

(2014) 09 BOM CK 0202
In the Bombay High Court
Case No : Writ Petition No. 1755 of 2013

Devanand

APPELLANT

Vs

Bank of Maharashtra

RESPONDENT

Date of Decision : 16-09-2014

Acts Referred:

Constitution of India, 1950 — Article 19(1)(f), 300A, 300A, 31(1)
Official Secrets Act, 1923 — Section 5
Penal Code, 1860 (IPC) — Section 25, 405, 463
Pensions Act, 1871 — Section 11, 4, 6

Citation : (2014) 09 BOM CK 0202

Hon'ble Judges : C.V. Bhadang, J; A.P. Bhangale, J

Bench : Division Bench

Advocate : D.N. Dani, Advocate for the Appellant; B.G. Kulkarni, Advocate for the Respondent

Judgement

C.V. Bhadang, J.

1. Rule. Rule made returnable forthwith. The petition is heard finally with the consent of the parties.

2. The petitioner was working as a computer operator/clerk in respondent no.1 - Bank of Maharashtra, in its Jaripatka Branch at Nagpur. The petitioner opted for voluntary retirement and was relieved from service on 12.9.2008. The petitioner was sanctioned a pension of Rs. 13,500/- per month on his retirement. On 26.11.2012, the petitioner was informed by a communication by the Deputy General Manager (Inspection and Audit) of the Bank about serious charges levelled against him. It was alleged that during the period from 31.5.2004 to 26.5.2008, the petitioner had entered into certain financial irregularities, in which the petitioner had opened five accounts in fictitious name and deposited 46 cheques of the customers of the Bank in the said account and had thereby committed misappropriation to the tune of Rs. 96,43,599/- . It appears that the petitioner gave a reply to the said letter on 9.12.2012 refuting the allegations.

However, the respondents blocked the pension account as well as the ATM card of the petitioner without any intimation. According to the petitioner, he has not been allowed to withdraw his pension since August 2012. By a notice dated 17.1.2013, the petitioner sought restoration of ATM card as well as release of his pension, which did not evoke any favourable response. It is in these circumstances, the petitioner filed this petition initially with a prayer.

to hold that the action of the respondents in blocking the pension and ATM card of the petitioner is illegal , and to

direct the respondents to make and release full and complete pension to the petitioner every month since August 2012 and onwards without any deductions.

3. It appears that, in the meantime, the petitioner was served with a chargesheet dated 20.3.2014 and as such the petition came to be amended, with a prayer for quashing of the chargesheet.

4. It appears that the matter was also reported to the Police Station, Jaripatka, Nagpur on 10.11.2012, in which, apart from the petitioner, there are twelve others named who, according to the respondents -Bank, have conspired with the petitioner, in siphoning out the amount on the basis of the fictitious accounts. It further appears that an offence is registered in respect of the same and a criminal case is instituted and is pending.

5. The Bank has also instituted Special Civil Suit No.471 of 2013 against the respondents and thirteen others seeking recovery of amount of Rs.2,40,40,556/- . That suit is pending before the learned Civil Judge, Senior Division at Nagpur.

6. The material contention challenging the action of blocking of the pension and the ATM card as well as the issuance of the chargesheet, is that the same is without any authority and without following due process of law. It is contended that the respondents have no authority to block the pension in view of the provisions of Sections 4, 6 and 11 of the Pension Act, 1871. Insofar as issuance of the chargesheet is concerned, it is contended that the same is served on the petitioner on 27.3.2014, which is beyond the period of four years, from the date of his retirement, which is not permissible in view of Regulation No.48 of the Bank of Maharashtra (Employees) Pension Regulations, 1995 ("Regulations" for short).

7. The respondents have filed return and it is contended that the petitioner has opened five accounts in fictitious names, deposited 46 cheques in the same and the amount was siphoned out. It is contended that soon thereafter the petitioner opted for voluntary retirement. So far as ground of limitation for issuance of the chargesheet is concerned, it is contended that it is from accrual of the cause of action which, in the present case, is disclosure of irregularities/misappropriation. It is contended that the chargesheet is thus well within time and there is no breach of Regulation No.48 of the Regulations.

8. We have heard Shri Dani, the learned counsel for the petitioner and Shri

Kulkarni, the learned counsel for the respondents.

