

IN THE GAUHATI HIGH COURT
**(THE HIGH COURT OF ASSAM; NAGALAND; MIZORAM AND ARUNACHAL
PRADESH)**

ITANAGAR PERMANENT BENCH
(NAHARLAGUN)

WP (C) 156 (AP) 2018

1. Shri Tony Koyu,
Managing Director,
Arunachal Pradesh Industrial Development
and Financial Corporation Ltd.,
Govt. of Arunachal Pradesh,
Itanagar.
Mobile No. 9436040252

.....petitioner.

-VERSUS-

- 1. The State of Arunachal Pradesh,**
Represented by the Chief Secretary, Govt. of
Arunachal Pradesh, Itanagar.
- 2. The Commissioner/Secretary,**
Department of Industries, Govt. of Arunachal
Pradesh, Itanagar.
- 3. The Managing Director,**
Arunachal Pradesh, Industrial Development
and Financial Corporation Ltd., Govt. of
Arunachal Pradesh, Itanagar.

.....respondents.

By Advocates:

For the petitioners: Mr. Tony Pertin
 Mr. K. Saxena
 Mr. U. Bori

Mr. R. L. Thungon
Mr. Y. Riram
Mr. H. K. Jamoh
Mr. M. Pertin
Mr. G. Taloh

For the respondents: Mr. S. Tapin, learned Senior
Government Advocate

:::BEFORE:::
HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN

Date of hearing : 18.7.2018

Date of Judgment : **24.7.2018**

JUDGMENT & ORDER(CAV)

Heard Mr. T. Pertin, learned counsel appearing on behalf of the petitioner.

Also heard Mr. S. Tapin, learned Senior Govt. Advocate appearing on behalf of the State respondents No. 1 and 2 and Mr. N. Sharma, learned counsel appearing on behalf of the respondent No. 3.

2. The petitioner herein was appointed as a Assistant General Manager, Arunachal Pradesh Industrial Development and Financial Corporation Ltd. (in short APIDFC), Govt. of Arunachal Pradesh undertaking on 12.05.1993, by the Managing Director of APIDFC. Thereafter, he was promoted as General Manager in the year 2006 and also appointed as a Managing Director of the Corporation on usual pay and scale as per rules. The appointment of Managing Director is regulated under the relevant provision contained in Memorandum of Association and Articles of Association of APIDFC. The official date of birth of the petitioner is 18.03.1960 and as he has been appointed by the Govt. of Arunachal Pradesh providing all the service benefits, hence, according to the petitioner, he is a Govt. servant for all the purpose and in terms of the government notification, AR-68/2010, dated 28.10.2018, the retirement age of every Govt. servant under the Govt. of Arunachal Pradesh has been fixed as 60 years but the petitioner has now been suddenly released by the Commissioner, Industries, Govt. of Arunachal Pradesh, by order dated

29.03.2018 from his service w.e.f. 31.03.2018 on attaining the age of superannuation. Challenging the aforesaid order of the Commissioner, the present writ petition has been preferred under Article 226 of the Constitution for issuance of writ of certiorari and or mandamus for a direction to the authority to consider his date of superannuation as on 31.03.2020, at the age of 60 years in terms of the government notification AR-68/2010, dated 20.10.2017. Further contention that has been raised that he was not served with any prior notice of impending superannuation by the department to prepare his future course and he has been deprived of his legitimate right. Further it contends that the APIDFC is the corporation under the government of Arunachal Pradesh and is controlled and finance by the government. Although corporation was created as a separate entity under the Memorandum of Association and Articles of Association and incorporated under the Companies Act, there is no separate service and conduct rules governing the service condition of Director and the Managing Director of the Corporation. The Memorandum and Articles of Association of APIDFC is silent on the same and all the service rules of central government have been adapted by the State of Arunachal Pradesh like CCS (CCA) Rules 1965, CCS (conduct) Rules 1964. According to the petitioner as he has been appointed as per Article 68 and 69 of the Memorandum of Association, APIDFC, by the Governor of Arunachal Pradesh and therefore, service conditions applicable to the government servants shall be equally applicable to him. The petitioner being appointed as Director is stated to be out of administrative control of the corporation and even if there is any separate service rule in the APIDFC, the same would not cover the petitioner. Referring to office note, dated 22.03.2018, with proposal for extending the benefit of retirement age in terms of the Government Notification No. AR-68/10, dated 20.10.2017, which was placed before the Managing Director, who has made an observation "*as per government order*", it has been contended that the effect of aforesaid notification has been approved by the competent authority and therefore retirement age of 60 years will be applicable to the petitioner.

