

## Senior Supdt. Of Post Office & Ors vs Izhar Hussain on 10 August, 1989

**Equivalent citations: 1989 AIR 2262, 1989 SCR (3) 796, AIR 1989 SUPREME COURT 2262, 1989 (4) SCC 318, (1989) 3 JT 411 (SC), (1989) 2 SCALE 222, (1989) 2 LAB LN 730, 1989 SCC (L&S) 648**

**Author: Kuldip Singh**

**Bench: Kuldip Singh, Misra Rangnath**

PETITIONER:

SENIOR SUPDT. OF POST OFFICE & ORS.

Vs.

RESPONDENT:

IZHAR HUSSAIN

DATE OF JUDGMENT 10/08/1989

BENCH:

KULDIP SINGH (J)

BENCH:

KULDIP SINGH (J)

MISRA RANGNATH

CITATION:

1989 AIR 2262                      1989 SCR (3) 796

1989 SCC (4) 318                JT 1989 (3) 411

1989 SCALE (2) 222

CITATOR INFO :

RF                      1990 SC 450 (4)

ACT:

Administrative Law: Statutory rule--Cannot be modified or amended by executive instructions constitutionally invalid rule cannot be validated by executive instructions--Instructions can only supplement and not supplant the rule.

Fundamental Rules: Rule 56J--Premature retirement--Only in 'public interest'.

Liberalised Pension Rules, 1960: Rule 2(2)--Compulsory retirement-Permissible after 30 years qualifying service at 'discretion' of Government--No guide-line provided--Rule in valid.

HEADNOTE:

The respondent, and employee in the Posts and Telegraph Department, was retired from service under Rule 2(2) of the Liberalised Pension Rules, 1950 which empowered the Government to retire a servant at any time after he had completed 30 years of qualifying service. The respondent's writ petition in the Allahabad High Court was dismissed by the learned Single Judge holding that there was no infirmity in the Rule. The Division Bench, however, accepted the Special Appeal filed by the respondent and declared Rule 2(2) invalid.

Before this Court, it was contended on behalf of the appellant that the Government of India had issued instructions dated July 11, 1955 and February 8, 1956 which laid down that the retirement under Rule 2(2) of the Pension Rules should be effected when such retirement was necessary in public interest. It was further contended that the Ministry of Home Affairs Memorandum dated November 30, 1962 which was issued in the name of the President of India, was statutory and had the effect of amending Rule 2(2) of the Pension Rules, and reading the rule and the memorandum together the power under Rule 2(2) could only be exercised to weel-out unsuitable employees.

Dismissing the appeal, this Court,

HELD: (1) Central Government servants superannuate at the age of 58 years. The Government has the absolute right under Rule 56(j) of

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Fundamental Rules to prematurely retire a servant in 'Public Interest' after he has attained the age of 55 years. The Government has also the power under Rule 2(2) of the Liberalised Pension Rules to retire a servant at any time after he has completed 30 years of qualifying service. [798H-799A]

(2) Fundamental Rule 56(j) while granting absolute right to the Government provides that such power can only be exercised in 'Public Interest'. This guide-line is sufficient safeguard against the arbitrary exercise of power by the Government. The object of this Rule is to chop-off dead-wood. Rule 2(2) of the Pension Rules on the other hand provides no guide-line and gives absolute discretion to the Government. There is no requirement under the rule to act in 'Public Interest'. [799E-F]

(3) Although the rules are mutually exclusive and have been made to operate in different fields but the operational effect of the two rules is that a Government servant who has attained the age of 55 can be retired prematurely under F.R. 56(j) only on the ground of 'Public Interest' whereas another Government servant who is only 51 and has completed 30 years of qualifying service, can be retired at any time at the discretion of the Government under Rule 2(2) of the Pension Rules. Any Government servant who has completed 30 years of qualifying service and has not attained the age of

55 years can be picked up for premature retirement under Rule 2(2). Since no safe-guards are provided in the Rule, the discretion is absolute and is capable of being used arbitrarily and with an un-even hand. Rule 2(2) of the Pension Rules is therefore ultra vires Articles 14 and 16 of the Constitution of India. [799G, 800B-C]

(4) A statutory rule cannot be modified or amended by executive instructions. A valid Rule having some lacuna or gap can be supplemented by the executive instructions, but a statutory rule which is constitutionally invalid cannot be validated with the support of executive instructions. The instructions can only supplement and not supplant the rule. [800E]

(5) The Ministry of Home Affairs, Memorandum dated November 30, 1962 has not been issued under Article 309 of the Constitution of India and as such cannot be statutory. The memorandum is in the nature of executive instructions issued in the name of the President of India as required under Article 77(1) of the Constitution of India. [801D]

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Union of India & Ors. v. R. Narasimhan, A.I.R. 1988 S.C. 1733, distinguished-

#### JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1361 of 1974.

From the Judgment and Order dated 21.11.1973 of the Allahabad High Court in Special Appeal No. 60 of 1972. Anil Dev Singh, C.V.S. Rao and Tara Chand Sharma for the Appellants.

