

(1988) 04 CAL CK 0039

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction F.M.A. No"s. 811-812 of 1991

Bank of India and Others

APPELLANT

Vs

Kalyan Kumar Sarkar

RESPONDENT

Date of Decision : 06-04-1988

Acts Referred:

Bank of India (Officers Service) Regulations, 1979 — Regulation 20, 20(2), 45, 46
Bank of India Gratuity Fund Rules — Rule 20(2), 8, 9
Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 — Section 1(2), 12(2), 21
Constitution of India, 1950 — Article 14, 16, 226
Employees State Insurance Act, 1948 — Section 2(9)
Payment of Gratuity Act, 1972 — Section 2A

Citation : (1998) 2 CALLT 130 : (1998) 2 CHN 15 : (1999) 1 LLJ 904

Hon'ble Judges : Satyabrata Sinha, J; Dibyendu Bhusan Dutta, J

Bench : Division Bench

Advocate : Mr. P. Sengupta, for the Appellant; Mr. P.K. Mukherjee, for the Respondent

Judgement

S.B. Sinha, J.—This appeal is directed against a Judgment and order dated 31.5.90 passed by a learned single Judge of this court whereby and whereunder the writ petition filed by the petitioner claiming, inter alia, the following reliefs were allowed.

"(a) a Writ of declaration declaring the petitioner was in continuous service since 17th September 1973 till 21st July 1987 as an Officer of Bank of India;

(b) a Writ in the nature of Mandamus commanding upon the respondents not to withhold any payment of Gratuity and Provident Fund dues of the petitioner as an Officer of the Bank of India."

2. The fact of the matter lies in a very narrow compass.

3. The appellant bank was nationalised in terms of the banking Companies (Acquisition & Transfer of Undertakings) Act, 1970. Section 21 of the said Act

was brought into force u/s 1(2) of the said Act on 19.7.69. The Board of Directors, in terms of the aforementioned provisions, are entitled to frame regulation relating to service conditions of officers of the bank and also empowered to make regulation for establishing and maintaining pension and gratuity fund for officers of the bank. Admittedly, on 7.8.73 the writ petitioner/respondent No. 1 was appointed as a Probationary Officer of Bank of India for a year. He was confirmed as an officer of Bank of India. He started contributing to the provident fund. In the meantime, on 1.1.75. Gratuity Fund Rules were framed by the appellant bank. Rule 8 of the said Rules, which is relevant for the purpose of this case is set out hereInbelow :

"8. Gratuity when payable and when may be forfeited

subject to the provisions of the Payment of Gratuity Act, 1972, or any other law relating to the payment of gratuity to any class of employees or any part thereof,--

Gratuity as specified in Rule 9 shall be payable to an employee after he has rendered continuous service to the Bank-

(a) for not less than five years in case of employees who are governed by the Payment of Gratuity Act, 1972, and

(b) for not less than ten years in case of officers and other employees not governed by the said Act-

(i) on his retirement or resignation, or

(ii) on his death whilst in the service of the Bank, or

(iii) on his incapacitation, to be certified by a medical practitioner acceptable to the Bank, to serve the Bank due to accident or continued ill-health or disease, or

(iv) on termination of his service by the Bank:

Provided that the completion of continuous service of five years or ten years as aforesaid shall not be necessary where the termination of the service of a member with the Bank is due to the reason mentioned. In clause (II) or (III) or (IV) of this Rule :

Provided further that there will be no forfeiture of gratuity for dismissal on account of misconduct except in cases where such misconduct causes financial loss to the Bank and in that case to that extent only.

Explanation.--For the purpose of this Rule, continuous service means uninterrupted service and Includes service which is interrupted by sickness, accident, leave, lay-off strike or a lock-out or cessation of work not due to any fault of the employee concerned, whether such uninterrupted or interrupted service was rendered before or after the commencement of these Rules."

4. On or about 14.7.78, Internal circular was published inviting applications from

the internal officers. In the said circular, it was categorically stated that the selected officers would have to resign from their present services and join as fresh recruits and during such probation no contribution to provident fund would be made. It was further stipulated that consequent upon such resignation, the accumulated leave would also lapse and provident fund and gratuity would be paid according to rules. Pursuant to or in furtherance of the said internal circular dated 14.7.78, the petitioner amongst others applied for appointment to the post of Industrial Relation Officer. He was interviewed and selected. On or about 1.7.79, Bank of India (Officers'') Service Regulation, 1979, was made by the bank in terms of the aforementioned power read with section 12(2) of the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970. In terms of Rule 20(2). an officer cannot resign from service of the bank otherwise than expiry of 3 months from the service of the bank of a notice in writing of such resignation. Regulation 45 deals with provident fund of officers of Bank of India and by the Note appended thereto, existing Bank of India Provident Fund Rules were made part of the regulation. Regulation 46 deals with gratuity of officers of Bank of India, and in terms of the Note appended thereto, existing Bank of India Gratuity Fund Rules were made part of the regulations.

