(2010) 03 AHC CK 0222

In the Allahabad High Court

Shiv Nath Singh APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 12-03-2010

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : (2010) 03 AHC CK 0222

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.P. Sahi, J.—The petitioner after retiring from the armed forces on 1st of November, 1983 was appointed on 4th of November, 1986 as an Armed Guard in the respondent-Oriental Bank of Commerce and was posted at one of the Branches of the bank in District Ghaziabad. The petitioner has challenged the order dated 12th December, 2008 communicated to him by the bank refusing to extend him the benefit of pension which the petitioner claims entitlement to under the Oriental Bank of Commerce Employees Pension Regulations, 1995.

2. It is undisputed that the petitioner joined his duties in the service of the bank in the year 1986 on 10.11.1986. The bank came up with a voluntary retirement scheme, a copy of where has been appended as Annexure-1 promulgated on 10th of November, 2000. The petitioner had not completed 15 years of service but was above 40 years of age, therefore, he moved an application as being eligible for seeking voluntary retirement. The petitioner was voluntarily retired on his request which was accepted w.e.f. 15th of January, 2001. A copy of the said letter is Anneuxre-2 to the petition. Having voluntarily retired the petitioner further claimed pensionary benefits as per the 1995 Regulations which was also provided for in the said scheme. This scheme was made on the strength of the then existing Regulation 28 which had not been amended on the date when the voluntary retirement scheme had been enforced. The said Regulation provided for superannuation pension and Regulation 14 of the said Regulations provided

for a minimum of 10 years of service as the qualifying period for grant of pension. Since the petitioner was earlier in military service, therefore, it needs to be classified that he was not entitled for counting his services in the military for the purpose of qualifying years of service as per Regulation 24 thereof. Chapter V of the Regulations contains the following categories of pensionary benefits.

(a) Superannuation Pension (Regulation 28)

(b) Pension on Voluntary Retirement (Regulation 29)

(C) Invalid Pension (Regulation 30)

(d) Compassionate Allowance (Regulation 31)

(e) Premature Retirement Pension (Regulation 32)

(f) Compulsory Retirement Pension (Regulation 33).

3. The prayer of the petitioner for grant of pension was rejected vide order dated 9th of August, 2001 which was challenged by the petitioner in writ petition No. 35798 of 2001. The said writ petition after contest was allowed on 27th February, 2007 holding that the proposal of the bank through the circular dated 15.12.2000 for amending Regulation 28 of the 1995 Regulations was a mere proposal which cannot take away the right of the petitioner to avail pension under the then existing Regulation 28 and, therefore, the relief prayed for was granted. It was further found as a matter of fact as follows:

...Neither in the circular nor in the counter affidavit there is any recital that the qualifying services for the purpose of retirement has been suitably amended in pursuance thereof....

4. The bank preferred special appeal No. 895 of 2007 before the Division Bench. The Division Bench came to the conclusion that the retiral benefits to the petitioner would be available in accordance with 1995 Regulations. It was, however, held in the said judgment that Regulation 28 had already been amended on 26th of January, 2002 through a gazette notification and the proviso which was added to Regulation 28 was made applicable w.e.f. 1st of September, 2000. In view of the specific provision which was incorporated in Regulation 28, the petitioner did not qualify for the grant of pension as he had not completed a minimum period of 15 years on the date of his voluntary retirement. The amended Regulation 28 is quoted below:

28. Superannuation Pension

Superannuation Pension shall be granted to an employee who has retired on his attaining the age of superannuation specified in the Service Regulation or Settlements.

Provided that, with effect from 1st September, 2000 pension shall also be granted to an employee who opts to retire before attaining the age of superannuation, but after rendering service for a minimum period of 15 years in terms of any Scheme that may be framed for such purpose by the Board with the approval of the Government.

