumstances contemplated in Rules 21 and 106(b). Rule 22 contemplates payment of "provisional pension" pending action under Rule 21 but provides that no gratuity or death-cum retirement gratuity shall be paid to the applicant until the conclusion and till final orders are passed in the proceeding. No officer may be granted pension who is dismissed or removed from service for misconduct, insolvency or inefficiency though some "compassionate allowances" etc. may be granted to him according to Rule 24.

9. We may now address ourselves to the core question. What is the object and purpose of Rule 21 ? What precisely is the ambit and scope of clause (a) thereof ? That pension can be claimed by person who had been in Govt. service and is no longer in service is beyond doubt. That it is a statutory right is also clear. Pension Rules obviously deal with this right. They do not deal with right of any serving Govt. servant relating to his conditions of service. Can we, therefore, read Rule 21 as conferring power on the Govt. to punish its ex-employee for anything done by him while in service and for that matter continuing a disciplinary proceeding with that object though initiated before he ceased to be in service ? The language of Rule 21 itself does not suggest that it has this object in view. The object of the rule is to be gathered from the cognate provision to which we have referred above. It deals with some of the cases and circumstances in which the Govt. can refuse either wholly or partly, in the manner prescribed therein the claim of pension laid by an ex employee. Therefore, an affirmative and positive action must be taken under Rule 21 by the authority competent to act thereunder. According to us clauses (a) and (b) provide the modalities of taking action under Rule 21. They need not be read as 'provisos' in the technical sense. We do not, and indeed cannot, read clause (a) to mean, therefore, that in virtue thereof there shall be an automatic continuation of a pending disciplinary proceeding against an ex- employee. This provision is not meant, according to us, to resurrect a dead proceeding, a proceeding which could only be co-extensive with the tenure of service of the employee. If clause (a) is construed to mean that in virtue thereof a pending proceeding against an employee must be continued then in all cases in all pending proceedings this must be done in anticipation of action to be taken under Rule 21 by the competent authority whether or not such action is warranted thereunder. This construction would certainly produce an absurd result. Besides, there will be scope for complaints of arbitrary action if such proceedings are not continued in all cases and the disciplinary authority at its whim decides to pick and choose. Such a construction must, therefore, be ruled out as it would be unconstitutional. We must view this matter also from another angle. Rule 21 expressly confers power on the Governor of Assam to take action thereunder. Unless, therefore, such action is contemplated by him the authority which was holding the enquiry prior to the retirement of the Govt. servant will have no jurisdiction to continue the proceeding. If he does so it will tantamount to his exercising the power under Rule 21 which expressly is conferred not on him but on the Governor of Assam. The fact that clause (b) mandates sanction of the Governor to be obtained for a denovo proceeding supports this view. So also the fact that clause (b) bars action in respect of events (beyond 4 years) which also can be similarly considered by the Governor. Indeed, express omission of this requirement in cl. (a) makes it constitutionally fragile and only by interpolating consideration of the same circumstance by the Governor in taking decision, the virus of unreasonable nexus can be removed to pre-empt challenge on this score.

10. The language of clause (a) may now be examined the expression "deemed to be a proceeding under this rule" in our opinion, patently indicates recognition of the position that power to continue against an ex-employee a pending disciplinary proceeding is not warranted in law. And, because, it will be a proceeding against a "pensioner" for the purpose merely of taking action under Rule 21, the nature and character of the proceeding requires to be indicated. The object of continuing the proceeding is obviously to spare the person concerned, if possible, the ordeal of a de novo proceeding which is contemplated under clause (b). It is for expeditious disposal of the matter, because, the Pension Rules, as alluded, mandate early disposal of applications for pension. It is merely an enabling provision meant to benefit the prospective pensioner. The expression "shall be continued" is not a mandate. The word "shall" is not to be read in the mandatory sense. That use of the expression "shall" is not considered decisive is well settled by canons of construction. In a recent decision rendered in *Ajit Singh's case*. (1983) 2 SCC 217, the law on this point has been summarised and the dominant norm of interpretative technology in this field has been vocally projected. The meaning to be attached to the term should be determined, according to their Lordships, by answering the question "whether the object of the legislature will be defeated or furthered". There is intrinsic evidence written in Rule 21 itself which is to be read as a whole to indicate that the expressions "shall be continued" does not carry in it any mandate. Because, the nature and object of the proceeding under Rule 21 is entirely different. The pending proceeding even if continued cannot end in the punishments contemplated under the Disciplinary or Service Rules. Rule 7 of the Service Rules contemplates different kinds of penalties which may be imposed on a Govt. servant. Although clause (iii) contemplates "recovery from pay of the whole or part of any pecuniary loss caused by negligence or breach of orders to the Govt. "under Rule 21 what can be done is recovery from a person of the whole or part of any pecuniary loss caused to the Govt". on the condition that the person concerned in the pending proceeding is found guilty of "grave misconduct or negligence". Having regard to Explanation (a) to Rule 21 wherein mention is made of "statement of charges" we feel persuaded to take the view that unless the person concerned is apprised of the intention by the govt. of continuing the pending proceeding in terms of Rule 21 there shall be no jurisdiction to do so in the authority which had commenced the same. The expression "statement of charges" must obviously indicate not the allegations only but also the consequences likely to follow from the action proposed to be taken in respect thereof. Indeed, the requirement of principle of natural justice would persuade us to take this view. Prior warning is imperative for visiting a person with penal consequences. In their recent decision in *liberty Oil Mills's case* (AIR 1984 SC 1271) their Lordships dwelt at length on the question of reading into the statutory provision the requirements of natural justice. There can be no doubt that pursuant to a decision rendered in a pending proceeding continued after retirement of a Government servant serious civil consequences of penal nature follow which are writ large on the face of Rule 21 itself. In *Maneka Gandhi* (AIR 1978 SC 597) nine learned Judges of the Supreme Court dealt with the question of reasonableness of procedure in the context of Art. 21. Bhagwati, J. (speaking for himself and for Untwalia and Fazal Ali, JJ.) observed that natural justice is a great humanising principle intended to invest law with fairness and to secure justice. "Although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of legislature", so said their Lordships. Although "pension" for a Govt. servant is a bounty for his past services the statutory obligation saddled on the State under the Pension Rules prohibits it from acting in a manner which may impinge on his right to livelihood embraced by Art. 21. We must remember that Pension Rules aforesaid are framed under Art. 309. However, in *(Francis Coralie)* (AIR 1981 SC 746) the court observed that the right to life enshrined in Art. 21 means something more than just physical survival, It includes right to live with human dignity and all that goes along with it, the bare necessities of life such as adequate nutrition, clothing and shelter over the head----". In a later decision, *Board of Trustees vs. Dilip Kumar* (AIR 1983 SC 109). their Lordships observed as follows :