5. On 14.8.99, the writ petitioner was offered with appointment to the post of Industrial Relation Officer of the appellant bank on the terms and conditions mentioned therein which, Inter alia, are that his application was considered along with certain concession as granted by the management subsequently, namely, upon selection he would have to resign from present service and Join as fresh recruit on probation and he would have no lien on previous service during the period of probation. During the period of probation, the writ petitioner was also not to get benefit of contribution of bank's provident fund. On 25.1.80, the General Manager, Head Office of Bank of India under an inter office memorandum forwarded to the then Regional Manager, Eastern Region, a draft resignation letter to be submitted to the bank by the petitioner, an appointment letter dated 1.2.80 was to be addressed to him. In the letter it was clearly Instructed that the respondent No. 1 was to be handed over first the resignation latter in duplicate and the Regional Manager was to ensure that the resignation letter was to be delivered by the respondent No. 1 in terms of draft resignation letter enclosed resigning from bank's service and upon obtaining the same, the Regional Manager was to Issue appointment letter order to the respondent No. 1. and pursuant whereto the respondent No. 1 may report to his duly as Industrial Relation Officer on 2.2.80. In terms of the said stipulation, a type written resignation letter was served upon the writ petitioner by the Regional Manager, which the petitioner complied with and on 2.2.80. he was offered the appointment as Industrial Relation Officer, and he Joined the said post. After Joining the said post, the petitioner made several representations praying therein that he may be given the benefit of continuous service, but admittedly the appellant refused to do so. The writ petitioner, however, was allowed to retain certain powers, Inter alia, that of the signing authority which power had been

conferred upon him while he was working as a Probationary Officer. The writ petitioner appears to have resigned in the year 1987, and he was released from service by the appellant on 21.7.87. Despite the same, he made further representation that his new employer United Industrial Bank was willing to take over his house building loan liabilities accrued to Bank of India. He further claimed provident fund and gratuity on the ground that his service was continuous and made request to transfer total of provident fund contribution to the Trustees of Provident Fund Department of United Industrial Bank, and the gratuity amount payable to the Chief Manager. United Industrial Bank. The said prayer of the writ petitioner having been rejected, he filed a writ application before this court. By an order dated 6.1.89 a learned Judge of this court directed the matter to come up for hearing on 24.1.89 and in the meantime directed the bank to file its affidavit in opposition. It was further directed that if any amount is payable to the writ petitioner by the bank, the same upon calculation would be paid to him and without prejudice to his rights he may accept the same. By reason of the impugned judgment dated 31.5.90 the writ application was allowed.

6. Mr. Sengupta, learned counsel appearing on behalf of the appellants has raised two contentions in support of this appeal. Learned counsel firstly submitted that the Bank of India Gratuity Fund Rules, being not statutory in nature, the writ petitioner could not have maintained the writ application and by reason thereof no legal right was accrued in him. Alternatively, It was submitted that the writ petitioner/respondent No. 1 did not complete the minimum period for being eligible to obtain the amount of gratuity or provident fund.

7. Mr. Mukherji appearing on behalf of respondent, on the other hand, submitted that from a perusal of the various rules of Bank of India Gratuity Fund Rules, it would appear that the same are statutory in nature, particularly in view of the fact that the said rules had been adopted by reason of Bank of India (Officers") Service Regulation. Learned counsel contended that in view of the aforementioned adoption of the rules by reason of a statutory rule, gratuity rules became a part of the Service Regulation, and thus, the rules are statutory in nature. Learned counsel further submitted that as in terms of the aforementioned regulation procedures have been laid down for valid resignation and in view of the fact that the writ petitioner was made to sign on the dotted line and the same did not comply with the statutory regulations as contained in regulation 20 of the said regulation, the writ petitioner would be deemed to be in continuous service of the appellant bank. Learned counsel submitted that the learned trial Judge cannot be said to have committed an error in referring to the provisions of section 2A of the Payment of Gratuity Act, in as much as. explanation appended to Rule 8 of the said Rules would clearly show that the said provisions are in pari materia. It has been pointed out that the writ petitioner has also filed a cross objection, in as much as, the bank apart from releasing a sum of Rs. 38,000/- by way of provident fund, did not find him entitled to the rest of the amount, as in the opinion of the bank, the petitioner did not hold the office continuously for a period of ten years so as to make him

eligible for the said amount.

