

(2011) 03 GUJ CK 0162
In the Gujarat High Court

Case No : Special Civil Application No. 6252 of 2001

Mahendrabhai Bhavanishankar Mehta	APPELLANT
Vs	
State of Gujarat and Others	RESPONDENT

Date of Decision : 14-03-2011

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 161, 161(2), 254
Revised Pension Rules, 1950 — Rule 7, 8

Citation : (2011) 2 GLH 401

Hon'ble Judges : J.B. Pardiwala, J

Bench : Single Bench

Advocate : Biren A. Vaishnav for Petitioner, for the Appellant; V.S. Pathak, AGP for Respondents: 1 - 3, for the Respondent

Final Decision : Allowed

Judgement

Mr. J.B. Pardiwala, J.—By way of this petition the petitioner has pressed for grant of the following reliefs :-

(AB) Quash and set-aside the impugned order dated 29.11.2002 as being illegal, arbitrary and contrary to law;

(AC) Declare that the petitioner be treated to have voluntarily retired from service with effect from 2.2.2000 in accordance with the Communication dated 2.11.1999 treating the same to be effected prospectively and direct the respondents to release the terminal benefits payable to the petitioner on and from the date of retirement i.e. on and from 2.2.2000.

2. Brief facts relevant for the purpose of deciding the present petition can be summarised as under :-

The petitioner was serving as Assistant Binder in the Government Press at Bhavnagar under the administrative control of the head being respondent No. 2. He joined Government service on 16th July 1975. After putting in more than 20 years of service, on account of personal family problems, he decided to opt for

voluntary retirement as provided by Government Resolution dated 3rd February 1978 issued by the Finance Department. Government Resolution dated 3rd February 1978 as it was governing the field so far as the voluntary retirement is concerned, at the relevant point of time was applicable so far as the petition is concerned.

3. The petitioner had to leave for U.S.A. as the petitioner's sister was suffering from cancer and there was nobody at U.S.A. with his sister. He made an application for grant of leave from 18th October 1997 to 12th February 1998 and thereafter he made applications on 9th February 1998, 13th July 1998 and 9th December 1998. Leave from 18th October 1997 to 12th February 1998 was granted. The petitioner tendered notice of voluntary retirement dated 2nd November 1999 and requested the respondent No. 2 to permit him to voluntarily retire from service as he had completed 20 years of service in the Department. The petitioner requested that he may be permitted to voluntarily retire from 20th October 1997 and if any amount was to be recovered towards the salary paid during the time he was on leave then he would be ready and willing to pay the amount. The petitioner gave an undertaking to this effect in his application dated 2nd November 1999, which is at Annexure-"A" to this petition.

4. On 24th April 2000 i.e. almost after a period of about five months, respondents took decision not to accept the voluntary retirement as prayed for by the petitioner. Vide communication dated 24th April 2000 the petitioner was informed that his request for voluntary retirement has been turned down by the Government. On 20th April 1999, a show-cause notice came to be issued to the petitioner calling upon the petitioner to show-cause as to why Departmental action should not be taken against him for remaining absent from service without any sanctioned leave. On 8th May 2000 charge-sheet came to be served upon the petitioner. After an ex-parte Departmental inquiry the competent Authority held the petitioner guilty of misconduct for remaining absent from duty and passed an order of compulsory retirement dated 29th November 2002.

5. In the present petition, a neat question of law has been raised. Learned Counsel for the petitioner contends that the petitioner issued notice, for voluntary retirement dated 2nd November 1999. As per the Government Resolution dated 3rd February 1978 all Government servants (including Class-IV employees) shall have an option to retire after completion of 20 years of qualifying service, after giving three months' notice to the appointing Authority.

6. The contention is to the effect that if the Authorities were not inclined to accept the request of voluntary retirement made by the petitioner then the Authorities ought to have rejected the request and the petitioner should have been informed before the notice period expired. He has contended that in the present case, the decision was taken after a period of 90 days and for the first time on 24th April 2000 the petitioner was informed that his request for voluntary retirement has not been entertained and accepted. He contends that since there was no refusal on the part of the Authorities before the expiry of the

period of notice, the petitioner legitimately presumed acceptance of his request for voluntary retirement and the retirement became effective in terms of the notice. He contends that once retirement is effective in terms of the notice, any subsequent action on the part of the Authorities would be nonest. The sum and substance of the contention is that the Departmental inquiry, which was initiated and pursuant to which the petitioner was imposed with penalty of compulsory retirement from service was wholly untenable and nonest.

