STATE OF WEST BENGAL & ORS. A

v.

DR. TONMOY MONDAL

(Civil Appeal No. 2928 of 2019)

MARCH 12, 2019 B

[ARUN MISHRA, NAVIN SINHA AND INDIRA BANERJEE, JJ.]

West Bengal Service Rules, 1971:

Rule 75 – Interpretation of – Voluntary retirement sought – Declined on the ground that it was not appropriate in the public interest – Order declining voluntary retirement quashed by State Administrative Tribunal – In writ petition High Court upheld the order whereby prayer for voluntary retirement was declined – Review petition was allowed restoring order of the Tribunal – On appeal, held: Merely on entertaining a different view on interpretation of rule 75, it was not open to Division Bench of High Court to review previous judgment and order passed by a different Division Bench of High Court – High Court while deciding the review has committed a fundamental jurisdictional error – It has acted as if it was exercising appellate power while exercising review jurisdiction – Even in the review application no ground was raised to constitute an error apparent on the face of record – Another jurisdictional error was that the court while deciding the review petition also decided the matter on merit instead of hearing the matter afresh – Rule 75(aa) deals with retirement in public interest which brings in the concept of compulsory retirement – Rule 75(aaa) deals with voluntary retirement – Note 3 to Rule 75 (aaa) is not confined in operation to sub-rule (aaa), it is applicable to both i.e. sub-rule (aaa) and sub-rule (aa) of Rule 75 – The High Court had taken a correct view while dealing with the writ petition – High Court in review, illegally interfered with the same – Service Law – Voluntary Retirement – Review. C D E F G

State of Uttar Pradesh v. Achal Singh **2018 (10) SCALE 89 – relied on.**

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A **Case Law Reference**

2018 (10) SCALE 89	**relied on**	**Para 9**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2928 of 2019

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From the Judgment and Order dated 20.01.2017 of the High Court at Calcutta in R.V.W. No. 18 of 2015

Anand Grover, Sr. Adv., Suhaan Mukerji, Ms. Astha Sharma, Abhishek Manchanda, Amit Verma, Ms. Dimple Nagpal, M/s Plr Chambers and Co, Advs. for the Appellants.

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S. B. Upadhyay, Sr. Adv., Konark Tyagi, Deepayan Mondal, Rahul Shyam Bhandari , Advs. for the Respondent.

The following Order of the Court was passed :

D **O R D E R**

1. Leave granted.

2. The question involved in the appeal is the interpretation of Rule 75 of West Bengal Service Rules, 1971 [hereinafter 'Rules'] framed in exercise of powers conferred by the proviso to Article 309 of the Constitution of India.

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3. The respondent-Dr. Tonmoy Mondal had joined services initially on 20.10.1986 as a Medical Officer in West Bengal Health Services on ad hoc basis. He was confirmed in the said post vide Notification dated 15.11.2002. On 16.11.2011, he sought voluntary retirement. The prayer made by the respondent was rejected by the Government vide order dated 22.02.2013 on the ground that it was not considered appropriate in the public interest to accept the request for voluntary retirement. Following is the relevant portion of the order:

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> "We know that the public interest is the welfare or wellbeing of general people. The welfare of the general public is ensured, inter alia, through recognization, promotion, and protection of the same by the Government or its agencies. The Government or its department cannot adversely affect the rights, health, and finance of the public at large. The applicant, i.e. Dr. Tanmoy Mondal is a

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doctor and his service is indispensable in public interest. At this stage, the Health & Family Welfare Department is having many vacancies and it is necessary to retain doctors to provide service to people.

Considering all these aspects, I am inclined to hold that it is not in public interest to retire Dr. Mondal. Consequently, it appears to me that the prayer of Dr. Tanmoy Mondal should be rejected. Moreover, voluntary retirement of a member of Health Services is not maintainable as per provisions laid down in DCRB Rules."

4. The respondent questioned the aforesaid order by way of filing Original Application No.754 of 2013 before the West Bengal Administrative Tribunal. The Tribunal vide order dated 18.11.2013 allowed the application and quashed the order passed by the State government declining voluntary retirement. The State of West Bengal filed Writ Petition being WPST No.208/2014 in the High Court at Calcutta challenging the same.

5. The Division Bench of the High Court initially vide judgment and order dated 22.08.2014 opined that according to Note 3 below Rule 75(aaa) of the Rules, every case of retirement under Rule 75 is to be examined by the appointing authority on the facts of the case concerned. Permission granted to one Medical Officer to retire under the Rule cannot necessarily lead to the conclusion that another Medical Officer seeking to retire under the Rule is also entitled to the permission. The extent of public interest involved in the case is to be examined by the appointing authority objectively and the opinion formed by the appointing authority as to the existence of public interest cannot be judicially reviewed unless it is the case that it was recorded with malice or *ex facie* without any basis. It was opined that the application for voluntary retirement under Rule 75 (aaa) of the Rules has nothing to do with the right not to work. The question is whether the right to seek voluntary retirement is an absolute right. It is not a case of resignation. While setting aside the order of the Tribunal dated 18.11.2013, the High Court upheld the order passed by the State Government declining to accept the prayer for voluntary retirement.

