(2016) 02 GUJ CK 0147

In the Gujarat High Court

Case No : Letters Patent Appeal No. 1074 of 2012 in Special Civil Application No. 9818 of 2012

Jayantilal Vashram Teraiya APPELLANT

Vs

Bank of India RESPONDENT

Date of Decision : 18-02-2016

Acts Referred:

Citation : (2016) 3 GCD 2273 : (2016) 3 GLR 2265 : (2016) LIC 2366 : (2017) 2 RSJ 134 : (2017) 1 SCT 10

Hon'ble Judges : S.R. Brahmbhatt and K.J. Thaker, JJ.

Bench : Division Bench

Advocate : Navaldan R. Langa, Advocate, for the Appellant; Nandish Chudgar and Krutik A. Parikh, Advocates for Nanavati Associates, for the Respondent

Final Decision : Allowed

Judgement

S.R. Brahmbhatt, J.—1. Heard learned counsel appearing for the parties.

2. The appellant, who happened to be petitioner in the original petition being S.C.A. No. 9818 of 2012, who has made prayers in S.C.A., which are reproduced hereunder, has taken out this Letters Patent Appeal under Clause 15 of the Letters Patent Appeal Act being aggrieved and dissatisfied with the judgment and order passed by the learned single Judge on 20.07.2012, whereunder the learned single Judge has dismissed the petition summarily. The prayers of S.C.A. No. 9818 of 2012 is reproduced as under;

A. Your Lordships may be pleased to issue writ in the nature of Mandamus or any other appropriate writ, direction or order directing the respondent to act according to the established principles of law and grant the petitioner his lawful right to exercise a second option for joining the pension scheme.

B. Your Lordships may be pleased to grant such other relief or reliefs as may be deemed just and proper in the circumstances and grounds narrated in this petition.

C. Your Lordships may be pleased to award the cost of this petition to the petitioner.

3. Facts in brief, as could be gathered from the proceedings, would indicate that the petitioner was serving with the respondent Bank and he had put in almost about 33 years of services when on account of his health he had to put up his papers on 17.12.2007, which was accepted by the Bank and he stood relieved from the services on 31.03.2008. The respondent Bank assigned a settlement with all the concerned once again offering an option and a chance to those who had not opted or missed in the year 1995 of switching over to the pension scheme by refunding the proportion, as envisaged thereunder, so as to be entitled, eligible and receive the pensionary benefits from the funds that was envisaged to be created to cater to the needs of pension.

3.1 As per the said settlement, the scheme was extended to the persons, who had retired after the year and prior to the date of settlement that happened to be 27.04.2010 and therefore, petitioner also approached the authorities for seeking said relief by voluntary to refund the amount which is required to refund for being eligible to receive the benefit of pension scheme. This was not accepted by the respondent on account of the fact that the quitting of Bank services by the petitioner under the communication dated 17.12.2007 was treated to be a resignation, as defined under Clause 22 of the regulation called Bank of India (Employees'') Pension Regulation 1995, and hence the said benefit was denied to the petitioner which gave cause of action for the petitioner to bring a petition in form of S.C.A. No. 9818 of 2012 in which the learned single Judge after recording reasons that the petitioner could not have moved the petition for the reason that he had resigned and the fact that scheme did not envisaged this aspect, dismissed the same summarily, wherefrom the present Letters Patent Appeal has arisen.

4. Learned counsel appearing for the appellant-petitioner invited this Court''s attention to the letter of so called resignation produced at page No. 57 and submitted that close perusal thereof would not indicate that the petitioner who had put in 33 years of service by then would even dream of bringing about forfeiture of the services in terms of Clause 22 of the regulation.

5. Learned counsel appearing for the appellant-petitioner further submitted that the settlement, as could be seen from page No. 21 and terms thereof, would in unequivocal terms indicate that the persons like petitioner were entitled to receive the benefit of pension scheme by switching over the fund, as mentioned thereunder. The denial to the petitioner to the said benefit on the specious plea of the letter of voluntary retirement dated 17.12.2007 being wrongful treated as letter of resignation so as to entail forfeiture of services under Clause 22 of the regulations.

6. Learned counsel appearing for the appellant-petitioner submitted that there existed no rhyme or reason for the petitioner to even bring about an end to the

services which would disentitle him to seek benefit of his past services. Therefore, Clause 22 and its invocation, so far as present petitioner is concerned, is unfortunate and required to be deprecated.