7. Per contra, the contention of the learned AGP for the State is to the effect that the petitioner had been on unauthorized leave for a long period of almost three years before sending application for voluntary retirement dated 2nd November 1999. The learned AGP would further contend that the application for voluntary retirement was made without resuming duties and further the request for voluntary retirement was made on 2nd November 1999 with retrospective effect of 18th October 1997. Learned AGP would further contend that the Government Resolution dated 3rd February 1978 makes it very clear that all Government servants shall have an option to retire after completion of 20 years of qualifying service after giving three months" notice to the appointing Authority. Learned AGP has drawn my attention to the application of the petitioner dated 2nd November 1999 and has pointed out that in the application requesting for voluntary retirement, there is no reference of three months" notice period. Learned AGP would further contend that the conditions necessary to avail of the benefit of the Resolution dated 3rd February 1978 are not fulfilled by the petitioner and, therefore, the Authorities were justified in rejecting the request of the petitioner for voluntary retirement. It is further submitted by learned AGP that Rule 7 of the Resolution does not contemplate any automatic acceptance of the request for voluntary retirement. It is submitted by learned AGP that disciplinary proceedings were contemplated against the petitioner as show-cause notice was already issued to the petitioner dated 20th April 1999 i.e. much prior to the application of the petitioner requesting for voluntary retirement.

8. To decide this, issue, it would be appropriate to reproduce the relevant portion of the Resolution dated 3rd February 1978, which is at page 94 of the petition. Conditions Nos.(i),(iii) and (vii) are relevant for the purpose of deciding the issue, which reads as under:-

(i) The scheme is purely voluntary, the incentive resting with the Government servant himself. The Government does not have the reciprocal right to retire Government servants on its own under this Scheme.

(iii) A notice of less than 3 months may also be accepted by the appointing Authority in deserving cases, with the concurrence of the Finance Department.

(vii) A notice of voluntary retirement given, after completion of 20 years" qualifying service will require acceptance by the appointing Authority if the date of retirement on the expiry of notice would be earlier than the date on which the Government servant concerned could have retired voluntarily under the Rule-161

of B.C.S.Rs. or Rule 254 of B.C.S.Rs or Rule 8 of Revised Pension Rule 1950. Such acceptance may be generally given in all cases except those (a) in which disciplinary proceedings are pending or contemplated against the Government servant concerned for the imposition of a major penalty and the Disciplinary Authority, having regard to the circumstances of the case, is of the view that the imposition of the penalty of removal or dismissal from service would be warranted in the case; or (b) in which prosecution is contemplated or may have been launched in a Court of Law against the Government servant concerned. If it is proposed to accept the notice of voluntary retirement even in such cases, approval of the Administrative Department should be obtained in regard to Class I and Class II Officers and that of the Head of the Department in cases of Class-III and Class-IV Government servants. Even where the notice of voluntary retirement given by a Government servant requires acceptance by the appointing Authority, the Government servant giving notice may presume acceptance and the retirement shall be effective in terms of the notice, unless the competent Authority issues an order to the contrary before the expiry of the period of notice.

9. Plain reading of the conditions regulating voluntary retirement of Government servants under the Scheme suggests the following aspects :-

1. The rules governing voluntary retirement in the form of Resolution dated 3rd February 1978 envisage that all Government servants shall have an option to retire after completion of 20 years of qualifying service after giving three months" notice to the appointing Authority;
2. The Scheme is purely voluntary and the incentive resting with the Government servants;
3. The- Government does not have reciprocal right to retire Government servants under the Scheme;
4. While it envisages under clause (vi) of the Resolution that a notice of voluntary retirement may be withdrawn subsequently only with the approval of the appointing Authority provided request for such withdrawal was made before the expiry of period of notice. It is not subject to acceptance in all cases by the appointing Authority;
5. Voluntary retirement request, even when approval is needed, ordinarily it cannot be refused except in circumstances mentioned in clause (vii).

10. I may now deal with condition No. 7 specifically. What can be deduced on plain reading of condition No. 7 is as under:-

- (a) Notice of voluntary retirement after completion of 20 years of qualifying service;
- (b) Notice of voluntary retirement given after completion of 20 years of qualifying service will require acceptance by the appointing Authority only if the date of retirement on the expiry of notice would be earlier than the date on

which the Government servant concerned could have retired voluntarily under Rule-161 of B.C.S.Rs or Rule 254 of B.C.S.Rs or Rule 8 of Revised Pension Rules, 1950;

(c) Such acceptance is generally given in all cases except those in which disciplinary proceedings are pending or contemplated against the Government servant concerned for the imposition of a major penalty and the disciplinary Authority is of the view that the imposition of penalty of removal or dismissal from service would be warranted.

(d) Notice of voluntary retirement even if proposed to accept will need approval of the administrative Department in regard to Class-I and Class-II officers and that of the Head of the Department in cases of Class-III and Class-IV Government servants.

(e) Even where notice of voluntary retirement requires acceptance by the appointing Authority, the Government servant giving notice may presume acceptance and the retirement will be effective in terms of the notice unless the competent Authority issues an order to the contrary before the expiry of the period of notice.

11. I have to examine the entire issue keeping in mind Rule 7 of the Government Resolution, which was applicable at the relevant point of time on the issue of voluntary retirement by Government servants after completion of 20 years of qualifying service.

12. I shall first deal with the contention of the learned AGP to the effect that the application of the petitioner dated 2nd November 1999 requesting for voluntary retirement is defective as it does not lay down and there is no reference of the notice period of 90 days as prescribed under the Government Resolution.

