Supreme Court of India
State Of Assam And Anr. Etc vs Basanta Kumar Das Etc. Etc on 22 December, 1972
Equivalent citations: 1973 AIR 1252, 1973 SCR (3) 158
Author: A Alagiriswami
Bench: Alagiriswami, A.

PETITIONER:
STATE OF ASSAM AND ANR. ETC.

Vs.

RESPONDENT:
BASANTA KUMAR DAS ETC. ETC.

DATE OF JUDGMENT22/12/1972

BENCH:
ALAGIRISWAMI, A.
BENCH:
ALAGIRISWAMI, A.
VAIDYIALINGAM, C.A.

CITATION:
1973 AIR 1252 1973 SCR (3) 158
1973 SCC (1) 461
CITATOR INFO :
F 1977 SC1517 (8)
OPN 1980 SC 563 (21)
F 1989 SC 75 (8)

ACT:
Civil Servant-Inct-ease in age of retirement on satisfaction by-egarding efficiency and physical fitness-Right to be in service.
Constitution of India, 1950, Art. 133-Certificate of leave to appeal to Supreme Court granted by High Court-No mention of clause of Art. 133 under which it was thought fit-Liability of appeal to dismissed.

HEADNOTE:
In March 1963, the appellant-State issued a memorandum raising the age of retirement of the State government servants from 55 to 58. The memorandum however, stated that no government servant would be entitled to the benefit of the increased age unless he has been permitted to continue in service after the age of 55 after the appointing authority is satisfied that he is efficient and physically fit. In the annexure to the memorandum the procedure for finding out the efficiency and physical fitness of the employee was laid down.

In the case of respondents BR and K, the Board constituted to codsider their cases recommended the extension of their service, but the Minister in charge did not agree.
In the case of respondents S and H, though the Deputy Commissioner recommended their continuance in service, the Commissioner, who was the appointing authority, was not satisfied that they were fit to be continued in service and hence they were not continued.
In the case of respondent B K, the appointing authority was not ,satisfied with his work so as to extend his services.
The five respondents filed petitions in the High Court. The High Court allowed the petition of BR, and following that judgment allowed the other petitions without doing into the facts and merits of each of those cases.
Allowing the appeals to this Court,
HELD : (1) The memorandum was a mere executive instruction and not a rule under Art. 309. It did not confer legal rights and no legal action can be founded on it [164C]
(2)The petitioners did not get any right to continue in service beyond the age of 55 years as a result of the memorandum. A government servant has no such tight beyond the age of superannuation and if he is retained beyond that age it is only in exercise of the discretion ,of the Government. [165-D]
Assam v. Premadhar-, [1971] 1 S.C.R. 503 and Kailash Chatidii v. Union of India, [1962] 1 S.C.R. 374 followed.
(3)The fact that certain persons were found fit to be continued in service does not mean that others who were not so found fit had been discriminated against. Otherwise, the whole idea of continuing only efficient people in service after 55 years becomes meaningless. [165-G]
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B. N. Mishra v. State, [1965] 1 S.C.R. 693, followed.
Union of India v. J. N. Sinha, [1971] 82 I.T.R 561, referred to.
(4)(a) It is true that in the case of respondents BR and K, the Screening Board recommended their continuance and there is no material to show why the Minister formed a different impression about their capacity. But once it is held that the memorandum is only an executive instruction which confers no right on any body, the judgment of the Minister cannot be questioned unless it could be shown that there was mala fides, or that Minister was guided by ulterior motives or that the decision contravenes some law. In the present case, there is no allegation of any mala fides on the part of any of the authorities. [161-H]
(b)The High Court erred in merely following the judgment in the case of BR and ignoring the facts in the other cases. It was its duty to haveconsidered the merits of each case. [163G]
(5)The certificate of leave to appeal to this Court was granted by the High Court without mentioning under what particular clause or sub-clause of Art. 133 the leave was

granted. But in the present case, the fact that the leave obtained was not a proper one is not a ground for dismissing the appeal. A,,n objection to the certificate should be taken by the respondent at the earliest possible moment, and this Court is always prepared to consider the request by the appellant for grant of ,special leave at any stage if the circumstances of the case so requires. [168-B]

When the High Court decided these cases, the judgment of this Court in Premadhar's case had not be delivered. Therefore, a substantial question of law arose for decision in these cases, and, if the respondents had raised the point about leave at the earliest possible time, this Court would have been prepared to consider an oral request for special leave by the appellant and for condonation of delay and would have directed the appellant to file appropriate petitions. But the #poin ' t was @aised after the appeals were taken up for hearing and hence, the appellant should not be made to suffer by the respondent's negligence. [168D]