3. Both the State respondents as well as the Managing Direction, APIDFC in their affidavits took similar stand that the petitioner was a employee under the corporation and his salary etc. was given by the company and he was given appointment by the Governor of Arunachal Pradesh in terms of Article 68-69 of the Article of Association but not under Article 309 Constitution of India, so he cannot be a Govt. employee. As the petitioner was never a Govt. employee so he cannot claim the benefit of the new Govt. notification regarding the extension of age of superannuation as the said notification has

not yet accepted by the Board of Director of Corporation. The job of the petitioner was limited to the company, not to the State and his salary was also paid by the company.

4. The State respondent has specifically pleaded that Govt. of Arunachal Pradesh has not raise the retirement age of the employees of the Govt. undertaking Corporation from 58 to 60 years as has done in the case of State govt. employee. The petitioner was an employee of APIDFC, which is government undertaking corporation duly registered under the provision of company Act 1956 being certificate of incorporation 1748 of 1978-79 issued by the Registrar of Company on 09.08.1978 and his service is governed by the Article of Association and rules/order/practice framed or followed by the Corporation. There is no such recommendation for raising the age of superannuation in respect of the petitioner and other employees of the corporation. The Govt. notification dated 20.10.2017, Ipsofacto is not applicable to employee of the association unless duly adopted. Since inception of the corporation the age of 58 year is fixed as age of superannuation a matter of practice and rule and many of the employee of corporation has already been released on attaining the age of 58 years. The petitioner was given charge of the Managing Director, APIDFC on 12.04.2018 till regular appointment of Managing Director.

5. Further, it has been contended by all the respondents that APIDFC has its own separate and duly approved Service Rules lying down the terms and conditions of service but same could not be traced out till date for which all concern has been informed to trace out same. The petitioner has deliberately suppressed aforesaid facts to mislead the Court.

6. Regarding the pension benefit, it submits that as the service of petitioner is covered under the Social Security Schemes of Employees, (EPFO) retirement benefits are initiated after the date of retirement to be initiated by the Regional Commissioner, employee of EPFO, Guwahati and to this effect, State Govt. has to pass an order as per Article of Association and same has now been issued by the Commissioner under the Article of Association, being the head of Nodal Department of the Corporation. Denying the contention raised by the petitioner that there is no serving rule governing the director and managing director, it has been countered by the respondents that there is recruitment rules/service rule, APIDFC which was approved and authenticated by the Chairman of Board in its 56th Board of Director's meeting that was held on 08.01.1992 and no CCS conduct rules is not applicable in the case of petitioner. The respondent No.3 being the Managing Director, APIDFC has redirected the same facts as has been pleaded by the State respondents. However, he has mentioned that in the agenda item No. 3 of

56th Board of Director's meeting held on 08.01.1992, the draft staff service rule and recruitment rules was placed before the Board and same was approved and adopted which come into operation w.e.f. 01.04.1992. The then Chairman initiated a copy of rules by way of authentication on behalf of the board, copies of said meeting is annexed with the affidavit.

7. Thus according to the respondents, the petitioner has duly superannuated at the age of 58 years.

8. I have given due consideration of both the parties as well as the pleadings on record.

9. It cannot be disputed that the petitioner was an employee under the APIDFC and terms and conditions of such employee is governed by the Memorandum of Association and Article of Association. Although it is contended by the respondent side and specifically denied by the petitioner that there is a rule governing under the corporation but the same could not be produced (along with the affidavit) which remain untraced since long. However, there is a reference about such draft rules in the official communications and time of hearing a copy of draft rule has been produced with a submission that in view of the resolution of the board as incorporated in the rules, such a draft rule can be taken into consideration by this Court for a limited purpose. As per clause 23 of the draft rules, vide annexure 8 (already submitted), "an employee of a corporation except group D employees shall ordinarily retire at the age of 58 years. The board may sanction from time to time re-employment beyond the 58 years for a period not exceeding one year at a time but no employee shall ordinarily be retained in service beyond the age of 60 years."

10. Referring to decision *Vimal Kumari Vs. State of Haryana & Ors., (1998) 4 SCC 114*, it has been submitted such a draft rule can be relied provided that there is clear intention on the part of the govt. to enforce the rule in near future. Recourse to such draft rule is permissible for the interregnum to meet any emergence situation. In the instant case, the board of directors have examined and approved the service rules and recruitment rules of the corporation in the 56th meeting of the board held on 08.01.1992, as reflected from the agenda No. 3 (page 4) of draft rule with incorporation of date of retirement as 58 years as mentioned above. Such a draft rule produced from the authority is found to be not a doubtful document. From the series of earlier orders passed by the respondent authority also reflect that the employees of the corporation was superannuated at the age of 58 years. Facts to be noted that the petitioner despite

serving under the corporation for long span has not mentioned about such RR which was very much prevalent for the corporation.

