
(2008) 10 BOM CK 0044
In the Bombay High Court
Case No : Writ Petition No. 1122 of 2008

Smita N. Trivednee

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 07-10-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 311

State Bank of India (Officers Service) Rules, 1992 — Rule 40(3), 68

Citation : (2009) 1 BomCR 767

Hon'ble Judges : Rebello F.I., J;Kumbhakoni A.A., J

Bench : Division Bench

Advocate : Tejas Vora and G.K. Vora, for the Appellant; Harihar Bhawe, instructed by Bhawe and Co., for the Respondent

Judgement

Rebello F.I., J.—Rule heard forthwith.

2. From the pleadings on record, some facts may be set out. The petitioner joined the services of respondent No. 1 and was confirmed with effect from 2nd January, 1974. During the course of the employment, petitioner has been transferred to various branches. The petitioner, with effect from 1st July, 2003 was posted as an officer at Mumbai, main branch at the International Banking Division of the respondent No. 1. The petitioner applied for Privilege Leave for the period from 1st September, 2003 to 27th September, 2003, which was sanctioned as she was to be operated on right eye, and the concerned doctor had advised her to take rest for at least three weeks. The petitioner thereafter informed the respondent No. 1 that she had undergone off pump coronary Artery Bye-pass surgery on 4th October 2003. The relevant documents in support thereof were furnished by her and she was advised to take rest upto 28th December, 2003. The petitioner did not report to her duties till 27th January, 2004.

3. From the affidavit-in reply, the following averment can be set out. The petitioner to seek leave with effect from 9th February, 2004 to 31st July, 2004,

had applied by application for leave dated 3rd August, 2004 to the respondent No. 1. The said application was not sanctioned by the concerned authorities. The respondent No. 1 intimated the petitioner vide letter dated 5th June, 2004, that she has been remaining absent unauthorisedly from duty since 1st January, 2004 and that she had not submitted any proper leave application duly supported with medical report in support of the same, and was advised to report to the duty immediately. In spite of receipt of the said letter, the petitioner did not join. It is also set out that the respondent No. 1 further intimated the petitioner by the letter dated 22nd July, 2004 that her leave has not been sanctioned and called upon her to report to duty immediately. According to the respondent No. 1, the petitioner applied for leave for the period from 1st August, 2004 to 31st December, 2004 by leave application dated 3rd January 2005. The said application was not supported by appropriate medical report, justifying the leave for long duration; as such the application was not sanctioned by the respondent No. 1. The petitioner thereafter vide her letter dated 21st March, 2005 intimated the respondent No. 1 that she was fit for reporting for duty, which was supported by the necessary fitness certificate. The respondent No. 1 informed the petitioner by the letter dated 24th March 2005 that she had been placed at the disposal of Chief Manager, Government Accounts Division and was called upon to report to the concerned officer. According to respondent No. 1, the petitioner attended her duties from 24th March, 2005 to 21st April, 2005.

4. The petitioner again applied for leave for the period from 23rd April, 2005 to 22nd July, 2005 by leave application dated 26th March, 2005. The case of the respondent is that the said application was not supported by appropriate medical reports, justifying her leave for long duration, and the absence of the petitioner from duty during the said period was unauthorized and without proper authority. The petitioner by application dated 17th August, 2005 again applied for leave but that was not sanctioned and thereafter the petitioner stopped attending the office altogether.

5. The further case of respondent No. 1 is, as per the State Bank of India, Officers Service Rules (hereinafter referred to as the "Rules"), under Rule 40(3), an officer is required to submit the application for availing the leave and the same is required to be sanctioned by the concerned authority. The Rule also prescribes the types of leaves that can be availed by the concerned officer and the duration of the same. It is contended that if an officer having submitted an application for though leave was refused, absents himself for a period of 90 or more consecutive days, then the bank is required to give a notice to such officer at his last known address available with the bank calling upon him to report for the duty within 30 days of notice, and if the officer does not report on duty within the stipulated period, the officer may by an order of the Appointing Authority be deemed to have voluntarily vacated his employment on the expiry of period as set out in the notice. The case of the respondent is that in terms of those rules, the petitioner had been called upon by the letters dated 5th June, 2004 and 23rd August, 2004 and further by letter dated 17th August, 2005 to

report for the duty within 30 days from the service of the said letters. These letters were duly served on the petitioner. As per the rules, it was appropriate for the Appointing Authority to pass an order holding that the services of the petitioner is deemed to have been voluntarily vacated her employment and this has been done by an order dated 22nd July, 2006. It is also submitted that under Rule 40(3) of the Rules, there is no provision for inquiry to be conducted as also for personal hearing.