Sardar Bahadur S. Indra Singh Trust v. C.I.T., [1971] 82 I.T.R. 561, The Union of India v. Kishori Lal Gupta & Bros. [1960] 1 S.C.R. 493, Shri Durga)Irasad v. The Banaras Bank Ltd., [1964] 1 S.C.R. 475. a@rkd Bijili Cotton Mills v. Iiidustrial Tribunal II, A.I.R. 1972 S.C. 1903 referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1561 to 1563 of 1969 & 179 and 180 of 1971.

Appeals from the judgment and order dated August 19, 1968 of the Assam & Nagaland High Court in Civil Rule No. 473, 350 and 319 of 1966.

Naunit Lal for the appellants (in all the appeals). C. K. Daphtary and D. N. Mukheriee for respondents (in C.As. Nos. 1561 & 1563/69 & C.As. Nos. 179 & 180/71). D. N. Mukheriee and S. K. Nandy for respondent (in C.A. No.

1562/69).

The Judgment of the Court was delivered by ALAGIRISWAMI, J. These five appeals by leave are by the State of Assam against the judgment of the High Court of Assam in five petitions filed by the respondents in the respective appeals.

Shri Bansi Ram Das was Professor and Head of the Department of Physics in the Government Cotton College, Gauhati. Shri Kanak Lal Das was Professor and Head of the Department of Philosophy. Shri Basanta Kumar Das was a Physiological Chemist in Class I of the Assam Veterinary Service and on the relevant date was the Deputy Director of Animal Husbandry & Veterinary Department. Shri Khageswar Saikia was an Upper Division Assistant in the office of the Deputy Commissioner, Darrang Tezpur on the relevant date, and Shri Anand Chandra Hazarika was an

Head Assistant in the office of the Deputy Commissioner, Darrang, Texpur. On 21st March, 1963 the Government of Assam issued a memorandum raising the age of retirement of its servants from' 55 years to 58 years. The relevant portion of the memoranduM was as follows :

"3. No Government servant will be entitled to the benefit of the increased age of compulsory retirement unless he has been permitted to continue in service after the age of 55 years after the appointing authority is satisfied that he is efficient and physically fit for further Government service. The procedure to be followed by the appointing authorities before they permit a Government servant to continue in service is outlined in the Annexure.....

4.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 3 (three) months' notice without assigning any reason.

8.Necessary amendments to the relevant rules will be issued in due course."

In the Annexure to this memorandum the procedure to find out the efficiency and the physical fitness of the employee concerned was laid down. They were to be tested as to their efficiency by a Board consisting of the Chief Secretary, the Secretary of the department concerned and the Head of the Department. As regards physical fitness such persons were to be examined by the Civil Surgeon of the, district in which they were posted.

These five respondents were not allowed to continue in service in accordance with this memorandum and they filed petitions before the Assam High Court questioning the validity of the orders retiring them from service. The High Court first decided the case of Shri Bansi Ram Das in Civil Rule No. 319 of 1966. They allowed his petition and directed him to be put back in service to continue there till he attained the age of 58 years. The other four petitions were allowed on the basis of this judgment without going into the facts of each case or their merits.

All the five officers had put forward the contention that under terms of the memorandum dated 21-3-1963 they had a right to continue in service even after they had completed their 55th year. All of them also contended that they had been picked out for special discrimination. The Government's reply to these contentions was that no one got a right to continue in service after completing 55 years and that there was no discrimination and the fact that some officers were allowed to continue and some others who were found not fit were not continued did not mean that there was any discrimination.

In the case of Shri Bansi Ram Das and Shri Kanak Lal Das, who was the petitioner in Civil Rule No. 350 of 1966 (he is now dead and his widow is the first respondent) the Board constituted to consider their cases, after scrutinising their character roll and after consideration of facts decided to recommend them for retention in service beyond 55 years. But the Minister incharge of Education made a note as follows :

"I' cannot agree to giving extension to Prof. Kanak Lal Das and Prof. Bansi Ram Das. I consider them to be outmoded in their intellectual development."

So it can be said these cases are alike. In their cases the contention in the Government's counter affidavit was that they were not found fit to continue in service after attaining fifty five years. The Minister's remark was also given as another reason.

