
(1989) 08 MAD CK 0007
In the Madras High Court
Case No : W.A. No. 547 of 1988

L.D. Kanchan

APPELLANT

Vs

Indian Overseas Bank and Others

RESPONDENT

Date of Decision : 22-08-1989

Acts Referred:

Constitution of India, 1950 — Article 226, 32(1), 32(2)
Penal Code, 1860 (IPC) — Section 120
Prevention of Corruption Act, 1988 — Section 5(1), 5(2)
Staff Gratuity Fund Trust Deed and Rules — Rule 34
Staff Provident Fund Rules — Rule 12

Citation : (1991) 1 LLJ 279

Hon'ble Judges : S.T. Ramalingam, J; S. Mohan, J

Bench : Division Bench

Judgement

S. Ramalingam, J.—The appellant was the manager of the Byculia Branch of the Indian Overseas Bank between February, 1975 and

August 1977. On 28th November 1977, a First Information Report was registered in Crime No. 56 of 1977 against the appellant herein and

another person by name C. Sharma alleging commission of offences punishable under Ss. 120-B, 420, 467, 468 and 471 of the Indian penal code

and S. 5(1)(d) read with S. 5(2) of the Prevention of Corruption Act. It was alleged therein that the appellant had granted loans to certain persons

who were found to be fictitious persons and that some credit vouchers were prepared by the appellant and C. Sharma and some of the cheques

were encashed by them. Hence the allegations of preparation of false documents for granting loans with intent to cheat the Bank were made.

2. The appellant was placed under suspension on 11th November 1977 under Regulation 12(1) of the Discipline and Appeal Regulations of the

Bank.

3. In the normal course, the appellant was due to retire on superannuation on 31st May 1987. By order dated 8th may 1987, the appellant was

informed as follows :

We hereby permit you to retire form the Bank's service on 31st May 1987 when you attain the age of superannuation. You will stand relieved

from the Bank's service on 31st May 1987 even when you are under suspension which please note.

Even when the appellant was in service and much before 31st may 1987, by another letter dated 18th May 1987 issued by the Disciplinary

Authority, the appellant was informed as follows :

I hereby order that you will not be entitled to any other amount except the subsistence allowance already paid during the period of your

suspension under Regulation 15(2) of the Indian Overseas Bank Officer Employees (Discipline and Appeal) Regulations 1975. Please not that the

above has been done without prejudice to the Court case filed by C.B.I. pending against you as stated above.

4. On 30th of December, 1987, the appellant submitted a representation for payment of his Provident Fund and Gratuity as well as what may be

due by way of arrears of wages during the period of suspension. Not getting any favorable response, he filed W.P. No. 1969 of 1983 praying for

a Mandamus directing the 1st respondent viz., the Indian Overseas Bank to pay the appellant herein salary for the period of suspension from 11th

November 1977 to 31st May 1987, after deducting the subsistence allowance already paid and to settle his Provident Fund and Gratuity

accounts.

5. This Writ Petition was dismissed in limine by the learned Single Judge as follows :-

It is stated in the affidavit filed in support of this writ petition that there was a demand made on the respondents for settlement of the amounts

stated to be due to the petitioner, but there has been a reply not accepting the liability on the part of the respondents. It will be appropriate for the

petitioner to resort to the ordinary civil process, claiming settlement of the amount referred to in the prayer in the writ petition. Relegating the

petitioner to the above process; this writ petition is dismissed.

The correctness of the above order of the learned Single Judge is canvassed in this Writ Appeal.

6. The appellant has also filed C.M.P. No. 11604 of 1986 for amendment of the prayer in the Writ Petition seeking the quashing of the order of the 1st respondent dated 18th May 1987.

7. The contentions of Mr. B. R. Dolia, learned counsel for the appellant, are as follows :-

It is not in dispute that the appellant was placed under suspension on 11th November 1977 and he was also allowed to retire on 31st May 1987.