13. In short, the contention is that the petitioner has not specified any date with effect from which his notice for voluntary retirement was to be effective. This contention is devoid of any merit. Though the petitioner has not specified any date with effect from which his notice for voluntary retirement was to be effective, it only means that it could be effective only on the expiry of three months from the notice and not earlier thereto. It is very specifically stated in the application (Annexure-"A") dated 2nd November 1999 that the petitioner has already completed 20 years of service and it is not possible for him to return in near future. He has also stated that he was ready and willing to refund the amount of difference in the salary which may be calculated for the period during which he continued on leave without valid sanction or permission.

14. Mere non-mentioning of three months would not invalidate the notice of retirement. A member of service is qualified to seek voluntary retirement on completion of 20 years of qualifying service after giving three months" notice to the appointing Authority. Clause (iii) of the Resolution also provides that a notice of less than three months may also be accepted by the appointing Authority in

deserving cases with the concurrence of the Finance Department. The Government Resolution comprises of two parts, namely, the part relating to the qualifications for retirement as well the method for retirement. The qualifications for the retirement are in the nature of conditions precedent and unless these conditions are satisfied, no member can voluntarily seek retirement. Since these qualifications are in the nature of conditions precedent, I am of the opinion that they are mandatory. They are the conditions precedent prescribed in the perspective of the public interest. The dictates of public interest enjoin that a member of the service must have put in a prescribed number of years of service. On the other hand, the method for retirement is by giving three months' previous notice in writing to the Authority concerned, which notice would intimate that the member of the service concerned would retire on any of the contingencies under the Resolution. The question whether a particular provision of a statute is directory or mandatory might arise in a case where merely a period is specified for performing the duty but the consequences for not performing it within time specified are not mentioned. When a provision can be held to be mandatory or directory is a subject matter of many decisions of High Courts as well as Supreme Court. It is axiomatic that the object of a statute is the determining factor for the purpose of deciding the mandatory or directory nature of a provision. It is equally settled that if the words of a statute are precise and unambiguous, there is no necessity to expound them since the words are the best declaration of the legislative intent. If a statute requires a thing to be done in a prescribed manner or form but does not set out the consequences for noncompliance, the mandatory or directory nature is to be judged by legislative intent as disclosed by the object, purpose and scope of the Act. The ultimate test seems to be whether a particular statute or a provision thereof is based on the ground of public policy, or whether it is intended for the benefit of a particular person or a class of persons. If it is based on a public-policy, it cannot be waived and the contravention of such a provision is always considered to be a nullity. If on the other hand, it is envisaged for the benefit of a person or a party, or a class of persons or parties, then it is always held to be directory and it can be waived.

15. I am of the view that in view of the settled legal position, so far as the period of notice is concerned, it is merely a method or manner of seeking retirement and on the plain reading of it, it appears to have been envisaged with the a view to enable the Government to make alternative arrangement for filling up the vacancy arising as a result of the earlier retirement of a member of the service. The legislative intent does not appear to be that unless the previous notice is of clear three months it would be nonest for all intents and purposes. It cannot be asserted successfully that the requirement of three months' notice is dictated solely and exclusively in public interest. In my opinion, it is designed for the convenience and benefit of the Government which can always waive such a requirement. The whole object and purpose of the Government Resolution of 3rd February 1978 is to confer the benefit and privilege on the members who have

not reached the superannuation age. If this is the object and intent of the Government Resolution and if such a privilege has been conferred, the duty of the Court in interpreting such beneficent clauses should be to so interpret them as to advance the cause and not to construe in a manner which will defeat the legislative intent. In any case, in absence of any consequence being provided for the non-compliance of the period notice since no consequences are prescribed to be ensued, it is a provision which has been envisaged for the benefit of the Government and a requirement which the Government can always waive, I am of the opinion that the period of notice cannot be said to be mandatory at all. I am of the opinion that having regard to the scope, purpose and object of the Government Resolution dated 3rd February 1978, the requirement of three months' notice must be held as directory provision which, if substantially complied with, may enable the member of service to seek voluntary retirement if he is qualified under the other clauses of the Government Resolution.

16. I have to now consider as to whether the State Government was justified in refusing to accept the notice dated 2nd November 1999. On 2nd November 1999, the petitioner gave notice of his intention to voluntarily retire from service as the petitioner had completed 20 years of service. The petitioner's case is that if the Authorities concerned were not inclined to accept the request made by the petitioner for voluntary retirement then as per clause (vii) of the Resolution the Authorities were obliged to inform the petitioner that the request has not been acceded and the petitioner is not permitted to voluntarily retire. The case of the petitioner is that even where the notice of voluntary retirement given by him requires acceptance by the appointing Authority, the petitioner can legitimately presume acceptance and the retirement shall be effective in terms of the notice, unless the competent Authority issues an order to the contrary before the expiry of the period of notice. The Authorities were conscious of the fact that as per the Resolution the notice period is 90 days. They could have informed the petitioner within the period of 90 days i.e. before the ninetieth day expires, that the request has not been acceded and for the reasons which the Authorities would have recorded, the request for voluntary retirement could have been turned down. However, in the present case, for the first time on 24th April 2000 the Authorities informed that the request of the petitioner for voluntary retirement has not been accepted. It would not be out of place and on the contrary it would be expedient to state here that in the letter of refusal dated 24th April 2000 (Annexure-"B"), no reason worth the name has been assigned and all that has been stated is that the request has not been accepted. The case of the petitioner is that once there was no refusal on the part of the Authorities within the period of 90 days, the retirement became effective in terms of the notice and all consequential proceedings thereafter initiated were nonest.

