(1999) 08 J&K CK 0031

In the Jammu And Kashmir High Court

Case No : Letters Patent Appeal No. 322 Of 1997

Khurshid Ahmad Lolo — APPELLANT

Vs

Govt.of India and Others — RESPONDENT

Date of Decision : 12-08-1999

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : (2000) 1 SCT 747 : (1999) SriLJ 466 : (1999) 2 SriLJ 466

Hon'ble Judges : Bhawani Singh, C.J and Bashir-Ud-Din, J

Bench : Division Bench

Judgement

Syed BashirUdDin, Judge.

1. Appellant Upper Division Clerk (U.D.C) of National Cooperative Consumers Federation of India Ltd. (hereafter Federation), applied on

18111991, for voluntary retirement, effective from 141992. This he did pursuant to Voluntary Retirement Scheme circulated by Federation for its

employees in 1991. Petitioner alleges that he subsequently withdrew the offer of voluntary retirement and, therefore, continued as U.D.C of the

Federation. In the meanwhile, Federation issued orders accepting his voluntary resignation effective from 141992 and paid him compensation as

assessed under the scheme. His claim(s) to provident fund and gratuity on process were taken up with Provident Fund Commissioner and Life

Insurance Corporation. Petitioner challenged this order of April 10, 1992 and has prayed for its quashment. Besides mandamus against the

Federation is solicited for continuation of the services of petitioner as U.D.C with the Federation as its Srinagar Branch, with all benefits flowing

from such continuous service. A Single Bench of this Court, dismissed the writ petition ""for revoking his offer of voluntary retirement"" as meritless and rejected his prayer for taking him back in the service of Federation. But at the same time issued directions to the concerned functionaries

including Life Insurance Corporation and Provident Fund Commissioner 'for examining and proceeding the case of petitioner for release of gratuity,

post pensionary benefits and provident fund within six months'. Against this order of July 31, 1997 of the Single Bench, petitioner has come

forward to challenge the judgment and order in this Letters Patent Appeal.

2. Before dealing with the contentions focussed on in the arguments by the counsel for the parties, following additional facts (succinctly stated)

need to be taken note of:

3. Petitioner joined the Federation on 191279 and rose to the rank of U.D.C. The Federation circulated a Voluntary Retirement Scheme for its

employees in September 1991 and supplemented it by circulated order dated 31101991. Employees of the Federation who gave option to seek,

voluntary retirement, were to avail benefits under the said voluntary scheme as per its provisions. Under the Scheme, NCCF Voluntary Retirement

Rules of 1991 effective from 25101991, were framed. All categories of employees of the Federation were covered by these rules. The

management has been given right to accept or reject the request of an employee for voluntary retirement under the Scheme. The interested

employee is supposed to apply on prescribed form (AnnexureA to NCCF Voluntary Retirement Rules 1991). The case is to be sent to the

Managing Director for orders, after it is processed in the Personnel Department of the Federation. The scheme provides benefits in the nature of

lumpsum compensation, gratuity, encashment of leave, provident fund, retirement TA and notice pay. In terms of the rules, the Managing Director

is competent authority torn accept the request for voluntary retirement from an employee of the Federation. The petitioner applied on the

prescribed perform for voluntary retirement. He sough the voluntary retirement from the service of Federation from 141992. The voluntary

retirement application was submitted to Managing Director of the Federation with 19111991 as the date of submission of this application.

Petitioner alleges that he moved an application on 741992, addressed to the Managing Director of the Federation at New Delhi, conveying his

decision that his earlier application of 18111991, for voluntary retirement under scheme, may be treated as cancelled. The respondent/ Federation

has denied that it ever received this communication of Shri Lolo till his voluntary retirement offer was accepted by the Federation. The Branch

Incharge of the Federation at Srinagar, issued an office order on 1041992 with copy endothersed to petitioner intimating him that his application

for voluntary retirement from the service of Federation, has been accepted by the competent authority from 1st of April 1992, the date indicated

by the petitioner and, therefore, he is relieved from 1041992. Besides a cheque for lumpsum compensation for Rs, 36254.66 was also

endothersed to the petitioner. Petitioner has challenged this office order. Shri Lolo addressed another letter dated 2241992 to the Managing

Director of the Federation requesting that his application for voluntary retirement having been accepted, his request for efficiency bar may be

cleared and arrears paid to him after reckoning his basic pay at Rs. 640/. He also acknowledges payment of the above said lumpsum

compensation. Subsequently communications also show that the petitioner has been requesting the Federation for release of other benefits under

the scheme, after his efficiency bar is cleared and his basic pay as on the date of retirement is treated as Rs. 640/ (Annexure z 19, z 21). He has

also conveyed to the Federation that incase this demand of his is not acceded to, he will join back the Federation as U.D.C and has even

suggested date(s) towards that end.

