

(2006) 01 DEL CK 0018

In the Delhi High Court

Case No : Writ Petition (C) 14471 of 2005

R.C. Aggarwal

APPELLANT

Vs

Delhi Tourism and Transportation Development Corporation
Ltd. and Others

RESPONDENT

Date of Decision : 02-01-2006

Acts Referred:

Citation : (2006) 86 DRJ 703 : (2006) 3 SLJ 238

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Prag Tripathi and Deepesh Aneja, for the Appellant; S.B. Upadhyay and Vikram Yadav for Respondent No. 1 and Sangeeta Bharti, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—The petitioner, in these proceedings under Article 226 of the Constitution, has sought for a quashing order against the respondents' letters dated 3.1.2003 and 6/11-5-2005 and a direction that his lien in the post of Financial Controller and Secretary with the first respondent (hereafter called DTTDC) be continued.

2. The petitioner was appointed as a Financial Controller and Secretary with the DTTDC in 1991. His services were governed by Staff Service Rules, in respect of various issues, and as regards conditions of the service not provided for, those applicable to employees of the Central Government governed his employment. On 5.9.2000, he was selected by the Public Services Enterprises Board for the post of Managing Director, Hotel Corporation of India (hereafter called the Corporation) for five years. On 7.9.2000, he wrote to the DTTDC requesting that he be allowed to retain his lien for a period of his appointment as Managing Director of the Corporation. The relieving order, issued on 7.9.2002, inter alias read as follows:

Sh. R.C. Aggarwal, Financial Controller and Secretary has also informed that his

lien on the post of Financial Controller and Secretary will be as per rules. This order is issued with the approval of the Managing Director and Chief Executive (DTTDC)

3. By the first impugned order dated 3.1.2003, the DTTDC communicated that upon the petitioner tendering his technical resignation in the post of Financial Controller and Secretary and expiry of lien, of two years, the competent authority had terminated his lien w.e.f. 7.9.2002.

4. The petitioner alleges that he neither submitted any resignation nor did the relieving order dated 7.9.2002 contain any mention in this regard. He claims that sometime in March 2005, he became aware, for the first time that his lien in the DTTDC had been terminated w.e.f. 7.9.2002, through the order dated 3.1.2003. He requested by letter dated 3.3.2005 to the Managing Director, DTTDC that the order dated 3.1.2003 be suitably modified taking into consideration the policy decision of the Government, which permitted retention of lien for a period of five years. In that letter, the petitioner placed reliance upon an office memorandum dated 13.1.1999 issued by the Department of Public Enterprises. The memorandum of 1999 had modified existing circulars and indicated the maximum period for which retention of lien could be permitted. The relevant portion of the office memorandum dated 13.1.1999 reads as follows:

2. In modification of the above, the Government has decided that the maximum period for which retention of lien to be permitted in the case of below board level employees of Public Sector Enterprises on their selection and appointment to board level posts in the same or any other Central Public Enterprises will be 5 years.

3. All the Administrative Ministries/Departments are, Therefore, requested to advise the PSEs under their administrative control to comply with the above decision of the Government.

5. The petitioner relies upon the formal Presidential Order in respect of his appointment to the Corporation which contained the terms and conditions of service. Clause (1) enumerated various entitlements and clause (2) stated that in respect of other terms and conditions not covered in paragraph (1) he was to be governed by the rules of the PSU.

6. The petitioner, Therefore, alleges that the stand of the respondent in denying him lien in DTTDC on the one hand and treating his lien as having expired after two years i.e. w.e.f. 7.9.2002 is illegal and arbitrary.

7. The DTTDC in its return has alleged concealment of facts and on the part of the petitioner it has placed reliance on the letter dated 11.3.2003 written by him where his understanding that lien stood expired/terminated on 7.9.2002 is clearly brought forth. It is alleged that by this letter he even sought for transfer of his terminal benefits such as gratuity and leave standing to his credit to the Hotel Corporation of India. The DTTDC avers that the terminal benefits amounted

to Rs. 3,04,908/- were sent to the Corporation by a cheque dated 1.5.2003, that was duly accepted by the petitioner. It is averred that the letter terminating his lien issued on 3.1.2003 was duly dispatched to his known address.