17. I am of the opinion that cases of voluntary retirement fall in three categories, namely, (1) where voluntary retirement is automatic and comes into force on the expiry of the notice period; (2) where voluntary retirement comes into force on the expiry of the notice period unless an order is passed within the notice period

withholding permission to retire; and (3) where voluntary retirement does not come into force unless permission to this effect is specifically granted by the competent Authority.

18. It is appropriate at this stage to consider the decision of the Supreme Court in the matter of State of Haryana and Others Vs. S.K. Singhal, In the said case, the relevant rule 5.32(B) of the Punjab Civil Services Rules under consideration was as follows :

5.32(B)(1) At any time "a Government employee has completed twenty years" qualifying service, he may, by giving notice of not less than three months in writing to the appointing Authority retire from service. However, a Government employee may make a request in writing to the appointing Authority to accept notice of less than three months giving reason therefor. On receipt of a request, the appointing Authority may 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 the Government employee shall not apply for commutation of a part of his pension before the expiry of the period of notice of three months.

(2) The notice of voluntary retirement, given under sub-rule (1) shall require acceptance by the appointing Authority subject to Rule 2.2 of the Punjab Civil Services Rules Vol.11:

Provided that where the appointing Authority docs not refuse to grant the permission for retirement before the expiry of the period specified in sub-rule (1) supra, the retirement shall become effective from the date of expiry of the said period:

Provided further that before a Government employee gives notice of voluntary retirement with reference to sub-rule (1) he should satisfy himself by means of a reference to the appropriate Authority that he has, in fact, completed twenty years" service qualifying for pension.

19. In paragraph 9 of the judgment, the Apex Court considered the general scheme of voluntary retirement in service rules and also noted earlier decisions of this Court in the case of Dinesh Chandra Sangma Vs. State of Assam and Others, B.J. Shelat Vs. State of Gujarat and Others, Union of India and others Vs. Sayed Muzaffar Mir, and Himachal Pradesh Horticultural Produce Marketing and Processing Corporation Ltd. Vs. Suman Behari Sharma, This Court observed:

9. The employment of Government servants is governed by rules. These rules provide a particular age as the age of superannuation. Nonetheless, the rules confer a right on the Government to compulsorily retire an employee before the age of superannuation provided the employee has reached a particular age or has completed a particular number of years of qualifying service in case it is

found that his service has not been found to be satisfactory. The rules also provide that an employee who has completed the said number of years in his age or who has completed the prescribed number of years of qualifying service could give notice of, say, three months that he would voluntarily retire on the expiry of the said period of three months. Some rules are couched in language which results in an automatic retirement of the employee upon the expiry of the period specified in the employee's notice. On the other hand, certain rules in some other Departments are couched in language which makes it clear that even upon expiry of the period specified in the notice, the retirement is not automatic and an express order granting permission is required and has to be communicated. The relationship of master and servant in the latter type of rules continues after the period specified in the notice till such acceptance is communicated; refusal of permission could also be communicated after 3 months and the employee continues to be in service. Cases like *Dinesh Chandra Sangma Vs. State of Assam and Others*, *B.J. Shelat Vs. State of Gujarat and Others*, and *Union of India and others Vs. Sayed Muzaffar Mir*, belong to the former category, where it is held that upon the expiry of the period, the voluntary retirement takes effect automatically as no order of refusal is passed within the notice period. On the other hand *Himachal Pradesh Horticultural Produce Marketing and Processing Corporation Ltd. Vs. Suman Behari Sharma*, belongs to the second category where the bye-laws were interpreted as not giving an option "to retire" but only provided a limited right to "seek" retirement thereby implying the need for a consent of the employer even if the period of the notice has elapsed. We shall refer to these two categories in some detail.

20. In *5. K. Singhal (supra)*, the Apex Court considered previous decisions at quite some length and held:

13. Thus, from the aforesaid three decisions it is clear that if the right to voluntarily retire is conferred in absolute terms as in *Dinesh Chandra Sangma* case by the relevant rules and there is no provision in the rules to withhold permission in certain contingencies the voluntary retirement comes into effect automatically on the expiry of the period specified in the notice. If, however, as in *B.J. Shelat* case and as in *Sayed Muzaffar Mir* case the Authority concerned is empowered to withhold permission to retire if certain conditions exist, viz., in case the employee is under suspension or in case a Departmental enquiry is pending or is contemplated, the mere pendency of the suspension or Departmental enquiry or its contemplation does not result in the notice for voluntary retirement not coming into effect on the expiry of the period specified. What is further needed is that the Authority concerned must pass a positive order withholding permission to retire and must also communicate the same to the employee as stated in *B.J. Shelat* case and in *Sayed Muzaffar Mir* case before the expiry of the notice period. Consequently, there is no requirement of an order of acceptance of the notice to be communicated to the employee nor can it be said that noncommunication of acceptance should be treated as amounting to withholding of permission.