Since the appellant has been allowed to retire without reserving the right to take disciplinary action against him under R. 20(3)(c) of the Service

Regulations and since Regulation 15(2) of the Conduct Regulations is not attracted since no disciplinary action had been taken against him, the

entire period from 11th November 77 to 31st May 1987 should be treated as "on duty" and the appellant should be paid the difference in the

wages.

Secondly, it is contended that under Regulation 46 of the Service Regulations, the Staff-officer shall be eligible for gratuity on retirement and

therefore, the appellant should be paid the gratuity as per the provisions of Staff Gratuity Fund Trust Deed and Rules, and

Thirdly it is contended that the appellant is entitled to be paid the Provident Fund standing to his credit as per the provisions of the Staff Provident

Fund Trust Deed and Rules.

8. Regulation 12 of the Conduct Regulations states that, an officer employee may be placed under suspension by the competent authority -

(a) "where a disciplinary proceeding against him is contemplated or is pending or

(b) where a case against him in respect of any criminal offence is under investigation, inquiry or trial.

Regulation 14 states that an officer who is placed under suspension during the period of such suspension shall be entitled to receive subsistence

allowance at the rates specified therein. Regulation 15(1) states that where the competent authority holds that the officer employee has been fully

exonerated or that the suspension was unjustifiable, the officer employee concerned shall be granted the full pay to which he would have been

entitled to had he not been suspended together with any allowance of which he

was in receipt immediately prior to his suspension, etc

Regulation 15(2) states that in all other cases, the officer employee shall be granted only such proportion of pay and allowances as the competent authority may direct.

9. Relying upon these provisions, the appellant contends that since no disciplinary action was ever initiated against the appellant while he was in service and as he was allowed to retire on 31st May 1987 and thereafter there would be no possibility of taking any disciplinary action against him,

the appellant cannot be visited with an order under Regulation 15(2) and he cannot be denied the full pay for the period of suspension.

10. In answer to the above contention, the learned counsel for the 1st respondent would submit that the appellant cannot trace his claim to demand

full wages for the period during which he was suspended under any express provision of the Conduct Regulations or Service Regulations. He

states that Regulation 15(1) is not attracted to the facts of the present case since the employee in question had not been fully exonerated under any

disciplinary enquiry taken against him. He stoutly disputes the claim of the appellant and denies any liability on the part of the 1st respondent to pay

the difference in wages for the period of suspension.

11. As regards gratuity, in addition to referring to Regulation 46 of the Service Regulations, the appellant relies on R. 34 of the Rules framed in

respect of Staff Gratuity Fund. That Rule is as follows :-

34. Gratuity payable in the case of misconduct : An employee who is dismissed for misconduct shall not forfeit gratuity except in cases where such

misconduct causes financial loss to the Bank and in that case also, to that extent only. A certificate from the Bank or person acting under the

authority of the Bank as to the misconduct of any employee and the consequent financial loss to the Bank shall be conclusive evidence thereof and

shall be binding upon the Trustees and the employee concerned.

The argument that is developed is that only in case an employee is dismissed for misconduct, he is likely to forfeit gratuity and that forfeiture can

only be to the extent of the financial loss caused to the Bank. The submission is that since no disciplinary action had been taken against the

appellant and there is no question of the appellant suffering any dismissal for misconduct, the employer has no right to forfeit any portion of the

gratuity and the entire gratuity is therefore liable to be paid to him.

12. In answer to the above submission, the learned counsel for the 1st respondent-Bank would submit that though the appellant had been allowed to retire from service with effect from 31st May 1987, yet that was without prejudice to the rights of the 1st respondent-Bank and the right so reserved is to proceed against the respondent and recoup the loss caused to the Bank out of the amounts that may be standing to his credit either in the Gratuity Account or in the Provident Fund Account. It is further contended that, in any event, the 1st respondent Bank does not admit that any gratuity is payable to the appellant and when there is a disputed liability, a Mandamus should not issue.