9. It is submitted on behalf of the petitioner that the action of blocking of the pension and the ATM Card, as also the issuance of the chargesheet is clearly in breach of the relevant provisions of the Pension Act and Regulations which are binding between the parties. The learned counsel has placed reliance on unreported decision of the Hon'ble Supreme Court in the case of State of Jharkhand and Others Vs. Jitendra Kumar Srivastava and Another, in order to submit that in absence of any provision of withholding of pension or gratuity, the same is illegal. It is submitted that pension is held to be a "property" and in view of provisions of Article 300-A of the Constitution of India, a person cannot be deprived of pension save by authority of law. Insofar the issuance of the chargesheet is concerned, it is contended that it is issued beyond four years of the retirement of the petitioner and as such needs to be quashed and set aside.

10. On the contrary, it is submitted by Shri Kulkarni, the learned counsel for the respondents that there was a discrepancy as to reconciliation of amount insofar as Jaripatka Branch is concerned and that was consistently being shown as being less than one month category. It was, in these circumstances, that the chargesheet could not have been issued immediately and the same is issued after disclosure of the irregularities and the same would be well within limitation and there is no breach of Regulation 48 of the Regulations. The learned counsel has also supported the order about blockage of pension and the ATM card. It is submitted that the petition is devoid of any substance. There are irregularities involving huge public amount and the attempt by the respondents to thwart the departmental proceedings at the threshold cannot be sustained. He, therefore, prayed that the petition be dismissed.

11. The petitioner is claiming the following reliefs :

[i] to quash and set aside the charge sheet dated 20.03.2014 (Annexure A -1) issued by the respondents to the petitioner on 27.03.2014 as illegal;

[ii] hold that the action of the respondents in blocking the pension and ATM card of the petitioner is illegal, with a direction to release full and complete pension to the petitioner every month since August 2012 and onwards without any deductions. The prayer regarding quashing of the charge -sheet goes to the root of the matter.

12. The challenge to the issuance of the chargesheet and the departmental action is based on Regulation No.48 (1) and more particularly the third proviso thereof. Reliance is also placed on the decision of the Supreme Court in the case of Jitendra Kumar Srivastava (supra). Regulation No.48 reads as under :

"Recovery of pecuniary loss caused to the Bank. - (1) The Competent Authority may withhold or withdraw a pension or a part thereof, whether permanently or for a specified period, and order recovery from pension of the whole or part of any pecuniary loss caused to the Bank if in any departmental or judicial

proceedings the pensioner is found guilty of grave misconduct or negligence or criminal breach of trust or forgery or acts done fraudulently during the period of his service. Provided that the Board shall be consulted before any final orders are passed :

Provided further that departmental proceedings, if instituted while the employee was in service, shall, after the retirement of the employee, be deemed to be proceedings under these regulations and shall be continued and concluded by the authority by which they were commenced in the same manner as if the employee had continued in service.

Provided also that no departmental or judicial proceedings, if not initiated while the employee was in service, shall be instituted in respect of a cause of action which arose or in respect of an event which took place more than four years before such institution.

[2] Where the Competent Authority orders recovery of pecuniary loss from the pension, the recovery shall not ordinarily be made at a rate exceeding one -third of the pension admissible on the date of retirement of the employee :

Provided that where a part of pension is withheld or withdrawn, the amount of pension drawn by a pensioner shall not be less than the minimum pension payable under these regulations.

13. Precisely the submission is that the petitioner ceased to be in service with effect from 12.9.2008, when his notice of voluntary retirement became effective. The alleged irregularities relate to a period from 31.5.2004 to 26.5.2008. The chargesheet is served on the petitioner on 27.3.2014. It is contended that this is beyond the period of four years as contemplated under the third proviso to Regulation No.48 (1) of the Regulation.

14. There were some submissions advanced by the learned counsel for the parties, as to whether, a person who opts for voluntary retirement would come within the ambit of a person who is "retired" or "deemed to have retired", within the meaning of regulations. However, there cannot be any manner of doubt that for the purpose of the Pension Regulations, 1995, no distinction can be drawn between an employee who retired on superannuation and the one who opts for voluntary retirement.

15. A perusal of Regulation No.48 would show that it basically concerns about the recovery of pecuniary loss caused to the Bank and the powers of the Competent Authority to withhold or withdraw pension or a part thereof, whether permanently or for a specified period, as also the powers of the Competent Authority to order recovery from pension of the whole or part of any pecuniary loss caused to the Bank. For the present purpose, we are concerned with third proviso which states that no departmental or judicial proceedings shall be initiated against an employee in respect of a cause of action which has arisen or in respect of an event which took place more than four years before such

institution.

