(1997) 12 GAU CK 0021

In the Gauhati High Court

Case No : Writ Appeal No. 124 of 1996

Assam Industrial Development Corporation Ltd.and Anothers — APPELLANT

Vs

Manjushree Pathak and Anothers — RESPONDENT

Date of Decision : 05-12-1997

Acts Referred:

Assam Industrial Development Corporation Employees Service Rules, 1992 — Clause 8.1, Clause 8.1
Fundamental Rules — Rule 56, 56

Citation : (1998) 1 GLJ 25 : (1997) 3 GLT 620

Hon'ble Judges : M.Ramakrishna, C.J. and D.Biswas, J

Bench : Division Bench

Advocate : A.K.Phukan, M.Bhuyan, P.K.Tiwari, B.K.Sharma, S.S.Dey, Advocates appearing for Parties

Judgement

M. Ramakrishna, C.J.—Responddent No. l, Dr. (Mrs) Manjushree Pathak was the writ petitioner in Civil Rule No. 816 of 1996 filed before this Court. The writ petitioner had sought for the following prayer :

(i) To issue a writ of Mandamus, directing the respondents to treat the petitioner as a free person who is no longer an employee of the AIDC and who has gone on voluntary retirement with effect from 7.12.95;

(ii) To issue a writ of Mandamus directing the respondents to make available to the petitioner all the retirement benefits she is entitled to under the AIDC Voluntary Retirement Scheme, 1992 with immediate effect;

(iii) To quash and set aside the show cause notice dated 15/16.2.96 (Annexure 8);

(iv) To direct the respondents to act strictly in compliance of the AIDC Voluntary Retirement Scheme, 1992;

(v) To issue any other writ, order or direction as may be deemed fit and proper or pass such further or other orders as your Lordships may deem fit and proper in the facts and circumstances of the case.

(vi) To award cost of this petition to the petitioner.

This petition was opposed by the respondents by filing a statement of objections by way of a counter traversing the averments made in the writ petition. The learned Single Judge, after hearing the learned counsel on both sides, by an order made on 26.2.96, allowed the writ petition with the following direction :

"The benefits of voluntary retirement shall be given to the petitioner in accordance with rules and law as expeditiously as possible."

It is further observed in the course of the order that the writ petitioner must be deemed to have gone on voluntary retirement as and from 5.2.96. It is this order that is called in question by the appellant Nos. I and 2 challenging the correctness and the legality of this order of the learned Single Judge made in the above civil rule, for the grounds taken in the appeal.

2. A few facts which are necessary for the disposal of the appeal are as follows :

The first respondent/writ petitioner having been employed as Deputy Manager (Legal) in the Assam Industrial Development Corporation Ltd (AIDC Ltd in short), she has been serving as such under the conditions of service rules, made by the Corporation for a period of twentythree years. It is stated that the AIDC Ltd hereinafter referred to as the Corporation, launched a scheme for the purpose of enabling those employees willing to retire voluntarily, so that they may avail the benefit of the AIDC Voluntary Retirement Scheme, 1992. With a view to avail this benefit, the first respondent presented an application on 7.12.95, seeking voluntary retirement as envisaged in the scheme. Annexure 2 to the writ petition is the copy of the application. It is stated therein that:

"I am aware of the benefits admissible to me under this scheme and 1 would not be entitled to any other benefit other than those provided in the scheme." Later, on 23rd January, 1996, she filed another application wherein she had requested the Managing Director of the Corporation to accept the application for voluntary retirement and to release her with effect from 5.2.96 by adjusting her Earned Leave against her balance notice period. As there was a delay in acting upon this application and to pass order under the voluntary retirement scheme, the petitioner approached this Court by filing the above civil rule on 23rd February. 1996.