7. Learned counsel appearing for the appellant-petitioner thereafter contended that the similar forfeiture clause occurred in LIC regulations also, which came to be interpreted by the Supreme Court in case of Asger Ibrahim Amin Vs. Life Insurance Corporation of India in the proceeding of Civil Appeal No. 10251 of 2014 rendered on 12.10.2015, in which a special emphasis was led upon the observation of the Supreme Court contained in paragraph Nos. 7, 8, 9 and 10. It was submitted that the resignation, as it occurred in regulation 23 in the LIC regulation should take colour from the other phrases and wordings employed thereunder, as held by the Supreme Court that the resignation which is occurring there is to be meant to be understood to imply that the compulsion to resign and not voluntary resignation, where the employee has not incurred any disqualification or handicaps so as to bring about an end to his services by way of resignation. In the instant case, the employee-petitioner had put in as many as 33 years of service, when on account of his ailment and health problem, he has to put in his papers. This communication of 17.12.2007 also contains a specific plea of voluntary retirement, then in that scenario, it was indeed unfortunate that the Bank did not accede to his request for permitting him to switch over the pension scheme.

8. Learned counsel for the appellant-petitioner also relied on the decision in case of Shashikala Devi Vs. Central Bank of India And Ors. in the proceeding of Civil Appeal No. 11488 of 2014 rendered on 17.12.2014.

9. Learned counsel appearing for the respondent Bank submitted that the scheme, which came to be a part of the settlement of 27.04.2010, if peruses closely, did not permit inclusion of the persons like the present petitioner, as the petitioner could be said to have resigned. The occurrence of word ''retirement'' in the resignation acceptance letter was merely an inadvertence, which has been dealt with in the affidavit-in-reply and the same communication did talk about the resignation and therefore, it would not be permitted to the petitioner to urge that his resignation be treated to have been a retirement or a voluntary retirement, so to say, and the petitioner has put in a communication, wherein he has acknowledged and expressed gratitude and used the word ''resignation'', which also would conclusively prove that the parties had ''resignation in mind'', when the petitioner resigned. Therefore, in this view of the matter, it would not have been permissible for the petitioner to seek switching over to the pension scheme.

10. Learned counsel appearing for the respondent Bank invited this Court''s attention to the scheme as well condition at page No. 23, which is a part of conditions. The condition No. 4 read as under;

"(4) Employees who ceased to be in service on or after 29th September 1995 in case of Nationalized Banks/26th March 1996 in case of Associate Banks of State Bank of India on account of voluntary retirement under special scheme after rendering service for a minimum period of 15 years, shall be eligible to exercise an option to join the Pension Scheme subject to the terms and conditions mentioned for retiring employees opting for joining the Scheme."

Relying thereupon, it is submitted, assuming for the sake of argument, that there existed a voluntary retirement, as pleaded by the petitioner, then also the voluntary retirement of such employee only, as discussed in paragraph No. 4, entitled and not all. Admittedly, the petitioner''s resignation or retirement or voluntary retirement was not the one, which was envisaged in Clause 4 of the scheme and therefore he stood excluded from the benefit of the scheme.

11. Learned counsel appearing for the respondent Bank relied upon the decision rendered by the Supreme Court in case of M.R. Prabhakar And Others Vs. Canara Bank And Others, reported in , (2012) 9 Supreme Court Cases 671, submitted that the factum of resignation and retirement are distinct and therefore in that case where the petitioner had put in the resignation and when the pension scheme was not available, that happened in the year 1993 or thereafter, then the petitioners therein attempted to seek benefit of the scheme, were not accepted by the Supreme Court. The fine distinction between the voluntary retirement and retirement is sought to be pressed into service for supporting the contention of the respondent, in the instant case.

12. We have heard learned counsel appearing for the parties and perused the documents. Before adverting to the rival contentions, it would be most appropriate to set out few aspects emerging therefrom.

(i) The petitioner joined the services of the respondent Bank, as submitted by the counsel way back in the year 07.06.1975.

(ii) The petitioner did not opt for the scheme when it was floated in the year 1995.

(iii) The petitioner put up his papers on 17.12.2007, which letter is at page No. 57, which contains under the column subject as under:

"Swachhik Nivrity" (Voluntary Retirement)

The said letter is addressed to the Manager of the Branch, in which it is indicated that his voluntary retirement shall take effect from 01.04.2008, which was accompanying with certificate of his health, which was a reason for seeking voluntary retirement. It was also urged that the certificate was also in support of the leave, which he obtained for the period from 27.11.2007 to 27.03.2008, it may be treated as notice period and be treated to have been relieved on voluntary retirement from 01.04.2008.