“Where therefore the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person, some of the finer graces of human civilisation which make life worth living would be jeopardised and the same can be put in jeopardy only by law which inheres fair procedures”.

11. This court had occasion to deal with the justiciability of reasonableness of procedure as well as necessity of reading the requirement of reasonable procedure in statutory rules. In *Dhirendra Kumar Borthakur* (1983) 2 GLR 459, one of us (Dr. Singh J.) observed trying on *Dilip Kumar* (supra) that Art. 21 being attracted to disciplinary proceeding the reasonableness of procedure also apart from the action of the authorities which impinges on the right of livelihood of civil servant becomes justiciable. In *Sushil Kumar vs. Assam* (AIR 1984 Gau. 69) one of us (Dr. Singh, J) in dealing with the provision concerning suspension/dissolution of a School Managing Committee observed in the context of the right inhered by Arts. 29 and 30 that the Court would read in the relevant provision the requirement of show cause notice.

12. For the foregoing reasons we entertain no doubt about the position that Rule 21 of the Pension Rules does not contemplate or authorise automatic continuation of any pending disciplinary proceeding against a retired Govt. servant. Indeed, according to us, condition precedent for continuance of the proceeding in terms of clause (a) thereof is a decision of the competent authority, namely, Governor of Assam, to take

action against the person concerned under Rule 21. That apart, before a pending proceeding can be "continued" after retirement of a Govt. servant a show cause notice must be served on him apprising him of the decision and of the action proposed to be taken in terms of clause (a) of Rule 21. Reasonableness of this procedure would, however further mandate these requirements to be fulfilled in a reasonable manner and within a reasonable time. In *Mansaram* (1984) 1 SCC 125, their Lordships of the Supreme Court held that when time is not stipulated in the statute in respect of the proposed action the administrative action contemplated must be taken within a reasonable time. The nature of the action and the proceeding contemplated under Rule 21 make it necessary to insist on the primacy of the requirement of "reasonable time". Because, the nature of the right created by the Pension Rules and the object of the provisions of the said Rules make it clear that there should be no unreasonable delay in the matter of settlement of a claim for pension. The object fulfilling the Directive Principles must not be defeated. Reasonable explanation must be forthcoming to explain the delay in taking decision by the competent authority under Rule 21 and also in the service of show cause notice thereunder by the disciplinary authority. A pending proceeding cannot be allowed to prolong indefinitely awaiting either the "decision" or the "show cause notice" which are essential requirements of an action under Rule 21.

13. The admitted position in the instant case is that there is no decision by the Governor of Assam under Rule 21 and indeed, no show cause notice also has been served on the petitioner informing him that the proceedings initiated against him in 1975 shall be continued in term of Rule 21. The petitioner retired on 1. 4. 83. The return to the petition in the instant case was filed by the respondents, State of Assam & ors. on 6. 6. 83. Neither in the return nor in the course of hearing which took place from 19.6.84 to 21.6.84 we were informed that any "decision" was taken or any "show cause notice" was served on the petitioner. The stand of the respondents all throughout has been that Rule 21 contemplates an automatic continuance of the pending proceeding and accordingly the impugned proceeding initiated in 1975 did not lapse on the retirement of the petitioner but continued and shall continue until the respondents at their sweet will decide to conclude the same. We have, therefore, no hesitation to hold the impugned proceedings (Annexure XI) to be without jurisdiction and to quash the same.

14. In the result the application succeeds and is allowed. The rule is made absolute. But in the facts and circumstances of the case we make no order as to costs.

15. Before parting with the records of the case we would like to say two more things. First, petitioner's learned counsel, Mr. B. K. Das, pressed several other points as well indeed vigorously, while assailing the validity of Annexure XI and cited several decisions on the interpretation of the term "misconduct" and the effect of crossing efficiency bar but we consider it unnecessary to burden this judgment by dealing with his other contentions. Second, both of us had to be away on judicial tours for long and also short spells with intervening summer recess and other holidays which made it impossible for us to deliver our judgment with greater despatch.