13. In so far as the Provident Fund is concerned, the appellant contends that R. 12 of the Staff Provident Fund Rules is applicable and based on that rule, that Provident Fund or atleast that portion of the Provident Fund, which represents the contribution made by the appellant should be paid to him. R. 12 is extracted below :

The Bank shall have a first and paramount claim or lien upon the amount from time to time standing to the credit of the individual account of each member in the Fund to the extent to which such amount represents contributions of the Bank or interest credited towards such contributions in respect of the actual financial loss caused to the Bank by the misconduct of such member who is dismissed for misconduct. The Trustees shall on receiving from the Bank notice of such claim or lien make payment to the extent of such amount so standing at such credit of the amount of the claim or lien to the Bank in accordance with the provision of R. 30 but in no case exceeding the actual financial loss suffered by the Bank and the receipt of the Bank for such payment shall be a good and sufficient discharge to the Trustees.

Based on the wording of the above Rule, the appellant contends that since no disciplinary action had been taken against him and there is no proof of financial loss caused to the Bank by any misconduct committed by him, the 1st respondent-Bank cannot withhold payment of full Provident Fund amount.

14. The answer of the 1st respondent to the above contention is that the retirement of the appellant from service with effect from 31 May 1987 is

not a retirement in the legal sense, since it is without prejudice to the rights of the Bank and as and when the criminal case is over, the 1st

respondent-Bank would be in a position to take action against the appellant for the loss caused to the Bank, and in such an event they can have

recourse to the amount standing to his credit in the Provident Fund Account. In addition thereto, the 1st respondent would deny not only the

quantum of the Provident Fund claimed but also the very claim itself.

15. The prayer in writ petition as originally framed is for Mandamus to direct the respondents to pay the gratuity, Provident Fund, difference in

wages etc., On the other hand the amended prayer for certiorari is to quash the order dated 18th May 1987. Both revolve on the question whether

the appellant has an existing legal right, which he can enforce by a writ to command the respondents to pay him the amount claimed. It is true that a

Mandamus would lie to enforce existing legal right. And it is equally true that a certiorari would lie to correct an error of law apparent on the face

of the record.

16. Having regard to the peculiar facts of this case where admittedly the 1st respondent-Bank claims that it had lost large amount of nearly a lakh

of rupees by reason of the criminal offences alleged to have been committed by the appellant and thereby the 1st respondent stated that it is

entitled to get reimbursement of the financial loss suffered by it by taking appropriate action against the appellant and it is in that context it denies its

liability to pay any amount to the appellant, it is to be seen whether notwithstanding such circumstances the appellant can, as a matter of right,

demand that a writ should issue for the enforcement of his claims. It is in the above context the learned counsel for the appellant would rely upon

the decision of the Supreme Court reported in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and*

Others Vs. V.R. Rudani and Others, . The relevant portion, on which the appellant seeks to rely on, is extracted below (p. 331) :

Here again we may point out that Mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute.

Commenting on the development of this law. Professor De Smith states : "To be enforceable by mandamus a public duty does not necessarily have

to be one imposed by statute. It may be sufficient for the duty to have been

imposed by charter, common law, custom or even contract. We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found". The technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged by the appellants on the maintainability of the writ petition.

Reliance is also placed by the appellant on a passage occurring in the book written by Lord Denning under the caption ""The Closing Chapter

wherein he states that, "the judges can develop the public laws as they think best. That they have done and are doing."" The appellant also relies on

the law stated in the Judicial Review of Administrative Action by S. A. De Smith, which is extracted below :

To be enforceable by Mandamus a public duty does not necessarily have to be one imposed by charter, common law, custom or even contract.

17. It cannot be denied that like certiorari and prohibition, mandamus is also a discretionary remedy. A relief by way of mandamus may be refused

to an applicant, who has been guilty of undue delay or when the court finds that the public authority has done all that it can reasonably do. In R. v.

