(2007) 06 BOM CK 0139

In the Bombay High Court

Case No : Writ Petition No. 303 of 2007

Jitendranath Nayer — APPELLANT

Vs

The Oriental Insurance Co. Ltd. and Dilip Dhar, General Manager, The Oriental Insurance Co. Ltd. — RESPONDENT

Date of Decision : 21-06-2007

Acts Referred:

- Constitution of India, 1950 — Article 226
- General Insurance (Conduct, Discipline and Appeal) Rules, 1975 — Rule 23
- General Insurance Business (Nationalisation) Act, 1972 — Section 17A

Citation : (2007) 5 BomCR 167 : (2007) 109 BOMLR 1253

Hon'ble Judges : Swatanter Kumar, C.J;S.C. Dharmadhikari, J

Bench : Division Bench

Advocate : M.B. Singh, for the Appellant; A.G. Khothari, for the Respondent

Judgement

S.C. Dharmadhikari, J.—Rule in Writ Petition No. 303 of 2007. Respondents waive service. By consent, rule made returnable forthwith. Both sides agree that any order passed in this petition would cover writ petition No. 44 of 2002. That petition is also placed on board for hearing by consent of parties.

2. The first petition under Article 226 of the Constitution of India is directed against an order dated 18th August, 2006, a copy of which is annexed as annexure "I" (page 99) to the petition. By this order the respondents imposed upon the petitioner the penalty of "Removal from service" which shall not be disqualification for future employment". This penalty is imposed in terms of Rule 23(f) of General Insurance (Conduct, Discipline and Appeal) Rules, 1975. The consequence of the punishment, according to the respondents, is that the name of the petitioner is struck off from the roll of the company with immediate effect.

3. That the petitioner had earlier approached this Court by filing Writ Petition No. 44 of 2002 is not in dispute. Further, by order passed on 17th June, 2002 in that petition, interim relief was denied to the petitioner. However, the petition has been admitted by this Court.

4. The facts are very few and simple. The petitioner was employed by Respondent No. 1 as a Manager. According to him, he served the Company with loyalty and full dedication. He joined the service on 19th June, 1978. The petitioner was contributory to the provident fund of the first respondent in as much as in accordance with the scheme framed under the Provident Fund Act, 8.33% of the petitioner''s wages were deducted as Provident Fund contribution. The petitioner states that the employer was contributing equal amount.

5. The submission of the petitioner is that in 1995, the Government of India, Ministry of Finance (Department of Economic Affairs) (Insurance Division) notified in the Gazette dated 28th June, 1995 a scheme called "General Insurance (Employees) Pension Scheme, 1995". The scheme was notified in exercise of the power conferred by Section 17A of the General Insurance Business (Nationalisation) Act, 1972. The petitioner communicated his option of joining the scheme. Para 30 of the scheme provides for voluntary retirement and reads thus:

(30). Pension on voluntary retirement:

(1) At any time after an employee has completed twenty years of qualifying service, he may, by giving notice of not less than ninety days, in writing to the appointing authority, retire from service:

Provided that this sub-paragraph shall not apply to an employee who is on deputation unless after having been transferred or having returned in 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-paragraph shall not apply to an employee who seeks retirement from service for being absorbed permanently in an autonomous body or a public sector undertaking to which he is on deputation at the time of seeking voluntary retirement.

(2) The notice of voluntary retirement given under sub-paragraph (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-paragraph (1) may make a request in writing to the appointing authority to accept notice of voluntary retirement of less than ninety days giving reasons therefor; (b) on receipt of request under Clause (a), the appointing authority may, subject to the provisions of sub-paragraph (2), consider such request for the curtailment of the period of notice of ninety days 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 ninety days on the condition that the employee shall not apply for communication of a part of his pension before the expiry of the notice of ninety days.

(4) An employee who has elected to retire under this paragraph 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 paragraph 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 retirement.

(6) The pension of an employee retiring under this paragraph shall be based on the average emoluments as defined under Clause (d) of paragraph 2 of this scheme 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. Explanation : For the purpose of this paragraph, the appointing authority shall be the appointing authority specified in Appendix-1 to this scheme.

6. The petitioner submitted an application dated 5th March, 2001 seeking Voluntary Retirement from service of the 1st respondent in accordance with para 30 of the scheme.

7. The petitioner states that this application was received and duly acknowledged. Further, by letter dated 12th April, 2001 the petitioner requested that the notice period of 3 months may be reduced to one month as was done by respondent No. 1 in other cases. The petitioner confirmed his willingness to pay 2 months salary in lieu of notice period. Though the scheme envisages 90 days notice, the petitioner sought curtailment of notice period as above.

