

(2017) 01 GUJ CK 0139
In the Gujarat High Court
Case No : 219 of 2013

BARODA TRADERS CO-OP BANK LTD

APPELLANT

Vs

AMRUTLAL TULSIBHAI PATEL & ORS.

RESPONDENT

Date of Decision : 09-01-2017

Acts Referred:

Bombay Industrial Relations Act, 1946, Section 78, Section 79 - Powers of Labour Court. - Commencement of proceedings.

Citation : (2017) 01 GUJ CK 0139

Hon'ble Judges : K M Thaker

Bench : Single Bench

Advocate : N D Songara, Hemang M Shah, Paritosh Calla

Final Decision : Disposed

Judgement

1. Heard Mr. Songara, learned advocate for petitioner bank and Mr. Shah, learned advocate for respondent. The petitioner bank has taken out present petition against two judgment (wherein concurrent finding of facts, concurrent final conclusion and concurrent direction have been passed by the learned Trial Court and Appellate Court) and an order in Review Application. 1.1 The Bank has challenged award dated 31.12.2010 passed in BIRT Application No.5 of 2005 passed by learned Labour Court at Vadodara and the bank has also challenged the judgment dated 26.07.2011 passed by learned Industrial Court at Vadodara in Appeal No.2 of 2011 whereby learned Industrial Court at Vadodara confirmed the judgment by the learned Industrial Court and rejected the Appeal filed by bank against the judgment by learned Labour Court. The petitioner bank has also challenged order dated 07.01.2012 passed by learned Industrial Court in Review Application No.1 of 2011 whereby the learned Industrial Court rejected the Review Application seeking review/ modification of the judgment dated 26.07.2011 passed in Appeal No.2 of 2011 with reference to the date on which the claimant attained the age of superannuation.

2. So far as relevant facts are concerned, it has emerged from the record and from the submission by learned advocates that the claimant felt aggrieved by order dated 30.07.2005 passed by the petitioner bank whereby the bank terminated his service. Feeling aggrieved by the said Order the petitioner invoked Section 78 read with Section 79 of the Bombay Industrial Relations Act, 1946 (hereinafter BIR Act) and challenged the said order 30.07.2005. In his application before learned Labour Court, the claimant alleged that the bank illegally and arbitrarily terminated his service vide order dated 30.07.2005 and before terminating his service, the bank did not follow procedure prescribed by law and also violated principles of natural justice in as much as his service came to be terminated without opportunity of hearing.

3. The bank opposed the application on diverse grounds. The bank contended that the service of the claimant is terminated because he had committed misappropriation of funds of bank, therefore, bank lost confidence in the claimant, who at the relevant time worked as Cashier-cum-Clerk. The bank also alleged that the wife of the claimant also was an employee of the bank and her service was terminated, however, claimant and the wife both acted in collusion and misappropriated sum of Rs.50,000/- by misusing cheque in name of Ruchi Enterprise and that, therefore, it was found that it is not in the interest of bank to continue the claimant in service and consequently his service came to be terminated. 3.1 Learned Labour Court considered the material available on record and rival submissions. Learned Labour Court found that service of the claimant was terminated in violation of principles of natural justice. Therefore, learned Labour Court passed the judgment dated 31.12.2010 holding, inter alia, that the action of the bank of terminating service of the claimant by way of discharge with payment of one month Notice Pay is illegal and unsustainable. Learned Labour Court also observed that the claimant had in the meanwhile, attained age of superannuation and that, therefore, there was no question of actually reinstating the claimant. Consequently, learned Labour Court directed the bank to pay full wages and other benefits to the claimant from the date when his service came to be terminated to the date on which the claimant attained age of superannuation i.e. for the period from 30.07.2005 to 01.06.2010.

3.2 Feeling aggrieved by the said decision by learned Labour Court, the bank filed Appeal which was registered as Appeal (IC) No.2 of 2011. Learned Industrial Court heard the parties and examined the material on record as well as impugned judgment. Thereafter, learned Labour Court passed judgment dated 26.07.2011 whereby learned Industrial Court confirmed the findings and conclusion recorded by the learned Labour Court and rejected the Appeal.

3.3 Subsequently, the bank filed an application in form of Review Application whereby the bank contended that the judgment of learned Labour Court and Learned Industrial Court wherein the date of claimant's superannuation is mentioned, requires to be reviewed and modified because the claimant would retire from service on attaining 58 years of age whereas in the judgments the

Courts have taken into account 60 years of age as the age of superannuation. Learned Industrial Court considered the said Review Application No.01/2011 and after taking into consideration the provision under the standing Order and subsequent modification therein, learned Industrial Court rejected the Review Application.

