

(1995) 11 DEL CK 0028
In the Delhi High Court
Case No : C. W. No. 3213 of 1994

H.M.R. Rao and Others

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 01-11-1995

Acts Referred:

Citation : (1995) 11 DEL CK 0028

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Judgement

Usha Mehra, J.—The short point involved in this writ petition is whether post pensionary benefits can be withdrawn by an employer?

2. The relevant fact, rules/notifications and circulars in this regard issued by the respondent/employer have to be scrutinised for the purposes of determination of this issue. Brief facts are, petitioner No. 1 worked with the respondent in different capacities for nearly 28 years. He retired on 31st August, 1990 on attaining the age of superannuation as Engineering Manager. Petitioner No. 2 retired as Deputy Operation Manager and petitioner No. 3 retired on 30th April, 1994 as Manager, Technical Training CTE Hyderabad. Petitioner No. 4 retired on 30th October, 1980 as Officer Superintendent and the petitioner No. 5 retired as Senior Technical Assistant on 31st May, 1992. At the time of their retirement, respondent No. 2 issued notices stating therein that they would be entitled to retirement benefits admissible to retired employees under the Service Regulations. Along with these letters, list of certain facilities for retired employees were enclosed under the heading "Benefits for Retired Employees". One of the benefit was medical facilities to retired employees and their spouses (contributory scheme). The facilities which are relevant for the determination of the grievances of the petitioners are summed up as under :-

(i) Medical facilities to retired employees and their spouses (contributory scheme).

(ii) Free/Concession air passages to the retired employees after completing 10/20/25 years service (10 years in case of air-hostess).

3. The respondent No. 2 Indian Airlines Limited is a company fully owned by the Government engaged in the conduct of air transportation in and out of the country. The Central Government enacted Air Corporation (Transfer of Undertakings and Repeal) Act, 1994 (hereinafter called the Act). Under Sec. 9 of the said Act, the Central Government enjoys the overall powers of supervision and control over respondent No. 2. Thus for the purpose of guidance and regulations and for direction, the Respondent No. 2 looks towards the Central Government. The affairs of respondent No. 2 are also controlled by the Central Government.

4. These petitioners are governed by various regulations, namely,

(1) Service Rules for Employees in Aircraft Engineering Department.

(2) Service Rules for Flying Crew.

(3) Service Rules for Employees other than Flying Crew and those in the Aircraft Engineering Department.

5. The petitioner No. 1 belongs to Engineering Department. Petition No. 2 belongs to Flying Crew and petitioners 3 to 5 belong to other categories. These regulations were framed by respondent No. 2 under Sec. 45(2)(b) & (c) of Air Corporation Act, 1953. These regulations governed the service conditions of the petitioners. Over and above these regulations, there are other service conditions laid down by respondent No. 2 vide various circulars/schemes which were framed in this regard. The retirement benefits under the regulation/scheme are of two types - (i) the benefits admissible at the time of retirement which is a one time grant; and (ii) the benefits that recur during his retirement period. The second set of benefits are extendable to the spouses of the retired employee even after the death of the said employee. It is the second set of benefits quoted above that recur during his retirement period which include the medical facilities and free/concessional air passages. The medical facility is of two types - voluntary as well as contributory. To fall under the contributory scheme an employee had to contribute by depositing certain amount once a year depending upon the pay scale at the time of his retirement. The petitioner No. 1 opted for contributory scheme by depositing certain amount at the commencement of the financial year and thus become entitled to free medical facility. So far as the free air passage is concerned, under Sec. 45(2)(b) & (c) of the Air Corporation Act, the said provision underwent changes from time to time and ultimately this facility has been extended to the retired employees also. It has also been stipulated that subject to the provisions of this Act no Notification making regulation inconsistent with the Act or the Rule can be made. The scheme for providing medical facility was introduced w. e. f. 1st January, 1978. Though such a scheme was in vogue for more than 16 years but it become a statutory right of the employees w. e. f. 1st January, 1978. Similarly the benefit relating to free/