6. A Special Leave Petition was preferred in this Court against the decision dated 22.08.2014 rendered by the High Court. However, it

A was withdrawn on the ground that there were certain errors apparent on the face of the record of the order passed by the High Court and as such the petitioner wanted to file a review petition. Permission was granted to withdraw the Special Leave Petition with liberty to file a review petition.

7. Thereafter, pursuant to the aforesaid order, review petition B R.V.W. No.18/2015 in WPST No.208 of 2014 was filed in the High Court. The same has been allowed by the impugned judgment and order dated 20.01.2017 in R.V.W. No.18/2015 and the decision in Writ Petition No.208/2014 has been reversed. Same has been questioned by the State of West Bengal in the appeal.

C 8. The Division Bench while allowing the review petition has observed that on a proper interpretation, Note 3 of Rule 75 could not have been rationally or logically applied in respect of sub-Rule (aaa) of Rule 75 of the Rules. There was an error apparent on the face of the record in the judgment and order dated 22.08.2014 as such the same was required to be interfered with. Hence review has been allowed and D the order passed by the Tribunal has been restored.

9. Shri Anand Grover, learned Senior counsel on behalf of the appellant(s) has submitted that it was not proper for the Division Bench to review the previous judgment and order as no ground within the parameters of review jurisdiction was available. Apart from that, the E interpretation put upon Rule 75 (aaa) of the Rules is not correct and the case is clearly covered by the decision of this Court in *State of Uttar Pradesh v. Achal Singh* - 2018 (10) scale 89.

10. On the other hand, Mr. S.B. Upadhyay, learned Senior counsel appearing on behalf of the respondent has supported the judgment and F order passed by the High Court and contended that Note 3 was in fact not inserted vide order dated 23.06.1973 as mentioned in the notification dated 15.08.1971, there is a wrong reference to the insertion to the Note 3 of Rule 75(aaa) vide notification of 23.06.1973. He submitted that the concept of public interest is not germane in the case of voluntary G retirement. Note 3 is attracted only in the case of retirement ordered in the public interest under Rule 75 (aa) of the Rules. Thus, no case for inference with the impugned judgment and order of the High Court is made out.

11. We are constrained to observe that merely on entertaining a H different view on the interpretation of Rule 75, it was not open to the

Division Bench to review previous judgment and order passed by a different Division Bench of the High Court on 22.08.2014. A fundamental jurisdictional error has been committed by the Division Bench of the High Court while setting aside the order dated 22.08.2014. It has acted as if it was exercising appellate power while exercising the review jurisdiction. There was no such error apparent on the face of the record in the previous judgment and order dated 22.08.2014 warranting review by the different bench of the High Court. No doubt, there was a change in the composition of the Division Bench. The judgment and order passed by earlier Bench was required to be equally respected and not to be readily interfered with, until and unless there is an apparent error on the face of the record. Merely by entertaining a different view as to the interpretation of a particular provision, a judgment cannot be reviewed.

12. The Division Bench which earlier decided the matter had laboured hard to interpret Rule 75 by analyzing it more effectively and rightly than done while reviewing the order. We are of the opinion that the Division Bench ought not to have reviewed the judgment and order at all as no ground was available within the parameters of review jurisdiction. No ground had been raised even in the review application to constitute an error apparent on the face of record much less reflected in the impugned order passed in the review so as to set aside the previous judgment and order.

13. Apart from that, yet another jurisdictional error has been committed. Once the Court had found that there was sufficient reason for reviewing the order, only review petition should have been decided, after the recall of the order it ought to have heard the main matter afresh. That has not been done. By the same impugned order, the previous judgment and order have been set aside and the main case has also been disposed of without hearing it again separately. Thus, the proper procedure has not been followed.

14. When we come to the merits of the case, from the interpretation of Rule 75, it is apparent that it deals with retirement on attaining the age of superannuation in the public interest, and voluntary retirement. Rule 75 is extracted herein:

> "75 (a) Except as otherwise provided in these rules, a Government employee other than a member of the Group D service shall retire

A from service compulsorily with effect from the afternoon of the last day of the month in which he attains the age of fifty-eight years;

provided that a Government employee other than a member of the Group D service whose date of birth is the first of a month
B shall retire from service with effect from the afternoon of tin; last day of the preceding month of attaining the age of fifty-eight years;

provide further that the age-limit for retirement as prescribed in this rule shall not be applicable in cases where higher age limit up to 60 years for retirement has been fixed under any general or
C special orders of Government.