These two officers in particular, therefore, contended that the Board constituted to consider their fitness for further continuance in service having recommended them for such continuance and there being no material on record on the basis of which the Minister could pass the order above extracted. the order retiring them was invalid. It is true that the Screening Board had recomended the continuance of these two officers in service after their attaining the age of 55. There is also no material to show that exactly was responsible for the impression which the Minister formed about the capacity of these two officers. But once it is held that the memorandum of 21-3-63 is merely an executive instruction which confers no right on any body, the judgment of the Minister cannot be questioned unless it could be shown that there' were any mala Ides. There was no allegation even of any malafides. This Court would not go into the reasons which weighed 12-L631SupCI/73 with the, Minister in coming to the decision, unless it could be said that he was guided by ulterior motives or the decision contravenes some law. The decision of the Minister cannot, therefore, be questioned.

The cases of the other three officers are different because in their cases there is no recommendation of the Board on record showing that their continuance had been recommended. In Civil Appeal 179 and 180 though the Deputy Commissioner had recommended their continuance, the Commissioner had taken a different view. In the case of Shri Khageswar Saikia the Commissioner wrote as follows : "I have given careful consideration to this case and feel that it will not be desirable to grant extension to Shri Khageswar Saikia beyond 55 years. The reports for 1964 and 1966 recorded by different Deputy Commissioners are hardly favourable for his further retention.

On an overall consideration I regret my inability to accept your recommendation for giving any extension to Shri Khageswar Saikia. He should retire on attaining the age of 55 years."

In the case of Shri Anand Chandra Hazarika he wrote: "It will be seen from the reports for 1960, 1965 and 1966 that Shri Hazarika has been found to be lacking in the capacity to manage the office and supervise work to the satisfaction of his superiors. In 1960 the Deputy Commissioner commented that he should exercise more supervision over the junior hands. In 1965 another Deputy Commissioner commented on his lack of supervisory capacity and referred to his identification with some groups in the office. He also recorded that Shri Hazarika was slow in carrying out orders. In 1966 the same Deputy Commissioner repeated his adverse comments about lack of supervision. In the circumstances, it seems to me that the public interest will not be served by giving extension to Shri Hazarika as he will invertably hold a key supervisory post despite his lack of supervisory ability.

As regards Shri Narasimhan's report I may state that this report was received without being called for and in view of the consistent adverse remarks recorded for 1960, 1965 and 1966 it is difficult to believe that Shri Hazarika could have overnight become an excellent R.S., improved the working of

the office and proved as an asset to the Deputy Commissioner. I am afraid Shri Narasimhan's superlatives are based on an inadequate assessment for too short a period. I do not propose to comment on the preparation of a new Character Roll by Shri Hazarika containing uncertified remarks; I would, however, invite Government's attention to the Deputy Commissioner's letter in this regard.

I recommend that Shri Hazarika should be asked to retire from service on attaining 55 years of age." In the case of Shri Saikia and Shri Hazarika the Commissioner, who was the immediate superior officer of the Deputy Commissioner, who recommended their case, was not satisfied that they were fit to be continued in service beyond 55 years and he has given very valid reasons for not recommending their continuance in service. In Saikia's case, in their counter affidavit, the Government have pointed out that the Deputy Commissioner's recommendation was only a recommendation which cannot bind the Commissioner or the State Government and as the Commissioner did not find him suitable and did not allow him to continue beyond 55 years of age, he had to retire at the age of 55 years and there was no discrimination or favouritism or arbitrary action on the part of the Government. In Hazarika's case the Government, in their Counter affidavit, pointed out that though the Deputy Commissioner recommended his case for extension of service, the Commissioner did not do so and the Government had to decide the matter not in the light of the recommendation of the Deputy, Commissioner but in the light of the merits of the case judging from the entire material on record, that as he was not found efficient and suitable by the appointing authority, namely, the Commissioner, he was not allowed to continue beyond 55 years of age and that there was no discrimination or denial of equal protection of law nor any infringement of. any legal right of the petitioner.

The High Court has ignored these facts and simply followed its judgment in the case of Bansi Ram Das in these two cases also. It was its duty to have considered the merits of each case and it had failed to do so. It is obvious that these two respondents were found not suitable for being continued in service.