3.4 Feeling aggrieved by the said judgment the bank filed present petition.

4. While admitting the petition, this Court vide order dated 17.01.2013 read with order dated 31.01.2013, directed the bank to deposit the amount of backwages and other benefits with the registry of this Court and the Court also directed that that said amount should be invested with Nationalized Bank and the claimant should be allowed to withdraw quarterly interest. According to the learned advocate for the petitioner bank, the Bank has deposited Rs.8,76,131/- in compliance with the said interim orders passed by this Court while admitting the petition.

5. In this factual background, learned advocate for the petitioner assailed impugned judgment and submitted that learned Labour Court as well as learned Industrial Court have failed in not appreciating fact that the service of the claimant was terminated because the bank lost confidence and trust in the claimant who, while in service, misappropriated funds of the bank by misusing cheque of one of the customers of the bank. He submitted that learned Labour Court and learned Industrial Court ought not have directed the bank to pay wages from the date of termination to the date when the claimant attained the age of superannuation are unjust and arbitrary and, therefore, the said orders deserve to be set aside. Mr. Songara further directed that learned Labour Court also failed to appreciate that the date of retirement in respect of the service with the petitioner bank is 58 years and, therefore, the order directing the bank to pay wages until the date when the claimant attain 60 years of age, is unjust and arbitrary and contrary to the relevant provision in the standing order and the said orders deserve to be set aside.

6. Mr. Shah, learned advocate for the claimant opposed the submission of the learned advocate for the bank. Mr. Shah, learned advocate for the claimant submitted that there is no error in the judgment and order passed by learned Industrial Court and the learned Labour Court. He submitted that the claimant's service was terminated in violation of the statutory provision and in violation of principles of natural justice and that, therefore, the action of the bank namely viz. terminating service of the claimant was ex-facie arbitrary which has been set aside by the learned Labour Court and the said decision is confirmed by learned Industrial Court. According to learned advocate for claimant, the said decision by learned Courts do not warrant any interference in writ jurisdiction. He further submitted that standing order applicable to the bank were modified/ amended in 1982 whereby the age of superannuation came to be enhanced to 60 years and that, therefore, the learned Industrial Court is right and just in rejecting the Review Application and the submission by the bank against the order passed by

learned Industrial Court in Review Application No.01 of 2011 are also unjust and contrary to the bank's standing order. With such submission, learned advocate for the petitioner submitted that petition must be rejected.

7. I have considered rival submissions by learned advocates for the bank and original claimant. I have also considered material available on record of this petition including the judgments passed by learned Labour Court and learned Industrial Court as well as order in Review Application. 7.1 In present case it is not in dispute that the respondent herein i.e. original claimant was employee of the bank, prior to the date on which his service came to be terminated by the bank. It is also not in dispute that the original claimant worked as Cashier-cum-Clerk. It is also not in dispute that the claimant's service came to be terminated w.e.f. 30.7.2005. It is also not in dispute that before passing the order dated 30.7.2005 terminating service of original claimant, the bank neither conducted any domestic enquiry nor paid retrenchment compensation to the claimant. 7.2 Present case is required to be decided in light of abovementioned undisputed facts.

8. This petition does not deserve to be entertained and deserves to be dismissed, for reasons more than one. 8.1 First, the petitioner bank has challenged judgments and orders passed by learned Trial Court (Labour Court) and learned Appellate Court (Industrial Court) whereby both the learned Courts have recorded concurrent findings of fact and concurrent conclusions and both the learned Courts have passed similar directions. Thus, a petition against such concurrent findings of fact and conclusions does not deserve to be entertained. 8.2 Second, learned Labour Court has recorded findings of fact with regard to various aspects raised by the bank before learned Labour Court and said findings of fact are recorded on the basis of and after appreciation of the evidence available on record. The said findings of fact and final conclusion recorded by learned Labour Court have been, thereafter scrutinized by learned Industrial Court in exercise of appellate jurisdiction. Learned Industrial Court has examined and evaluated and appreciated the material available on record i.e. oral and documentary evidence led by the parties and after due examination of material available on record and rival submissions, learned Industrial Court reached to the conclusion that there is no error in the findings of fact recorded by learned Labour Court and / or in the conclusion recorded by learned Labour Court. Having reached such conclusion learned Industrial Court confirmed the final conclusion recorded by learned Labour Court and rejected the Appeal. During the hearing of present petition learned advocate for the petitioner failed to point out any document or any other material / evidence on record of the petition, which would convince this Court that the findings recorded by learned Labour Court and confirmed by learned Industrial are perverse or contrary to the evidence available on record. Learned advocate for the petitioner also could not point out any material or significant error of law or jurisdiction or even any error of fact from the impugned judgments and could not convince this Court, with aid of or on strength of material available on record, that the learned Labour Court or