concessional air passages though operating of a long period, however, it acquired a statutory status and formed part of the service conditions subsequently but much before the retirement of the petitioners. The withdrawal of above two facilities by Respondent No. 2 vide letter dated 8th July, 1994 has been challenged being against the principles of natural justice and vocative of the provisions of the Act and the Rules. The ground of withdrawal of these benefits hits at the fundamental rights of the petitioner. The benefits cannot be withdrawn on the ground that after retirement if the petitioners engaged themselves gainfully with other undertaking like domestic airline or air taxi operating in India and so long they are gainfully employed with the competitors of the respondent No. 2, these facilities will remain suspended.

6. The respondents' categorical stand before this Court had been that the impugned order passed by respondent No. 2 is to safeguard and protect the business interest of the Corporation. It is nor vocative of the principles of natural justice nor infringes any right of the petitioners. In fact these facilities were discretionary in nature. It could be withdrawn by an administrative order. Moreover, under the Indian Airlines Employees Passage Regulation, 1975 framed in exercise of Sec. 45(2)(c) of the Air Corporation Act air passages could not be claimed as of right. It was sanctioned at the discretion of the Corporation. Similarly, medical facilities were extended to the retired employees by an administrative order. These were in the nature of welfare measure and for welfare gesture to the retired employees. It was not a benefit of the nature which could be claimed as of a right, Therefore, under the Act the respondent had a discretion to withdraw these facilities. The same is not justiciable. The impugned order does not alter the terms and conditions of the retired employees nor it is hit by Sec. 8(1) of the Act. The impugned order had to be passed by respondent No. 2 keeping in view new economic orders sequel to the open sky policy adopted by the Central Government in line with the policy of liberalisation and competition. In fact since the petitioners are gainfully employed with the private competitors of respondent No. 2, allowing these facilities would mean to drain the public money. Hence the impugned orders are reasonable and justified in the facts and circumstances of the case.

7. Admittedly, at the time of retirement of these petitioners, the respondent had issued letters, Along with these letters it enclosed the list containing the benefits which the retired officials would be entitled to. For example, in the case of petitioner No. 1 letter was issued on 16th January, 1990 which is reproduced as under :

D. O. No. HPDOI/E-2501

16th January, 1990

Dear Shri Rao,

On your attaining the age of superannuation, you will be retired from the services of Indian Airlines from the afternoon of 31st August, 1990.

I would like to take this opportunity to thank you for the good work put by you towards the progress of the Organisation and for the contribution you have made to its growth.

You may like to avail of the privilege leave due to you before retirement.

I take this opportunity to enclose a list of the facilities admissible to retired employees and if you desire to avail yourself of the same, you may get in touch with the Personnel Department/Station Manager to get further details of the same.

With best wishes for sound health and happiness during your retired life.

Yours sincerely,

sd/-

(U. P. Singh)

List Benefits for retired employees

1. Medical facilities to the retired employees and their spouses (contributory scheme)
2. Free/concessional air passages to retired employees after completing 10/20/25 year service (in case of air-hostess)
3. Free passage for self and family and transportation of household effects from place of posting to the home town.
4. Retirement gift of Rs. 3,000/- after completion of 30 years service.
5. Holiday Home.

Encashment of Privilege Leave standing to the credit of the employee on retirement subject to a maximum of 240 days and subject to approval of the competent authority.

8. Copy of the circular which is produced on record dated 31st May, 1972 issued by the Joint Financial Controller to all concerned indicates that vide Sec. 45 of the Air Corporation Act, 1953 Indian Airlines amended the rules w. e. f. 1st April, 1972. These amended rules were to apply to all employees other than the Flying Crew and those in the Aircraft Engineering Department. After Rule 180A, a new rule was inserted as Rule 180B which is reproduced as under :

"1. An employee who has retired from the service of the Corporation after completion of a minimum of 20 years continuous service may be allowed, free and/or concessional passages as follows, viz., one free passage every calendar year or two free passages every alternative calendar year and not more than two 75% rebated passages every calendar year".