8. The only question which arises for consideration in this appeal is as to whether in view of the aforementioned facts and circumstances of the case, the petitioner can be said to have come within the purview of the definition of "continuous service" within the meaning of explanation appended to Rule 8 of the Bank of India Gratuity Fund Rules (hereinafter referred to as the Rules). Before advertng to the said question, we must observe that the submission of Mr. Sengupta to the effect that this writ application is not maintainable in view of the fact that the said rules are not statutory in nature is stated to be rejected, in as much as, as noticed hereinbefore, Mr. Mukherji has rightly submitted that by reason of Regulation 46, the said rules became a part of the Regulations. It has not been, and could not be disputed by the appellants that the Regulations having been framed in terms of the provisions of the Nationalisation Act, were statutory in nature, and in that view of the matter, the authorities framing the said Regulations, could direct that the matter relating to provident fund and gratuity would be covered by the respective provident fund and gratuity fund rules. Such provident fund and gratuity fund rules, therefore, having been made part of the regulations, the writ petition filed by the petitioner was maintainable.

9. Basic fact of the matter is not in dispute.

10. The writ petitioner was appointed on 2.8.73. He resigned on 1.2.80 from the post of Probationary Officer, and on the next day, that is, on 2.2.80, he was appointed as Industrial Relation Officer. The petitioner further resigned on 18.5.87 and was released from the service of the bank on 21.7.87. It is admitted that in terms of Rule 8, gratuity is payable to an officer who is not covered by the Payment of Gratuity Act, 1972, in case he has rendered continuous service to the bank for not less than 10 years. It stands admitted that the petitioner was not governed by the Payment of Gratuity Act, 1972. In that view of the matter, there cannot be any doubt whatsoever that the provision of Payment of Gratuity Act cannot be said to have any application whatsoever.

11. Section 2A of Payment of Gratuity Act, upon which reliance has been placed by the learned trial Judge states :

"2A Continuous service.

For the purposes of this Act.-

(1) an employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order * * * treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or Interrupted service was rendered before or after

the commencement of this Act.

Explanation.--For the purposes of clause (2). the number of days on which an employee has actually worked under an employer shall Include the days on which-

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946) or under the Industrial Disputes Act. 1947 (14 of 1947) or under any other law applicable to the establishment:

(ii) he has been on leave with full wages, earned in the previous year:

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks."

12. It is true, as he has contended by Mr. Mukherji that in terms of sub-regulation (2) of regulation 20 of the Bank of India (Officers") Service Regulation. 1979. an officer can resign from the service of the bank otherwise than expiry of 3 months from the service of the bank of a notice in writing of such resignation. An explanation to the said rule, however, has been made by adding a proviso thereto in terms whereof the competent authority has been empowered to reduce the period of 3 months or remit the requirement of notice. Admittedly, the petitioner was appointed as a Probationary Officer in the scale of pay of Rs. 400-1000/-, and he was getting a salary of Rs. 700/- per month, whereas as probationary officer he was getting a salary of Rs. 1,000/- per month. In ordinary course, the petitioner would not have been entitled to the said post. His candidature was considered evidently as an Internal candidate. It may be true that in ordinary circumstances resignation must be treated to be a voluntary act on the part of the employee concerned, but there cannot also be any doubt whatsoever that before a person is appointed to a higher post by way of a fresh appointment, he has to relinquish the post which he had been holding voluntarily, as by reason thereof provisions of Articles 14 and 16 would be attracted. Appointment of the petitioner to the post of Industrial Relation Officer was a case of direct recruitment. It was done only in order to facilitate consideration of candidature of the concerned officers merely as opportunity had been given to them to apply for the said post along with outsiders. The petitioner did not have any right thereto. Such an opportunity was not by way of his conditions of service. It has, therefore, to be assumed that before a person can be appointed to a new post having a higher scale of pay, he has to relinquish the post which he was holding. In that view of the matter, we are of the opinion that sub-regulation (2) of regulation 20 of the said regulations may not have any application in the facts of the case. Furthermore, there cannot be any doubt whatsoever that the petitioner having accepted the new offer must be held to have waived his right, if any. The petitioner at the time of filing of his application

