

(2009) 05 DEL CK 0001

In the Delhi High Court

Case No : LPA 41 of 2009

New India Assurance Company Ltd.

APPELLANT

Vs

Harish Kumar Arya

RESPONDENT

Date of Decision : 19-05-2009

Acts Referred:

Citation : (2009) 05 DEL CK 0001

Hon'ble Judges : A.P. Shah, C.J; Neeraj Kishan Kaul, J

Bench : Division Bench

Advocate : Jayant Bhushan, Saurabh Prakash and Vikash Bhatnagar, for the Appellant; Sandeep Sharma, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal is directed against the impugned order dated 28.11.2008. The respondent (original petitioner in the writ petition) had applied for voluntary retirement under the Special Voluntary Retirement Scheme initiated by the appellant (original respondent in the writ petition) on 1.1.2004. The request was rejected vide letter dated 25.5.2006. Consequently, the respondent was constrained to file the writ petition, out of which the present appeal arises challenging the rejection order. It would be relevant to reproduce hereinbelow Clause 3(ii) of the Special Voluntary Retirement Scheme:

Any officer who is under suspension or against whom disciplinary proceedings are pending or contemplated shall not be eligible to opt for the scheme. Provided that the case of an officer who is under suspension or against whom disciplinary proceedings is pending or contemplated may be considered by the Board of the Company concerned having regard to the facts and circumstances of each case and the decision taken by the Board shall be final.

2. The case of the appellant before the learned single Judge was that the respondent was not entitled to voluntary retirement with all benefits since a vigilance case was pending against the respondent and thus, his request could

not be accepted in terms of the policy formulated by the appellant. It was also the case of the appellant that the respondent was not agreeable for recovery of the amount outstanding against him from his terminal benefits and for that reason, he was not eligible for voluntary retirement in terms of Special Voluntary Retirement Scheme, 2004. However, it was contended on behalf of the respondent that while making an application for voluntary retirement, it had authorized the appellant to recover and adjust all loans/dues etc. payable by him to them from his terminal benefits including ex gratia. It was also contended on behalf of the respondent that there was no disciplinary proceedings or vigilance case pending against him on the date he made the application for voluntary retirement. It was further pointed out by the counsel for the respondent that appellants had allowed voluntary retirement to many of their employees against whom large recoveries were to be made in terms of audit objection and also to those against whom vigilance cases were pending. It was submitted that the appellants had allowed voluntary retirement under the Scheme even to those who were placed under suspension at one or the other point of time. The respondent gave the details of such persons in his rejoinder. Further, the counsel for the respondent also made a statement before the learned single Judge that the appellant was free to recover whatever amount was legally recoverable from the petitioner (respondent herein) from his terminal benefits including ex gratia. The learned single Judge took note of the fact that the Officer-in- Charge Branch/ Division of the appellant had appended a Certificate along with the application of the respondent certifying that no disciplinary action was either pending or contemplated against the respondent on the date he made his application for voluntary retirement. The learned single Judge also took note of the fact that there was no averment in the counter affidavit to show and explain the circumstances in which such a certificate was issued. The learned single Judge also observed in the impugned order that it was borne out from the counter affidavit of the appellant that the respondent was granted promotion subsequent to his making the application for voluntary retirement. The learned single Judge rightly expressed his anguish to the fact that though almost five years had expired since the respondent had applied for voluntary retirement, there was nothing on record to show what disciplinary action, if at all, has been taken by the appellants against the respondent. Apparently, as it appears from the impugned order during the course of the hearing, the counsel for the appellant took repeated adjournments from the court to inform the court about the outcome of the disciplinary proceedings and submitted that Inquiry Officer had submitted his report to the disciplinary authority. However, despite repeated opportunities given to the appellant, the required information was not furnished to the Court by the appellant. The learned single Judge rightly held that the appellants were acting arbitrarily in the matter in allowing the benefits of the Scheme to some and rejecting the request of others including the respondent at their whims and fancy.

3. The appellants have filed an additional affidavit with some documents to

substantiate their case that a vigilance enquiry was actually in contemplation when the respondent made his application under the Scheme. We are unable to agree with this submission. The documents produced do not bring out the picture clearly and it cannot be established on the basis of the same that an enquiry was in contemplation at the relevant time. Moreover, it is pointed out by the learned Counsel for the respondent that a number of documents now sought to be filed by the appellants were procured documents written at the behest of the appellant. Further, as per him, even the signatures of the signatory to some of these letters do not match. For instance the signature of Sh. Dalip Singh at Pg.205 is totally different from his signature at Pg.221. As per the respondent, this raises serious doubts about the veracity of these documents. We do not propose to enter into this controversy in the present proceedings.