8. The DTTDC further avers that the request of the petitioner for continuation of lien for a period of five years was rejected after due consideration since it is governed by Staff Rules and is an undertaking of the Government of NCT. Reliance has been placed upon a clarification dated 14.7.1967 issued by the Central Government in relation to Fundamental Rule 13 to the effect that lien can be retained in the parent department for a period of two years. It is alleged that the petitioner could have reverted to the DTTDC within that period or resigned at the end of the period. In the present case, he consciously chose to exercise the latter option. It is contended that the letter written on 7.9.2000 amounted to a technical resignation and this is evident from the terms of the petitioner's own letter dated 11.3.2003. In view of these facts, the petitioner is not entitled to any relief.

9. Mr. Parag Tripathi, learned senior counsel contended that the letter dated 7.9.2000 intimating the petitioner's desire to join the corporation does not reveal any intention to resign or forfeit his lien, technical or otherwise. He was, Therefore, entitled to retain the lien in accordance with the office memorandum applicable to Public Sector Units which meant that the lien had to be extended for a period of 5 years. Since, the petitioner had expressed his desire to return to the parent department in March 2005 itself, the DTTDC could not obstruct his right and entitlement to re-join it.

10. Learned counsel also contended that even if the letter of 7.9.2000 was to be construed as a technical resignation nevertheless, its acceptance was void since the authority not competent to act upon it had passed the order terminating the petitioner's lien. He submitted that the exercise of power under Staff Rule 10.1(ii) was ab initio a nullity on account of the judgment of this Court in *Sh. A.K. Parmar v. Delhi Tourism Development Corporation*, 1987(1) Delhi 123 where in respect of the respondent DTTDC an identically worded condition of service empowering it to terminate the services had been set aside as violative of Article 14 of the Constitution.

11. Mr. S.B. Upadhyay, learned counsel for the DTTDC submitted that the petitioner cannot claim any discretionary relief under Article 226 because he is guilty of willful suppression of facts. He placed considerable reliance upon the letter dated 13.3.2003 by the petitioner to say that he was aware of the true position that his lien in the parent department i.e. DTTDC had come to an end on 7.9.2002. He, Therefore, claimed transfer of leave to his credit and terminal benefits payable to him; a request that was duly complied with. In these circumstances, he had acquiesced to the fact of termination of lien and consciously chosen to seek all benefits on that basis. He, Therefore, could not come forward with a grievance on that score.

12. Learned counsel for the DTTDC disputed the applicability of the office memorandum dated 13.1.1999 permitting the retention of lien for 5 years. He claimed that DTTDC employees are governed by its Staff Service Rules and not by guidelines of Bureau of Public Enterprises. The Staff Rules are silent on the period of lien which results in applicability of Rule 14(2) of the said rules; it prescribes that in respect of the matters not specifically covered the provisions of the corresponding rules and regulations applicable to the Central Government Employees would govern the issue. It is, Therefore, contended that the clarification issued on 14.7.1987 in respect of Fundamental Rule 13 (FR-13) would be attracted. That clarification issued by way of a circular reads as follows:

(2) In the case of permanent Government servants, their lien may be retained in the parent Department/Office for a period of two years. They should either revert to the parent Department/Office within that period or resign from the parent Department/Office at the end of that period. An undertaking to abide by these conditions may be taken from them at the time of forwarding the applications to other Departments/Offices.

13. Learned counsel lastly contended that on application of general principles too, a public servant or employee appointed to a permanent post even on tenure basis outside the cadre in which he is borne would forfeit his lien on the previous permanent post. He relied upon the judgment of the Supreme Court reported as Dr. S.K. Kacker Vs. All India Institute of Medical Sciences and Others, .

14. On the factual matrix the following issues arise for consideration:

(i) Whether the petitioner by his conduct can be said to have acquiesced to the termination of his lien;

(ii) Whether the impugned orders are sustainable in law.