We shall next take up the case of Basanta Kumar Das. In his case also in their counter affidavit the Government had pointed out that the appointing authority was not satisfied with his work so as to extend, his services beyond the age of 55 years. It was specifically contended that he was not entitled to automatic extension till 58 years only because the Medical Board and the 'Screening Board found him efficient. It was further contended that as Deputy Director he was not able to manage his work quite well. It was stated that with regard to the cattle feed deals, there were large number of anomalies including charges of questionable conduct, and that as ordered by the Minister, the Secretary had to' go to Gauhati to look into the anomalies and to set things right, and that the Government did not see much of an advantage in extending his services beyond the age of 55. There was no reply, filed by the respondent to this statement on behalf of the Government and the statement, therefore, stood unchallenged. In the circumstances it is not possible to say that the Government was not justified in refusing to continue him in service beyond his 55th year.

We shall now deal with the contentions raised by all the five respondents. We must first of all point out that the memorandum dated 21-3-63 is, a mere executive instruction and not a rule made under

Article 309 of the Constitution. It did not confer any legal rights on the persons covered by it. No legal action can be founded on it. A similar view has been taken in a recent decision of this Court in Assam v. Pramadhar(1).

In Kailash Chandra v. Union of India(1) this Court had to consider the effect of Rule 2046(2) (a) of the Railway Establishment Code, which reads as follows : "Clause (a)-A ministerial servant who is not governed by sub-cl.(b) may be required to retire at the age of 58 years but should ordinarily be retained in service if he continues to be-,efficient up to the age of 60 years. He must not be retained after that age except in very special circumstances which must be recorded in writing and with the sanction of the competent authority.

This Court observed:

"This intention is made even more clear and beyond doubt by the use of the word "ordinarily". "Ordinarily means "in the large majority of cases but not invariably". This itself emphasises the fact that the appropriate authority is not bound to retain the servant after he attains the age of 55 even if he continues to be efficient. The intention of the second clause, therefore, clearly is that while under the first clause the appropriate authority has the right to retire the servant who falls within clause (a) as soon as he attains the age of 55, it will, at that stage, consider whether or not to retain him further. This option to retain for the further period of five years (1) [1971] 1 S.C.R. 503. (2) [1962] 1 S.C.R.

374. can only be exercised if the servant continues to be effi- cient; but in deciding whether or not to exercise this option the authority has to consider circumstances other than the question of efficiency also; in the absence of special circumstances he "should" retain the servant; but what are special circumstances is left entirely to the authority's decision. Thus, after the age of 55 is reached by the servant the authority has to exercise its discretion whether or not to retain the servant; and there is no right in the servant to be retained, even if he continues to be efficiency."

This was a case where the rule was statutory. It need hardly be emphasised that what applies to a statutory rule applies with greater force to mere executive instructions. This is a complete answer to the claim of the respondents in this case that as a result of the memorandum of 21-3-63 they got a right to continue in service beyond the age of 55 years. A Government servant has no right to continue in service beyond the age of superannuation and if he is retained beyond that age it is only in exercise of the discretion of the Government.

In B. N. Mishra v. State(1) it was held that "Government was not obliged to retain the services of every public servant for the same length of time. The retention of public servants after the period of retirement depended upon their efficiency and the exigencies of public service. It cannot be urged that if Government decides to retain the services of some Government servants after the age of retirement it must retain every Government servant for the same length of time. The retention of public servants after the period of retirement depends upon their efficiency and the exigencies of public service."

This again is a complete answer to the contention of the respondents that they had been discriminated against. The fact that certain persons were found fit to be continued in service does not mean that others who were not so found fit had been discriminated against. Otherwise the whole idea of continuing only efficient people in service even after they had completed 55 years becomes only meaningless. In this connection we may refer to certain observations of this Court in, Union of India v. J. N. Sinha(2) as follows : "There is no denying the fact that in all organizations and more so in government organisations, there is (1) [1965] 1 S.C.R. 693.

(2) [1971] I S.C.R. 791 at 795.

good deal of dead wood. It is in public interest to chop off the same."

With respect we agree with this observation. It is also to be noticed that there is no allegation of any mala fides on the part of any of the authorities who had to deal with their cases, alleged or proved in any of the cases. We thus come to the conclusion that there are no merits in any of the contentions put forward on behalf of the respondents, in these five appeals. This, however, leaves the question regarding the certificate granted by the High Court of Assam in the case of three respondents in three civil appeals Nos. 1961 to 1963 of 1969.

The certificates simply say "Leave to appeal to Supreme Court is granted" but do not mention under what particular clause or sub-clause of Art. 133 leave was granted. Based on the decision of this Court in Sardar Bahadur S. Indra Singh Trust v. C.I.T.(1) where it was stated: "In that certificate all the we find is a held statement by the High Court that the case is a fit one for appeal to this Court. This Court has ruled that such a certificate is an invalid one and an appeal brought on the strength of such a certificate is not maintainable."