R.D. Upadhyay for the Respondent.

The Judgment of the Court was delivered by KULDIP SINGH, J. The short question for consideration before us is whether Rule 2(2) of the Liberalised Pension Rules, 1950 (hereinafter called 'Pension Rules') which permits the Central Government to retire a Government servant at any time after he has completed 30 years of qualifying service by giving him three months' notice or pay in lieu of such notice, confers unguided powers in the Government and as such is ultra vires Articles 14 and 16 of the Constitution of India.

Izhar Hussain joined the Post and Telegraph Department as a clerk on June 4, 1935. The Director, Postal Services by an Order dated April 21, 1970, retired him from service under Rule 2(2) of the Pension Rules. Izhar Hussain challenged the order of retirement by way of a writ petition before the Allahabad High Court. The learned single Judge dismissed the writ petition holding that there was no infirmity in Rule 2(2) of the Pension Rules. The Special Appeal filed by Izhar Hussain before the Division Bench of the High Court was accepted and rule 2(2) of the Pension Rules was declared invalid and the retirement of Izhar Hussain was set aside. The Union of India has come up in appeal by special leave against the judgment of the Division Bench of the High Court-

Central Government servants superannuate at the age of 58 years. The Government has the absolute right under Rule 56(j) of Fundamental Rules to prematurely retire a servant in 'Public Interest' after he has attained the age of 55 years. The Government has also the power under Rule 2(2) of Pension Rules to retire a servant at any time after he has completed 30 years of qualifying service. We may quote these Rules:

"F.R. 56(j) Notwithstanding anything contained in this Rule, the appropriate authority shall, if it is of the opinion that it is in the public interest to do so, have the absolute right to retire any Government servant after he has attained the age of fifty-five years by giving him notice of not less than three months in writing.

Provided that nothing in this clause shall apply to a Government servant referred to in clause (e) or clause (f)."

"Rule 2(2) An Officer may retire from service any time after completing 30 years' qualifying service provided that he shall give in this behalf a notice in writing to the appropriate authority at least 3 months before the date on which he wishes to retire. Government may also require an officer to retire, any time after he has completed 30 years qualifying service provided that the appropriate authority shall give, in this behalf a notice in writing to the officer at least three months before the date on which he is required to retire, or three months' pay and allowances in lieu of such notice."

Fundamental Rule 56(j) while granting absolute right to the Government provides that such power can only be exercised in 'Public Interest'. This guide-line is a sufficient safeguard against the arbitrary exercise of power by the Government. The object of this Rule is to chop-off the dead-wood. Rule 2(2) of the Pension Rules on the other hand provides no guide-line and gives absolute discretion to the Government. There is no requirement under the rule to act in 'Public Interest'. A person who joins Government service at the age of 21 years can be retired at the age of 51/52 years as by then he must have completed 30 years of qualifying service. Although the rules are mutually exclusive and have been made to operate in different fields but the operational effect of the two rules is that a Government servant who has attained the age of 55 years can be retired prematurely under F.R. 56(j) only on the ground of 'Public Interest' whereas another Government servant who is only 51 and has completed 30 years of qualifying service, can be retired at any time at the discretion of the Government under Rule 2(2) of the Pension Rules.

The object of Rule 2(2) of Pension Rules may also be to weed-

out those Government servants who have out-lived their utility but there is no guide-line provided in the Rule to this effect. The Rule gives unguided discretion to the Government to retire a Government servant at any time after he has completed 30 years of qualifying service though he has a right to continue till the age of superannuation which is 58 years. Any Government servant who has completed 30 years of qualifying service and has not attained the age of 55 years can be picked-up for premature retirement under the Rule. Since no safeguards are provided in the Rule, the discretion is absolute and is capable of being used arbitrarily and with an un-even hand. We,

therefore, agree with the Division Bench of the High Court and hold that Rule 2(2) of the Pension Rules is ultra vires Articles 14 and 16 of the Constitution of India.

