Supreme Court of India
Pushkar Nath Nehru And Ors. vs Administrator (Now By Executive ... on 26 March, 1987
Equivalent citations: AIR 1987 SC 1311, JT 1987 (1) SC 799, 1987 LablC 982, 1987 (1) SCALE 603, (1987) 2 SCC 446, 1987 (1) UJ 429 SC
Author: A Sen
Bench: A Sen, B Ray
JUDGMENT A.P. Sen, J.

1. This appeal on certificate directed against the judgment and order of the Jammu & Kashmir High Court dated September 29, 1961 raises a question as to whether the late Shri B.N. Nehru, father of the present appellants, (hereinafter referred to as the 'petitioner') was entitled to pension under Sub-section (3) of Section 28 of the Jammu & Kashmir Municipal Act, Samvat 1998, as amended by the Jammu & Kashmir Municipal (Amendment) Act, Samvat 2008, read with Rule 5 of the Jammu & Kashmir Pension Rules, 1951.

2. The facts leading up to the appeal are as follows. On January 1, 1925 the petitioner was appointed to be salaried President of the Municipal Committee, Srinagar, He continued to function as such till August 14, 1939 when he was abruptly removed from his office by an Order-in-Council dated August 8, 1939 on the ground of gross inefficiency, culpable negligence and deliberate evasion of responsibility. His appeal as well as the review to His Highness the Maharaja of Kashmir were withheld by Ramchandra Kak, the then Chief Secretary and he dismissed the same. In 1945 the petitioner brought Civil Suit No. 17 of Samvat 2002 in the Court of the District Judge for declaration that the termination of his service was wrongful and that he was entitled to continue in his office and to all his rights and privileges. The District Judge, Srinagar by his judgment dated January 5, 1953 substantially dismissed the suit except that he granted a decree for one month's wages in lieu of notice as required under Section 28 (3), on the ground that the petitioner held his office during the pleasure of the Government and therefore the Court had no jurisdiction to entertain any suit for declaration of his wrongful dismissal. Although the learned District Judge held that the Court could not grant any relief, except to the extent indicated, he adversely commented upon the arbitrary and illegal manner in which the petitioner had been removed from his post without formulation of any charges and without being afforded an opportunity of hearing which was not warranted by the facts and the Rules. On appeal, the High Court in First Appeal No. 12 of 2010 affirmed the decree of the learned District Judge. It shared with the learned District Judge its unhappiness about the abrupt manner in which the services of the petitioner had been dispensed with and left open the question of grant of some gratuity or subsistence allowance to compensate him for the loss sustained and the hardship caused.

3. The petitioner made a representation to the Government in accordance with the directions of the learned District Judge for grant of pension but the same was rejected by the Government on September 4. 1954 on the ground that his services having been terminated on August 14, 1939 i.e. prior to September 20, 1944,, the date mentioned in Rule 5 of the Rules, he was not entitled to any pension or subsistence allowance. After rejection of his representation, the petitioner moved the High Court by a petition under Article 32 (2A) for the issuance of a writ in the nature of mandamus and other suitable directions or orders directing the respondents to reinstate him in service and pay

him his arrears of salary from August 14, 1939 when the impugned order of termination was served on him till he reached the age of superannuation and for pension under Sections 34(2) (c) and 34 (3) of the Act read with Rule 5 of the Rules. In view of the aforementioned judgment by the High Court in the appeal, the petitioner gave up his challenge to the impugned order of termination in the writ petition at the hearing before a learned Single Judge and confined his submission for pension under Sections 34 (2) (c) and 34 (3) of the Act read with Rule 5 of the Rules. The learned Single Judge (Kilam, J.) by his judgment and order dated June 6, 1958 allowed the writ petition holding inter alia that the impugned order was in effect an order of compulsory retirement of the petitioner inasmuch as both the learned District Judge as well as the High Court held that the petitioner was entitled to one month's salary in lieu of notice and decreed his claim in the suit to that extent in terms of Section 28 (3) of the Act. He further held that the petitioner was entitled to pension under Sections 34(2)(c) and 34 (3) of the Act and Rule 5 of the Rules which, according to him, were retrospective in operation. The learned Single Judge however struck down the proviso to Rule 5 of the Rules specifying the cut-off date as September 20, 1944 on the ground that the classification sought to be brought about in the matter of grant of pension to municipal officers and servants on the fortuitous circumstance of the date of retirement before or subsequent to the cut-off date September 20, 1944 was wholly arbitrary, irrational and discriminatory as it subjected retired municipal servants to differential treatment without any rational nexus to the object sought to be achieved, and it thus offended against Article 14 of the Constitution. Aggrieved, the respondents preferred an appeal under Clause 12 of the Letters Patent. A Division Bench of the High Court by its judgment dated September 29, 1961 allowed the appeal and set aside the judgment of the learned Single Judge and dismissed the writ petition holding that the impugned order of termination being based on grounds of gross inefficiency, culpable negligence and deliberate evasion of responsibility was in effect an order of dismissal and not an order of compulsory retirement. It accordingly held that the petitioner was not entitled to any pension under Section 34 (2) (c) of the Act read with Rule 5 of the Rules. It further held that the provision of Sections 34(2)(c) and 34 (3) and Rule 5 of the Rules did not have retrospective effect and therefore could not confer any right on persons like the petitioner who '. were not in service at the time when the amended Act of 1998 was brought into force.