learned Industrial Court have committed error of law or jurisdiction or any error with regard to the findings of fact. In this view of the matter any cause to interfere with the concurrent findings of fact recorded by two Courts" is not made out. 8.3 Besides this, this Court would not sit in appeal over the judgment by the learned Appellate Court and this Court would also not enter into process of reappreciation of evidence. Even otherwise, as mentioned above, learned Counsel for the petitioner bank failed to point out any evidence / document from the record so as to convince the Court that learned Labour Court and / or learned Industrial Court has committed any error and that the findings recorded by learned Courts are perverse. Therefore also the petition does not deserve to be entertained and any ground to interfere with the impugned judgment is not made out. 8.4 Third reason is important reason in light of which this Court is convinced that present petition does not deserve to be entertained. It has emerged from the record that the claimant worked with the bank as Cashier-cum-Clerk and that the bank terminated his service vide order dated 30.7.2005 on the allegation that he indulged in misappropriation of funds of the bank i.e. Rs.50,000/- by misusing cheque of bank's customer (i.e. M/s. Ruchi Enterprise) and that therefore bank lost confidence and trust in the claimant. True it is that post and position of Cashier-cum-Clerk in a Bank is fiduciary and the person engaged as and worked as Cashier-cum-Clerk should perform his duties and functions with honesty and integrity. Any lapse in performance of duty by Cashier-cum-Clerk and that too with regard to honesty and integrity by person working on such important post cannot be dealt with by the employer by any leniency. However, even in respect of person holding such sensitive and important post mere allegation or mere doubt cannot take place of and cannot be substituted for, evidence and even in such cases, service of person cannot be terminated without offering opportunity of hearing and defence to the person against whom allegations about breach of honesty and misappropriation of funds of the bank are made.

9. So far as present case is concerned, the bank alleged and contended before the learned Labour Court that the claimant indulged in act of misappropriation of funds of the bank and he, with his wife, misused negotiable instrument (cheque) in name of bank's customer i.e. Ruchi Enterprise and that therefore the claimant's service was terminated vide order dated 30.7.2005.

10. It is not in dispute that before passing order dated 30.7.2005 the bank had not not only not conducted regular domestic enquiry but the bank had not even issued any notice calling for explanation or reply from the claimant. 10.1 Even if it is assumed that when the bank sought to terminate the service of the claimant by way of discharge simplicitor and not by way of any punitive or penal action, a fulfilled and regular domestic enquiry was not required, then also failure to serve formal show-cause notice and failure to even call for explanation from the concerned person with reference to the allegation, cannot be approved. 10.2 Such an action i.e. termination of service without issuing even any show-cause notice and without even calling for plain and simple explanation or reply with

regard to the allegation and without granting any opportunity of explanation / hearing would amount to violation of principles of natural justice. 10.3 Any action, more particularly action whereby service of an employee is terminated without granting opportunity of hearing and in violation of principles of natural justice, cannot be sustained.

11. In present case learned Labour Court has rightly held that since the service of the claimant was terminated without granting opportunity of hearing and since the said factual position was not disputed even by the bank, the termination order dated 30.7.2005 passed by the bank was in violation of principles of natural justice and that therefore illegal and consequently it cannot be sustained.

11.1 The said conclusion by the learned Labour Court cannot be faulted. Therefore, learned Industrial Court, while deciding the appeal, rejected the objection of the appellant and confirmed the conclusion by the learned Labour Court holding, inter alia, that termination of applicant's service in violation of principles of natural justice is illegal. 11.2 Both the learned Courts reached same findings of fact and conclusion.

12. When it is not in dispute that before terminating service of the claimant bank did not even issue a showcause-notice and did not call for formal / proper explanation from the claimant before terminating his service on the allegation of misappropriation of funds and that therefore the action of terminating claimant's service is illegal act, then such conclusion cannot be faulted.

13. In this background, only question which would survive for consideration is about appropriate relief.

14. When the learned Labour Court and Industrial Court reached the conclusion that the claimant's service was terminated illegally ordinarily direction to reinstate the claimant would follow and such direction cannot be faulted. 14.1 However, in present case learned Court found that the claimant had, during pendency of the proceedings attained age of superannuation therefore, learned Labour Court modified the relief and directed the bank to pay full backwages and other benefits in lieu of reinstatement with continuity of service.

15. In light of above discussion and the facts and circumstances the said direction by the learned Labour Court cannot be faulted. 15.1 When the learned Industrial Court considered the said decision of learned Labour Court in light of undisputed fact and learned Industrial Court also concluded that the decision of learned Labour Court does not warrant any interference and therefore the learned Industrial Court dismissed the appeal, this Court is of the view that the said conclusion by the learned Labour Court and learned Industrial Court does not warrant any interference (i.e. see decision by Hon'ble Apex Court in case of Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) (2013) 10 SCC 324).