Mr. Daphthary who appeared for the respondent Bansi Ram Das urged that the appeal should be dismissed on this simple ground. If this contention is to be up-held it will apply to the other two cases also. On behalf of the State of Assam it was contended that this point was not raised till the appeals were taken up for' argument, that they were taken by surprise and they would be prepared to file a petition for special leave if that was considered' necessary, if the appeals were adjourned by a week. In the very case relied upon by Mr. Daphtary the appellant filed a special leave application and after hearing the parties the Court came to the conclusion that the leave asked for should be granted. We may now consider some of the earlier decisions of this Court on this point. In The Union of India v. Kishori Lal Gupta & Bros(2) special leave to appeal from the judgment of a single judge of the High Court had been obtained without first appealing to the appellate blench of the High Court. This Court held that the leave could have been revoked if the objection was taken at the earliest opportunity, and an objection to the leave so granted and an application for revocation of leave made after inordinate delay at a later stage would prejudice the appellant, for it the objection had (1) [1971] 82 I.T.R. 561.

(2) [1960] 1 S.C.R. 493.

been taken at the earliest point of time the appellant would have the opportunity to prefer a Letters Patent Appeal and the appellant cannot be made to suffer for the default of the respondent.

In Shri Durga Prasad v. The Banaras Bank Ltd.(1) the High Court had certified the case under Art. 13 3 (1) (a) of the Constitution for appeal to this Court. It was urged during the hearing of the appeal on behalf of the other side that the appeal was not competent on the ground that the High Court had no jurisdiction to grant the certificate under Art. 1 3 3 (1) (a) of the Constitution without certifying that the appeal involved some substantial question of law. This Court held that the appeal could not be entertained as it was a case of a judgment of the High Court which affirmed the judgment of the single Judge and the High Court had not certified that the decision involved any substantial question of law. The counsel for the appellant, however, requested that in any event special leave to appeal under Art. 136 of the Constitution be granted. But having regard to all the circumstances this Court decided that it was not a fit case for granting leave to appeal.

In Civil Appeal No. 578 of 1963, decided on 23rd July, 1965 ,this Court, though it held that the certificate granted by the High Court was incompetent, heard the Counsel for the appellant, who made an oral request for grant of special leave undertaking to file a petition supported by an affidavit and by an application for condonation of delay immediately. This Court thought that it was a fit and proper case and that special leave should be granted because important questions of law had to be decided. It directed the appellant to file the necessary special leave petition within a' week.

In the latest decision of this Court in Bijili Cotton Mills v.Industrial Tribunal II(2) , to which one of us was a party, it was held that this Court under Art. 136 is fully competent to entertain even an oral prayer for grant of special leave and condonation of delay and if the cause of justice so demands, to grant the same and to consider the special leave to appeal on merits. On consideration of all the circumstances of that case it was held that it was fit for granting special leave to appeal and for condoning the delay. The decision in C.A. 578 of 1963 was cited with approval. These cases establish that the powers of this Court to grant special leave under Article 136 are very wide and that it would be prepared to exercise it at any stage in a power case. Furthermore, it would not allow an objection to the nature of the certificate to be taken if it is done at a late stage making it impossible for the (2) A.I.R. 1972 S.C. 1906 appellant to resort to the proper remedy as he could have done if the objection had been taken at an early stage. This Court does not simply dismiss an appeal on the ground that the leave obtained was not a proper one and leave the matter, to rest there. It is always prepared to consider the request for grant of special leave at any stage if the circumstances of the case require. An objection to the certificate should be taken at the earliest possible moment and the respondent's failure to do so would not be allowed to prejudice the appellant and he would not be made to suffer for the failure of the respondents. In this case also if the objection had been taken at the earliest point of time the appellant could have applied for special leave and in the circumstances of this case we would have been prepared to grant special leave. When the High Court decided these cases the judgment of this Court in Assam v. Premadhar had not been delivered. Therefore, a substantial question of law arose for decision in these cases. If the respondents had raised the point at the earliest possible time we would have been prepared to consider an oral request for special leave and for condonation of delay and to direct the appellants to file petitions for this purpose. But as it has been done only at the last moment after the appeals were taken up for hearing we are of opinion that

the appellants should not be made to suffer by the respondents'negligence. We, therefore, hold against this objection.

In the result all the five appeals are allowed and the judgments of the Assam High Court are set aside. We, however, make no order as to costs.

V.P.S.

Appeals allowed.