
(2010) 07 CAL CK 0070
In the Calcutta High Court
Case No : F.M.A. No. 116 of 2010

Allahabad Bank and Others	Vs	APPELLANT
Sanjit Kumar Mukhopadhyay		RESPONDENT

Date of Decision : 21-07-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 226
Limitation Act, 1963 — Article 54

Citation : (2010) 07 CAL CK 0070

Hon'ble Judges : J.N. Patel, C.J.; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Jaharlal De, B.K. Jain and Siddhartha Banerjee, in FMA Nos. 116 and 187 of 2010, for the Appellant; Amal Baran Chatterjee and Satadal Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—Both the abovementioned appeals were taken up together as the points involved therein are to some extent similar. We, however, propose to dispose of these appeals by delivering separate judgments, one after the other.

2. This appeal is at the instance of the Respondent/Bank in a writ-application filed by a former employee thereof and is directed against order dated 30th January, 2009 passed by a learned Single Judge of this Court by which His Lordship allowed the writ-application by giving liberty to the writ-petitioner to submit a representation ventilating all his grievance after offering to refund 50% of the employer's share of provident fund together with interest thereon, with further direction upon the Chairman of the Bank to consider the said representation in accordance with the rules in the light of the observations made in the body of the order and to take appropriate action by granting pension to the petitioner under the Pension Scheme, 1995. His Lordship further directed that the entire process should be completed within three months from the date

of communication of the order and receipt of the representation.

3. Being dissatisfied, the Bank has come up with the present mandamus appeal.
4. The case made out by the writ-petitioner was that he joined Allahabad Bank as Clerk on 27th May, 1970 and got promotion to the post of officer prior to July, 1979. According to the writ-petitioner, on 16th November, 1995 the Bank intimated all the existing employees to submit their option by 27th January, 1996 under the scheme and the writ-petitioner opted for monthly pension scheme. The writ-petitioner contended that in view of the submission of option-form within the extended time, he was entitled to get the benefit of pension on his voluntary superannuation with effect from 30th April, 2001. According to the writ-petitioner, in spite of repeated demands, the Bank has not released his pension under the scheme of 1995.
5. The writ-application was opposed by the Bank by filing affidavit in opposition wherein it was denied that the writ-petitioner filed any option pursuant to Pension Regulation, 1995. According to the Bank, the writ-petitioner was regularly served with his Provident Fund Statements half-yearly for a long period wherein the employer's contribution and employee's contribution were shown to the credit of the writ-petitioner but at no point of time, the writ-petitioner ever raised any objection indicating that he opted for monthly pension under the scheme of the year 1995. The Bank asserted that after taking voluntary retirement from the service with effect from 30th April, 2001 the amount of Contributory Provident Fund of Rs. 6,96,830.06p. and Gratuity of Rs. 3,41,423/- had been paid to the writ-petitioner by treating him as a holder of Contributory Provident Fund option and the writ-petitioner duly accepted the said amount. After the lapse of four years five months from acceptance of the said amount, he had filed the writ-application. The Bank Authority further stated that the full retiral benefit, namely, the amount of Gratuity, Provident Fund, and Ex gratia amount of leave encashment etc. were credited to the Bank Account of the writ-petitioner and the amount was appropriated. The Bank, thus, prayed for dismissal of the writ-application.
6. The learned Single Judge, on consideration of materials of record, came to the conclusion that it was established from the written document produced by the writ-petitioner that he gave his option within the time specified in 1995 Scheme as would appear from various correspondences exchanged between the officials of the Bank. The learned Single Judge, therefore, was of the view that the writ-petitioner was entitled to the benefit of pension and accordingly, gave liberty to the writ-petitioner to refund 50% of the total Contributory Provident Fund with interest and to make representation to the employer with specific direction upon Bank to grant pension.
7. Mr. De, the learned advocate appearing on behalf of the appellant, strenuously contended before us that in view of the conduct of the writ-petitioner, the learned Single Judge should have dismissed the writ-application. Mr. De submits

that after getting full retirement-benefits by acceptance of Gratuity, Contributory Provident Fund, Ex gratia payment etc. the writ-petitioner was not entitled to claim for monthly pension even if it is assumed for the sake of argument that he opted for the monthly pension under the Scheme of 1995. According to Mr. De, in view of the decision of the Supreme Court in the case of Bank of India and Others Vs. O.P. Swaranakar etc., the writ- petitioner has waived his right to get pension. Mr. De, therefore, prays for setting aside the order impugned and dismissing the writ-application on the ground of waiver alone.

8. Mr. Chatterjee, the learned advocate appearing on behalf of the writ-petitioner, on the other hand, has opposed the contention of Mr. De and has contended that his client having complied with the provisions of the 1995 Scheme by opting for monthly pension within the time stipulated by the notification, the Bank is left with no other alternative but to grant pension even if his client had accepted the benefit of Contributory Provident Fund and Gratuity. Mr. Chatterjee, consequently, submits that the learned Single Judge rightly directed his client to refund the 50% of the Contributory Provident Fund with interest with a direction upon the Bank to pay monthly pension. Mr. Chatterjee, therefore, prays for dismissal of the appeal.

9. After hearing the learned Counsel for the parties and after going through the materials on record, we find that it has been proved from the materials on record that the writ-petitioner submitted an option for pension within the extended time fixed under the Scheme of 1995. However, it has also been established that in spite of such submission of option for monthly pension, the Bank Authority regularly conveyed to the writ-petitioner the amount of contribution of the Bank in his Provident Fund Account, which is never deposited in the Provident Fund Account of an employee who opted for monthly pension. It further appears that in the year 2000, a Scheme of Voluntary Retirement was floated and the writ-petitioner opted for such voluntary retirement and such offer was accepted by the Bank thereby accepting the voluntary retirement of the writ- petitioner with effect from 30th April, 2001. Thereafter, the entire Contributory Provident Fund, Gratuity and other Ex gratia amount was deposited in his personal savings account as a consequence of such voluntary retirement as retirement-benefit.

