J.P. Bansal vs State Of Rajasthan & Anr on 12 March, 2003

Author: Arijit Pasayat

Bench: Shivaraj V. Patil, Arijit Pasayat

```
           CASE NO.:
Appeal (civil)  5982 of 2001

PETITIONER:
J.P. Bansal

RESPONDENT:
State of Rajasthan & Anr.

DATE OF JUDGMENT: 12/03/2003

BENCH:
SHIVARAJ V. PATIL & ARIJIT PASAYAT.

JUDGMENT:
```

J U D G M E N T ARIJIT PASAYAT,J Appellant's prayer for issuing a writ of mandamus to the State of Rajasthan to pay compensation on cessation of functioning as Chairman of the abolished Rajasthan Taxation and Tribunal (in short 'the Tribunal') having been turned down by learned Single Judge and Division Bench of the Rajasthan High Court, this appeal has been preferred. As the core question involved is pristinely legal, it is unnecessary to enter into the factual aspects in detail.

Factual panorama in a nutshell is as follows:

> Appellant was appointed as Judicial Member of the Tribunal in terms of notification dated 16.9.1995 issued by the Finance Department (Taxation Division) of the Government of Rajasthan. Appointment of the appellant was made by the Governor in exercise of the powers conferred by clause (a) of sub-section (2) of Section 3 of the Rajasthan Taxes and Tribunal Act 1995 (in short 'the Act'). By the notification dated 16.9.1995 referred to above, Chairman and the technical member were also appointed. Subsequently, he was appointed to discharge functions of Chairman of the Tribunal till appointment of regular Chairman. This contingency arose on the previous Chairman attaining the age of 65 years. State Government vide notification dated 27.2.1999 issued an Ordinance No.1/1999 styled The Rajasthan Taxation Tribunal (Repeal) Ordinance, 1999 (in short 'the Ordinance'). The same became operative w.e.f. the date of notification i.e. 27.2.1999. By the above Ordinance under Section 5 matters and proceedings pending before Tribunal on the date of commencement of the Ordinance stood automatically transferred to the High Court for disposal. As a consequence of Tribunal being abolished, continuance of appellant as Chairman automatically came to an end. Appellant claimed compensation of

Rs.5,35,648/- with interest @ 15% per annum by filing a writ petition on the ground that his tenure appointment was to continue up to 18.9.2000. Since there was a premature termination of the tenure appointment, claim of compensation for the balance period from the date of termination of the appointment till 18.9.2000 (which according to him was the last date of the period of tenure appointment) was made. The writ application was filed before the Rajasthan High Court at Jaipur Bench. The stand of the appellant before the learned Single Judge was that there was a Cabinet decision taken to release salary to the appellant for the balance period which was to be paid. As the tenure of the appellant could not have been curtailed, he was entitled to compensation. By judgment dated 27.9.1999 in SB Civil Writ Petition No.4379 of 1999 the writ petition was dismissed by learned Single Judge. It was noted that the validity of the Ordinance was not challenged. Since the Tribunal itself was abolished and all cases pending before it have been transferred to the High Court, no interference was called for. It was noted that the exact amount of compensation can only be decided by a competent court after taking evidence of the parties. So far as implementation of the Cabinet decision is concerned, it was noted that the same was a matter of discretion of the Government and it was open to the appellant to make a representation to the concerned authorities. It was not open to the High Court to enforce the Cabinet decision. The matter was carried in appeal before the Division Bench which dismissed the same holding that the learned Single Judge has pronounced a well-reasoned judgment and no interference is called for.

Learned counsel for the appellant primarily took three stands in support of the appeal. Firstly, it was submitted that the decision of the Cabinet was enforceable. In the meeting of the Cabinet four decisions were taken. They related to: (1) Promulgation of Ordinance, (2) repatriation of the Technical Member to his parent department (3) absorption of the members of the staff and (4) payment of compensation to the appellant. While the first three decisions were implemented; only the last one relating to payment of compensation was not implemented. The stand taken by the State Government cannot partake the character of Government order under Article 166 of the Constitution of India, 1950 (in short 'the Constitution') is not tenable. Secondly, clause (2) of Article 310 of the Constitution deals with payment of compensation on premature cessation of a tenure appointment on the basis of contract to that effect. Even though there was no contractual prescription for payment of compensation, that has to be taken as inbuilt requirement in the spirit of clause (2) of Article 310. There has to be interpretation of the provisions for giving effect to constitutional mandates. The decision taken by the Cabinet was in line with the said provision and, therefore, the High Court was not justified in refusing the grant of compensation. Finally, since there has been violation of the legitimate expectation of the appellant to continue till the end of tenure period, by application of the principle of legitimate expectation the State Government was bound to pay compensation irrespective of whether there was any Cabinet decision earlier or not and that would not make any difference. Section 4(b) of the Ordinance also has relevance in that context. Any obligation or liability accrued or incurred under the Act repealed are not be affected by the repeal.