5. The Division Bench after noticing the said amendment came to the conclusion as follows:

A perusal of the aforesaid would show that though Regulation 28 amended in 2002 has been made effective from 1.9.2000 providing qualifying service of 15 years for admissibility of pension under the Pension Regulation, but that is only one kind of pensions as noted above, which are also prescribed under the aforesaid Regulations and are admissible to the Bank employees in accordance with the terms and conditions provided therefore. The submission of the bank that since the petitioner had not rendered 15 years of service in the Bank, therefore, he was not qualified for pension under Regulation 28 as amended in 2002 may be correct, but that would not exclude the applicability of other kind of pensions under the Regulations, if the petitioner fulfils the requirement of qualifying service etc. thereunder. This aspect of the matter as to whether the petitioner would be covered by any other provision of the Pension Regulation neither has been considered by the authorities while passing the order dated 9.8.2001, impugned in this writ petition, nor the Hon''ble Single Judge had any occasion to consider the same. The matter appears to have been contested before the Hon''ble Single Judge by the Bank mainly on the reasoning that the petitioner since is already getting pension from Army, therefore, would not be entitled for second pension from the bank and that his army service was not accountable for determining qualifying service under Regulation 28 of the Pension Regulations, therefore, he was not eligible for pension having not served the Bank of 15 years as required by Regulation 28 as in 2002.

6. Thereafter, the Division Bench went on to hold that even if the petitioner is not entitled to the pension after having accepted the voluntary retirement scheme and in view of the embargo of 15 years as contained in the amended Regulation 28, yet the Bank was obliged to consider as to whether the petitioner was entitled for any other different pension where the requirement is of less than 15 years of service. The judgment of the learned Single Judge was, therefore, modified with a direction to consider the claim of the petitioner employee in respect of his claim to pension under Regulations in any other category as enumerated herein above.

7. The bank thereafter has proceeded to pass the impugned order dated 12th December, 2008 concluding that the petitioner was not entitled to the benefit of pension under Regulation 28 keeping in view the amendment brought therein on 26th January, 2002 with effect from 1.9.2000. The bank however, did not proceed to consider any other regulation or its impact as indicated in the Division Bench judgment for the purpose of grant of pension to the petitioner.

8. Sri Arvind Srivastava and Sri Chandan Kumar, advocates for the petitioners contend that the petitioner was entitled to the benefit of pension under

unamended Regulation 28 and the amendment which was notified on 26th January, 2002 cannot take away the right of the petitioner with a retrospective effect. They submit that the said amendment cannot be given a retrospective operation so as to extend the period of qualifying service from 10 years to 15 years and the same is ultra vires and inoperative in so far as the claim of the petitioner is concerned. The impugned order is therefore liable to be set aside.

9. The second contention raised is that the Division Bench judgment does not preclude the petitioner from raising the aforesaid challenge inasmuch as the assumption made by the Division Bench in respect of the amendment of regulation 28 was on the information given to the court without there being any challenge to the said issue. They contend that it was on the mere information tendered without there being any scope of adjudication in respect thereof and, therefore, the said assumption would not be binding on the petitioner to raise a challenge in respect thereof in the present proceedings. In essence the submission is that the aforesaid issue decided does not amount to a decision so as to attract the principles of resjudicata or even constructive resjudicata and, therefore, there is no estoppel against the petitioner to raise the said issue in the present writ petition.

10. The third contention raised is that the petitioner was even otherwise entitled to the benefits of Regulation 32 and the Bank without referring to the same has passed the impugned order, therefore, its action is vitiated in law.

11. Learned Counsel for the Bank has produced the regulations and he submits that the petitioner had retired under the voluntary retirement scheme after completing 14 years two months and five days of service between 10.11.1986 and 15.1.2001. Since this period does not complete the period of 15 years therefore according to the regulations the petitioner did not qualify for the pensionary benefits. He further submits that the notification bringing about the amendment in Regulation 28 had already been notified and was published in the gazette as noticed by the Division Bench. The publication took place on 26.1.2002 whereas the judgment of the learned Single Judge was rendered on 27.2.2007. He submits that it appears that the said notification was not brought to the notice of the learned Single Judge and the same was brought before the Division Bench which took notice of the same and came to the conclusion that the petitioner was not qualified for pension under Regulation 28. He further submits that the issue relating to the retrospective operation of the applicability of the amended regulations cannot be permitted to be raised inasmuch as once the said regulations had been notified on 21.6.2002 then the petitioner who had filed the writ petition in the year 2001 itself ought to have challenged the same before the learned Single Judge. It is submitted that the petitioner will be presumed to have knowledge of the rule so notified and merely because it was not brought to the notice of the learned Single Judge the same cannot be rendered inapplicable as the law was very much in force on the date when the judgment was delivered. He further submits that the Division Bench taking notice

of the same has correctly concluded that the petitioner was not entitled to the benefit of pension.