10. We are unable to accept the contention of Mr. Chatterjee that his client was not aware of the fact that such amount was deposited in the Bank account of his client. It appears from the documents produced before us that the amount was deposited after taking counter signature of the writ-petitioner in the consent form and on the next day of such deposit, he withdrew Rs. 3 lakh out of the deposited amount and further amount of Rs. 3 lakh was withdrawn on the following day. Therefore, it is established that the money paid by the Bank in lieu of voluntary retirement by treating the writ-petitioner as one who opted for Contributory Provident Fund scheme, was accepted by the writ-petitioner and was appropriated.

11. It is true that the appellant, thereafter, had made several representations to

the Bank for giving him the benefit of monthly pension and even promised to return balance 50% amount of the Provident Fund with interest provided the monthly pension was first released in his favour.

12. The only question that falls for determination in this appeal is whether by accepting the entire amount of retiral benefit under Contributory Provident Fund Scheme and appropriating the said amount, the writ-petitioner was entitled to move the writ-application after more than four years from the date of acceptance of such benefit.

13. After going through the materials on record, we find that the Scheme of 1995 is the outcome of a Regulation, which comes within the realm of contract between the employer and employees. According to the writ-petitioner, in view of the agreement between the parties, he was entitled to get monthly pension whereas he had been illegally given the benefit of Contributory Provident Fund cum Gratuity for which he did not opt. In our opinion, although the writ-petitioner was really entitled to get the benefit of monthly pension in terms of his option, under the law of contract, he was also entitled to waive such right by accepting the alternative form of getting retirement-benefit, namely, Contributory Provident Fund and Gratuity, if offered by the employer. In this case, by acceptance of the amount of Contributory Provident, Gratuity and other benefit, which are not available to the employee opting for monthly pension with full knowledge and appropriating such amount for his personal benefit, in our opinion, the writ-petitioner has waived his contractual right to get monthly pension as held by the Supreme Court in the case *Bank of India v. O.P. Swarnakar and Ors.*, relied upon by Mr. De.

14. Therefore, the writ-petitioner was not entitled to invoke the writ- jurisdiction for enforcement of his agreement with the employer, once by his conduct he had waived such right available to him under the contract by receiving the retirement-benefit payable under an alternative mode.

15. Apart from the aforesaid fact, the writ-application was liable to be dismissed for the following additional reason:

16. A writ-application is entertainable when any of the legal or fundamental rights of a person is infringed by the action or inaction of a "State" within the meaning of Article 12 of the Constitution of India. In the case before us, the grievance of the writ-petitioner was that his legal right to get pension arising out of the scheme because of his option has been denied by the Allahabad Bank, a "State" within the meaning of Article 12 of the Constitution of India.

17. We have already pointed out that the writ-petitioner wanted to enforce a legal right, which arose from the sphere of contract available under a scheme framed by the employer. In other words, his prayer was for specific performance of a contract between the employer and the writ-petitioner. In the month of June, 2001, when the entire retirement-dues were paid to him in the alternative form of Contributory Provident Fund and Gratuity, the writ-petitioner had full

knowledge that the earlier contract for grant of benefit of monthly pension has been refused. In spite of such knowledge, he did not enforce the earlier agreement within the period of limitation fixed for instituting a suit for specific performance of an agreement as provided in Article 54 of the Limitation Act, which is three years from the time, when it is known to the plaintiff that the agreement has been refused by the defendant.

18. Therefore, on the date of filing of the writ-application in the month of November 2005, the right to enforce the agreement for getting benefit of monthly pension by way of a suit for specific performance of contract had become barred by limitation and was not enforceable under the law. Thus, on the date of filing of the writ-application, there was no subsisting legal right to enforce the agreement for getting monthly pension. If the existing legal right had become unenforceable, the writ-Court should not grant relief by way of revival of a barred right of the writ-petitioner.

19. In this connection, it may not be inappropriate to refer to the following observations of the five-Judges-Bench decision of the Supreme Court in the case of State of Madhya Pradesh Vs. Bhailal Bhai and Others, while dealing with the question of delay in filing a writ-application:

It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. This Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable.

20. The writ-application is, thus, liable to be dismissed also on the abovementioned ground of delay.

21. We, therefore, find that in this case, the learned Single Judge erred in law in granting a barred remedy, which is also liable to be dismissed on the ground of waiver.

22. We, accordingly, allow the appeal, set aside the order impugned and dismiss the writ-application on the two grounds mentioned above. There will be, however, no order as to costs.

FMA 187 of 2010

23. The subject matter of this appeal is to some extent similar to the one disposed of by us above. In this case also, it has been established that the writ petitioner/ employee opted for monthly pension within the time fixed by the Scheme and on retirement, he was offered the retiral benefit in terms of Contributory Provident Fund and Gratuity which, however, the employee refused to accept, and within one year, he filed the writ-application, which has been allowed by the learned Single Judge.

24. Therefore, in this case, the Bank is not entitled to take either the defence of waiver or the other plea that the writ-petitioner had no subsisting enforceable legal right on the date of filing of the writ-application.

25. We, therefore, find that in this case, the learned Single Judge rightly enforced the existing legal right of the writ-petitioner to have monthly pension under the Scheme, which was denied by a "State" within the meaning of Article 12 of the Constitution of India.

26. We, therefore, find no reason to interfere with the order impugned in this appeal.

27. The present appeal filed by the Allahabad Bank is thus dismissed with costs which we assess at Rs. 15,000/-.

Bhaskar Bhattacharya, J.

28. I agree.