4. The counsel for appellant submits that the voluntary retirement application submitted by the appellant was conditional, in so far as the offer was

subject to clearance of efficiency bar of the petitioner and that the retirement was effective from future stipulated date of April 1, 1992. The

petitioner opted to retire under the scheme as he contemplated to start his own business. Having failed in the business and his retirement not having

been accepted by the Federation, he addressed a letter on April 7, 1992 to the Managing Director of the Federation, for treating his application

for voluntary retirement, under the scheme as cancelled. Instead he was informed that his voluntary retirement has been accepted from 141992 and

was relieved on 1041992. The lumpsum compensation was paid to him without hearing his case for efficiency bar. The Federation thus not having

fulfilled the .conditions, petitioner was within his rights to cancel the voluntary retirement and Federation was under legal duty to treat him in service

as U.D.C of the Federation. In the premises the counsel submits that the petitioner was within his rights to withdraw the voluntary retirement offer

before it was accepted, notwithstanding that the retirement was to take effect from a future stipulated date. He has referred to AIR 1969 SC 180;

AIR 1981 SC and 1983(2) SLJ 332.

5. The counsel for respondents, counters the argument(s) by submitting that the petitioner claimed voluntary retirement* under the scheme after

filling the prescribed application under his own hand and signatures. No condition whatsoever was attached to the voluntary retirement except that

the retirement was stipulated to be effective from 1411992. The Federation accepted and approved his voluntary retirement from 141992. Merely

because acceptance of the voluntary retirement of the petitioner was not conveyed to the petitioner before 141992, would not invalidate the

voluntary retirement offer. Moreso, when the claimed voluntary retirement cancellation letter was not at all received by the Federation. The counsel

further submits that the letter dated 741992 is merely a ploy to bolster petitioner case for continuing with the Federation, notwithstanding his offer

of voluntary retirement and its acceptance by the Federation under the scheme and rules.

6. In Union of India etc. V/S Gopal Chandra Misra and others (AIR 1978 SC 694), though the Court Primarily adjudicated the question of

withdrawal of resignation before it became effective from a specified future date of Justice Satish Chandra, Judge of the Allahabad High Court, in

the context of Article 217 of the Constitution, yet the Court examined the question of withdrawal of the resignation generally as applicable both to

the Government servant and constitutional functionaries and observed:

51. That the general principle is that in the absence of a legal, contractual or constitutional bar, a ""prospective"" resignation can be withdrawn at

any time before it becomes effective, and it becomes effective when it operates to terminate the employment or the officetenure of the resignor.

This general rule is equally applicable to Government servant and constitutional functionaries.......................

59. In our opinion, what has been extracted above from the decision in the Kerala case, AIR 1964 Ker 194 correctly enunciates the principle that

a prospective resignation remains mute and inoperative till the date on which it was intended to take effect is reached, and can be withdrawn and

rendered nonest at any time before such date"".

7. In P.Kasillingam V/S P.S.G College of Technology (AIR 1981 SC 789), the Court while approving the submissions of the counsel for the

appellant that it is open to a civil servant to tender his resignation on a prior date to take effect on a subsequent date specified and, therefore, it

could always be withdrawn before the expiry of such date, observed that, there can be hardly any dispute with the above proposition, but

application of this principle shall have to be based on the facts and circumstances, in which a case arises before the Court.

8. The question when the servant's resignation becomes effective, as answered in Raj Kumar Vs. Union of India (AIR 1969 SC 180), is that the

services of a Government servant normally stand terminated from the date on which his resignation letter is accepted by the appropriate authority,

unless there is any law or statutory rule governing the conditions of services to the contrary. Once the resignation is accepted by the competent

authority, the public servant concerned has no locus paenitentiae thereafter. Merely, because communication of the order accepting resignation

reached him with a little delay, as against undue delay, would not make the resignation bad.