9. The amended Rule 180B applied to petitioners 3 to 5 because they were not

covered under the Engineering Department nor belonged to Flying Crew. They belonged to other categories. Therefore, Rule 180B was applicable to petitioners 3 to 5. Relying on Rule 180B Mr. Rajeev Dhawan, Senior Advocate appearing for the petitioners contended that so far as the applicability of the free and/or concessional air passages is concerned, they are to be governed by this statutory rule. The respondent No. 2 by an administrative order could not and cannot take away a right which is conferred on these petitioners under the Statute because administrative instructions cannot over-ride the statutory provisions. So much so this amended Rule 180B by a memorandum dated 24th October, 1972 issued by the Financial Controller, Indian Airlines Head Quarters, New Delhi indicated that the facility of free/concessional air passages given to retired employees would now be extended to all the employees who had retired after completion of a minimum of 20 years continuous service with the Corporation. This facility, however, was to be available w. e. f. 1st January, 1973. This concessional facility was also to be extended to superannuated employees who had not put in 20 years of continuous service in the Corporation by virtue of the fact that they may have been seconded from Government/Government Undertaking and, Therefore, did not have the opportunity of completing 20 years of service in the Corporation. It was also made clear that for the purpose of computing 20 years of service, service rendered by these employees in the Government/Government Undertaking had to be counted Along with their tenure in the Corporation. Mr. Rajeev Dhawan, Therefore, contended that by the memorandum of 24th October, 1972 Rule 180B was made applicable to all the employees who had retired after completing 20 years of service. The embargo/restriction which was placed in the circular of 31st May, 1972 restricting the Rule 180B only to the employees other than the Engineering Department and Flying Crew was removed by this office memo of 24th October, 1972 meaning thereby that w. e. f. 1st January, 1973 all employees irrespective of the department from which they retired become eligible for the facility of free/concessional air passages after retirement provided of course they had completed 20 years of service. Therefore, memo of 24th October, 1972 read with circular of 31st May, 1972 all the petitioners become eligible to free/concessional air passages after retirement. As pointed above, petitioner No. 1 retired on 31st August, 1990, petitioner No. 4 retired on 30th October, 1990 and petitioner No. 5 retired on 30th April, 1994, all of them after completing more than 20 years of service. I find force in the contention of Mr. Rajeev Dhawan that the respondent No. 2 could not by an administrative order withdraw the statutory benefit which had accrued in favor of the petitioners and which formed part of their service condition. By virtue of this provision they became due and entitled to this benefit at the time of their retirement. Their service condition could not be altered after retirement. These terms and conditions were communicated to them at the time of their superannuation as quoted above and hence formed part of contract which could not be altered to their detriment.

10. The contention of Mr. Arun Jaitley. Senior Advocate of respondent No. 2 that

the impugned order had to be passed in order to ensure that the benefit of the training given by the respondent No. 2 be not enjoyed by a competitor of the Corporation. According to him the embargo is limited only to discharge the retired employees from serving the rival operators within the country. He further contended that the order is purely administrative in nature which was passed for the sole purpose of clarifying certain terms and conditions governing the service of the employees. He draw the attention of this Court to Regulation No. 6 of the Indian Airlines Employees Passage Regulations, 1975 which indicates that air passages will not be claimed as of right but will be sanctioned at the discretion of the Corporation, Therefore, contended that these facilities given were discretionary in nature that is why in the Passage Regulations the word used "may be permitted". An employee retiring from service may be permitted to utilise the facility that may be due to him on the date of retirement. The word "may" clearly implies discretion to the Corporation to grant or not to grant the free/concessional air passage. I am afraid this argument of Mr. Jaitley has no force. The restrictions be that on account of jointing the private competitors or on account of discretion given to the employer or on account of the use of the word "may" impinges the vested right of the employee. It does not justify the withdrawal of the post pensionary benefits to a retired employee nor empowers the Corporation to arbitrarily withdraw or change the terms and conditions of employment at its whims and fancies after the employment ceased to exist. None of these grounds taken by Mr. Jaitley convinces this Court to allow the Corporation to unilaterally by an administrative order withdraw the service benefits which formed part of his service condition and which had accrued to him at the time of his retirement.