(iv) This letter is responded by the Bank vide communication dated 31.03.2008 at page No. 58, which read as under;

Dated: 31-03-2008

Shri J.V. Teraiya Staff Clerk-Chief Cashier Panchnath Branch

Ref: Your Resignation from Bank''s service.

We refer to your application Dated 17.12.2007 requesting and seeking resignation from Bank''s service.

This is to inform you that Competent Authority has accepted your request for resignation from Bank''s service and to be relived from Bank''s service on Date 31-03-2008.

You are require to pay off all dues including loans and advances before being relieved. You have to be requested the Bank to recover all the dues from the terminal dues payable to you. Having regard to your request in writing the Bank has acceded to your request in the matter. The please submit the papers for terminal dues at the earliest dully completed to enable Bank settle the same.

Accordingly, you are hereby relieved from the Bank''s services at the close of office hours to day and you stand retired from the Bank service w.e.f. 01-04-2008. Please acknowledge the receipt of this letter.

We wish you very healthy and peaceful retired life.

With regards,

Yours Faithfully For Bank of India

(D.J. Upadhyay) Sr. Branch manager. Panchnath Br.

(v) The relevant clause of the scheme and settlement read as under;

"(A) A Memorandum of Settlement for introducing Pension Scheme in the Banking Industry as second retiral benefit in lieu of Contributory Provident Fund was signed between Indian Banks'' Association (IBA) on behalf of Management of Banks and their workmen represented by the All India Bank Employees'' Association (AIBEA), National Confederation of Bank Employees (NCBE) and Indian National Bank Employees'' Federation (INBEF) on 29th October 1993. Bank Employees'' Federation of India (BEFI), by way of a separate Settlement with IBA dated 23rd June 1994 endorsed the said Settlement signed on 29th October 1993. The terms of the said Settlement were incorporated in the Bank Employees'' Pension Regulations, 1995 notified in the official Gazette of India by all the Nationalized Banks on 29th September 1995 and by Associate Banks of State Bank of India on 26th March 1996.

Terms of Settlement

(1) All workmen employees are in the service of the bank as on the date of this Settlement who exercise option to join the Pension Scheme in terms of this Settlement will contribute from their arrears on account of wage revision in

terms of the Settlement between the parties dated 27th April 2010 an amount of Rs. 878 crores towards their share in the amount of Rs. 1800 crores offered by UFBU towards 30% of the estimated funding gap of Rs. 6000 crores. The said amount is worked out @ 2.8 times of the revised pay for the month of November 2007, for individual workmen employees.

(2) Another option for joining the existing Pension Scheme shall be extended to those employees who:--

(I) (a) were in the service of the bank prior to 29th September 1995 in case of Nationalized Banks/26th March 1996 in case of Associate Banks of State Bank of India and continue in the service of the bank on the date of this Settlement;

(b) exercise an option in writing within 60 days from the date of offer, to become a member of the Pension Fund and

(c) authorize the Trust of the Provident Fund of the bank to transfer the entire contribution of the bank along with interest accrued thereon to the credit of the Pension Fund

(II) (a) were in service of the bank prior to 29th September 1995 in case of Nationalized Banks/26th March 1996 in case of Associate Banks of State Bank of India and retired after that date and prior to the date of this Settlement;

(b) exercise an option in writing within 60 days from the date of offer to become a member of the Pension Fund and

(c) refund within 30 days after expiry of the said period of 60 days, the entire amount of the banks contribution to the Provident Fund and interest accrued thereon received by the employee on retirement together with his share in contribution towards meeting 30% of Rs. 3115 crores which is estimated and reckoned as the funding gap for those eligible under Clause 2(II), 2(III) and 2(IV) of this agreement. On an individual basis, the payment over and above the bank''s contribution to Provident Fund and interest thereon has been worked out at 56% of the said amount of bank''s contribution to Provident Fund and interest thereon received by the employee on retirement.

(III) The family of those employees who were in the service of the bank prior to 29th September 1995 in case of Nationalized Banks/26th March 1996 in case of Associate Banks of State Bank of India retired after that date and died will be eligible for family pension, provided-

(a) the family of the deceased employee exercises option in writing within 60 days of the offer to become a member of the Pension Fund and

(b) refund within 30 days after expiry of the said period of 60 days, the entire amount of the bank''s contribution to the Provident Fund and interest accrued thereon received by the deceased employee on retirement together with his share in contribution towards meeting 30% of Rs. 3115 crores which is estimated and reckoned as the funding gap for those eligible under Clause 2(II), 2(III) and

2(IV) of this agreement. On an individual basis, the payment over and above the bank''s contribution to Provident Fund and interest thereon has been worked out at 56% of the said amount of bank''s contribution to Provident Fund and interest thereon received by the employee on retirement.