3, The learned Single Judge after hearing the learned counsel on both sides while proceeded to pass the order as aforesaid, refering to the legal question held:

"Mr. Phookan, counsel for the respondents further submits that subsequent to the offer of voluntary retirement, a show cause notice was issued to her and the petitioner did not reply to it, and that the scheme does not create any right in favour of the petitioner, I am not inclined to accept these contentions of Mr. Phookan. The benefits of voluntary retirement shall be given to the petitioner in accordance with rules and law as expeditiously as possible." To arrive at a conclusion in favour of the writ petitioner, the learned Single Judge referred to the law as laid down by the Supreme Court in the case of Union of India & others vs. Sayed Muzaffar Mir as reported in 1995 Supp. (1) SCC 76 and a decision of this Court in the case of Kshirod Chandra Baruah vs. State of Assam & others as reported in (1996) 1 GLR 60 (1995(2) GLJ 542). We will presently refer to these aspects of the matter.

4. The learned counsel for the appellants, who having taken us through the averments made in the writ petition, the stand taken by the Corporation in the counter filed by them and the finding recorded by the learned Single Judge, urged that:

(i) The learned Single Judge failed to notice that in the scheme issuing notice calling for voluntary retirement from the employees of the Corporation, the scheme is subject to certain conditions incorporated therein. Clause 8.1 of the scheme lays down as follows :

"Notwithstanding any of the aforesaid provisions, the scheme does not confer any right on an employee to have the request for voluntary retirement accepted by the management. The management shall have full discretion to accept or reject the request from any employee for voluntary retirement viewing the organizational requirement and any other relevant factors in this regard."

In that view of the matter, the learned Single Judge ought to have seen that the scheme as envisaged for the purpose of voluntary retirement, does not confer any such right to the employee to seek for voluntary retirement. On the other hand, a discretion is given to the Corporation either to accept of to reject such application seeking benefit of the scheme. Therefore, the finding recorded by the writ Court on this question is contrary to the provisions of the scheme.

(ii) Considering the other finding recorded by the learned Single Judge, refering to the notice period for consideration of the application for voluntary retirement, the conclusion arrived at by the learned Single Judge that the petitioner must be deemed to have gone on voluntary retirement as and from 5.2.96. by virtue of the Mandamus issued in the writ petition, cannot be sustained in law inasmuch as the writ Court ought to have seen that in the scheme referred to above, there is a provision under clause 6 (v) wherein it is laid down that:

"One month''s/three months'' notice pay (as per conditions of service applicable to him/her).''

The writ Court failed to notice this condition incorporated in subclause (v) of clause 6 of the scheme. The argument advanced by the learned counsel for the appellants is that this clause in the scheme must be read along with Rule 18 of the AIDC Employees Service Rules. His submission is that since Rule 18 refers to a situation where, action is taken to terminate an employee for some reason or the other, a notice of three months is required to be given in regard to Class I and 11 employees and on month''s notice in respect of Class III and IV employees. The further submission of the learned counsel for the appellants is that before the expiry period of ninety days from the date of application, the writ petitioner having approached this Court, the appellants did not take action to consider the application either to accept or to reject. There is no dispute that from the date of application, i.e., 7.12.95 to the date of filing of the writ petition on 22nd February. 1996. the period of ninety days was yet to expire.

(iii) The last submission of the learned counsel for the appellants is that regard being had to the facts and circumstances of the case, the view taken by the learned Single Judge that a right is accrued to the writ petitioner to seek for voluntary retirement, cannot be sustained in law.

5. In view of the foregoing, the learned counsel for the appellants submits that this is a fit case for setting aside the order of the learned Single Judge under appeal and to allow the appeal.

6. Contrary to these submissions of the learned counsel for the appellants, the learned counsel for the petitioner/respondent. Mr. BK Sharma. maintains that the conclusion reached by the writ Court is justified.

7. The legal contention urged by the learned counsel for the petitioner is that in the absence of a provision under the scheme referred to above, for the purpose of acting upon an application for voluntary retirement one was or the other, the writ Court was right in arriving at a conclusion that as there was no action on the part of the Corporation to pass any order on the application within a reasonable period of time, the conclusion reached by the learned Single Judge in favour of the petitioner was justifiable.