11. I also find no merits in the submission of Mr. Jaitley that this is not a general or blanket restriction but a reasonable restriction to protect the interest of respondent No. 2. particular in view of the open policy of the Government permitting the private airlines and private taxi operators, Therefore, such restriction is valid. The contention of Mr. Jaitley that if these facilities are allowed to continue even if the retired employee takes up job with the competitor it would amount to double enrichment and they would draw salaries from private operators but facilities from the respondent No. 2. This argument again cannot be sustained. Such restrictions, to my mind, would amount to restriction on trade and hence opposed to public policy. Moreover, these facilities cannot be withdrawn under the garb of competition of respondent No. 2 viz-a-viz private airlines operators or airlines. The respondent No. 2 at best could have a grievance if it could establish that petitioners joining other airlines had actually passed a trade secret of respondent No. 2. What trade secret a flying crew can pass or for that matter any other staff. After retirement if their services are availed by private airlines, the respondent No. 2 may be feeling threatened with the idea of competition because till date it was having monopoly in this field, but by no stretch of imagination it can be said petitioner's joining private airlines after retirement would mean passing of trade secrets. Supreme Court in the case

of Niranjan Shankar Golikari Vs. The Century Spinning and Mfg. Co. Ltd., was dealing with almost a similar situation. After analysing various provisions of law and in particular the restrictions mentioned in Section 27 of the Contract Act it was opined that :-

"The Court takes a far stricter view of covenants between master and servant than it does of similar covenants between vendor and purchaser or in partnership agreements. An employer, for instance, is not entitled to protect himself against competition on the part of an employee after the employment has ceased but a purchaser of a business is entitled to protect himself against competition per se on the part of the vendor. This principle is based on the footing that an employer has no legitimate interest in preventing an employee after he leaves his service from entering the service of a competitor merely on the ground that he is a competitor".

12. The Courts have, however, drawn distinction between restraints applicable during the tenure of service contract and those that apply after its cessation. A restraint by which an employee binds himself during the term of his employment directly or indirectly not to take service with any other employer or be engaged by a third party has been held not to be void and not against Section 27 of the Contract Act. Such is a condition held to be general. But when the contract of service is over with the employer such restriction has been held to be bad in the case of *Brahmaputra Tea Co. Ltd. v. Scarth*, ILR (1985) Cal. 545.

13. The medical facilities and free air passages facilities may or could have been withdrawn if these facilities the petitioners were availing from the private airlines but that is not the case of the respondent. Similarly the Court in the case of *Krishan Murgai Vs. Superintendence Company of India (P) Ltd.*, , observed that any restraint imposed by the employer on the employee would prima facie be illegal and void as being directly hit by Section 27 of the Contract Act if it is to operate after the expiry of the period of service contract. The Court of Appeal in the case of *Kores Manufacturing Co. Ltd. v. Kolok Manufacturing Co. Ltd.* (1958) 2 All. E. R. 65, held that :-

"An employer has no legitimate interest in preventing an employee, after leaving his service, from entering the service of a competitor merely on the ground that the new employer is a competitor. The danger of the adequacy and stability of his complement of employees being impaired through employees leaving his service and entering that of a rival is not a danger against which he is entitled to protect himself by exacting from his employees covenants that they will not, after leaving his service, enter the service of any competing concern....."