for the post of Industrial Relation Officer was aware of the contents of the circular, which was a condition precedent for consideration of his candidature. Knowing fully well the conditions laid down therein, he filed such an application, and in that view of the matter while he was selected for the said post, the appellant bank was entitled as a matter of right to enforce the conditions laid down therein. Sub-regulations (2) of regulation 20 as noticed hereinbefore, contains a proviso providing for reduction in the period of notice as also oral remission thereof. If the bank had taken recourse to such a procedure and had exercised the said power, no legal infirmity can be drawn by reason thereof. In any event, the writ petitioner for the first time in the writ application cannot be permitted to urge that he was made to sign on the dotted line and the said offer of resignation became bad in law, as he was coerced or threatened to tender the same. It is not expected of an officer of a bank to be ignorant about his rights and obligations. As indicated there in before, the petitioner was aware of his rights and obligations in terms of the circular. He was also aware of his rights and obligations of the conditions of offer of appointment. Nobody on the earth, far less the officers of the appellant bank could coerce the petitioner to submit his resignation. He did it only because he was to be appointed on a higher post. It is now well known that the matter relating to submission of resignation and acceptance thereof can be dispensed with by mutual consent. Consent on the part of the petitioner while being offered the post of Industrial Relation Officer, was explicit.

13. For the reasons aforementioned, we are of the opinion that by reason of such acceptance of the offer of resignation, the petitioner in law, would be deemed to be out of his service, and thereafter only he could join his new post of Industrial Relation Officer. Apart from the fact that a person with knowledge of his right may waive the same irrespective of the fact whether the procedures relating thereto are mandatory or directory in nature. Furthermore, a person by his conduct would be hit by the rule of acquiescence if he submits himself voluntarily to the jurisdiction without any demur whatsoever. Keeping the view of the aforementioned backdrop, let us consider the decisions cited by Mr. Mukherji in the case of Delhi Cloth and General Mills Co., Ltd. Vs. Workmen and Others etc., , wherein the apex court was dealing with a matter relating to payment of gratuity. It held :

"Gratuity in its etymological sense means a gift especially for services rendered or return for favours received. For some time in the early stages in the adjudication of Industrial disputes, gratuity was treated as a gift made by the employer at his pleasure and the workmen had no right to claim it But since then there has been a long line of precedents in which it has been ruled that a claim for gratuity is a legitimate claim which the workmen may make and which in appropriate cases may give rise to an industrial dispute. Gratuity paid to workmen is intended to help them after retirement on superannuation, death, retirement, physical incapacity, disability or otherwise. The object of providing a gratuity scheme is to provide a retiring benefit to workmen who have rendered

long and unblemished service to the employer and thereby contributed to the prosperity of the employer. It is one of the efficiency devices, and is considered necessary for an orderly and human elimination from industry or superannuated or disabled employees who, but for such retiring benefits, would continue in employment even though they function Inefficiently. It is not paid to an employee gratuitously or merely as a matter of boon."

14. There cannot be any dispute as regards the aforementioned proposition, but the said decision cannot be said to have any application in the instant case, in as much as, we are concerned herein with the question as to whether the petitioner completed 10 years continuous service, or not. In D.V. Jakatt & Ors. v. Regional Director, Employees' State Insurance Corporation 1982 Lab 1C NOC 53, a Division Bench of Karnataka High Court was dealing with the provisions of Employees' State Insurance Act. While considering with the function of employee as contained in section 2(9) of the said Act, the Division Bench held for the purpose of the said decision that it is not necessary that all the employees must b''e working on the floor of the factory, and thus even persons doing something Incidental to or preliminary to or connected with the work of factory would also be employees. In Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , the court was concerned as to whether clause (1) of Rule 9 of Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules, 1979 is violative of section 23 of the Contract Act, being opposed to public policy and is also ultra vires of Article 14 of the Constitution of India in terms whereof of Corporation had an absolute right to terminate services of permanent employees by giving him 3 months'' notice in writing or by paying him the equivalent of three months'' basic pay and dearness allowance in lieu of such notice. The apex court held that such a provision is wholly unreasonable. In the Instant case, we are not concerned with the vires of any such provision, nor any such question has been raised in the writ application or before us. In Lalappa Lingappa and Others Vs. Laxmi Vishnu Textile Mills Ltd., , the apex court while Interpreting the definition of continuous service as contained in section 2(c) of Payment of Gratuity Act, held that the same is a wide one. It was further held that Payment of Gratuity Act being a social welfare legislation, in construing the provisions thereof, rule of beneficial construction should be adopted. However, in that case, the apex court was concerned with the case of a Badli worker, who although did not come within the purview of the substantive provision of the definition of continuous service as contained in section 2(c) of the said Act read with section 2A thereof, but came within the purview of Explanation appended thereto. A bare perusal of the provisions of the Payment of Gratuity Act and Rule 8 including the proviso appended thereto, would clearly show that no such explanation had been appended in rule 8 of the Gratuity Rules. It is now a well settled principles of law that a decision is an authority for what it decides and not what can be logically deduced therefrom. It is also well settled that a little or additional fact may make a lot of difference in arriving at the final conclusion.