8. We will now examine the first point urged by the learned counsel for the appellants. By a perusal of the scheme as envisaged for the purpose of voluntary retirement, by a careful consideration of the scheme, a copy of which is produced before the Court, it is seen therefrom that as on 5th October. 1988, the Ministry'' of Industry. Govt. of India, Bureau of Public Enterprises issued an office memorandum which was duly signed by the Joint Director, Bureau of Public Enterprises. Under this office memo, a scheme had been evolved for the purpose of voluntary retirement of employees of public enterprises. It is stated therein that

"After a careful consideration it has been decided that public sector enterprises can introduce a voluntary retirement scheme on the following terms and conditions :"

Clause (b) of the aforesaid conditions which relevant for the purpose of the scheme, lays down:

"The management of the enterprises will have the right not to grant voluntary retirement for reasons to be recorded in writing."

Clause 2 of the office memorandum states that:

"The voluntary retirement scheme would be applicable to all employees, workers and executives. Where there is a surplus manpower, the vacancy caused by voluntary retirement scheme would not be filled up. Voluntary retirement scheme on the above parameters can be introduced by the Public Enterprises with the approval of the Administrative Ministries."

Keeping this in view, clause 8.1 in the AIDC Voluntary Retirement Scheme was issued by the Corporation as referred to above. It is pertinent to note that so long as by virtue of the above scheme, a right or direction has been reserved for the Corporation, while considering such applications either to accept or reject the requests made by the employee, taking into consideration the organisational requirements and any other relevant factors in this regard, the submission in this behalf by the learned counsel for the appellants is that, the Corporation was considering as to the consequences or otherwise in the event of accepting the application and also those if the same is rejected. In the meanwhile, since the writ petitioner had approached the writ Court seeking relief, the competent authority of the Corporation in its wisdom thought it best to await the outcome of the writ petition. These are all factual position. Coming to the legal position, the learned Single Judge has taken the view that once an application is presented accepting the offer of the department for voluntary retirement, a right accrues to the petitioner and this right cannot be taken away. This is the trend of consideration. Let us now examine the legal position.

9. We shall first examine the principles of law as laid down in the case of Dinesh Chandra Sangma vs. the State of Assam & others as reported in AIR 1978 SC 17. In the aforesaid case, a Bench of three Judges was called upon to consider and to interpret the law in relation to voluntary retirement scheme evolved under Rule 56 (c) of the Fundamental Rules, FR in short, made applicable to an employee working in the State of Assam. In paragraph 8 of the said judgment, their Lordships of the Supreme Court, refering to the facts and circumstances and the question of law while interpreting the provisions of FR 56 (c). held as follow :

"The above doctrine of pleasure is invoked by the Govt. in the public interest after a Govt. servant attains the age of 50 years or has completed 25 years of service. This is constitutionally permissible as compulsory termination of service under FR 56 (b) does not amount to removal or dismissal by way of punishment. While the Govt. reserves is right under FR 56 (b) to compulsorily retire a Govt. servant, even against his wish, there is a corresponding right of the Govt. servant under FR 6 (c) to voluntarily retire from service by giving the Govt. three months'' notice in writing. There is no question of acceptance of the request for voluntary retirement by the Govt. when the Govt. servant exercises his right under FR 56 (c)."

This law as laid down by the Supreme Court in Sangma''s case (supra) has been followed by this Court in the case of Kshirod Chandra Baruah vs. State of Assam & others, reported in (1996) 1 GLR 60 (1995 (2) GLJ 542). Again, refering to FR 56 (c) as made applicable to the State of Assam and refering to the scheme of Voluntary retirement by a Govt. servant, the learned Single Judge of this Court held in Kshirod Baruah (supra)''s case, following the Sangma (supra)''s case that:

"Once this option is exercised by the employee, the question of not accepting it by the authority does not arise." (Please see paragraph 5 of the decision) 10. By a careful consideration of Chapter IX of the FRs made applicable to the State of Assam, it is seen therefrom that FR 56 deals with compulsory retirement, premature retirement including voluntary retirement. It is seen from the scheme of the Rules under FR 56 that FR 56 (c) is part and parcel of this Chapter IX dealing with various factors concerning compulsory retirement, premature retirement and voluntary retirement. Rule 56 (c) of the FRs lays down as follows:

"Any Govt. servant may, by giving notice of not less than three months in writing to the appropriate authority, retire from service after he has attained the age of fifty years or has completed 25 years of sendee, whichever is earlier."