8. It is the case of the petitioner that he heard nothing from respondent No. 1 in response to his application for voluntary retirement. Therefore, he presumed that respondent No. 1 has no objection to the petitioner retiring voluntarily from service in terms of the application dated 5th March, 2001. He proceeded on the basis that he had voluntarily retired with effect from 16th April, 2001.

9. The petitioner submitted an application for permission to accept commercial employment which was also received. This application was made in terms of para 49 of the scheme which reads thus:

(49) Commercial employment after retirement:

(1) If a pensioner who, immediately before his retirement was holding the post of Deputy Manager or above and wishes to accept any commercial employment before the expiry of two years from the date of his retirement, he shall obtain the previous sanction of the Corporation or a Company, as the case may be, to such acceptance:

Provided that an employee who was permitted by the Corporation or a Company as the case may be take up a particular form of commercial employment during his leave preparatory to retirement or during refused leave shall not be required to obtain subsequent permission for his continuance in such employment after retirement....

(8) In this paragraph, (a) The expression "commercial employment" means:

(i) an employment in any capacity including that of an agent, under a company, co-operative society, firm or individual engaged in trading, commercial, industrial, financial or professional business and includes also a directorship of such company and partnership of such firm, but does not include employment under a body corporate, wholly or substantially owned or controlled by the Central Government or a State Government;

(ii) setting up practice, either independently or as a partner of a firm, as adviser or consultant in matters in respect of which the pensioner (A) has no professional qualifications and the matters in respect of which the practice is to be set up or is carried on or relatable to his official knowledge or experience, or; (B) has professional qualifications but the matters in respect of which such practice is to be set up are such as are likely to give his clients an unfair advantage by reason of his previous official position, or; (C) has to undertake work involving liaison or contract with the offices or officers of the Corporation or a company as the case may be. Explanation : For the purpose of this clause, the expression "employment under a co-operative society" includes the holding of any office, whether elective or otherwise, such as that of President, Chairman, Manager, Secretary, Treasurer and the like, by whatever name called in such society.

The petitioner has thereafter joined M/s Bajaj Allianz General Insurance Company. He was in touch with respondent No. 1 for the purposes of collecting his retiral dues. He was, however, shocked and surprised to receive a letter dated 1st October, 2001 addressed by the then General Manager of the first respondent informing him that the petitioner''s twin requests, as above, have been rejected for want of vigilance clearance. It was pointed out that the petitioner has unilaterally stayed away from duty which act would be termed as "unauthorized absence" from service and that is how he would be dealt with.

10. Upon receipt of this letter, the petitioner moved the first petition being Writ Petition No. 44 of 2002 in this Court.

11. On account of interim relief being refused, the petitioner received a show cause notice dated 20th September, 2002 alleging abandonment of service. The petitioner filed two replies thereto. His case was clear in as much as he contended that the Employer-Employee relationship does not subsist the moment period of 90 days prescribed in para 30 of the scheme has come to an end. Since the company refused to communicate anything to the petitioner with regard to his voluntary retirement application within a period of 90 days, then, after the said period the petitioner ceases to be in employment and stands retired in terms

of para 30 of the Scheme.

12. This stand of the petitioner was not acceptable to the first respondent and it proceeded to pass the impugned order holding therein that on account of admitted facts there is abandonment of the service by the petitioner which act is also punishable and, therefore, in the peculiar case of the petitioner it is permissible to impose penalty without holding any enquiry.

13. The action initiating the Enquiry and imposing penalty is subject matter of challenge in this petition.

14. Shri Singh, learned Counsel appearing for the petitioner, invites our attention to para 30 of the scheme and submits that there is no power to hold any enquiry in the light of clear wording of para 30(2). He emphasises the proviso to para 30(2). He submits that though the notice of voluntary retirement given in sub para (1) requires acceptance by the appointing authority such acceptance or rather refusal to grant permission to retire must be before the expiry of the period specified in the notice. Such a notice has to be of not less than 90 days. Upon expiry of the period specified in the notice, there cannot be any refusal to grant permission for retirement and, therefore, retirement becomes effective after expiry of 90 days in this case.