POINT No. 1

15. The petitioner raises his claim in the terms of the letter dated 7.9.2000 as well as the formal order dated 28.9.2001 to contend that when offered the post of Managing Director with the Corporation, he never submitted his resignation and he had indicated that his lien to the post would continue for a period of 5 years. The DTTDC on the other hand placed reliance on the letter dated 11.3.2003 and the amounts tendered to the petitioner which were willingly and unreservedly accepted by him.

16. The letter written by the petitioner on 7.9.2000 reveals that his intention was to retain a lien for the period of his appointment with the Corporation. This evident from the following terms:

I would like to retain the lien on my substantive post i.e. Financial Controller and Secretary, Delhi Tourism and Transport Development Corporation during this period.

The DTTDC relieved him on the same date. The relieving order, non-

committedly stated that his lien to the post would be as per the rules.

17. In the writ petition, there has been no mention about his request made on 11.3.2003 for release of financial benefits and transfer of leave standing to his credit. In fact, the petitioner contends as follows:

It is pertinent to note that neither the petitioner had submitted any resignation vide his application dated 7.9.2000 nor there was any mention in the above relieving order dated 7.9.2000 as wrongly/falsely stated.

18. The averment in the petition contained references to all documents as also contentions in relation to Staff Rule 14(2) and other allegations. However, it is singularly bereft of any mention to his own letter dated 11.3.2003. That letter states as follows:

Sub: Transfer of terminal benefits

As you are aware, I relinquished the charge of the post of Financial Controller and Secretary on 7th Sept. 2000 and took charge as Managing Director of Hotel Corporation of India Limited w.e.f. 8.9.2000, as per the orders issued by Government of India. Initially I had retained lien on my substantive post in Delhi Tourism and Development Corporation Ltd. For a period of two years, which had expired on 7th Sept. 2002 thereafter, I had made a request for transfer of my terminal benefits viz. Gratuity, leave to the credit of Hotel Corporation of India Ltd. Similarly, my Contributory Provident Fund which was being maintained by Delhi Tourism and Transport Development Corporation Ltd. (PF A/c No. DL/5549/950) for contribution deposited during my tenure with DTTDC and accumulations transferred by my previous employers and remittances made by HCI for the period Sept. 2000 to March 2001.

Recently the office of Regional Provident Fund Commissioner Mumbai vide their letter No. MH/12541/2760/PF/Accts/ 1015 dated 10.3.03 has also made a reference to Delhi Tourism and Transport Development Corporation Ltd. For transfer of the PF account being maintained by DTTDC to the credit of Regional Provident Fund Commissioner Mumbai by remitting the amount by DTTDC CPF Trust from A/C No. DL/5549/950 to A/C No. MH/2541/2760.

I shall be grateful if you kindly advise the concerned for doing the needful for transfer of this amount of terminal benefit to the credit of HCI together with the details and also for the PF transfer to the credit of Regional Provident Fund Commissioner, Mumbai under advise to HCI, preferably by this month end ensuring that interest earned by end of financial year is taken care by DTTDC CPF Trust.

The copy of the above letter has been produced by the DTTDC . It was apparently marked to it though addressed to the Hotel Corporation of India. On the strength of that letter the terminal benefits such as gratuity, leave encashment and other benefits admissible to him were released on 24.4.2003; a copy of a cheque for that amount has also been produced.

19. Acquiescence has been recognised as a course of conduct where a party consciously accepts consequences or certain action which may be opposed to his stated position, or pre-existing claim. In order to sustain a plea of acquiescence, it is necessary to establish that the concerned party had remained silent on the issue, even after discovering the truth of the matter. (See *Canara Bank Vs. Canara Sales Corporation and Others*, . The principle of waiver, on the other hand denotes an agreement between two parties whereby one, fully aware of his rights, agrees not to assert his rights for a consideration. A legal or statutory right can be waived, subject to the rider that such conduct does not defeat a public interest (ref. *Krishna Bahadur Vs. Purna Theatre and Others*,). On an application of the above principles, I am of the opinion that the petitioner, who was fully conscious of his rights and aware of it all times, about the true situation, exercised his choice to forfeit claim to his lien with DTTDC and secure all terminal benefits in the year 2003 itself. His studied silence of this aspect in the petition assumes significance about his conduct. I am, Therefore, of the opinion that in the facts of this case, he acquiesced to the termination of his lien had w.e.f. 7.9.2002.