Clause 27 of FR 56 deals with voluntary retirement. Considering the scheme of the Rule, it becomes clear that Rule 56 of FRs come within the scheme of general conditions of service of employee serving in the State of Assam to whom these Fundamental Rules are made applicable, they being governed under the statute of FRs. It is further seen that these Fundamental Rules are being made part of the statute under section 241 (2) (b) of the Govt. of India Act. 1935, as amended by the competent authority from time to time at the relevant point of time. Even after the Indian Constitution came into force in this part of the country, these Fundamental Rules are made applicable to the employees serving in the State of Assam: whereas in the instant case, the employee serving in the AIDC Ltd has been governed by a separate set of rules and the}'' are known as the Assam Industrial Development Corporation Employees Service Rules. 1992 there is no dispute about that. If that is so, the question is whether the scheme as envisaged by the Govt. of India and adopted by the Corporation in 1992 having been made applicable to the employees of the Corporation, these empl6yees could be said to be persons on whom the fundamental rules are made applicable ? The simple answer is ''no''. In other words, since the FRs are not made applicable to the employees of the Corporation, the question of extending the principle as laid down in Sangma''s (supra) case does not arise. Therefore, the Court will have to decide this question without being influenced by that decision.

11. As we have already observed, the Govt. of India in its wisdom in the Department of Industries. Bureau of Public Enterprises, extended the benefit of the scheme to confer certain benefits upon the employees serving in the Public Enterprises. Secondly, by virtue of clause 8.1 of the AIDC Voluntary Retirement Scheme, it is made clear undoubtedly that the discretionary power either to accept or reject the application of an employee, seeking voluntary retirement,

vests with the management of the Corporation. As we have already pointed out. before any action was taken by the Managing Director either to accept or reject the application the petitioner has approached the Court of law.

12. The learned Single Judge ought to have seen this situation. Considering the facts and circumstances including the question of law arising in this matter, we are clearly of the opinion that the conclusion reached by the learned Single Judge following the decision rendered in Sangma''s (supra) case, cannot be sustained in law. In other words, the finding recorded by the learned Single Judge in favour of the writ petitioner requires to be set aside.

13. Dealing with the subsequent question of law and the argument advanced by the learned counsel for the appellants, it is clear that there is no specific provision clearly indicating that three months'' notice must be given by an employee to the Managing Director to accept the letter to pass an order regarding voluntary rctirement,though the provisions of sub clause (v) to clause 6, extracted above, provides only a guideline that the law that is made applicable under the conditions of sendee for an employee in this behalf, shall be made applicable in this situation also. In other words, according to the submission of the learned counsel for the appellants, three months'' time is required to be given in the case of an employees of Class I and Class II serving in the Corporation in order to enable the Managing Director to consider such application for voluntary retirement.

We do not want to lay down a law interpreting this provision of the scheme. Be that as it may. the conclusion arrived at by the learned Single Judge that there is a deemed provision whereby the petitioner could have been deemed to be retired on a particular date, cannot be sustained in law. It is very difficult to accede to the contention raised by Mr. BK Sharma. the learned counsel for the petitioner/ respondent, in this behalf since if we accept this submission, then the conclusion reached by us while dealing with the first point cannot be sustained. Therefore, we are of the view that the writ Court reached the conclusion not based upon factual position and not interpreting the correct position of the law in the instant case. Therefore, there is no alternative but to set aside the order of the learned Single Judge under appeal.

Before we part with this case, we offered to Mr. BK Sharma. the learned counsel for the petitioner/respondent to whether it is acceptable to the writ petitioner to rejoin the Corporation and to continue in her service as the Deputy Manager. Legal ? But this offer was turned down. Therefore, no purpose will be served in considering this aspect.

14. In the result, the appeal is allowed for the reasons stated above. The order passed by the learned Single Judge in Civil Rule No.816 of 1996 on 26th February. 1996, is set aside.

We further make it clear that the amount of money already paid by the Corporation to the writ petitioner/respondent pursuant to the interim order passed by the Division Bench of this Court on 22.4.96, shall not be refunded; and the question of the Corporation considering the application of the writ petitioner/ respondent at this stage would not arise inasmuch, as on today, the writ petitioner/ respondent has ceased to be an employee of the Corporation.

Ordered accordingly