14. Before referring to the second category of cases where the rules require a positive acceptance of the notice of" voluntary retirement and communication thereof, it is necessary to refer to the decision of this Court in Dr. Baljit Singh Vs. State of Haryana, strongly relied upon by" the learned Counsel for the appellants and to Power Finance Corporation Ltd. Vs. Pramod Kumar Bhatia, The former case arose under Rule 5.32(B) of the Punjab Civil Services Rules. That rule extracted earlier contains an express provision in the proviso to sub-rule (2) that the retirement takes effect automatically if refusal is not communicated within 3 months. In that case, when the employee gave notice for voluntary retirement on 20-9-1993, criminal cases were pending against him. After expiry of 3 months, on 25-2-1994, the competent Authority declined to accept the notice. A two-Judge Bench of this Court, however, held that the voluntary retirement did not come about automatically on the expiry of the notice period but that it could take effect only upon acceptance of the notice by the Government and that the acceptance must also be communicated and till then the jural relationship of master and servant continues. This Court referred only to the decision of the two-Judge Bench in Sayed Muzaffar Mir case and stated that that case was to be confined to its own facts. The two-Judge Bench of this Court in Baljit Singh case did not notice that there were two three-Judge Bench cases in Dinesh Chandra Sangma and Shelat taking the view under similar rules that a positive order was to be passed within the notice period withholding permission to retire and that the said order was also to be communicated to the employee during the said period. By stating that an order of acceptance of the notice was necessary and that the said acceptance must be communicated to the employee and till that was done the jural relationship continued and there was no automatic snapping thereof on the expiry of 3 months" period, the two-Judge Bench, in our view, has gone contrary to the two three-Judge Bench cases which were not brought to its notice. In the above circumstances, we follow the two three-Judge Bench cases for deciding the case before us.

15. Learned Counsel for the appellant also relied on a two-Judge Bench decision in Power Finance Corpn. Ltd. v. Pramod Kumar Bhatia. That was a case where the letter of voluntary retirement was conditionally accepted subject to payment of dues and the employee wrote a further letter seeking adjustment thereof but before that was done, the scheme itself was withdrawn. There are again some observations made to the effect that there must be acceptance of request to retire and that it must be communicated. Neither Dinesh Chandra Sangma nor Shelat was referred to. In our opinion, the express provision in the proviso to sub-rule (2) of Rule 5.32(B) in the case before us does not permit such a view to be taken. The said observations again run contrary to the decision in the two three-Judge Bench -cases referred to above. Our comments on Baljit Singh apply equally to this case, so far as the observations are concerned.

16. We then come to the second category of cases where the rules require that an order of acceptance of notice be passed to make the voluntary retirement effective. In HPMC v. Suman Behari Sharma it will be noticed, the principle in

Dinesh Chandra Sangma case was accepted but the case was distinguished on the ground that Bye-law 3.8(2) in HPMC case provided differently and that under that bye-law an employee could be permitted at his request to retire on completion of 25 years" service or 50 years of age. Para (5) of Bye-law 3.8 stated as follows :-

(SCC p.588, para 7)

(5) Notwithstanding the provision under para (2) above, the corporation employees who have a satisfactory service record of 20 years may also seek retirement from the service of the Corporation after giving three months" notice in writing to the appropriate Authority.. Persons under suspension would not be retired under this clause unless process of the case against them are finalised....

(emphasis supplied)

While clause (2) speaks of 25 years" service, clause (5) speaks of 20 years" service.

17. The employee applied on 26-11-1990 for voluntary retirement effective from 30-11-1990 and also requested for waiver of notice of 3 months. He did not report to duty right from 1-12-1990. Earlier on 12-12-1989, a charge-sheet was issued against him for certain acts of misconduct. On 26-12-1990 he filed a reply to the charge-sheet. On 22-8-1992 another charge-sheet was served for unauthorised absence and one more on 18-9-1992. On 30-9-1992 he approached the Tribunal contending that he stood retired on expiry of 3 months from notice, w.e.f. 26-2-1990. The Tribunal accepted the said plea. Reversing the order of the Tribunal, this Court held while distinguishing Dinesh Chandra Sangma case and other similar High Court judgments, that clause (2) of the bye-law merely gave a right to make a request and the request would become effective only if permitted. Under clause (2) of the bye-law, it was a "right to a request" and not "a right to retire". If the request was not accepted and permission was not granted, the employee could not claim that there was an automatic retirement on the expiry of the period. Even under clause (5) while it was true that there was a non obstante clause, it was only an exception to clause(2) to a limited extent, i.e., completion of 20 years" satisfactory service [rather than 25 under clause (2)] but the grant of "permission" to the request seeking retirement was necessary even under clause (5) and was not dispensed with. If under clause (2) a person who had put in 25 years had to "seek to retire" and had to be "permitted to retire", a person with only 20 years" service under clause (5) could not have been placed on a better footing, it was held. The Court emphasised :-