In support of the stands reliance was placed on following decisions: (L.G. Chaudhari, vs. The Secretary, L.S.G. Dept., Govt. of Bihar and Others AIR 1980 SC 383, State of Himachal Pradesh and Anr. vs. Kailash Chand Mahajan and Ors. 1992 Supp (2) SCC 351, R. Rajendran and Ors. etc. etc. vs. State of Tamil Nadu and Ors. AIR 1982 SC 1107, State of A.P. and Ors. vs. Bollapragada Suryanarayana and Ors. 1997 (6) SCC 258, Dr. L.P. Agarwal vs. Union of India and Ors. AIR 1992 SC 1872, Sri Justice S.K. Ray, vs. State of Orissa and Ors. JT 2003 (1) SC 166).

In response, learned counsel for the State of Rajasthan submitted that there was no Cabinet decision in the line submitted by the appellant. Even if there would have been any such Cabinet decision, it cannot meet the requirement of Government order, as envisaged under Article 166 of the Constitution. Further the termination of the appointment came to be effectuated on the basis of legislative action. Therefore, there is no scope for grant of any compensation. The decisions relied upon have no application as there were specific provisions for payment of compensation in the concerned statutes. The principles of legitimate expectation have no application to the facts of the case, as are the provisions of Section 4(b) of the Ordinance. There is no dispute that under sub-section (5) of Section 3 of the Act, a Judicial Member was to hold office for a term of five years from the date on which he enters upon the office or till he attains the age of sixty two years, whichever is later. In view of this undisputed position, the controversy lies within the very narrow compass.

Article 166 of the Constitution deals with the conduct of Government business. The said provision reads as follows:

> "166. Conduct of business of the Government of a State. (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.
>
> (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.
>
> (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

Clause (1) requires that all executive action of the State Government shall have to be taken in the name of the Governor. Further there is no particular formula of words required for compliance with Article 166(1). What the Court has to see is whether the substance of its requirement has been complied with. A Constitution Bench in R. Chitralekha etc. vs. State of Mysore and Ors. (AIR 1964 1823) held that the provisions of the Article were only directory and not mandatory in character and if they were not complied with it could still be established as a question of fact that the impugned order was issued in fact by the State Government or the Governor. Clause (1) does not prescribe how

an executive action of the Government is to be performed, it only prescribes the mode under which such act is to be expressed. While clause (1) in relation to the mode of expression, clause (2) lays down the ways in which the order is to be authenticated. Whether there is any Government order in terms of Article 166, has to be adjudicated from the factual background of each case. Strong reliance was placed by learned counsel for the appellant on L.G. Chaudhari (supra) to contend that for all practicable purposes the decision of Cabinet has to be construed as a Government order, because three of the decisions taken by the Cabinet have been implemented. As noted above, learned counsel for the State took the stand that neither in the writ petition nor before the High Court, the Cabinet decision itself was produced. In fact, the Cabinet memorandum and the order of the Cabinet show that no decision was taken to pay any compensation. In this connection reference is made to the Cabinet memorandum dated 18.3.1993 and the decision No. 57 of 1999. It was further submitted that even if it is conceded for the sake of argument that such decision was taken, the same cannot be enforced by a writ petition.

We need not delve into the disputed question as to whether there was any Cabinet decision, as it has not been established that there was any Government order in terms of Article 166 of the Constitution. The Constitution requires that action must be taken by the authority concerned in the name of the Governor. It is not till this formality is observed that the action can be regarded as that of the State. Constitutionally speaking the Council of Ministers are advisors and as the head of the State, the Governor is to act with the aid or advice of the Council of Ministers. Therefore, till the advice is accepted by the Governor, views of the Council of Ministers does not get crystalised into action of the State. (See: The State of Punjab vs. Sodhi Sukhdev Singh AIR 1961 SC 493, Bachhittar Singh vs. State of Punjab and Anr. AIR 1963 SC 395). That being so, the first plea of the appellant is rejected.