(IV) The family of those employees who were in the service of the bank prior to 29th September 1995 in case of Nationalized Bank/26th March 1996 in case of Associate Banks of State Bank of India, but have died while in service of the bank after that date will be eligible for family pension, provided-

(a) the family of the deceased employee exercises an option in writing within 60 days of the offer to become a member of the Pension Fund and

(b) refund within 30 days after expiry of the said period of 60 days mentioned above, the entire amount of the bank''s contribution to the Provident Fund and interest accrued thereon received upon death of the employee together with his share in contribution towards meeting 30% of Rs. 3115 crores which is estimated and reckoned as the funding gap for those eligible under Clause 2(II), 2(III) and 2(IV) of this agreement. On an individual basis, the payment over and above the bank''s contribution to Provident Fund and interest thereon has been worked out at 56% of the said amount of bank''s contribution to Provident Fund and interest thereon received by the employee."

(emphasis supplied)

13. Against the aforesaid factual backdrop, we are called upon to examine the claim of the petitioner qua his entitlement to switch over to the pension scheme after refunding the amount as envisaged thereunder on strength of terms and conditions of the settlement dated 27.04.2010.

14. We are of the view that the regulations governing the petitioner and relied upon by the Bank contain provisions, which are required to be adverted to for appreciating the contentions. Therefore, they are set out hereinbelow;

Clause 22 - Forfeiture of service:--

(1) Resignation or dismissal or removal or termination of an employee from the service of the Bank shall entail forfeiture of his entire past service and consequently shall not qualify for pensionary benefits;

(2) An interruption in the service of a Bank employee entails forfeiture of his past service, except in the following cases, namely:--

(a) authorized leave of absence;

(b) suspension, where it is immediately followed by reinstatement, whether in the same or a different post, or where the bank employee dies or is permitted to retire or is retired on attaining the age of compulsory retirement while under suspension;

(c) transfer to non-qualifying service in an establishment under the control of the

Government or Bank if such transfer has been ordered by a competent authority in the public interest;

(d) joining time while on transfer from one post to another.

(3) Notwithstanding anything contained in sub-regulation (2), the appointing authority may, by order, commute retrospectively the period of absence without leave as extraordinary leave.

(4) (a) In the absence of a specific indication to the contrary in the service record, an interruption between two spells of service rendered by a bank employee shall be treated as automatically condoned and the pre-interruption service treated as qualifying service;

(b) Nothing in clause (a) shall apply to interruption caused by resignation, dismissed or removal from service or for participation in a strike:

Provided that before making an entry in the service record of the Bank employee regarding forfeiture of past service because of his participation in strike, an opportunity of representation may be given to such bank employees.

Clause 29 - Pension on Voluntary Retirement:--

(1) On or after the 1st day of November, 1993 at any time after an employee has completed twenty years of qualifying service he may, by giving notice of not less than three months in writing to the appointing authority retire from service;

Provided that this sub-regulation shall not apply to an employee who is on deputation or on study leave abroad unless after having been transferred or having returned to India he has resumed charge of the post in India and has served for a period of not less than one year;

Provided further that this sub-regulation shall not apply to an employee who seeks retirement from service for being absorbed permanently in an autonomous body or a public sector undertaking or company or institution or body, whether incorporated or not to which he is on deputation at the time of seeking voluntary retirement;

Provided that this sub-regulation shall not apply to an employees who is deemed to have retired in accordance with clause (I) of regulation 2.

(2) The notice or voluntary retirement given under sub-regulation (1) shall require acceptance by the appointing authority;

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

(3) (a) An employee referred to in sub-regulation (1) may make a request in writing to the appointing authority to accept notice of voluntary retirement of

less than three months giving reasons therefor;

(b) On receipt of a request under clause (a), the appointing authority may, subject to the provisions of sub-regulation (2), consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority may relax the requirement of notice of three months on the condition that the employee shall not apply for commutation of a part of his pension before the expiry of the notice of three months.

(4) An employee, who has elected to retire under this regulation and has given necessary notice to that effect to the appointing authority, shall be precluded from withdrawing his notice except with the specific approval of such authority;

Provided that the request for such withdrawal shall be made before the intended date of his retirement.

(5) The qualifying service of an employee retiring voluntarily under this regulation shall be increased by a period not exceeding five years, subject to the condition that the total qualifying service rendered by such employee shall not in any case exceed thirty-three years and it does not take him beyond the date of superannuation.