4. As regards the allegation of discrimination and selective permission being given to some and not to others under the Scheme, it is sought to be explained on behalf of the appellants that persons whose cases have been relied on by the respondent to allege discrimination actually pertained to cases where the audit queries had been raised and audit queries could not be a reason for withholding permission for voluntary retirement under the Scheme. It was the contention of the respondent that though some officers had been granted voluntary retirement despite pendency of audit recoveries and suspension against them, the respondent had not been given the same benefit. It was the case of the respondent that if the appellants could allow SVRS to persons who had misappropriated funds, then it could not discriminate against the respondent and make unfounded allegations. As per the respondent, the audit clearance certificate (Pg.146-147 of paper book) showed that the total outstanding amount against him was approximately Rs. 71,000/- whereas the persons who had been granted SVRS despite audits queries and suspension had much larger amounts pending against them which were owed to the appellant as was evident from the tabulation at Pg.59/60 of the paper book.

5. The explanation sought to be given by the appellants to meet the argument of discrimination is unsatisfactory. It is admitted that audit queries for large sums were pending against these persons, yet they were granted voluntary retirement. Further, there is no explanation as to how and why the person who was under suspension due to misconduct had been granted SVRS. No doubt the proviso to Clause 3(ii) of the Scheme grants discretion to the Board of the appellants to consider extending the benefit of the Scheme even to an officer under suspension or against whom disciplinary proceedings is pending or contemplated having regard to the facts and circumstances of each case. However, this discretion has to be exercised reasonably, fairly and in a non-discriminatory manner. We fail to understand how persons against whom audit queries with regard to large sums owed by them were pending as also person under suspension had been given the benefit of voluntary retirement and yet the respondent's request was rejected. Further, even the documents now sought to be relied on do not clearly establish that vigilance enquiry was actually in

contemplation at the time when the respondent applied for voluntary retirement under the Scheme.

6. As held by the Supreme Court in *Bangalore Medical Trust Vs. B.S. Muddappa and others*, , discretion is an effective tool in administration. It provides an option to the authority concerned to adopt one or the other alternative. When a statute either provides guidance or rules or regulations are framed for exercise of discretion then the action should be in accordance with it. Even where statutes are silent and only power is conferred to act in one or the other manner, the Authority cannot act whimsically or arbitrarily. It should be guided by reasonableness and fairness. The legislature never intends its authorities to abuse the law or use it unfairly. Where the law requires an authority to act or decide, "if it appears to it necessary" or if he is "of opinion that a particular act should be done" then it is implicit that it should be done objectively, fairly and reasonably. In a democratic set up, the people or community being sovereign the exercise of discretion must be guided by the inherent philosophy that the exerciser of discretion is accountable for his action. It is to be tested on anvil of rule of law and fairness or justice particularly if competing interests of members of society is involved. The action or decision must not only be reached reasonably and intelligibly but it must be related to the purpose for which power is exercised. No one howsoever high can arrogate to himself or assume without any authorization express or implied in law a discretion to ignore the rules and deviate from rationality by adopting a strained or distorted interpretation as it renders the action ultra vires and bad in law.

7. Further, it may also be relevant to refer to the decision of the Supreme Court in *Union of India (UOI) Vs. Kuldeep Singh*, , wherein the Supreme Court held that discretion is to discern between right and wrong; and therefore, whoever hath power to act at discretion, is bound by the rule of reason and law. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humor. It is to be not arbitrary, vague, and fanciful, but legal and regular.

8. Clearly in the present case, the action of the appellant was unfair, unreasonable and discriminatory. The learned single Judge has rightly directed the appellants to accept the request of the respondent for voluntary retirement and in case any recovery is made from him then such recovery may be made by the appellant from the terminal benefits, to which the respondent may be entitled as per rules. The appellants have also been permitted by the learned single Judge to keep the issue of vigilance enquiry against the respondent pending for adjudication in accordance with the policy on the subject.

9. We are in complete agreement with the findings of the learned single Judge. The appeal is accordingly dismissed. All applications stand disposed of as well.