Note-In cases where the Matriculation certificate does not show the actual date of birth and instead shows the age of the candidate as on the 1st March of the years in which the examination was held in terms of years and months only excluding days, Government
D may alter the date of birth recorded in the Service Book, to correspond to the actual date of birth, if the Government employee concerned is able to produce acceptable documentary evidence in the form of an extract from Birth Register or Admission Register of the institution concerned etc. In support of the actual date of birth claimed by him, and a decision to retire him shall be taken on
E the basis of such altered date of birth. Where, however, the date of birth of a Government employee has been recorded as the first day of a month on the basis of Matriculation certificate showing the age as on the 1st March of the year in which the examination was held in terms of years and months only and where it is not
F possible to ascertain the exact date of birth on the basis of any acceptable documentary evidence like extract from the Birth Register or Admission Register of the institution concerned etc., it shall be presumed that the actual date of birth of the Government employee was a day other than the first date of the month and he may be allowed to retire on the last day of the same month instead
G of the last…of the previous month,"

75(aa) Notwithstanding anything contained in the rule, the appointing authority shall, if it is of opinion that it is in the public interest so to do, have the absolute right to retire any Government

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employee by giving him notice of not less than 3 months in writing or 3 months' pay and allowances in lieu of such notice.

(i) if he is in Group A or Group B (erstwhile gazetted) service or post and had entered Government service before attaining the age of 35 years, after he has attained the age of 50 years; and (ii) in all other cases, after he has attained the age of 55 years.

Note-(i) if on a review of the case either on a representation from the Government employee retired prematurely or otherwise, it is decided to reinstate the Government employee in service, the authority ordering reinstatement may regulate the intervening period between the date of premature retirement and the date of reinstatement by the grant of leave or, by treating it as dies non depending upon the facts an circumstances of the case;

Provided that the intervening period shall be treated as a period spent on duty for all purposes including pay and allowances, if it is specifically held by the authority ordering reinstatement that the premature retirement was itself not justified in the circumstances of the case, or if the order of premature retirement is set aside by the Court of law.

(ii) Where the order of premature retirement is set aside by a Court of law with specific directions in regard to regulation of the period between the date of premature retirement and the date of reinstatement and no further appeal is proposed to be filed, the aforesaid period shall be regulated in accordance with the directions of the court.

75(aaa)Any government employee may, by giving notice of not less than 3 months in writing to the appointing authority, retire from Government service after he has attained the age of 50 years, if he is in Group A or Group B (erstwhile gazetted) service or post, and had entered Government service before attaining the age of 35 years; and in all other cases, after he has attained the age of 55 years, provided that it shall be open to the appointing authority to withhold permission to a Government employee under suspension who seeks to retire under this sub-rule.

A Note 1 - In computing the three months notice period referred to in sub-rule(aa) and (aaa) the date of service of the notice and the date of its expiry shall be excluded.

Note 2 - The 3 months' notice referred to in sub-rule (aa) or sub-rule (aaa) above, may be given before the Government employee
B attains the age specified in the said sub-rules, provided that the retirement takes place after the Government employee, has attained the specified age.

Note 3 - The appointing authority should invariably keep on record that in his opinion it is necessary to retire the Government employee
C in pursuance of the aforesaid rule in public interest.

16. Rule 75(a) deals with the retirement on attaining the age of superannuation. The expression "compulsory" retirement has been wrongly used in the said provision. What is meant by compulsory
D retirement probably is that no one to continue in service after attaining the age of 58 years. The retirement on attaining the age of superannuation is not a concept of compulsory retirement as understood in the service jurisprudence. Be that as it may, the State may be well advised to amend the rule.

E 17. Rule 75 (aa) deals with retirement in public interest. As a matter of fact, the concept of compulsory retirement is the one which is to be found in Rule 75 (aa). It provides that there is an absolute right with the State Government in the public interest to retire a person by giving a notice of not less than 3 months in writing or 3 months' pay and allowances in lieu of such notice.

F 18. When we come to Rule 75 (aaa) of the Rules, it is apparent that the same deals with the voluntary retirement of a government employee. Any Government employee by giving notice of not less than 3 months in writing or 3 months' pay and allowances in lieu of such notice, to the appointing authority, may retire from government service
G after he has attained the age of 50 years, if he is in Group A or Group B (erstwhile gazette) service or post and had entered Government service before attaining the age of 35 years, and in all other cases, after he has attained the age of 55 years, provided that it shall be open to the appointing

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authority to withhold permission to a government employee under suspension who seeks to retire under this sub-rule.