Coming to the plea relating to clause (2) of Article 310, it has to be noted that compensation is payable for premature termination of contractual service. The clause is only an enabling provision which empowers the Governor to enter into the contract with specially qualified person(s) providing for payment of compensation where no compensation is payable under the doctrine "service at the pleasure of the State". In the absence of any specific term regarding compensation, it cannot be countenanced that the intention was to pay it. Had there been an inbuilt requirement to pay compensation as contended by the appellant, there was no necessity for specifically incorporating a provision in that regard. A bare reading of clause (2) makes it clear that there can be a stipulation for payment of compensation in the contract to a person who is holding a civil post under the Union or a State, if before the expiry of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate the post. Being an enabling provision in the matter of payment of compensation on the basis of a contractual obligation, it cannot be said that even when there is no stipulation in a contract of employment, the same is implicit.

Submission of learned counsel that such a provision is inbuilt and has to be read into the Act and the Ordinance is clearly unacceptable.

It is said that a statute is an edict of the legislature. The elementary principle of interpreting or construing a statute is to gather the mens or sententia legis of the legislature.

Interpretation postulates the search for the true meaning of the words used in the statute as a medium of expression to communicate a particular thought. The task is not easy as the "language" is often misunderstood even in ordinary conversation or correspondence. The tragedy is that although in the matter of correspondence or conversation the person who has spoken the words or used the language can be approached for clarification, the legislature cannot be approached as the legislature, after enacting a law or Act, becomes functus officio so far as that particular Act is concerned and it cannot itself interpret it. No doubt, the legislature retains the power to amend or repeal the law so made and can also declare its meaning, but that can be done only by making another law or statute after undertaking the whole process of law-making.

Statute being an edict of the legislature, it is necessary that it is expressed in clear and unambiguous language. In spite of Courts saying so, the draftsmen have paid little attention and they still boast of the old British jingle "I am the parliamentary draftsman. I compose the country's laws. And of half of the litigation, I am undoubtedly the cause", which was referred to by this Court in Palace Admn. Board v. Rama Varma Bharathan Thampuran (AIR 1980 SC 1187 at. P.1195). In Kirby v. Leather (1965 (2) All ER 441) the draftsmen were severely criticized in regard to Section 22(2)(b) of the (UK) Limitation Act, 1939, as it was said that the section was so obscure that the draftsmen must have been of unsound mind.

Where, however, the words were clear, there is no obscurity, there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to innovate or take upon itself the task of amending or altering the statutory provisions. In that situation the Judges should not proclaim that they are playing the role of a law-maker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. This can be vouchsafed by "an alert recognition of the necessity not to cross it and instinctive, as well as trained reluctance to do so". (See: Frankfurter, Some Reflections on the Reading of Statutes in "Essays on Jurisprudence", Columbia Law Review, P.51.) It is true that this Court in interpreting the Constitution enjoys a freedom which is not available in interpreting a statute and, therefore, it will be useful at this stage to reproduce what Lord Diplock said in Duport Steels Ltd. v. Sirs (1980 (1) ALL ER 529, at p.

542):

> "It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if Judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to public interest."

Where, therefore, the "language" is clear, the intention of the legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the statute as also what has not been said. A construction which requires, for its support, addition or substitution of words or which results in rejection of words, has to be avoided, unless it is covered by the rule of exception, including that of necessity, which is not the case here. (See: Gwalior Rayons Silk Mfg. (Wvg.) Co.

Ltd. v. Custodian of Vested Forests (AIR 1990 SC 1747 at p. 1752); Shyam Kishori Devi v. Patna Municipal Corpn. (AIR 1966 SC 1678 at p. 1682); A.R. Antulay v. Ramdas Sriniwas Nayak (1984 (2) SCC 500, at pp. 518, 519)]. Indeed, the Court cannot reframe the legislation as it has no power to legislate. [See State of Kerala v. Mathai Verghese (1986 (4) SCC 746, at p. 749); Union of India v. Deoki Nandan Aggarwal (AIR 1992 SC 96 at p.101) The decision in Dr. L.P. Agarwal (supra) is also of no assistance to the appellant because the issues involved was whether in respect of tenure post concept of superannuation is applicable and the consequences of premature retirement. In that context direction was given for payment of arrears of salary etc. The issues were entirely different and, therefore, that decision has no application.

The decision in R. Rajendran and Ors. etc. etc. (supra) revolves around altogether different controversy. That related to doctrine of pleasure incorporated under Article 310. It was, inter alia, observed in the said case that the power to abolish a civil post is inherent in the right to create it. The Government has power subject of course to the constitutional provisions to reorganize a department to provide efficiencies and to bring about economy. It can abolish an office in good faith. It was further held in that case that the abolition of the post of village officers was sought to be achieved by a piece of legislation passed by the State legislature. Want of good faith or modalities cannot be attributed to a legislature. The only question to be considered was whether the legislature is a colorable one lacking in legislative competence or whether it transgresses any of the constitutional limitations. The plea that there was violation of Article 19(1)(g) of the Constitution was negatived as the Act did not affect right of any of the incumbent of the posts to carry on any occupation of their choice, even though they may not be able to stick on to the post which they were holding.