16. The learned counsel for the respondents has submitted that the proviso envisages the reckoning of such time both from the accrual of the cause of action "or" in respect of an event which took place more than four years before such institution. Precisely the submission is that although the events in the present case may relate to a period prior to four years of the institution of the departmental proceeding, the cause of action can be said to have arisen subsequently. It is submitted that the whole misconduct alleged against the petitioner is in the nature of a fraudulent act and in such a case the cause of action would be from the date on which the fraud is discovered or disclosed. It would be useful to refer to the contentions raised on behalf of the respondents in their additional reply dated 21.4.2014 in para 3 as under :

"It is respectfully submitted that in so far as Jaripatka Branch is concerned there was a huge amount which was untallied amount. The said entries were pending since migration to CBS i.e. from 06.06.2007 (Computerized Banking System). At every time the said untallied amounts were shown under the head "below one month category" namely recent untallied transaction thought the entries were related to old transactions. The amounts were punched with the recent dates but repeated entries of the said amounts had created a serious doubt about the said untallied entries. It is submitted that as a matter of fact till the ending of the financial year 2011 -2012 the entries had remained unexplained though shown as "recent category". Hence, after the ending of financial year 2011 -2012 as on 31.03.2012, the Zonal Office and the Head Office had paid serious attention to untallied amounts because till 31.03.2012 the entries were always shown in "recent outstanding" category, but the amount remained the same. The matter was thoroughly discussed in video conferencing between the Zonal Manager and higher officers of Head Office and on 13.06.2012 and a team of senior officers was appointed to undertake the tallying work. The copy of letter dated 13.06.2012 issued by the Zonal Manager is annexed hereto and marked as Document No.1. Accordingly the Zonal Manager had issued directions to the Branch Manager, Jaripatka Branch as per letter dated 05.07.2012, copy of which is annexed hereto as Document No.2. The Head Office had raised queries about the untallied amounts as well as the action of showing them recent outstanding in terms of letter dated 07.07.2012. The copy of letter dated 07.07.2012 received from the Head Office is annexed hereto as Document No.3."

It is further contended in para 7 as under :

"It is respectfully submitted that even though the period during which misappropriation of an amount of Rs. 96,43,599/- was done was from 01.09.2007 to 08.05.2008, the untallied amounts had become a focus of concern at the end of financial year 2011 -2012 and hence from June 2012 prompt steps were taken so as to investigate the accounts and finally to expose the fraud. In the meantime, immediately after accomplishing the fraud, the petitioner had opted for voluntary retirement and at the relevant time as the facts were not

known, the request was accepted. Even though the period of 4 years had elapsed, the misconduct involves financial misappropriation resulting in huge loss to the Bank (Public Fund). In such cases the limitation/bar is not applicable. It is submitted that the Bank had already filed Civil Suit against the petitioner and his associates. The bank has already initiated departmental proceedings against the petitioner as well as other officers who are found to be negligent during the said period."

It would thus appear that, according to the respondents, there was a concerted effort by the petitioner and his associates which has resulted into huge loss to the Bank. The submission is that the entries were pending since bank migrated to CBS i.e. from 06.06.2007, the untallied amounts were shown under the head "below one month category". It was on 31.03.2012 that the Zonal Office and the Head Office had paid serious attention to untallied amounts because till 31.03.2012 the entries were always shown in "recent outstanding" category.

17. We have given our anxious consideration to the rival circumstances and the submissions made. Prima facie, we find that the third proviso to Regulation No.48 (1) envisages the counting of the 4 years period both in relation to the "events" in respect of which the departmental action is initiated OR "the cause of action". We find that, at this stage, the departmental action as well as the criminal action initiated by the bank, as also the civil suit filed for recovery are pending before the competent authority/courts. Thus, it would be neither necessary nor proper to make any detailed appreciation of the material or to record any final conclusion. We find that in view of third proviso to Regulation No.48 (1) and having regard to the fact that according to respondents the entire irregularities were disclosed at the end of the financial year 2011 -2012, the chargesheet cannot be quashed at the threshold, on the basis of the third proviso to Regulation No.48 (1). We also find that this aspect can be considered by the Disciplinary Authority, while passing the final orders in the departmental proceedings and the petitioner would be entitled to raise these contentions based on Regulation No.48 (1). We say so, because the question, whether the alleged irregularities have been disclosed at the end of the financial year 2011 -2012 or subsequent thereto, would be a question of fact, which can be properly agitated and considered by the Disciplinary Authority, while passing the final orders. With this, we find that the challenge raised to the chargesheet has to be negated at this stage.