POINT No. 2

20. During the course of hearing, the counsel for the petitioner had placed considerable reliance on Rule 10.1(2) to say that the petitioner's lien could not have been terminated since an identical condition had been set aside by this Court. It was also contended that lien had not been terminated by the competent authority. However, there is no pleading on that aspect. Even otherwise on the merits, the termination is not of the kind covered by clause 10.1(ii) since it contemplates the termination or cession of ongoing employment not the termination of lien of a person who has placed himself outside the cadre and is working with another department or public agency as it were.

21. The next aspect for consideration, on the issue of lien is the applicability of the memorandum dated 13.1.1999. The petitioner places reliance on that memorandum to say that he was in the post of Financial Controller and Secretary, DTTDC, a position that is lower than the board level service and, Therefore, was entitled to retain his lien for a period of 5 years. In the absence of any stipulation in Staff Rules, this contention would have been possible. However, Rule 14(ii) of the Staff Rules applicable to DTTDC categorically states that in respect of issues not covered (lien being one such) the conditions and rules applicable to Central Government employees would prevail. The relevant rule governing lien is FR-13 of the Fundamental and Supplementary Rules. The second proviso to FR-13 states that lien of a Government Servant cannot be retained on foreign service/deputation beyond the maximum limit admissible under orders of the Central Government issued from time to time. One such order was issued on 13.7.1967. It states that the lien of the such employees can be retained in the parent department for a period of two years.

22. This precise issue of what constitutes a post outside the cadre and the

maximum period of lien had come up for consideration in Dr. Kacker's case. After noticing the text of FR-13 and the contention of counsel for the parties, particularly, the submission that a tenure appointment even to permanent post are of a temporary character and would not result in loss of lien, the Court held as follows:

10. It would indicate that on appointment to a permanent post, be it under the Central Government or the State Government, outside the cadre on which he is borne, his lien on the previous permanent post stands terminated on his acquiring a lien in a permanent post. The post of Director is not in the same cadre as the post of Professor in the AIIMS. The post of Director is the Head of the AIIMS and it is independent of all the Departments. The Director is enjoined to supervise not only the administrative work of the AIIMS, but also its management for and on behalf of the Institute Body. Therefore, on his appointment to the permanent post as a Director, he lost his lien on the post as a Professor and Head of the ENT Department. Resultantly, when the tenure of the appellant had expired on/by efflux of time or in case any of the eventualities mentioned in Regulation 30-A had happened, he cannot revert to the post of Professor and Head of the Department.

11. In Dr. L.P. Agarwal case, it is seen from the facts that Dr. Agarwal came to be appointed as a Professor of Ophthalmology and the Director of the Institute. It was a composite appointment. Thereafter, when he was compulsorily retired as a Professor, the question arose whether his tenure post as a Director had also automatically come to a terminus. In that behalf, this court had considered the question and had held in para 16 thus: Even an outsider (not an existing employee of AIIMS) can be selected and appointed to the post of Director. Can such person be retired prematurely curtailing his tenure of five years? Obviously not. It would thus be clear that an incumbent appointed to the post of Director is governed by the Fundamental Rules and he is independent of the tenure which he holds in any other post either on permanent or temporary basis. Accordingly, on his ceasing to be a Director, he does not have the right to fall back upon the previous permanent post held by him as Professor and Head of the ENT Department.

23. In the present case, the post of Managing Director of the Corporation is undeniably a permanent one. The petitioner was appointed, albeit on tenure/temporary basis for a period of 5 years. The outer limit of FR-13 Therefore applied and Dr. Kacker's judgment in my opinion clearly covers the issue. The petitioner, Therefore cannot legitimately claim to retain his lien with the DTTDC. Therefore, the contention on behalf of the petitioner that he was entitled to retain lien with DTTDC for a period of 5 years is devoid of merits.

24. In view of the foregoing discussion, the petitioner is not entitled to the reliefs claimed for. The writ petition is accordingly dismissed. No costs.