11. The contention of petitioner is that the service condition of the employee of the corporation is covered by the CCS rules, in absence of RR, which is vehemently denied by the respondents. Let us examine certain aspect of the matter. There is no denial that the petitioner was serving under the corporation but by virtue of the appointment given by the Governor of the State, the petitioner claimed himself to be the government servant and thereby entitled to all the relevant benefits of the government servant. Now, the Article of Association of the APIDFC itself reflects that it is registered under the Companies Act, 1956 and there is a certificate of incorporation and for all the purpose, the said APIDFC is a company and all the employee under the company is governed by the same. The petitioner was also appointed under the clause 68 and 69 of Memorandum of Association and the Governor is the authority to appoint such person. So far as the CCS service conduct rules, 1964, Section 2 "government servant" means any person appointed by the govt. to any civil service or post in connection with the affairs of the union and includes the civilian in a defence service. As per the definition itself, the petitioner was appointed under a company, not to a post of civil service and he cannot be a government servant at all. Simply because the petitioner was appointed by the Governor and the corporation is government under taking cannot itself indicate that the petitioner is a government servant as has been claimed by the petitioner.

12. The respondent has relied upon the decision of 2003 5 SCC 163, A. K. Bindal & Anr. Vs. union of India & Ors., 2003 6 SCC 490 Officers and Supervisors of IDPL Vs. Chairman and MD IDPL & Ors. and also 2017 0 Supreme AP 64, G. Rama Mohan Rao & Anr. Vs. Govt. of AP wherein following aspects were dealt with

1. Whether the employees of public sector undertakings can be said to be persons appointed to public service and post in connection with the affairs of the State?
2. Whether employees of the government companies can claim themselves to be the government servant and claim benefits like to seek pay revision etc.?

13. In Officers & Supervisors (supra) it has been held as follows –

"Since the employees of government companies are not government servants, they have absolutely no legal right claim that the Government should pay their salary or that the additional expenditure incurred on account of revision of their pay scales should be met by the Government. Being employees of the companies, it is the responsibility of the

companies to pay them salary and if the company is sustaining losses continuously over a period and does not have the financial capacity to revise or enhance the pay scale, the petitioners, cannot claim any legal right to ask for a direction to the Central Government to meet the additional expenditure which may be incurred on account of revision of pay scales."

14. In A. K. Bindal (supra), Hon'ble Apex Court held as below –

"The legal position of the government company is that its identity remains distinct from the Government. The government company is not identified with the union but has been placed under a special system of control and conferred certain privileges by virtue of the provisions contained in Sections 619 and 620 of the Companies Act. Merely because the entire shareholding is owned by the Central Government will not make the incorporated company part of the Central Government. It is also equally well settled that the employees of the government company are not civil servants and so are not entitled to the protection afforded by Article 311 of the Constitution. Since employees of government companies are not government servants, they have absolutely no legal right to claim that the Government should pay their salary or that the additional expenditure incurred on account of revision of their pay scale should be met by the Government."

15. Reiterating the same position in G. Rama Mohan (supra), it has been held that **merely because public sector undertakings are instrumentalities of the State under Articles does not make its employees government servant.** It is observed that while public sector undertaking is a distinct juristic entity with a corporate structure of its own and carries on its functions on business principles with a certain amount of autonomy, behind the formal ownership is the deeply perverse presence of the government which acts through the instrumentality or agency of the corporation. The corporate bodies are independent entity and their employee claim benefit with the state government employee. The state government has a master servant relationship with the civil servant of the state whilst it has no such direct or indirect nexus with the employees of the corporate bodies. As the employee of the public sector undertaking and the government servant constitute two different and distinct classes neither do the conditions of service prescribed for the government servants automatically apply to the employees of public sector undertaking nor does the plea of discrimination or violation of Article 14.

16. The above proposition laid down by the Hon'ble Apex Court in clear terms has indicated that the employee of a government undertaking is not a government servant and the provision of Section 2 of the CCS is also not applicable to the petitioner. The petitioner has duly superannuated at the age of 58 years as per the RR of the corporation and there appears no perversity in the aforesaid action of the respondent.

The writ petition stands dismissed accordingly.

JUDGE

Lipak