14. There appears to be no case exactly comparable to this one but the nearest in point is a decision of Queen's Bench Division in the case of *Bull v. Pitney Bowes Ltd. & Ors.* decided on July 21, 26, 1966 reported by Hoon Coovadia Esq. Barrister-at-Law. The observations in that case squarely apply to the facts of this case. In that case it was held that :-

"The defendant company, manufacturers and vendors of postal franking machines, employed the plaintiff from 1938 to 1964, first as Sales Clerk and eventually as Sales director. By a scheme of 1940 the company required all its employees who were eligible under the rules, the plaintiff amongst them, to join their pension and life insurance scheme and to pay contributions according to the rules. In 1956 the defendants replaced their former scheme by a non-contributory pension fund, the assets of which were vested in trustees, and the plaintiff, as he was required to do, became a member of the fund in 1957.

By rule 16 of the fund :-

"If in the opinion of the committee any retired member is engaged or employed in any activity or occupation which is in competition with or detrimental to the interests of the company (the defendants), and if he shall fail to comply with a written notice from the company requiring him to discontinue such activity or occupation the committee shall be entitled to cancel all his rights and benefits under the rules".

In 1964 the plaintiff voluntarily retired from the defendants' employment and entered the service of another company carrying on a similar business to that of the defendants. By that time the plaintiff had, subject to the other rules, qualified under the pension fund for a deferred pension to start at his normal retirement date. The defendants by written notice required the plaintiff to discontinue his new employment, and warned him that if he failed to do so the management committee of the fund would become entitled under Rule 16 to cancel all his rights and benefits under the fund.

On the plaintiff's claim for declarations that Rule 16 of the fund was an unreasonable restraint of trade and void and unenforceable and that on reaching his normal retirement date he would be entitled to receive a pension under the fund, in which the defendants contended that Rule 16 was not a covenant in restraint of trade since it merely defined the persons who were to benefit from a trust fund and was not a promise by the plaintiff, not to do other work, nor did it place him under any obligation not to join the company for which he was now working :-

Held, making the declarations sought, that the provisions of pension fund were part of the terms and conditions of the plaintiff's employment; that from the point of view of the public interest there was little, if any, distinction between a covenant not to take up certain skilled work and discontinuance of a pension if such work were taken up, for the relevant factor was inducement not to take up skilled work; and that Rule 16 was a covenant in restraint of trade which was unreasonable and, Therefore, void and unenforceable".

15. The facts and principle of law laid down in Bull's case (supra) squarely apply to the facts of this case. In this case the contributory medical facility became a part of the terms and conditions of the petitioners service. Petitioner No. 1 contributed a sum of Rs. 217/- at the commencement of the financial year as a

sequel of this contributory scheme. Similarly, other petitioners opted to this contributory scheme. Now by the unilateral action the respondent No. 2 cannot be allowed to change to the disadvantage of the petitioners their service conditions particularly after their retirement from service. As per the contributory medical scheme, not only the petitioners but even their family members were made eligible to this facility. But with one stroke of pen after the retirement of the petitioners, the respondent No. 2 wants to deny this facility to the petitioners as well as to their family members which cannot be sustained. This facility became part of their service condition, for that reference can be made to a booklet issued by the respondent under the heading "Information for Retired Employees" published on 1st April, 1989 by the Indian Airlines. This deals with the benefit admissible at the time of retirement and medical facility after retirement is one of the benefit. Both the schemes i.e., Retired Employees Medical Scheme (REMS) and Coverage under the existing Contributory Family Medical Scheme (CFMS). The beneficiaries of the same are retired employees and the spouse only. They could avail any of these schemes at the time of retirement. Therefore, it does not lie in the mouth of the respondent now to say that since the petitioner has taken employment in private airlines, Therefore, they have deprived themselves from this facility and consequently their spouses have also been deprived of the same. When this scheme became operative it was made clear that the option was to be exercised within one month of the employee's retirement. The option once exercised by the retiring/retired employee would hold good for a minimum of two years before the same could be changed in favor of other scheme. The change had to be for better scheme but not to withdraw the same after the option had been exercised by the petitioners. The circulars dated 4th October, 1977, 14th October, 1980, 25th May, 1981, 20th October, 1981, 30th March, 1981, 10th August, 1987, 21st December, 1988, 21st May, 1991 and 6th April, 1993, reading together clearly show that the medical facility was a scheme meant for the retired employees purely on voluntary basis and the members were to contribute for the same. Having opted once they could not be deprived of this benefit which had become part of their service. The retired employee who intended to join the scheme had to pay the contribution. The quantum of contribution was to be determined on the basis of last basic pay drawn by the employee at the time of his retirement. The contribution for a period of 12 months was payable in advance at the time of joining the scheme. No refund of contribution was to be allowed if a retired employee wanted to opt out of it. Therefore, after becoming a member, he was to enjoy the benefit. This being a voluntary scheme all the petitioners who became member of the same could not be deprived of this facility simply because they after retirement took up a job with the competitor of the respondent No. 2.