15. In Punjab National Bankv. P.K. Mittal reported in AIR 1989 SC 1053. the Supreme Court was considering a case of a permanent employee. In that case, the writ petitioner gave a notice of 3 months for his resignation and clearly stated in his letter as to when such resignation would take effect. The resignation was accepted on the next day. Before the expiry of 3 months, the resignation was withdrawn. It was in that situation, the apex court held :

"The proviso should not be Interpreted as enabling a bank to thrust a resignation on an employee with effect from a date different from the one on which he can make his resignation effective under the terms of the regulation. Cl. (2) of the regulation and its proviso are Intended not only for the protection of the bank but also for the benefit of the employee. It gives the employee a period of adjustment and rethinking. It also enables the bank to have some time to arrange its affairs, with the liberty. In an appropriate case, to accept the resignation of an employee even without the requisite notice if he so desires it."

16. Interpreting the provision in the aforementioned manner, the apex court observed :

"The result of the above Interpretation is that the employee continued to be in service till the 21st April. 1986 or 30th June, on which date his services would have come normally to an end in terms of his letter dated 21st January, 1986. But, by that time, he had exercised his right to withdraw the resignation. Since the withdrawal letter was written before the resignation became effective, the resignation stands withdrawn, with the result that the respondent continues to be in the service of the bank. It is true that there is no specific provision in the regulations permitting the employee to withdraw the resignation. It is, however, not necessary that there should be any such specific rule. Until the resignation becomes effective on the terms of the letter read with Regulation 20, it is open to the employee, on general principles, to withdraw his letter of resignation. That is why, in some case of public services, this right of withdrawal is also made subject to the permission of the employer. There is no such clause here."

17. Furthermore, it is also settled that a point which was not argued nor decided cannot become a binding precedent (See) Madhavkrishna and Another Vs. Chandra Bhaga and Others, .

18. As Indicated hereinbefore, the case at hand stands absolutely on a different footing. In the instant case, the petitioner had received the benefits and advantages by getting a higher salary and a higher post. In the event, the contention of the petitioner is accepted, his appointment to the post of Industrial Relation Officer would become illegal. The petitioner, in this situation, we are of the opinion, cannot be permitted to approbate and reprobate. Having obtained the benefits of the said post for a period of 7 years, he cannot be hard to say that the resignation letter was obtained from him by exercising coercion or threat. The petitioner, in our opinion, is clearly estopped from doing so. Reference in this connection may be made to the decisions reported in Madan Lal and Others Vs.

State of Jammu and Kashmir and Others, and Munindra Kumar and others Vs. Rajiv Govil and others, . The apex court recently in Construction India Vs. Secretary, Works Department, Government of Orissa and Others, , has held that where a person submits to the jurisdiction of the Arbitrator who did not have any Jurisdiction otherwise, the same would indicate a conscious acquiescence on the part of the respondent in the continued jurisdiction of the Arbitrator. It is not disputed that if the resignation of the petitioner is held to be valid, he was not entitled to the benefit of the gratuity and provident fund as he did not satisfy the requirement of continuous service of a period of 10 years. Conditions appended to his offer of appointment clearly show that the same was absolutely a fresh one and for that purpose, even his earlier provident fund, leave or any other right which might have accrued to him, were not to be given. It is profitable at this juncture to refer to a decision of the apex court in Union of India (UOI) and Another Vs. Dr. S. Baliar Singh, . wherein the apex court while considering the provisions of Railway Servants (Pass) Rules, 1986, held that although services rendered by the writ petitioner in other Government services would be counted for the purpose of retiral benefits, unless a person serves the railways for a period of 20 years, he cannot be given the benefit of the said Rules, and pursuant thereto, no pass could be given to him. The Supreme Court in that case applied the principles of continuous service stringly. In the circumstances, we are of the opinion that the judgment and order passed by the learned trial Judge cannot be upheld.

19. For the reasons aforementioned, the judgment and order passed by the learned trial Judge is set aside and the appeal is allowed. Consequently, the cross objection filed by the writ petitioner/respondent is also dismissed.

It appears from the records that the appellants, pursuant to an order of this court, deposited certain amount with the Registrar, Appellate Side of this court, and the said officer has been asked by this court to invest the same in a short term deposit. The said amount deposited with the Registrar, may be refunded to the appellants with Interest accrued thereupon. However, in the facts and circumstances of this case, there will be no order as to costs.

D.B. Dutta, J.—I agree.

2. Appeal allowed