19. Note 1 to Rule 75 (aaa) provides that in computing the three months notice period referred to in Rule 75 (a) and (aaa) date of service of the notice and date of expiry shall be excluded.

20. Note 2 specifically deals with three months notice referred in Rule (aa) and sub-rule (aaa) that it may be given before the government employee attains the age specified in the said sub-rules provided that the retirement takes place after the Government employee has attained the specified age.

21. However, Note 3 which is relevant is not confined in operation to sub-rule (aaa) of Rule 75. It is clearly provided in Note 3 that the appointing authority should invariably keep on record that in his opinion it is necessary to retire the Government employee in pursuance of the aforesaid rule in public interest. Obviously, the Note 3 is applicable to both Rule 75 (aa) and 75 (aaa) as was rightly opined by the Division Bench while rendering the judgment and order dated 22.08.2014.

22. The question is no more *res integra*. It has been considered by this Court in *Achal Singh (supra),* in which the following observations have been made:

> "33. The concept of liberty not to serve when the public interest requires cannot be attracted as retirement which carries pecuniary benefits can be subject to certain riders. The general public has the right to obtain treatment from super skilled specialists, not second rates. In Jagadish Saran v. Union of India (1980)2 SCC 768, the Court observed thus:
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> > "44. Secondly, and more importantly, it is difficult to denounce or renounce the merit criterion when the selection is for postgraduate or postdoctoral courses in specialized subjects…...To sympathize mawkishly with the weaker sections by selecting substandard candidates is to punish society as a whole by denying the prospect of excellence say in hospital service. Even the poorest, when stricken by critical illness, needs the attention of super skilled specialist, not humdrum second rates. So it is that relaxation on merit, by overruling

A equality and quality altogether, is a social risk where the stage is postgraduate or postdoctoral.

34. The concept of public interest can also be invoked by the Government when voluntary retirement sought by an employee, would be against the public interest. The provisions cannot be B said to be violative of any of the rights. There is already a paucity of the doctors as observed by the High Court, the system cannot be left without competent senior persons and particularly, the High Court has itself observed that doctors are not being attracted to join services and there is an existing scarcity of the doctors. Poorest of the poor obtain treatment at the Government hospitals. They C cannot be put at the peril, even when certain doctors are posted against the administrative posts. It is not that they have been posted against their seniority or to the other cadre. Somebody has to man these administrative posts also, which are absolutely necessary to run the medical services which are part and parcel D of the right to life itself. In the instant case, where the right of the public is involved in obtaining treatment, the State Government has taken a decision as per Explanations to decline the prayer for voluntary retirement considering the public interest. It cannot be said that State has committed any illegality or its decision suffers from any vice of arbitrariness.

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35. The decision of the Government caters to the needs of human life and carry the objectives of public interest. The respondents are claiming the right to retire under Part III of the Constitution such right cannot be supreme than right to life. It has to be interpreted along with the rights of the State Government in Part F IV of the Constitution as it is obligatory upon the State Government to make an endeavour under Article 47 to look after the provisions for health and nutrition. The fundamental duties itself are enshrined under Article 51(A) which require observance. The right under Article 19(1) (g) is subject to the interest of the general public and G once service has been joined, the right can only be exercised as per rules and not otherwise. Such conditions of service made in public interest cannot be said to be illegal or arbitrary or taking away the right of liberty. The provisions of the rule in question cannot be said to be against the constitutional provisions. In case

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of voluntary retirement, gratuity, pensions, and other dues etc. are payable to the employee in accordance with rules and when there is a requirement of the services of an employee, the appointing authority may exercise its right not to accept the prayer for voluntary retirement. In case all the doctors are permitted to retire, in that situation, there would be a chaos and no doctor would be left in the Government hospitals, which would be against the concept of the welfare state and injurious to public interest. In the case of voluntary retirement, there is provision in Rule 56 that a Government servant may be extended benefit of additional period of five years then an actual period of service rendered by him there is the corresponding obligation to serve in dire need."

22. In view of the aforesaid discussion, we are of the considered opinion that in the previous judgment and order passed by the Division Bench on 22.08.2014 had taken a correct view on merits and was illegally interfered with while exceeding the jurisdiction by the subsequent Division Bench while reviewing it and dismissing the Writ Petition being WPST No.208 of 2014 by the impugned judgment and order dated 20.01.2017.

23. The respondent is directed to report back to the duty within one month from today. He will not be entitled to the wages for the period he has not served and that would also not be counted towards the period of service for the purpose of retiral benefits.

24. The impugned order dated 20.01.2017 is set aside and the judgment and order dated 22.08.2014 is hereby restored. The appeal is allowed. No costs.

Kalpana K. Triapathy Appeal allowed.