(SCC pp.588-89, para 8)

The words "seek retirement" in para 5 indicate that the right which is conferred by it is not the right to retire but a right to ask for retirement. The word `seek" implies a request by the employee and corresponding acceptance or permission

by HPMC. Therefore, there cannot be automatic retirement or snapping of service relationship on expiry of three months" period.

On that basis, it was held that though the rejection of the request was not communicated within the notice period, there was no automatic retirement. There are no such provisions in the case before us.

18. In the case before us sub-rule (1) of Rule 5.32(B) contemplates a "notice to retire" and not a request seeking permission to retire. The further "request" contemplated by the sub-rule is only for seeking exemption from the 3 months" period. The proviso to sub-rule (2) makes a positive provision that "where the appointing Authority does not refuse to grant the permission for retirement before the expiry of the period specified in sub-rule (1), the retirement shall become effective from the date of expiry of the said period. The case before us stands on a stronger footing than Dinesh Chandra Sangma case so far as the employee is concerned. As already stated Rule 2.2 of the Punjab Civil Services Rules Vol. II only deals with a situation of withholding or withdrawing pension to a person who has already retired.

21. In Tek Chand Vs. Dile Ram, a three Judge Bench of the Apex Court considered S.K. Singhal's case in paragraph 34 of the judgment and then went on to hold as follows :-

35. In our view, this judgment fully supports the contention urged on behalf of the appellant in this regard. In this judgment, it is observed that there are three categories of rules relating to seeking of voluntary retirement after notice. In the first category, voluntary retirement automatically comes into force on expiry of notice period. In the second category also, retirement comes into force unless an order is passed during notice period withholding permission to retire and in the third category voluntary retirement does not come into force unless permission to this effect is granted by the competent Authority. In such a case, refusal of permission can be communicated even after the expiry of the notice period. It all depends upon the relevant rules. In the case decided, the relevant Rule required acceptance of notice by appointing Authority and the proviso to the Rule further laid down that retirement shall come into force automatically if the appointing Authority did not refuse permission during the notice period. Refusal was not communicated to the respondent during the notice period and the Court held that voluntary retirement came into force on expiry of the notice period and subsequent order conveyed to him that he could not be deemed to have voluntarily retired had no effect. The present case is almost identical to the one decided by this Court in the aforesaid decision.

36. This Court in B.J. Shelat v. State of Gujarat while dealing with a case of voluntary retirement, referring to the Bombay Civil Service Rules, Rule 161(2)(ii) proviso and Rule 56(k) of the Fundamental Rules, in a similar situation, held that a positive action by the appointing Authority was required and it was open to the appointing Authority to withhold permission indicating the same and

communicating its intention to the Government servant withholding permission for voluntary retirement and that no action can be taken once the Government servant has effectively retired. Paras 9 and 10 of the said judgment read thus:

(SCC pp. 207-208)

9. Mr. Patel next referred us to the meaning of the word "withhold" in Webster's Third New International Dictionary which is given as "hold back" and submitted that the permission should be deemed to have been withheld if it is not communicated. We are not able to read the meaning of the word "withhold" as indicating that in the absence of a communication it must be understood as the permission having been withheld.

10. It will be useful to refer to the analogous provision in the Fundamental Rules issued by the Government of India applicable to the Central Government servants. Fundamental Rule 56(a) provides that except as otherwise provided in this Rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. Fundamental Rule 56(j) is similar to Rule 161(aa)(1) of the Bombay Civil Services Rules conferring an absolute right on the appropriate Authority to retire a Government servant by giving not less than three months' notice. Under Fundamental Rule 56(k) the Government servant is entitled to retire from service after he has attained the age of fifty-five years by giving notice of not less than three months in writing to the appropriate Authority on attaining the age specified. But proviso (b) to sub-rule 56(k) states that it is open to the appropriate Authority to withhold permission to a Government servant under suspension who seeks to retire under this clause. Thus under the Fundamental Rules issued by the Government of India also the right of the Government servant to retire is not an absolute right but is subject to the proviso whereunder the appropriate Authority may withhold permission to a Government servant under suspension. On a consideration of Rule 161(2)(ii) and the proviso, we are satisfied that it is incumbent on the Government to communicate to the Government servant its decision to withhold permission to retire on one of the grounds specified in the proviso.