15. Shri Singh invites our attention to para 30(3) and submits that curtailment of 90 days is a distinct contingency. In his submission para 30(4) would make the intention clear. The intention to permit the employee to retire voluntarily after he has elected to retire and has given necessary notice to that effect is apparent and clear. Upon serving notice as aforesaid a condition is imposed on the employee. He cannot withdraw the notice except with specific approval of the employer and that too before the intended date of his retirement. Equally the employer is obliged to communicate his refusal, if any, within the period of notice i.e. 90 days. Once the notice period expires then retirement becomes effective.

16. In support of his submissions, Shri Singh placed reliance upon the orders passed in similar cases by Division Benches of Delhi High Court.

17. On the other hand, Shri Kothari appearing for the respondents submits that the petitioner is not entitled to any discretionary and equitable relief. His conduct is such that he did not bother to inform the respondents before accepting commercial employment in private sector. His application made on 5th March, 2001 itself cannot be considered as a request for voluntary retirement in terms of para 30 of the Scheme. Once such is the position, then there is no question of further paras or clauses of para 30 being applicable. Consequently, the act of the petitioner, in staying away from service unauthorizedly has to be viewed seriously and for which penalty prescribed by the Rules can be imposed upon him. That such a penalty (removal from service) can be imposed without full-fledged departmental enquiry, in an appropriate case, is not being disputed at all. There is no question of any voluntary retirement from service nor can it be a case of resignation by the petitioner. In these circumstances and when on earlier

occasion, this Court declined interim relief, the present petition should not be entertained and is liable to be dismissed with costs.

18. Shri Kothari has relied upon the following decisions in support of the above submission.

i) Dharmarathmakara Raibahadur Arcot Ramaswamy Mudaliar Educational Institution v. Educational Appellate Tribunal and Ors. reported in (1997) 7 S C C 332.

ii) Aligarh Muslim University and Others Vs. Mansoor Ali Khan, ; and

iii) Dr. Anil Bajaj v. Post Graduate Institute of Medical Education and Research and Ors. reported in 2002 (4) All MR 248.

19. For properly appreciating the rival contentions, it would be appropriate if a reference is made to the application preferred by the petitioner on 5th March, 2001.

20. In that application, the petitioner prayed that he should be permitted to retire voluntarily so also to take up commercial employment. He requested that the notice period be reduced from 90 days to 30 days. He has given an undertaking that he would not apply for commutation of part of the pension before expiry of notice period of 90 days. A separate application was being made by him for permission to engage in commercial employment.

21. On perusal of this application, it is not possible to agree with Shri Kothari that para 30 of the Pension Scheme of 1995 is not being invoked by the petitioner. The first contention of Shri Kothari must, therefore, fail.

22. Secondly, what we find is that on 12th April, 2001 the petitioner addressed a communication in the following terms.

The Oriental Insurance Company Limited

12th April, 2001

The Chairman-cum-Managing Director Oriental Insurance Company Head Office New Delhi

THROUGH PROPER CHANNEL BY REGD.A.D.

Dear Sir

Re : My application for Voluntary Retirement from the services of the Oriental Insurance Company.

This has reference to my application dated 5th March, 2001 for Voluntary Retirement from the services of the Company. In the said application I had requested that the notice period of three months may please be reduced to one month as was done by the company in other cases. I also confirm that I would be willing to pay two months salary in lieu of notice period in keeping with the

Company''s practice.

In view of the fact I have not heard anything regarding my application for Voluntary Retirement from the services of the Company, I presume that the Company has no objection to my Voluntary Retirement as per the terms of my application dated 5th March, 2001.

In view of this fact, I presume that the same has been accepted and I shall proceed on Voluntary Retirement from 16th April, 2001.

I once again wish to place on record my gratitude to each one in Oriental Insurance for the support extended to me during the discharge of my duties.

Thanking you.

Yours faithfully, Sd/- (J. Nayar) Manager.

Shri B.D. BANERJEE CHAIRMAN CUM MANAGING DIRECTOR THE ORIENTAL INSURANCE CO. HEAD OFFICE, NEW DELHI.

23. To both communications referred to above, a reply was sent on 1st October, 2001 by the respondents which is in the following terms:

THE ORIENTAL INSURANCE COMPANY LIMITED Mumbai Regional Office No. 1 Oriental House, 2nd floor, 7, Jamshedji Tata Road, Mumbai 400 020.

1st October, 2001

PERSONAL DEPT.

Shri J. Nayar C/504, Adarsha Apartments Spring Mills Compound Naigaon, Dadar, MUMBAI 400 014

Re : Your request for Voluntary retirement under Para 30 of the Pension Scheme and request for Commercial employment.

We refer to your letters dated 5th march, 2001 and 12th April, 2001 on the above subject.