9. In this case we find that while applying for voluntary retirement from the service of the Federation, appellant has not attached any condition to

the retirement. The retirement is specifically stated to be effective from 141992. The option for seeking voluntary retirement is on the prescribed

form. We have examined this application from record produced before us. We find that voluntary retirement sought and applied form 141992, is in

terms of the circulated NCCF Voluntary Retirement Scheme and Federation's Voluntary Retirement Rules of 1991. The acceptance or rejection

of the request for voluntary retirement of an employee of Federation is with the management decision taken through Managing Director of the

Federation. After V.R application is received and processed by the personnel section/Department of Federation, its approval is to be obtained

from the Managing Director of the Federation. The Branch Incharge of the Federation at Srinagar informed the appellant that his request for voluntary retirement has been accepted by the competent authority and same shall be effective from 141992, the date specified by the appellant in

the application prescribed for voluntary retirement under the scheme. Even the cheque for Rs. 36254.66, as lumpsum compensation to which

petitioner was entitled under the scheme, was also handed to petitioner. It is not denied by the appellant/ petitioner that he has received the cheque

for the amount. The office order conveying the decision of the competent authority to petitioner is dated 1041992. The photostat copy of the

application which bears date as 741992, to show that the petitioner has changed his mind and requested the competent authority to treat his

application for voluntary retirement as cancelled, appears not a genuine document. The respondents have denied that this letter was ever received

by the competent authority and that the respondents were ever conveyed that the petitioner had withdrawn his offer of voluntary retirement. This

letter though shown as through proper channel, does not bear any number and date of Srinagar Branch Office. Besides the endothersement at the

bottom is unsigned. It does not show that the Incharge NCCF at Srinagar delivered this request personally at Head Quarter. As already stated that

the respondents have denied all this. Contextually the genuineness of these documents can be further tested in the light of the letter subsequently

addressed by the petitioner to the Managing Director in which the petitioner mentions that as his voluntary retirement has been accepted by the

competent authority, his efficiency bar case may be cleared and arrears paid to him on that basis. In the letter receipt of lumpsum compensation

awarded under the scheme while accepting the voluntary retirement of the petitioner is acknowledged. Interestingly the appellant has in this letter

shown himself as ""Ex. U.D.C NCCF, an Anantnag based Advocate"". The petitioner has on his own tendered voluntary retirement (after its

approval) effective from the specified date of 141992. Obviously, he has made his V.R Operative from the said specified date. He cannot request

for cancellation on 741992 of the voluntary retirement effective from 141992, once his voluntary retirement was accepted by the competent

authority. There has been no undue or long delay in conveying the acceptance of voluntary retirement to the petitioner. At what basic pay the

petitioner is entitled to lumpsum compensation in terms of the scheme and rules providing for voluntary retirement, is a matter of record. But merely because petitioner believes that he would be entitled to compensation on basic pay after his claim for efficiency bar is acceded to by the employer,

is neither a ground nor condition for voluntary retirement scheme. The voluntary retirement cannot be said to be bad or vitiated on these counts.

10. Nihal Singh Vs. Director of Education and others 1983(2) SLJ 332, is cited by appellant's counsel for the proposition that if the retirement is

not accepted in terms of the offer, there is no acceptance of V.R. In this case offer of Principal of school (Nihal Singh) was subject to condition

that his military service be counted towards his pension. His offer of V.R was accepted, but without adding military service towards his pension.

The Court held V.R was not validly accepted. The laid proposition is not applicable to our case. It is not a case of conditional offer of V.R. On the

other, this case belongs to the specie of unconditional, absolute and unqualified Voluntary Retirement Cases.

11. The counsel for respondents submitthat the petitioner cannot keep the amount of lumpsum compensation calculated and paid under the scheme

with him and at the same time press for deemed continuance as U.D.C with the Federation. If the appellant bonafidely believed that his voluntary

retirement was deemed to be cancelled, he should have returned the benefit of lumpsum compensation, received under the scheme. He has kept

the amount with him and is yet pressing for being treated as employee of the Federation. The reasons which made the petitioner to change his mind

from seeking voluntary retirement to seeking continuation as U.D.C in the Federation, is not relevant matter to effect the outcome of the petition.

12. In answer counsel for the appellant submits that the petitioner opted for voluntary retirement as he started a business venture, but soon after he

incurred losses and suffered adversely, thereby, he changed his mind to continue in the employment with the Federation. He is prepared to pay

back this amount received, incase his is taken back in the service of the Federation with all benefits.