(6) The pension of an employee retiring under this regulation shall be based on the average emoluments as defined under clause (d) of regulation 2 of these regulations and the increase, not exceeding five years in his qualifying service, shall not entitle him to any notional fixation of pay for the purpose of calculating his pension."

15. Thus, learned counsel for the Bank placed reliance upon Clause 22 for indicating that the factum of resignation is essentially different than the retirement and voluntary retirement so to say and therefore, when the petitioner''s resignation is so worded, it entail forfeiture of services, as even Clause 29 is talks about voluntary retirement did made an exception to a case where the resignation is mentioned, as could be seen from the language of Clause 22 and 29. We are unable to accept this submission, as the peculiar facts of the present case would indicate that the letter and communication of the petitioner dated 17.12.2007 cannot be classified to be a resignation simplicitor. The Bank has not indicated anywhere that petitioner was under any compulsion cloud or likely to face a stigmatic ouster, if he had not resigned. Had it been the case, then one would appreciate that the petitioner''s resignation was an attempt to avoid those situation. On the contrary, the Bank has accepted it that the petitioner''s quitting of service was on account of his ill health and no other stigmatic reasons and, therefore, the so called resignation of 17.12.2007 is required to be viewed as to why and for what reason the man who has put in 33 years service by then, would ever think of have past service forfeited, when there is no reason. The wordings of the letter has to be taken to its face value to indicate that the petitioner never ever intended to resign so as to entail forfeiture

of service by reason of provision of Clause 22 of the regulations.

16. The Bank also, when accepted the same, wished him well for his retired life. The Court hasten to add here that the factum of resignation and voluntary retirement are two different thing, but if the same is required to be viewed from the conduct of the parties with attending circumstances, then one can safely conclude that there is no reason for the petitioner to seek resignation for forfeiting his past service, nor has the Bank come out with any other reason, which would persuade this Court to hold otherwise. In absence of the same, when there existed a provision in terms of Clause 29 that the voluntary retirement was permissible only after 15 years of service, then in that situation a man who has put in 33 years service with the Bank when write a letter with clear subject mentioning that this is a voluntary retirement and when the Bank has not shown that the petitioner has to seek any voluntary retirement, then the Bank''s attempt to forcibly treat the same to be a resignation is nothing but arbitrary, illegal and is required to be deprecated.

17. When the Court has come to the conclusion that petitioner''s communication dated 17.12.2007, cannot be classified to be a resignation simplicitor, as envisaged under Clause 22, especially when the petitioner is not shown to have incurred any disqualification or disability, which would entail other factors so as to forfeit his service, as envisaged and mentioned by the Supreme Court in case of Asger Ibrahim Amin (supra), the same is required to be viewed as nothing but a voluntary retirement and therefore, if this is treated as retirement, then the Clause and conditions mentioned in the scheme by way of settlement would get attracted so as to make petitioner entitle for receiving the said benefit on his refunding the amount mentioned thereunder.

18. The decision cited at the Bar on behalf of the Bank in case of M.R. Prabhakar And Others (supra), in our view, would be of no avail, as the facts there clearly indicated that when the factum of resignation was accepted, the scheme of pension benefit was not even offering; and the factum of resignation was treated to be a resignation simplicitor and therefore, the Supreme Court did not accept the contention. Whereas, in peculiar facts of present case, where the settlement of 27.04.2010 in terms and compasses of the left out employees of the Bank who were given one more opportunity of availing the benefit, then the petitioner''s claim for being governed by then, could not have been denied on the specious ground that regulation 4, would not be applicable, as it would be rather tried to say that the Bank encompassed the employee, who had voluntarily retired in a special scheme after putting 15 years of service and the Bank denied the benefit of such employee who has otherwise retired as per the regulation on putting in 33 years of service. The reason for denying the benefit is to say the least illegal beyond comprehension of reasonableness and therefore, is required to be deprecated and quashed and set aside.

19. This aspect unfortunately has not been addressed to in the judgment of the learned single Judge and therefore, to that extent, we are unable to sustain the

judgment of learned single Judge and the same is required to be quashed and set aside.

20. As a result thereof, the following direction is required to be issued.

The petitioner is declared to be entitled to receive the benefit of the scheme on fulfilling the condition of scheme. The Bank is under obligation to inform the petitioner as to what amount he has to refund and after receiving the communication, if the petitioner is refunding the same within a period of three months, he would be entitled to receive the benefits, as envisaged in the scheme.

21. With these observations and directions, the appeal is allowed. However, there shall be no order as to costs.