16. At this stage it is relevant to note that after the Industrial Court rendered final decision the bank had filed review application and requested the industrial

Court to review the decision with regard to date of superannuation. 16.1 It is pertinent that the learned Labour Court directed that the bank shall pay full wages and other benefits to the claimant from 30.07.2005 (i.e. the date on which the claimant's service came to be terminated) to 1.6.2010 (i.e. the date on which the claimant attained 60 years of age). The Industrial Court, in its judgment confirmed the said direction. 16.2 In that background the bank filed review application with the contention that according to standing order, the age of superannuation is 58 years and therefore the final direction with regard to the period for which backwages are to be paid, may be modified. 16.3 So as to support the said request the bank sought to rely on clause No. 12 of its standing order and the bank contended that the age of superannuation, in case of claimant would be 58 years. 16.4 From the record it has emerged the standing orders in respect of the bank came to be settled before or in May 1972. 16.5 According to the standing orders which came to be settled in May 1972, the age of superannuation was 55 years which can be extended upto 58 years subject to the employee's fitness to continue in service up to 58 years and it can be extended to 60 years subject to employee submitting medical certificate declaring that the employee is fit to continue in service upto 60 years. 16.6 The said standing orders, according to the bank, came to be modified / amended in 1982. 16.7 According to the bank, upon amendment / modification in the standing orders, the age of superannuation came to be fixed at 60 years of age however, standing orders also require that upon completion of age of 58 years the employee should submit certificate by Civil Surgeon declaring the employee to be fit to continue in service. 16.8 The bank claimed that in case of the claimant such certificate was not submitted and therefore the claimant should retire at the age of 58 years.

17. Learned Industrial Court considered relevant provision, more particularly clause 12 of the standing orders which came to be amended in 1982, and upon due consideration of the said provision, learned Industrial Court reached to the conclusion that the standing orders provide that age of superannuation is 60 years of age and that if any employee fails to submit medical certificate then the bank merely gets right to take appropriate decision however, age fixed for superannuation continues to be 60 years of age. Having reached such conclusion learned Industrial Court rejected the review application. 17.1 When said clause 12 is taken into account it emerges that there is no error in the decision by learned Industrial Court inasmuch as the said clause 12 prescribes that age of superannuation shall be 60 years of age. Therefore, principal provision prescribes that 60 years of age is the age of superannuation however employee would be required to submit fitness certificate from Civil Surgeon upon completion of 58 years of age. 17.2 On reading clause 12 it becomes clear that merely on ground of failure to submit fitness certificate upon completion of 58 years of age right of employee to continue in service until 60 years would not be affected. Such an event only allow the bank to take decision with regard to such employee. 17.3 Obviously if the bank takes decision to discontinue any employee on completion

of 58 years of age i.e. 2 years before the prescribed age for superannuation then bank will have to record sufficient reason and justification and only reason that the employee failed to submit certificate would not be sufficient to discontinue an employee at the age of 58 years until it is established that the employee is otherwise not fit to continue in service after 58 years of age.

18. In present case the employee could not submit certificate because his service was already terminated and he was out of employment and litigation against the decision of terminating his service was pending before the learned Court. 18.1 In such circumstances, the claimant could not submit certificate and for the failure on account of such reason, the claimant cannot be penalized or cannot be retired two years before the prescribed age for superannuation, more particularly when the bank failed to establish that claimant was, otherwise also, not fit to continue in service after age of 55 years or age of 58 years. 18.2 Any conclusion to the said effect, based on cogent material was not recorded by the bank at the time when the claimant completed 58 years or even at the time when the bank preferred review application.

19. Under the circumstances it cannot be said that the Industrial Court committed any error in rejecting review application. 19.1 In light of foregoing discussion and having regards to the reasons recorded above, the petition fails and deserves to be rejected. Consequently the petition is hereby rejected.

20. Before concluding it is necessary and relevant to mention that the petitioner bank has, in compliance of the interim orders deposited Rs.8,76,131/- with the registry of this Court (said amount have been invested by the registry in view of the interim order passed by the Court). 20.1 It appears that the claimant has raised some grievance with regard to the calculation of the amount payable to him in accordance with order passed by learned Labour Court.

21. Learned advocate for the petitioner submitted that the bank has placed on record the basis of calculation and the details of calculation to justify that the calculation is correct and it is in accordance with rules of the bank and there is no error or discrepancy in the calculation. 21.1 In view of such dispute it is necessary to clarify that if at all the claimant has any dispute or grievance with regard to calculation of the wages for said period, the claimant will have to establish the ground of such grievance and will also have to establish, in accordance with law, correct calculation. This process can be undertaken by the claimant before appropriate forum inasmuch such disputed question with regard to the calculation of backwages cannot be gone into and entertained by this Court while deciding the petition filed by the bank against judgment passed by learned Labour Court and learned Industrial Court.

21.2 Therefore with the clarification that the claimant may approach appropriate forum if he has any grievance with regard to calculation, the petition is disposed of. Rule is discharged.