12. Coming to the challenge to the aforesaid provision on the ground of Article 14, learned Counsel for the Bank submits that the same has been made applicable uniformly for all such employees and there is no discrimination so as to admit of any legal infirmity in the retrospective operation of the said regulations. He further submits that it is not even arbitrary inasmuch as the voluntary retirement scheme itself made the payment of pension subject to the regulations of 1995. The submission is that there is no independent right of pension under the voluntary retirement scheme and the petitioner having opted for the same and having retired prior to 15 years of service he cannot be granted the relief.

13. The reply of the learned Counsel for the respondent bank to argument in respect of Regulation 32 is that Regulation 32 contemplates of premature retirement pension and none of the contingencies exist as provided for in Clause (b) of the said Regulation to extend the benefit of pension to the petitioner. Regulation 32 therefore is not attracted.

14. Arguments were heard and learned Counsel for the petitioner has also submitted written submissions placing reliance on the following judgments to support the aforesaid contentions.

1. Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others,

2. State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others,

3. A.P. Srivastava (Dead by Lrs.) Vs. Union of India (UOI) and Others,

4. The Amalgamated Coalfields Ltd. and Another Vs. The Janapada Sabha, Chhindwara,

5. Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer and Others,

6. P. Mohan Reddy etc. Vs. E.A.A. Charles and Others etc.,

15. I have heard, learned Counsel for the parties and perused the records and the decisions cited and indicated herein above.

16. The question of grant of pension after having voluntarily retired is already included in Chapter V as Regulation 29. The said Regulation 29 makes a provision under Sub Regulation (1) thereof that the qualifying years of service for voluntary retirement would be completion of 20 years and Regulation 5 thereof empowers the same to increase it by a period of 5 years but not exceeding 33 years. Thus the aforesaid regulation did make provision for pension of voluntary retirement but the qualifying years of service therein did not apply as the petitioner has not been retired under Regulation 29.

17. The petitioner''s voluntary retirement is under a fresh scheme which was notified on 10th of November, 2000. This reduced the period of the eligibility of voluntary retirement as indicated in Regulation 29 and substantial modifications were made as a result whereof the petitioner became entitled for a voluntary retirement under the scheme. The scheme further provided for the benefits of pension that would be available as per pension Regulations 1995, Regulation 14 provides for minimum 10 years of service as the qualifying service for pension. The petitioner, therefore, was entitled for consideration of grant of pension on the date when the said voluntary retirement scheme was enforced but the denial as come on account of the amendment brought about under Regulation 28 which was published on 26.1.2002 and was made applicable w.e.f. 1.9.2000. This increased the period of qualifying years of service to 15 years as against 10 years provided for in Regulation 14. The contention raised on behalf of the petitioner that the said amendment cannot operate retrospectively as the petitioner had already been retired on 15.1.2001 would have been acceptable in view of the law laid down in the case of Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others, but the said issue stands foreclosed in view of the conclusions drawn by the Division Bench and quoted herein above. The course open to the petitioner was to have contested the impact of the said amendment before the Division Bench itself or to have challenged the correctness or otherwise of the conclusion drawn by the Division Bench before a higher Court of appeal. The situation appears to be that the petitioner did not do that at all and, therefore, the aforesaid finding of the Division Bench is binding on me.