18. This takes us to the challenge as to keeping the pension in abeyance. In this regard, Regulation No.42 onwards falling under "General Conditions", in Chapter IX of the Regulations of 1995 may be reproduced as under :

42. Pension subject to future good conduct : - Future good conduct shall be an implied condition of every grant of pension and its continuance under these regulations.

43. Withholding or withdrawal of pension : - The Competent Authority may, by

order in writing, withhold or withdraw a pension or a part thereof, whether permanent or for a specified period, if the pensioner is convicted of a serious crime or criminal breach of trust or forgery or acting fraudulently or is found guilty of grave misconduct. Provided that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the minimum pension per mensem payable under these regulations.

44. Conviction by Court : - Where a pensioner is convicted of a serious crime by a court of Law, action shall be taken in the light of the judgment of the Court relating to such conviction.

45. Pensioner guilty of grave misconduct : - In a case not falling under regulation 44 if the Competent Authority considers that the pensioner is prima facie guilty of grave misconduct, it shall, before passing an order, follow the procedure specified in Bank of Maharashtra Officer Employees" (Discipline and Appeal) Regulations, 1976 or in Settlement as the case may be.

46. Provisional Pension : - (1) An employee who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued, a provisional pension, equal to the maximum pension which would have been admissible to him, would be allowed subject to adjustment against final retirement benefits sanctioned to him, upon conclusion of the proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld etc. either permanently or for a specified period.

(2) In such cases the gratuity shall not be paid to such an employee until the conclusion of the proceedings against him. The gratuity shall be paid to him on conclusion of the proceedings subject to the decision of the proceedings. Any recoveries to be made from an employee shall be adjusted against the amount of gratuity payable.

Explanation. - In this chapter -

(a) the expression "serious crime" includes a crime involving an offence under the Official Secrets Act, 1923 (19 of 1923).

(b) the expression "grave misconduct" includes the communication or disclosure of any secret official code or password or any sketch, plan, model, articles, note, document or information, such as is mentioned in Section 5 of the Official Secrets Act, 1923 (19 of 1923) which was obtained while holding office in the Bank so as to prejudicially affect the interests of the general public or the security of the State.

(c) the expression "fraudulently" shall have the meaning assigned to it under Section 25 of the Indian Penal Code, 1860 (45 of 1860).

(d) the expression "Criminal breach of trust" shall have the meaning assigned to

it under Section 405 of the Indian Penal Code, 1860 (45 of 1860).

(e) the expression "forgery" shall have the meaning assigned to it under Section 463 of the Indian Penal Code, 1860 (45 of 1860).

19. The learned counsel for the petitioner has placed reliance on Regulation No.43 in order to submit that unless and until the pensioner is convicted of a serious crime or criminal breach of trust or forgery or acting fraudulently or is found guilty of grave misconduct, the pension could not have been withheld. In short, the submission is that such an order can be passed only after a finding is recorded by the criminal court or the Disciplinary Authority, as the case may be. It is contended that when no such finding is recorded either by the Criminal Court or by the Disciplinary Authority, the pension could not have been withheld or kept in abeyance. On the contrary, the learned counsel for the respondents has placed reliance on Regulation No.45 in order to submit that in a case where the Competent Authority prima facie finds the petitioner guilty of grave misconduct, the pension can be withheld or withdrawn. It is contended that the present case would fall under the Regulation No.45.