16. To the same effect are the rules regarding free/concessional air passages. It will be wrong to assert that the free air passages was purely a discretionary facility in nature. In fact as per the benefit admissible to the employees at the time of retirement free/concessional air passages was a part of their service

conditions. The free/concessional air passages were not only admissible qua the petitioners but even to their families. The only difference was that an employee retiring after completing 25 years of service would get two free passages and four 90% concessional passages every calendar year. Whereas an employee who retires after completing 20 years of service would get one free air passage every calendar year or two free passage in alternate year and three 90% concessional passages every year. To this extent the discretion has been left with the Corporation. The employees who retired after running and completing 20 years and above service this facility formed part of their term of employment. They become eligible to receive free air passages as of right and as stipulated therein. No discretion in this regard has been left with the Corporation. The free/concessional air passages entitlement facility has in fact been extended to the spouse of the retired employee. It is so apparent from the circular issued on 12th February, 1982. These facilities, namely, medical facility as well as free/concessional air passage having been enjoyed by the employees after retirement as well as by their spouses they acquired a statutory right over the same which cannot be taken away by an administrative order. In this regard reliance can be placed on Section 8(4) of the Air Corporation (Transfer of Undertakings and Repeal) Act, 1994 which lays down as under :

(4) The officers and other employees who have retired before the appointed day from the service of a Corporation and are entitled to any benefits, rights or privileges shall be entitled to receive the same benefits, rights or privileges from the company in which the undertaking of that Corporation has vested.

17. Reading of the same shows that from the appointed date in this case i.e., 29th January, 1994, the employees who were getting any benefits, right or privilege were allowed to continue to enjoy the same which they were availing from the company before the vesting of the same with the Corporation. Hence the benefits, rights and privileges which these petitioners were enjoying. Section 8(4) of the Act has protected the same. Thus there was no justification for the respondent to withdraw or snatch these privileges and rights simply to ward off the competition in business which hence before was the monopoly of the respondent No. 2. Since these petitioners have joined the private airlines or taxi operators, to my mind, by no way means that these petitioners will pass on any trade secret of the respondent No. 2, nor such a case has been set up by respondent No. 2 that they are carrying with them some trade secret which will be disclosed by them to the private airlines. In the absence of the same the impugned restriction is vocative of the service conditions of the petitioners which the respondent No. 2 could not alter after the cessation of the contract of employment.

18. The question was put to Mr. Dhawan that if private airlines are also providing medical facility and free/concessional air passages then why should petitioners be permitted to avail double benefits, Mr. Dhawan while answering the query placed on record the affidavits of these petitioners stating that they were not

getting these two facilities from the private airlines where they were working. Therefore, this is not a case where the petitioners are taking double advantages. Thus restriction imposed by the impugned order is not a reasonable restriction and tent amount to amending the terms and conditions of employment of the petitioners hence liable to be struck down. These cannot be sustained on the ground of competition.

19. For the reasons stated above, the impugned order dated 8th July, 1994 being vocative of the rights of the petitioners and also infringing the terms and conditions of their service after retirement cannot be sustained in the eyes of law as discussed above. The impugned order dated 8th July, 1994 is accordingly set aside with no order as to costs.