4. In is necessary in the first instance, to deal with some of the statutory provisions. Section 28 (3) of the Jammu & Kashmir Municipal Act, 1970 was in these terms :

28(3). In the absence of a written contract to the contrary, every officer or servant employed by a Committee, shall be entitled to one month's notice before discharge or to one month's wages in lieu thereof, unless he is discharged during a period of probation or for misconduct or was engaged for a special term and discharged at the '. end of it.

5. At the time when the services of the petitioner were terminated i.e. on August 14, 1939, the posts of municipal officers and servants, including that of the salaried President, were not pensionable. By Sections 34(2) (c) and 34(3) of the Jammu & Kashmir Municipal Act, 1998 : (corresponding to 1941 A.D.) which come into effect on April 14, 1942, it was provided :

34(2). If an officer or servant of a Committee is not a Government official, the Committee may subject to such conditions as the Government may prescribe grant him pension...

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(c) If his pay is over twenty rupees a month establish and maintain a provident or annuity fund and compel him to contribute thereto and where such a fund is not established grant him pension on retirement according to such rules as may be framed in this behalf."

34(3). All officers and servants of the Committee engaged previous to the date of passing of the Municipal Act of Samvat 1970 shall be considered permanent and pensionable servants of the State and shall be entitled to gratuity or pension under the pension Rules of the State to be paid from the Municipal fund.

6. The Municipal Officers and Servants' Pension Rules, 2008 (corresponding to 1951 A.D.) framed under Section 54(2) (b) of the Act by Rule 5 provide as follows :

5. Subject to the provisions of these Rules, all officers and servants of a Municipal Committee engaged after the date of passing of the Municipal Act of 1970, shall be considered pensionable servants of the Municipal Committee provided they retire on or after the 20th day of September 1944.

7. In this appeal, three main questions arise. The first question is whether the appeal under Clause 12 of the Letters Patent against the judgment of a learned Single Judge of the High Court dated June 6, 1958 allowing the writ petition filed by the petitioner and holding that he was entitled to pension under Sections 34(2) (c) and 34(3) of the Act read with Rule 5 of the Rules, was maintainable. The second is whether the Division Bench which differed from the learned Single Judge was right in holding that the termination of the services of the petitioner by the impugened Order-in-Council dated August 8, 1939, served on the petitioner on August 14, 1939, was tantamount to dismissal from service and not an order of compulsory retirement as held by the learned Single Judge and therefore he was not entitled to any pension. The third question is whether the Division Bench was in error in holding that the provisions of Sections 34(2) (c) and 34(3), as amended, and Rule 5 of the Rules were not retrospective in operation and therefore these provisions did not confer any right on persons like the petitioner who were not in service at the time when the Act of Samvat 1998 was brought into force i.e. on April 14, 1942.

8. Having heard learned counsel for the parties at quite some length, we have formed the opinion that the appeal must fail. As to the maintainability of the appeal, it is now too late in the day to say that the order passed by the learned Single Judge granting a writ of mandamus under Article 32(2A) was not a judgment in exercise of the original jurisdiction of the High Court and therefore no appeal lay under Clause 12 of the Letters Patent. Learned counsel for the appellants contends that in exercising jurisdiction under Article 32(2A) the High Court acts as a special tribunal in exercise of a new jurisdiction, and not in exercise of original civil jurisdiction and as no provision for appeal had been made in the Constitution itself, there was no right of appeal. We find it difficult to accept the contention. Clause 12 of the Letters Patent ordains that an appeal shall lie from the judgment of a Single Judge, not being an appeal in the second appellate jurisdiction, or in the exercise of the revisional jurisdiction and not being a sentence or order passed or made in exercise of the power of

superintendence. It cannot be doubted that the judgment of the learned Single Judge granting a writ of mandamus under Article 32 (2A) was not an order made by the High Court in exercise of the revisional or supervisory jurisdiction. The jurisdiction of the High Court to issue writs, directions or orders under Article 32 (2A) was undoubtedly a new jurisdiction but the judgment delivered by the learned Single Judge was in the exercise of the original civil jurisdiction and therefore appealable under Clause 12 of the Letters Patent. Unless the matter relates to criminal jurisdiction, it must be taken that the issuing of writs of certiorari will ordinarily be in the exercise of original civil jurisdiction and therefore appealable under Clause 10 of the Letters Patent. It is well-known that when a question is referred to an .established court without more, the proceedings are to be regulated by the practice and procedure of the court. The first point regarding maintainability of the appeal under Clause 12 of the Letters Patent cannot prevail.