Mr. Anil Dev Singh, appearing for the Union of India, contended that the Government of India has issued instructions dated July 11, 1955 and February 8, 1956 which lay down that the retirement under Rule 2(2) of the Pension Rules should be effected when such retirement is necessary in public interest. The instructions being supplementary to the Rule, according to him, the order of retirement has to be in 'Public Interest' and as such there is no vice of arbitrariness in the Rule. We do not agree with this contention of the learned counsel. A statutory rule cannot be modified or amended by executive instructions. A valid rule having some lacuna or gap can be supplemented by the executive instructions but a statutory rule which is constitutionally invalid cannot be validated with the support of executive instructions. The instructions can only supplement and not supplant the rule.

Shri Anil Dev Singh then placed reliance on Ministry of Home Affairs Memorandum dated November 30, 1962 and argued that the same, having been issued in the name of President of India, is statutory and has the effect of amending Rule 2(2) of Pension Rules. According to him reading the two together the power under Rule 2(2) of Pension Rules can only be exercised to weed-out unsuitable employees. The relevant part of the memorandum is as under:

"It has now been decided and the President is pleased to direct that the age of compulsory retirement of Central Government servants should be 58 years subject to the following exception:

6. Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' notice without assigning any reason.

This will be in addition to the provisions already contained in rule 2(2) of the Liberalised Pension Rules 1950 to retire an officer who has completed 30 years' qualifying service, and will normally be exercised to weed out unsuitable employees after they have attained the age of 55 years. The Government Servant also may, after attaining the age of 55 years, voluntarily retire after giving three months' notice to the appointing authority.

7. These provisions will have effect from the 1st December, 1962."

A bare reading of the memorandum shows that there is an obvious fallacy in the argument of Mr. Singh. The memorandum has not been issued under Article 309 of the Constitution of India and as such cannot be statutory. The memorandum is in the nature of executive instructions issued in the name of President of India as required under Article 77(1) of the Constitution of India. This was issued in anticipation of the Fundamental (Sixth Amendment) Rule, 1965 which inter alia incorporated Rule 56(j) into Fundamental Rules. Even otherwise para 6 of the memorandum could not and did not add anything to Rule 2(2) of the Pension Rules. Rule 2(2) of Pension Rules was mentioned to clarify that the power to retire under para 6 was in addition to the power already

contained in the Pension Rules. The words "weed-out unsuit- able employees" can only be read qua the power to retire under para 6 and not under Rule 2(2) of Pension Rules. There is thus no force in the argument and we reject the same. Relying on the decision of this Court in Union of India and others v. R. Narasimhan, A.I.R. 1988 S.C. 1733 Mr. Anil Der Singh contended that para 620 of the Railway Pension Manual, which is identical to Rule 2(2) of the Pension Rules, has been upheld by this Court. In Narasimhan's case the scope of Rule 2046 of the Indian Railway Establishment Code and para 620 of the Railway Pension Manual was consid- ered by this Court. Rule 2046 is a statutory rule and is identical to Fundamental Rule 56(j). Para 620 is in the nature of executive instructions but is similarly worded as Rule 2(2) of Pension Rules. A Division Bench of the Madras High Court came to the conclusion that Rule 2046 having been framed under Article 309 of the Constitution and being a compendious rule, the railway employees are only gover-

ned by the said rule and para 620 was void and inoperative. This Court while setting aside the judgment of the High Court held as under:

"Thus the areas of operation of Para 620 of the Railway Pension Manual is different from that of clause (h) and (k) of Rule 2946 of the Rules. Para 620 of the Railway Pension Manual should be treated as supplementary to Rule 2046 of the Rules. The said para which has been framed by the Union Government in exer- cise of its executive powers under Article 73 of the Constitution should be given due effect since there is no statutory provisions or a rule framed under the proviso to Article 309 of the Constitution which is inconsistent with it. "

Narasimhan's case has thus no relevancy to the contro- versy involved in this case. There was no challenge to any of the rules or para 620 of the manual on the ground that it gives unguided power to the Railway authorities to pick and choose railway employees for the purpose of pre-mature retirement. Para 620 of the Manual being executive instruc- tion supplementing the statutory Rule 2046 has no parity with Rule 2(2) of Pension Rule which is a statutory rule. In any case the point before us in the present case was neither involved nor raised in Narasimhan's case and as such Mr. Anil Dev Singh cannot derive any support from the said judgment.

There is thus no legal or equitable ground to interfere with the judgment of the Division Bench of the High Court. The appeal is dismissed with costs which we quantify as Rs.3,000.

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Appeal dis-