Garland (1879) 5 L.R. Q.B. 269 it was held that the court always retains discretion to withhold the remedy where it would not be in the interests

of justice to grant it. Seervai in his text book on "Constitutional Law of India" states the law as follows :

The writ of mandamus is not of right or of course but it is discretionary, except that the right to move the Supreme Court for a writ of Mandamus

for the enforcement of fundamental rights is itself a fundamental right under Article 32(1). However, as we have seen under Article 32(2), the grant

of the writ is discretionary. In Durga Prasad Vs. Chief Controller of Imports and Exports, the Supreme Court held that under Article 226 even

where fundamental rights were involved the grant of writ is discretionary. Were the writ is discretionary, it may be refused if there is an adequate

alternative remedy ... or if the petitioner has been guilty of delay or if he has been guilty of conduct disentitling him to relief, or where it would be

against the requirements of justice to grant him relief

Based on the judgment of Supreme Court, it follows that this Court retains the discretionary power to withhold the remedy where it would not be

in the interest of justice to grant it.

18. Further it should be recalled that as early as on 18th May 1987, the appellant was informed that the orders of retirement made earlier had been

done without prejudice to the court case filed by C.B.I. pending against him. The words "without prejudice" occurring in this letter is of great

significance. It clearly indicates that the retirement from service was not unequivocal, but is a retirement subject to the right of the management to

proceed against him. What is meant by "without prejudice" has been considered by a Full Bench of this Court in the decision reported in Y. S.

Venkata Subbiah Chetty v. A. Subba Naidu and others. (1915) 2 L.W. 977. it was held :

It is quite true that when a man makes an offer "without prejudice", the effect is to prohibit the reading of the letter if the offer is not accepted. But

the actual meaning of the words in such a case is this : "I am making an offer which I do not admit I am bound to take; and I make it without

prejudice to my existing legal rights. In other words, you shall not use this letter as an admission that I owe what I offer.

Judged from this angle, it is possible to construe the letter dated 18th May 1987 as indicating the mind of the management that even though the

appellant might have been allowed to retire from service, such retirement was without prejudice to all such legal rights which the management may

have against the appellant and which are not in any manner abdicated or surrendered by allowing appellant to retire.

19. Apart from this, it is held in the judgment of Supreme Court reported in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another,

as follows :

This Court does not take action in cases covered by the ordinary jurisdiction of the civil courts, that is to say, it does not convert civil and criminal

actions into proceedings for the obtainment of writs. Although there is no rule or provision of law to prohibit the exercise of its extraordinary

jurisdiction this Court has always insisted upon recourse to ordinary remedies or the exhaustion of other remedies. It is in rare cases, where the

ordinary process of law appears to be inefficacious, that this court interferes even where other remedies are available. This attitude arises from

acceptance of a salutary principle that extraordinary remedies should not take the place of ordinary remedies.

It is not as if the appellant has no remedy before an ordinary civil court.

20. In such circumstances, when this Court finds that the appellant herein while in office and while in the course of the discharge of his duties was

found to have committed certain alleged offences under Sections 420, 467, 468 and 471 of the Indian Penal Code and when criminal prosecution

had been launched against him and the same is pending trial and when he had been placed under suspension immediately after the detection of such

offences and when he had been retired from service without prejudice to the rights of the respondents, and when prima facie he is found to have

caused loss to the first respondent Bank, to the tune of nearly a lakh of rupees, the appellant cannot be allowed to get away from it all by seeking a

remedy by way of mandamus or certiorari and mulct the Bank with a further liability to pay him difference in wages, gratuity and Provident Fund.

This Court considers that this is not a fit case where a mandamus or certiorari could issue. The learned single Judge was perfectly right in relegating

the appellant to a proper civil proceeding where the rights of parties could very well be worked out each claiming relief against the other. This is

not a case, where in exercise of jurisdiction under Art. 226 of the Constitution of India, relief can be granted to the appellant. Hence the writ

appeal is dismissed. There will be no order as to costs.