The matter was referred to the Competent Authority and we have been informed that your request for Voluntary Retirement could not be considered for want of Vigilance Clearance from the concerned Authorities.

We take reference of your letter dated 12/04/2001 informing the Company that you have unilaterally on your own presumed acceptance of VRS and decided to keep away from the duties of the Company since 16/04/2001.

We may add here that the permission to accept Commercial Employment after retirement arises only after request for Voluntary Retirement is accepted by the Competent Authority.

In view of the above, your absence from duty w.e.f. 16/04/01 is being treated as unauthorized absence.

Thanking you,

Yours faithfully, Sd/- (M.K. JINDAL) ASSTT. GENERAL MANAGER.

24. We have reproduced para 30 of the Scheme only to emphasise the fact that the scheme postulates retirement which is on attaining the age of superannuation so also by other mode.

25. Para 2(j) defines the term "Date of Retirement", which reads as under:

2(j) "date of retirement" means the last day of the month in which an employee attains the age of superannuation or the date on which he is retired by the Corporation or a Company or the date on which the employee voluntarily retires.

26. Thus, the date of retirement can be a date on which the employee voluntarily retires. The term "retirement" is defined in para 2(t) of the scheme to mean the following.

(t) "Retirement" means:

(i) the retirement in accordance with the provisions contained in paragraph 12 of General Insurance (Rationalisation and Revision of Pay scales and Other Conditions of Service of Supervisory, Clerical and Subordinate Staff) Scheme, 1974 notified under the notification of Government of India in the Ministry of Finance (Department of Revenue and Insurance) number S.O. 326(E) dated the 27th May, 1974;

(ii) the retirement in accordance with the provisions contained in paragraph 4 of the General Insurance (Termination, Superannuation and Retirement of Officers and Development Staff) Scheme, 1976 notified under notification of Government of India, in the Ministry of Finance (Department of Economic Affairs) number S.O. 627(E) dated 21st September, 1976;

(iii) Voluntary retirement in accordance with the provisions contained in paragraph 30 of the scheme:

27. Thus, Voluntary Retirement in accordance with Rules contained in para 30 of the scheme is nothing but retirement from services of the respondents.

28. In this backdrop, Chapter V in which para 30 falls needs to be noticed. An employee who has completed 20 years of qualifying service, may by giving notice of not less than 90 days, retire from service. The words "not less than 90 days" would mean that a longer period is also contemplated. It can be thus more than 90 days but not less than the same. This is the period of notice. The notice has to be given in writing to the Appointing Authority. The notice requires acceptance by the Competent Authority. However, if within the period of notice (specified in the notice itself) permission to retire voluntarily is not refused, then, the retirement shall become effective from the date of expiry of the said period.

29. A combined reading of the sub paras of para 30 would make it clear that for an employee to be admissible to pension his voluntary retirement application has

to be in the manner provided in para 30. Its acceptance also must be in the same manner. If the employee cannot withdraw his offer after the period of 90 days or Notice Period has expired, then, the employer is also bound to act in terms of the proviso below para 30(2) of Chapter V of the scheme.

30. In the instant case, the communication dated 1st October, 2001 is much beyond the period prescribed in para 30. The application for voluntary retirement stipulates 90 days. The application is dated 5th March, 2001. There is a reminder on 12th April, 2001. It is true that the petitioner proceeded upon the basis that his application for voluntary retirement is accepted. He proceeded for commercial employment even before the period stipulated in the notice came to an end. Thus, without waiting for 90 days to get over he proceeded in the matter. According to Shri Kothari this act of the petitioner disentitles him to all benefits under para 30 of the scheme. It is clear that by his own conduct he has waived the notice and right, if any, flowing therefrom. It is not possible for us to accept these submissions. Once we hold that the notice is for voluntary retirement in terms of para 30 of the scheme, then, it was incumbent upon parties to abide by the stipulations thereof. The scheme provides for the voluntary retirement and also the date when it is effective. On both sides conditions are imposed. This is a scheme fully covered by the law laid down in the case of Bank of India and Others Vs. O.P. Swaranakar etc., and more particularly the observations in paras 92 to 117 thereof. In such circumstances, the communication of 1st October, 2001 purporting to refuse permission is contrary to the scheme. Assuming that the act of the petitioner in not reporting for work after 16th April, 2001, is contrary to para 30 of the scheme which postulates minimum 90 days notice period, yet, nothing prevented the respondents from communicating to the petitioner the refusal in terms of the proviso to para 30(2) within the period of 90 days or if the vigilance clearance was awaited or investigation ordered by the Special Judge, communicate that fact as well, at least by August, 2001. Admittedly the letter of 1st October, 2001 is beyond the period stipulated in the notice issued by the petitioner and received by the respondents. It is not the respondents'' case that they received the communicational of the petitioner after the notice period. There is no explanation forthcoming from the respondents about the period i.e. date of receipt of notice from the petitioner till October, 2001. The communication dated 1st October, 2001 rejecting permission to retire voluntarily for want of vigilance clearance is bad in law being contrary to the scheme itself. If the record in Writ Petition No. 44 of 2002 is perused, it is apparent that the communication from CBI was received by the respondents on 10th May, 2001. The CBI was of the view that there is enough material to hold regular Departmental Enquiry against the petitioner and others. It is not as if this fact was already known to the petitioner. There is no material to hold that he decided to take voluntary retirement on account of his involvement in a criminal case. The criminal case is of 1999. Despite this the respondents accepted the application dated 5th March, 2001 and further letter dated 12th April but did nothing within the notice period.