13. The petitioner opted for voluntary retirement with eyes wide open and after understanding fully the scheme and its implications. He applied

under the rules. He received the lumpsum compensation, calculated and worked out by the Management of Federation in terms of the scheme and

rules. The other retrial benefits like gratuity, leave encashment, P.P. etc. were also processed. While being conveyed the decision of the

Management/Managing Director (the competent authority of the Federation) of acceptance of his voluntary retirement, he was paid the lumpsum

compensation of Rs. 36254.66 through cheque on 1641992. He has kept this amount throughout to date with him. Even while claiming

conveyance of his alleged cancellation of the voluntary retirement request, he did not return the amount. In such circumstances there is footing and

base for the contention of the respondent counsel that the appellant cannot at the same time affirm the action of acceptance of his voluntary

retirement, so far it relates to his accepting the benefits and simultaneously disaffirm the same transaction so far as it effects discontinuance of

appellant as U.D.C with the Federation. He had full knowledge and was sufficiently informed of his rights and obligations under the scheme of

voluntary retirement circulated for its employees by Federation and rules framed thereto. He cannot at the same time be left to keep the benefit and

disaffirm action of acceptance of his voluntary retirement. He cannot be allowed to seek deemed continuance of service with Federation on the one

hand and to keep benefit(s) of the scheme with him on the otherhand. The petitioner having elected to retire voluntarily as against the other choice

of continuing in the service of the Federation and having derived advantage under the scheme and its rules, cannot now turn around to disclaim the

voluntary retirement while keeping the benefit/ advantage under the scheme and rules framed thereunder. The law does not permit petitioner to

approbate and reprobate at the same time.

14. Lastly, the counsel for the respondents 2 and 3 canvasses that the Federation is a society sponsored by Cooperative activists/leaders

interested in consumer welfare. Its functions are essentially meant for keeping available goods to consumers on mass basis at reasonable prices. Its

functioning and control is not under Union or State Government. Therefore, NCCF is not State or authority or instrumentality of State, and is not

amenable to jurisdiction of the Court under Article 226 of the Constitution of India corresponding to Section 103 of the Constitution of State.

Therefore, the writ petition against the Federation is not maintainable.

15. The counsel for the appellant submits that as the Federation is controlled by and functions under the Government of India, it is amenable to writ

jurisdiction and is an authority/instrumentally under the State within Article 12 of the Constitution.

16. In the impugned judgment the learned Single Judge has not dealt with the rival contentions of the parties on the question, whether NCCF is

amenable to writ jurisdiction under Article 226 of the Constitution or not, on the premises that the petitioner's case on merits does not find

acceptance with the Court. We take notice of case law cited by respondent's counsel in support of his submission that NCCF 01 India is not

amenable to writ jurisdiction under article 226 of the Constitution of India. This question arose before a Division Bench of Delhi High Court in civil

writ petition No. 554/1985 titled J.S.Arneja Vs. NCCF of India Ltd. and others. The services of Shri J.S.Arenja initially appointed as Manager

(Industries and Export) in the NC?CF in January 1976 and subsequently promoted as Chief Manager in March 1983, were terminated in

February 1985 by an order styled as termination simpliciter. He challenged the order in the above writ petition before Delhi High Court. An

objection was raised on behalf of NCCFrespondents that the Federation essentially being a Cooperative Society not created by Statute though

registered under the statute, is governed by its own Byelaws. Besides its functions are neither controlled nor shared by the Government. Hence

Federation is not amenable to writ jurisdiction. The Court after applying the tests for determining whether Corporation can be said to be an

instrumentality or agency of the State, laid down by the Constitutional Bench of the Supreme Court in Ajay Hasia Vs. Khalid Mujeeb (AIR 1981

SC 487), came to the conclusion that the NCCF is neither an instrumentality nor agency of the State within the meaning of article 12 of the

Constitution and dismissed the writ petition.

17. Delhi High Court while coming to the above conclusion also relied on a Divsion Bench decision of Madhya Pradesh High Court in Ramu Ram

Sahu Vs. NCCF of India (AIR 1991 M.P.63). The D.B of Madhya Pradesh High Court in this case after applying the various tests and guidelines

evolved by the case law and in the ""prospective"" of InterState Multipurpose Societies Act 1984 held that NCCF is not a State and also not

amenable to writ jurisdiction under article 226 of the Constitution.

18. In P.Bhaskaran Vs. Additional Secretary Agricultural (Cooperation) Department AIR 1988 Kerela 75, Kerela High Court while interpreting

provisions of Kerela Cooperative Society Act 1985, came to the conclusion that no writ can lie against Cooperative Society.

19. The full bench of Orissa High Court in Banabihari Tripathy Vs. Registrar of Cooperative Societies and another (AIR 1989 Orissa, 31), held

that the Cooperative Society is neither authority under Article 12 of the Constitution nor it is amenable to writ jurisdiction.'

20. In result, for the aforesaid reasons, we find no merit in this appeal. The LPA is dismissed.