So far as Kailash Chand Mahajan and Ors. (supra) is concerned, there was a specific provision regarding payment of compensation in the said case. That makes a great deal of difference.

The decision in State of A.P. and Ors. vs. Bollapragada Suryanarayana and Ors. (supra) does not in any way assist the appellant and, in fact, is one which goes against him. That case related to abolition of posts by legislation. In the said case also there was a provision for compensation specifically indicated in Section 5 of the A.P. Abolition of Posts of Part-time Village Officers Act, 1985. As indicated in the case of Kailash Chand Mahajan and Ors. (supra) clear stipulation in the Act makes a difference. There is no specific provision for payment of compensation in the present case.

The relevant observations appeared at paragraph 5 of the judgment in Bollapragada's case reads as follows:

> "It is contended by the State that the respondents are not entitled to gratuity or the benefit of the Family Benefit Scheme because the posts of part-time Village Officers have been abolished under the said Act. The Gratuity Scheme under GOMs dated 18.4.1980 provides, inter alia, for payment of gratuity to the Village Officer at the time of demitting office after attaining the age of 58 years after giving notice to the appointing authority. Therefore, the Gratuity Scheme expressly provides for the manner of demitting office on attaining the age of 58 years, or 60 years, as the case

> may be. It is only when the office is demitted in the manner set out in the Scheme that gratuity under the said GOMs becomes payable. The office is required to be demitted by the holder concerned after giving a notice to the appointing authority. This clearly contemplates a voluntary relinguishment of office on attaining the specified age. There is no retirement age for this office. This provision would not apply when, by legislation, the posts are abolished. In such a situation there is no question of voluntary demitting of office after notice. The provisions of the said GOMs, therefore, cannot be attracted when the posts are abolished by legislation. This is precisely the reason why under Section 5 of the said Act, a provision for compensation has been made, which the respondents have received."

One of the pleas of the appellant was with reference to Section 4(b) of the Ordinance, which reads as under:

> "4. Savings The repeal made under Section 3 shall not affect
>
> (a) the previous operation of the Act so repealed or anything duly done or suffered thereunder; or
>
> (b) any obligation or liability accrued or incurred under the Act so repealed; or xxx xxx xxx"

The said provision also does not in any way assist the appellant because there is no obligation or liability accrued or incurred under the repealed Act to pay compensation. There was no obligation or liability fixed under the Act for payment of compensation.

The decision in Sri Justice S.K.Ray vs. State of Orissa and Ors. (JT 2003 (1) SC 166) is also distinguishable on facts. In that case under the scheme of the enactment under which the appellant was appointed, there was a bar on the appointee to hold any office of trust or profit and also there was bar on his acting as a member of the legislature, Central or State or any other position which may come in conflict with the office of Lokpal. There was provision also that he cannot hold any office even after he ceases to hold the office of Lokpal. There were these disabilities attached to him for all time to come after ceasing to hold office. In the instant case there is no such provision, and on the contrary in the Ordinance Section 6 provides as follows:

> "6. FURTHER EMPLOYMENT OF CHAIRMAN AND MEMBER,
>
> -
>
> Notwithstanding anything contained in sub-section (7) of Section 3 of the repealed Act, the Chairman or any other member of the Tribunal shall not be ineligible for further employment under the State Government or under any local authority or under any corporation owned or controlled by the State Government."

What remains to be considered is the plea of legitimate expectation. The principle of 'legitimate expectation' is still at a stage of evolution as pointed out in De Smith Administrative Law (5th Edn. Para 8.038). The principle is at the root of the rule of law and requires regularity, predictability and certainty in governments' dealings with the public. Adverting to the basis of legitimate expectation its procedural and substantive aspects, Lord Steyn in Pierson v. Secretary of State for the Home Department (1997 (3) All ER 577, at p.606)(HL) goes back to Dicey's description of the rule of law in his "Introduction to the study of the Law of the Constitution" (10th Edn. 1968 p.203) as containing principles of enduring value in the work of a great jurist. Dicey said that the constitutional rights have roots in the common law. He said:

> "The 'rule of law', lastly, may be used as a formula for expressing the fact that with us, the law of constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land".