31. It is in the facts peculiar to this case and considering the clear language of the scheme that it is not necessary to deal with any larger issue and controversy. The petitioner could not have been proceeded with for abandoning his services when the conduct of the respondent is contrary to the scheme. The scheme and the para under consideration will have to be read in its entirety. Nothing can be seen in isolation and torn from context. If all sub clauses/paras of para 30 are read together it is clear that obligation of the employer has not been discharged by the respondents in this case. This is a case where fraud or ulterior motives are not alleged by the respondents. It is not their case that the petitioner is in any way responsible or instrumental in the respondents not responding to his letters dated 5th March, 2001 and 12th April, 2001. In a case of fraud being alleged and proved the situation is bound to be viewed differently. Fraud vitiates every thing.

32. In the result all proceedings which have been commenced pursuant to the communication/letter dated 1st October, 2001 including the charge sheet and enquiry so also the subsequent punishment are vitiated and, therefore, deserve to be quashed and set aside.

33. The conduct of the petitioner and the order passed by this Court refusing interim relief in the earlier petition and permitting the employer to hold an enquiry could not in any manner be considered as diluting the rigour of para 30 of the scheme. In any event, the order is an interim order. Any observation or finding or direction which takes away the right conferred upon the employee by para 30 of the scheme cannot be given effect to or else the scheme would be rendered nugatory. We cannot lose sight of the fact that the scheme is framed in exercise of the powers conferred by Section 17A of the Act of 1972. Nothing is pointed out from the scheme and the Act which would take away the benefit under the scheme available to the petitioner merely because some case is pending in a criminal court. It may be that the order passed by this Court on 17th June, 2002 makes a reference to the proceedings culminating in the order of the Special Judge, C.B.I. dated 8th June, 2001. However, nothing prevented the respondents from initiating appropriate proceedings and refusing permission to retire in the face of this order within the period prescribed or the notice period i.e. 90 days. Far from assisting the respondents, the fact of the order dated 8th June, 2001 of the Special Judge in the CBI Special case being known to them much earlier militates against their stand. The permission to retire could have been refused by the respondents within 90 days from 16th April, 2001. That having not been done, the CBI case or the conduct of the petitioner is wholly irrelevant in the facts of this case. For identical reasons, the observations in the interim order of this Court in Writ Petition No. 44 of 2002 would not be of any assistance. In the light of the conclusions drawn by us, the decisions of the Supreme Court on the concept of abandonment of service and the penalty prescribed for unauthorized absence are totally inapplicable. They are rendered in the context of admitted unauthorized absence and overstaying extra ordinary leave. The Hon''ble Court upheld the argument that principles of natural justice may not apply in such cases.

34. Consequently, writ petition No. 303 of 2007 succeeds. Rule is made absolute in terms of prayer Clause (a). However, as the petitioner has himself relied upon Delhi High Court orders and his communication making it clear that he does not want pension for the concerned period so also he is willing to pay the amount of two months salary in lieu of notice, it is directed that the petitioner would not be granted pension for two years. This order is passed because the petitioner had already taken up commercial employment. Rule is made absolute in the above terms with no order as to costs. However, this judgment and order and any observation herein shall not in any manner influence the outcome of the criminal/ special case which must proceed on its own merits and in accordance with law.

35. In the light of the order passed in Writ Petition No. 303 of 2007 writ petition No. 44 of 2002 does not survive and is accordingly disposed of.