9. As to the second point, the Division Bench was obviously in error in holding that the impugned order of termination merely being based on the ground of gross inefficiency, culpable negligence and deliberate evasion of responsibility was tantamount to dismissal and did not amount to compulsory retirement of the petitioner and therefore he was not entitled to any pension. It failed to appreciate that this could also be a ground for compulsory retirement. The order of termination does not use the word 'dismissal' but the word 'terminate' and it has to be read in conjunction- with the words used in Section 28 (3) of the Act which relates to discharge by the Government of. permanent municipal officers and servants by service of one month's notice or one month's salary in lieu thereof. The case of the petitioner clearly falls within the purview of Section 28 (3) of the Act and he was entitled to one month's notice or one month's salary in lieu thereof. Logically, it seems to us that the Government having accepted the dicers of the learned District Judge in the civil suit brought by the petitioner which was affirmed in appeal granting to him one month's salary in lieu of notice in terms of Section 28 (3) of the Act, it was not open to the Government to contend that the impugned order of termination must be construed to be one of dismissal and not of compulsory retirement. Upon consideration of the merits we are satisfied that the decision of the Division Bench on the factual aspect was apparently wrong. It must accordingly be held that the petitioner was not discharged for proven misconduct and therefore could not be held to be disentitled to receive pension on that account. That however does not imply that the petitioner, as held by the learned District Judge, was entitled to receive pension under Sections 34 (2) (c) and 34 (3) of the Act read with Rule 5 of the Rules.

10. As to the third, the ultimate question is one of construction of the provisions contained in Sections 34 (2) (c) and 34 (3) of the Act as also Rule 5 of the Rules. The learned Single Judge held that the petitioner had to be considered as permanent and pensionable servant of the State by reason of Section 34 (3) of the Act read with Rule 5 of the Rules having been appointed on January 1,1925 i.e. after the date of passing of the Municipal Act of Samvat 1970. The Division Bench has differed from him on the construction of the words used in Sections 34 (2) (c) and 34 (3) of the Act as well as Rule 5 of the Rules. According to its view, the use of the present tense in Section 34(2)(c) "may grant" and also in Section 34 (3) "shall be entitled to gratuity or pension under the Pension Rules" implies that a person concerned should be in service on the date when the Act of 1998 was brought into force i.e. on April 14,1942. On a plain construction of these provisions, the view of the Division Bench must prevail.

11. At the time when the services of the petitioner were terminated i.e. on August 14,1939, the posts of municipal officers and servants including that of the salaried President were not pensionable. There was a change in the law brought about by Act of 1998 which was brought into force on April 14, 1942.Section34 (2) was an enabling provision conferring power on the Municipal Committee to grant pension or allowances to municipal officers and servants subject to such conditions as were prescribed by the Government. Clause (c) of Section 34 (2) provided that the Committee may grant such pension to such officers according to rules as the Government prescribes. Section 34 (3) in terms made the posts of municipal officers and servants appointed after the date of passing of the Act of 1970 pensionable posts. It must follow as a necessary implication that persons appointed after that date would also be entailed to pension;, The ambiguity, if any, was removed by Rule 5 which was of a clarificatory nature and it speaks of 'all officers and servants of a Municipal Committee engaged after the passing of the Municipal Act of Sam vat 1970'. On a plain reading of "these provisions, the conclusion is irresistible that the petitioner by reason of Section 34 (3) of the Act and Rule 5 of the Rules had to be regarded as a person holding a pensionable post on the date of termination of his service i.e. on August 14, 1939. But that does not furnish a solution to the problem because the legal fiction contained in Section 34 (3) cannot be stretched any further. The provisions contained in Sections 34 (2) (c) and (3) of the Act and Rule 5 of the Rules were unfortunately not attracted in the case of the petitioner because on the date the Act of 1998 was brought into force i.e. on April 14, 1942, he was not in service holding the post of salaried President of the Municipal Committee. The third point also cannot prevail.

12. In the result, the appeal must fail and is dismissed. There shall be no order as to costs.