This, says Lord Steyn, is the pivot of Dicey's discussion of rights to personal freedom and to freedom of association and of public meeting and that it is clear that Dicey regards the rule of law as having both procedural and substantive effects. "The rule of law enforces minimum standards of fairness, both substantive and procedural". On the facts in Pierson, the majority held that the Secretary of State could not have maintained a higher tariff of sentence that recommended by the judiciary when admittedly no aggravating circumstances existed. The State could not also increase the tariff with retrospective effect.

The basic principles in this branch relating to 'legitimate expectation' were enunciated by Lord Diplock in Council of Civil Service Unions and Ors. v. Minister for the Civil Service (1985 AC 374 (408-409) (Commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced. In the above case, Lord Fraser accepted that the civil servants had a legitimate expectation that they would be consulted before their trade union membership was withdrawn because prior consultation in the past was the standard practice whenever conditions of service were significantly altered. Lord Diplock went a little further, when he said that they had a legitimate expectation that they would continue to enjoy

the benefits of the trade union membership, the interest in regard to which was protectable. An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambiguous. It could be a representation to the individual or generally to class of persons.

Even so, it has been held under English law that the decision maker's freedom to change the policy in public interest, cannot be fettered by the application of the principle of substantive legitimate expectation. Observations in earlier cases project a more inflexible rule than is in vogue presently. In R. v. IRC, ex p Preston (1985 AC

835) the House of Lords rejected the plea that the altered policy relating to parole for certain categories of prisoners required prior consultation with the prisoner, Lord Scarman observed:

> "But what was their legitimate expectation. Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case be examined individually in the light of whatever policy the Secretary of State sees fit to adopt provided always that the adopted policy is a lawful exercise of the discretion conferred upon him by the statute. Any other view would entail the conclusion that the unfettered discretion conferred by statute upon the minister can in some cases by restricted so as to hamper or even to prevent changes of policy."

To a like effect are the observations of Lord Diplock in Hughes vs. Department of Health and Social Security (HL) 1985 AC 776 (788):

> "Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government."

Before we do so, we shall refer to some of the important decisions of this Court to find out the extent to which the principle of substantive legitimate expectation is accepted in our country. In Navjyoti Co-op. Group Housing Society vs. Union of India (1992 (4) SCC

477), the principle of procedural fairness was applied. In that case the seniority as per the existence list of co-operative housing societies for allotment of land was altered by subsequent decision. The previous policy was that the seniority amongst housing societies in regard to allotment of land was to be based on the date of registration of the society with the Registrar. But on 20.1.1990, the policy was changed by reckoning seniority as based upon the date of approval of the final list by the Registrar. This altered the existing seniority of the societies for allotment of land. This Court held that the societies were entitled to a 'legitimate expectation' that the past consistent practice in the matter of allotment will be followed even if there was no right in private law for such allotment. The authority was not entitled to defeat the legitimate expectation of the societies as per the previous seniority list without some overriding reason of public policy as to justify change in the criterion. No such overriding public interest was shown. According to the principle of 'legitimate expectation', if

the authority proposed to defeat a person's legitimate expectation, it should afford him an opportunity to make a representation in the matter. Reference was made to Halsbury's Laws of England (p.151, Vol.1 (1) (4th Ed. re-issue) and to the CCSU case. It was held that the doctrine imposed, in essence, a duty on public authority to act fairly by taking into consideration all relevant factors, relating to such legitimate expectation. Within the contours of fair dealing, the reasonable opportunity to make representation against change of policy came in.

Lastly we come to the three-judge Bench judgment in National Building Construction Corporation vs. S. Raghunathan & Others. (1998 (7) SCC 66). This case has more relevance to the present case, as it was also a service matter. The respondents were appointed in CPWD and they went on deputation to the NBCC in Iraq and they opted to draw, while on deputation, their grade pay in CPWD plus deputation allowance. Besides that, the NBCC granted them Foreign Allowance at 125% of the basic pay. Meanwhile their Basic Pay in CPWD was revised w.e.f. 1.1.1986 on the recommendation of the 4th Pay Commission. They contended that the above- said increase of 125% should be given by NBCC on their revised scales. This was not accepted by NBCC by orders dated 15.10.1990. The contention of the respondents based on legitimate expectation was rejected in view of the peculiar conditions under which NBCC was working in Iraq. It was observed that the doctrine of 'legitimate expectation' had both substantive and procedural aspects. This Court laid down a clear principle that claims on legitimate expectation required reliance on representation and resultant detriment in the same way as claims based on promissory estoppel. The principle was developed in the context of 'reasonableness' and in the context of 'natural justice'.

The principles of legitimate expectation have no application to the facts of the present case.

Looking at from any angle the appeal is devoid of any merit and deserves dismissal, which we direct.