18. The contention raised by the learned Counsel for the petitioner that the principles of resjudicata/constructive resjudicata/estopel cannot bind this Court would not be attracted inasmuch as the amendment had already been notified during the pendency of the writ petition filed by the petitioner on the earlier occasion. Not only this if the Division Bench was informed of the said amendment and which was not before the learned Single Judge yet the petitioner had the opportunity to contest it before the Division Bench. There is no explanation forthcoming as to why the petitioner chose to keep silent and did not even challenge the said finding. The matter which was remanded by the Division Bench having therefore foreclosed the said issue and, therefore, the Bank could have proceeded to decide the matter on the presumption that the amendment had been accepted. There was no occasion for the bank to have not proceeded on the basis of the amendment that remained intact with the observation made by the Division Bench. In my considered opinion, the petitioner was not precluded and he ought to have challenged the same if he was aggrieved either before the Division Bench or before the Higher Court of Appeal. The issue was therefore, directly and substantially involved with record to the applicability of Regulation 28 and the petitioner cannot be said to have been taken by surprise. Once the Division Bench has remanded the matter after consideration of the said issue then it is well settled by now that resjudicata applies at different stages of

the same proceedings and the remand order having become final between the parties, the finding recorded therein cannot be permitted to be agitated before a learned Single Judge. Reference may be had to the judgment of the Apex Court Sita Ram Goel Vs. Sukhnandi Dayal and Another, and State of Maharashtra Vs. Harishchandra and Others, It has been held by the Apex Court that the principles of constructive resjudicata apply in reward proceedings as well namely;

1. Daryao and Others Vs. The State of U.P. and Others,

2. Forward Construction Co. and Ors. v. Prabhat mandal (Regd.), Andheri and Ors. reported in 1986 (1) SCC 100.

3. The Direct Recruit Class-II Engineering Officers'' Association and others Vs. State of Maharashtra and others,

19. It is however, correct that there cannot be any resjudicata on a question of law but resjudicata will apply where a judgment has been rendered after contest. It has also been held by the Apex Court that an omission to raise an issue does constitute constructive resjudicata as reported in P.K. Vijayan Vs. Kamalakshi Amma and Others,

20. In the instant case judicial discipline also demands that the aforesaid conclusion drawn by the Division Bench in a contest between the same parties and in relation to the same provision deserves to be respected. The Bank is not at fault in proceeding to apply the amended Regulation 28 so long it remains in the regulations. Accordingly, the question of entertaining the plea of not allowing regulation to operate retrospectively does not arise. The petitioner will have to seek his remedy elsewhere for the same.

21. On facts if the regulation is applicable then there is no dispute that the petitioner has not completed 15 years of service and, therefore, he is not entitled for the pension.

22. In view of the conclusions drawn herein above and in the absence of any material to indicate arbitrariness on the part of the Bank in applying the said regulation, there is no occasion to strike down the impugned order. The petitioner forms a different class in the sense that he is an employee who has been extended the benefit of voluntary retirement under a special scheme of the year 2000. He therefore, stands on a different footing from those employees who qualify under the regulations. The object sought to be achieved is to restrict the payment of pension to such employees who have completed 15 years of service and the rationality of such a decision is to be found in the note appended to regulation 28 after its amendment which has been quoted extensively by the Division Bench in its judgment. Accordingly I see no reason to accept the argument of the petitioner on the ground of rationality so as to attract Article 14 of the Constitution of India.

23. The issues having been answered, the claim of the petitioner in respect of Regulation 32 has to be considered. It is correct that the impugned order does

not record any finding in relation to the applicability of Regulation 32. Regulation 32 is quoted herein below:

32. Premature Retirement Pension

Premature Retirement Pension may be granted to an employee who,

(a) has rendered minimum ten years of service;

(b) retires from service on account of orders of the Bank to retire prematurely in the public interest or for any other reason specified in service regulations or settlement, if otherwise he was entitled to such pension on superannuation on that date.

24. A perusal of the said regulation indicates that the qualifying years of service is 10 years and the incumbent has to retire on account of orders of the Bank in public interest or for any other reason in the service regulation or in any settlement.

25. In the instant case, the petitioner has retired under a separate voluntary retirement scheme which is not under the orders of the Bank to retire prematurely. The petitioner has voluntarily opted to retire. Secondly, it is not a retirement under the service regulations but under a voluntary retirement scheme and, therefore is not for any other reason specified in the service regulation. Thirdly, the retirement does not come out through any settlement. In view of this Regulation 32, in my opinion, does not apply at all to the facts of the present case.

26. The writ petition, therefore, fails and is hereby dismissed.