20. On behalf of the petitioner, reliance is also placed on the case of Jitendra Kumar (supra). In that case, the question before the Hon'ble Supreme Court was, whether in the absence of any provision in the Pension Rules, the State Government can withhold a part of pension and/or gratuity during the pendency of departmental/criminal proceedings? The respondent Jitendra, in that case, was working in the Department of Animal Husbandry and Fisheries and was allegedly involved in serious financial irregularities and there were two cases registered against him under various sections of the Indian Penal Code as well as the Prevention of Corruption Act during the year 1990-1991, 1991-1992 when he was posted as Artificial Insemination Officer at Rachi. The Hon'ble Apex Court, after taking a survey of the decisions in the case of D.S. Nakara and Others Vs. Union of India (UOI), and Deokinandan Prasad Vs. The State of Bihar and Others, , has held that pension is not a bounty. It is in the nature of hard earned benefit which accrues to an employee and is in the nature of "property". This right to property cannot be taken away without the authority of law as per the provisions of Article 300A of the Constitution of India. In the case of Deokinandan Prasad (supra), it has been held that the right to receive pension by a Government servant is property, so as to attract Articles 19(1)(f) and 31(1) of the Constitution. By the time, the case of D.S. Nakara and others was decided in the year 1983, the Constitution was amended by the 44th Amendment Act thereby introducing Article 300-A in the Constitution, in the place of Article 19(1) (f). It has been held that although the right to property is no longer a fundamental right, nonetheless it continues to be a constitutional right. The net result is that a person cannot be deprived of his pension without the authority of law. In the case of Jitendra Kumar (supra), the pension was sought to be withheld pending outcome of the criminal cases/departmental inquiry on the basis of some administrative instructions. The Hon'ble Supreme Court has

reiterated that, while the administrative instructions can supplement the statutory rules, the same cannot supplant such statutory provisions. In that view of the matter, impugned action was found to be not sustainable. The following observations in paras 14 and 15 of the judgment are to the point :

14. Article 300A of the Constitution of India reads as under :

"300A : Persons not to be deprived of property save by authority of law : - No person shall be deprived of his property save by authority of law."

Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the Constitutional mandate enshrined in Article 300-A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.

15. It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as "law" within the meaning of aforesaid Article 300A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold - even a part of pension or gratuity. As we noticed above, so far as statutory rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these rules, the position would have been different.

21. Turning to the present case, the respondent is a Body Corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. The Regulations of 1995 have been framed in exercise of the powers conferred under the said Act. Thus, the regulations would be clearly statutory in nature. Thus, whatever action the respondents have taken has to be tested on the basis of availability of the powers to the Competent Authority under the said Regulations. We find that the provisions of Regulation Nos.43 to 46 and Regulation No.48 have to be read together, in order to find out, whether the action of the withholding of the pension is legal and proper or not. It is true that Regulation No.43 and Regulation No.44 would come into play only after there is a finding by the Criminal Court or the Disciplinary Authority, as the case may be. However, Regulation No.45 envisages a situation, where the proceedings are still pending and the Competent Authority "considers that the pensioner is prima facie guilty of grave misconduct". In that case, it can pass an order after following the procedure specified in Bank of Maharashtra Officer Employees" (Discipline and Appeal) Regulations, 1976 or in Settlement as the case may be. Regulation No.45, as would be evident, would come into play in a case not falling under Regulation No.44. Regulation No.46, then provides that an employee, who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued, a provisional pension, equal to

the maximum pension which would have been admissible to him, would be allowed, subject to adjustment against final retirement benefits sanctioned to him, upon conclusion of the proceedings, but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld etc. either permanently or for a specified period.

22. In the present case, the respondents have not placed on record any formal order by which the pension, which was already, sanctioned is kept in abeyance, so as to find out as to under what provisions the said action has been taken. However, we find that conjoint reading of Regulation 45 and Regulation No.46 would show that the pension, in such a case, cannot be less than the minimum pension payable under these regulations. In that view of the matter, we find that the respondents can be directed to release the minimum pension/ provisional pension payable under the Regulations to the petitioner from the date on which it is withdrawn or kept in abeyance until conclusion of the disciplinary proceedings when the final orders can be passed in this regard. Insofar as the blocking of the ATM Card is concerned, that is purely a facility extended by the Bank/s, which is governed by the terms and conditions of the contract between the bank and its constituent, at the time of opening of account. It is not known, as to whether, the bank concerned has taken action of blocking ATM card of the petitioner. If that be so, the bank is not before us. Thus, no relief can be granted, in this regard, unless petitioner approaches bank concerned.

23. In the light of the discussion as above, the following order is passed :

(i) The petition is partly allowed. The prayer for quashing and setting aside the charge -sheet (Annexure - A1) stands rejected.

(ii) The respondents shall release the minimum/provisional pension as admissible under the Regulations to the petitioner since August, 2012 or from the date from which the same is kept in abeyance until conclusion of the disciplinary proceeding.

(iii) It will be open to the disciplinary authority to pass final orders in this regard as may be permissible.

(iv) Rule is made absolute in the above terms, with no order as to costs.