In this decision effect of Rule 56(k) of the Fundamental Rules is also considered which answers the argument of the learned Counsel for the respondent on this aspect. It may also be noticed that under Rule 48-A in the Government of India's decision giving instructions to regulate voluntary retirement it is stated :-

Even where the notice of voluntary retirement given by a Government servant requires acceptance by the appointing Authority, the Government servant giving notice may presume acceptance and the retirement shall be effective in terms of the notice unless the competent Authority issues an order to the contrary before the expiry of the period of notice.

22. In the case of Jaipal Singh Vs. Smt. Sumitra Mahajan and Another, in an appeal from election petition, the Apex Court had an occasion to consider the

difference between "voluntary retirement" and "resignation". This Court held thus :-

10.....In the case of Reserve Bank of India and Another Vs. Cecil Dennis Solomon and Another, this Court has laid down that in service jurisprudence there is a difference between "voluntary retirement" and "resignation" as they convey different connotations. It has been held that voluntary retirement and resignation involve voluntary acts on the part of the employee to leave service and though both involve voluntary acts, they operate differently. One of the basic distinctions between the two is that in the case of resignation, it can be tendered at any time but in the case of voluntary retirement, it can only be sought for after rendering prescribed period of qualifying service. In the case of resignation, a prior permission is not mandatory while in the case of voluntary retirement, permission of the employer concerned is a requisite condition. Under Rule 16 of the 1958 Rules, an employee who seeks voluntary retirement has to give three months' notice to enable the employer to complete the designated mode of acceptance. (See Halsbury's Laws of England, 4th Edn., Vol. 9, p. 133.) Lastly, in a given case, the appointing Authority may refuse to waive the said notice period which shows that resignation may be unilateral whereas voluntary retirement is bilateral. A similar question came up before this Court in the case of UCO Bank and Others Vs. Sanwar Mal, in which this Court has inter alia held that in the case of "resignation", the relationship of employer and employee terminates on acceptance of resignation whereas in the case of "retirement", voluntary or on superannuation, the relationship continues for the purposes of payment of retiral benefits. In the case of retirement, there is a nexus between such retirement and retiral benefits.:

23. The aforesaid decisions of Apex Court do provide some guidance but the controversy in hand has to be decided in the light of the words used in clause (vii) of the Government Resolution.

24. I am of the opinion that clause (vii) of the Government Resolution is abundantly clear. As discussed earlier, notice of voluntary retirement given after completion of 20 years of qualifying service will require acceptance by the appointing Authority. Such acceptance may be generally given in all clauses except those in which disciplinary proceedings are pending or contemplated against the Government servant concerned for the imposition of a major penalty and the disciplinary Authority is of the view that imposition of the penalty of removal or dismissal from service would be warranted. It is also clear that notice of voluntary retirement even if proposed to accept will need approval of the administrative Department. However, what is most important is the last part of clause (vii), which I would once again like to reproduce :

Even where the notice of voluntary retirement given by a Government servant requires acceptance by the appointing Authority, the Government servant giving notice may presume acceptance and the retirement shall be effective in terms of the notice, unless the competent Authority issues an order to the contrary before

the expiry of the period of notice.

25. It is very clear that for any reason if request for voluntary retirement is not to be accepted then the competent Authority is obliged to issue an order to the contrary before the expiry of the period of 90 days. Otherwise, the Government servant giving notice may legitimately presume acceptance and the retirement would be effective in terms of the notice. It is true that before the request was made by the petitioner dated 2nd November 1999 for voluntary retirement, the petitioner was already served with a show-cause notice dated 20th April 1999 calling upon the petitioner to resume duties otherwise appropriate action would be initiated. But, the fact that the Authorities failed to inform the petitioner within 90 days from 2nd November 1999, that his request for voluntary retirement is not accepted as they were contemplating Departmental inquiry, would put an end to the whole matter. On the expiry of the period of 90 days from 2nd November 1999, the petitioner legitimately presumed that his request has been accepted and his retirement has become effective in terms of the notice.

26. I am of the view that the case of the petitioner is squarely covered by the ratio as propounded by the Apex Court in the case of B.J. Shelat (supra). It was held that a positive action by the appointing Authority was required and it was open to the appointing Authority to withhold permission indicating the same and communicating its intention to the Government servant withholding permission for voluntary retirement and that no action can be taken once the Government servant has effectively retired. The same would be the case over here. At this stage, learned AGP has tried to canvass that the Resolution does not just speak about acceptance of voluntary retirement but it also says that even if it is proposed to accept the notice of voluntary retirement, even in such cases, approval of the administrative Department should be obtained in regard to Class-I and Class II officers and that of the Head of the Department in cases of Class-III and Class-IV Government servants. Learned AGP would contend that, therefore, it is subject to approval of the administrative Department, and if it is subject to approval of the administrative Department, then the voluntary retirement would not come into effect automatically on the expiry of the period of 90 days i.e. on the expiry of the notice period.

27. I am afraid, if I accept this contention, it will render the entire last part of clause (vii) otiose. When clause (vii) of the Resolution speaks about acceptance of notice of voluntary retirement, it would include the approval of the administrative Department. I am concentrating on the last part of clause (vii) of the Resolution, which is very clear and it states that even where the notice of voluntary retirement given by a Government servant requires acceptance by the appointing Authority, the Government servant giving notice may presume acceptance and the retirement shall be effective in terms of the notice, unless the competent Authority issues an order to the contrary before the expiry of the period of notice.

28. Learned AGP has placed reliance on the judgment of the Apex Court in the

matter of Padubidri Damodar Shenoy Vs. Indian Airlines Limited and Another, Relying on this judgment of the Apex Court, the learned AGP would contend that the voluntary retirement would not come into effect only on the expiry of the period of 90 days because it is subject to approval of the administrative Department as required by clause (vii) of the Resolution. Learned AGP would contend that clause (vii) provides that even if it is proposed to accept the notice of voluntary retirement, the approval of the administrative Department has to be obtained and if it is subject to approval then there is no automatic retirement.

29. The Supreme Court was considering Regulation 12 of Service Regulations for employees (other than those in the Flying Crew and those in the Aircraft Engineering Department). Clause 12 of the Service Regulations in that case was as under :--

12. An employee shall retire from the service of the Company on attaining the age of 58 years provided that the competent Authority may ask an employee to retire after he attains the age of 55 years on giving three months" notice without assigning any reasons. An employee :-

(a) On attaining the age of 55 years;

OR

(b) On the completion of 20 years of continuous service may, by giving three months" notice, voluntarily retire from the service;

Provided that the voluntary retirement under Clause (b) shall be subject to approval of the competent Authority.

Provided further, notwithstanding anything contained in regulation-12, the services of an employee may, at the option of the Managing Director and the employee being found medically fit, be extended by one year at a time beyond the age of retirement of 58 years for an aggregate period not exceeding two years.

30. In view of the specific language impelled in Regulation 12 of the Service Regulations, the Supreme Court took the view that the use of word "shall" in the proviso, prima facie, leads to an inference that provision is imperative. The Supreme Court held that the expression "shall be subject to approval" is indicative of its intendment that the voluntary retirement applied by the employees covered by clause (b) is effective only upon approval by the competent Authority. Ultimately, the Supreme Court held that notice of three months for voluntary retirement given by an employee covered by clause (b) remains valid even if no communication is received within notice period but it becomes effective only on its approval by the competent Authority. There is a vast difference between Regulation 12, which was being considered by the Supreme Court and clause (vii) of the Government Resolution dated 3rd February 1978, which is the subject matter of consideration in the present case. Unlike the last part of clause (vii) in the Resolution dated 3rd February 1978, there is

nothing in Regulation 12 to suggest as to what would be the position if there is no reply at the end of the Authorities within a period of 90 days i.e. notice period. In the Government Resolution of 1978, it is categorically stated with a definite object that even if notice of voluntary retirement requires acceptance by the appointing Authority, the Government servant giving notice may presume acceptance and the retirement shall be effective in terms of the notice, unless the competent Authority issues an order to the contrary before the expiry of the period of notice.

31. In these circumstances, I am of the opinion that the letter of the petitioner seeking voluntary retirement dated 2nd November 1999 became effective on the expiry of the period of three months from the date of receipt of the notice and, thereafter, the petitioner ceased to be in the service of the respondents by seeking voluntary retirement.

32. With these precincts, there remains no occasion thereafter for initiating inquiry for remaining unauthorizedly absent from duty after the petitioner ceased to be in employment and removing the petitioner from service by imposing penalty of compulsory retirement.

33. I have examined the matter from one another angle. It deserves to be noted that condition (vii) says that notice of voluntary retirement given after completion of 20 years of qualifying service will require acceptance by the appointing Authority. However, it is very clear that it will require acceptance only in those cases where the date of retirement on the expiry of notice would be earlier than the date on which the Government servant could have retired voluntarily under Rule-161 of B.C.S.Rs or Rule 254 of B.C.S.Rs or Rule 8 of the Revised Pension Rules, 1950. Prima facie, it appears that on the date of issuance of notice if the employee has put in more than 20 years of service and if the date of retirement on the expiry of notice is not earlier then the date on which the Government servant could have retired, in that case, no acceptance is necessary and the voluntary retirement would immediately get into effect on the expiry of the period of 90 days.

34. In the present case, it is important to state that the petitioner had completed 20 years of service on 15th July 1995 i.e. 4 years before he issued notice for voluntary retirement. Even if it is assumed that the petitioner remained unauthorizedly absent from 1997 till the date of issuance of notice and even if this period is excluded, he had put in more than 22 years of service.

35. I am of the view that if this is considered then no acceptance of the notice is required and the retirement is deemed to have effected on the expiry of the notice period.

36. The petition succeeds on this ground alone. The impugned order dated 29th November 2002 removing the petitioner from service by imposing penalty of compulsory retirement is quashed and set-aside.

37. It is further declared that the petitioner voluntarily retired from service with effect from 2nd February 2000. The Authorities are directed to release all terminal benefits payable to the petitioner on and from the date of the retirement.

38. Rule made absolute to the aforesaid extent. No order as to cost.