6. The petitioner by an application dated 19th October, 2006 had applied for permission to exercise the exit option and get voluntarily released from the bank services as from the close of business on the 18th January, 2007. According to the respondent No. 1, the petitioner was ineligible to avail the said opportunity as her services had already been declared to have been voluntarily vacated by the Appointing Authority by the order dated 22nd July, 2006, and this was communicated to the petitioner by the respondent by the letter dated 3rd November, 2006.

7. The petitioner challenged the said order passed by the Appointing Authority before the Appellate Authority. However, the said appeal was dismissed by the order dated 12th May, 2007. It is set out that there is no provision for personal hearing. Aggrieved by this action of the respondent No. 1, the petitioner has preferred the present petition.

8. It is the case of the petitioner that her services came to be terminated without holding inquiry, as required in terms of Rule 68 of the Rules. The action of the respondent it is submitted, is contrary to the Rules and consequently illegal and void. It is also set out that the petitioner had applied for voluntary exit option. The respondents have unauthorisedly refused to consider the same, and on this ground also, the action of the respondent rejecting the application is without authority of law.

On the other hand, on behalf of the respondent No. 1, it is the submission of the learned Counsel that considering Rule 40(3) of the Rules, the petitioner is deemed to have voluntarily vacated her employment and as such the question of conducting inquiry would not arise. Once she had voluntarily vacated her service, the question of considering her voluntary exit option would also not arise. Therefore, the action of the respondent cannot be faulted and the petition, accordingly has to be dismissed.

9. In our opinion, the first issue that we have to consider is whether the petitioner is deemed to have voluntarily vacated her employment on the expiry of the period, set out in the notice. For that purpose, we may gainfully refer to Rule 40(3) of the Rules, which reads as under:

40.(3) Where an officer who has not submitted an application for leave or where an officer having submitted his application was refused sanction of leave, absents himself for a period of 90 or more consecutive days or overstays the sanctioned leave by 90 or more consecutive days notwithstanding the provisions of Sub-rule

(2), the Bank may at any time thereafter give a notice to the officer at his last known address available with the bank calling upon him to report for duty within 30 days or the notice. If the officer does not report for duty within the stipulated period, he may, by an order of the Appointing Authority be deemed to have voluntarily vacated his employment on the expiry of the said period set out in the notice. In such cases the officer shall also be liable to pay to the Bank such notice monies as are payable in case of resignation as if he has been permitted to pay the emoluments in lieu of notice. Provided, however, that an officer may appeal to the competent authority within a period of three years from the date of order recording voluntary vacation under the aforesaid rule. The Competent Authority shall consider such appeal to treat the said order as rescinded if it is satisfied that the officer was prevented by any sickness incapacitating him from reporting for duty within the prescribed time or for any other sufficient cause, and pass such orders as it may deem fit in the circumstances of the case.

10. The next relevant fact for consideration is the communication addressed to the petitioner which is undated, but was received by the petitioner on 17th August, 2005. Though in the reply filed on behalf of the respondent No. 1, a reference is made to the petitioner having voluntarily vacated the employment by order dated 22nd July, 2006, the said letter has not been produced but is referred to in the order of the appellate authority while dismissing the appeal of the petitioner by order dated 12th May, 2007.

11. As noted earlier, for an employee to be treated as having deemed to have vacated his employment would require the compliance of the Rule 40(3) of the Rules. Rule 40(3) which we have reproduced requires the following facts to be established.

(a) On the Officer who had not submitted an application for leave or an Officer having submitted his application was refused sanction of leave, absents himself for a period of 90 or more consecutive days or overstays the sanctioned leave by 90 or more consecutive days notwithstanding the provisions of Sub-rule (2) the Bank may at any time thereafter give a notice to the officer at his last known address available with the bank calling upon him to report for duty within 30 days of the notice.

(Emphasis supplied)

(b) If the officer does not report for duty within stipulated period, he may by the order of the Appointing Authority be deemed to have voluntarily vacated his employment on the expiry of the said period, set out in the notice.

(Emphasis supplied)

12. The only correspondence relied upon by the respondent to contend that the petitioner has deemed to have voluntarily vacated her employment is the undated communication which was received by the petitioner on 17th August, 2005, pursuant to which she applied for leave. We may gainfully reproduce the

said letter which reads as under:

Madam

UNAUTHORISED ABSENCE

It is observed that you are absenting from duty without submitting application for the leave. The last leave application which you have forwarded is for the period from 23.4.5 to 22.7.5 alongwith Medical Certificate. In the past also you were absenting from the duties from 9.2.2004 onwards without submitting application and reported for duty on 24.3.2005, worked intermittently and again absenting from 23.4.2005 onwards. During 24.3.2005 to 22.4.2005 you were absent on 15.4.2005 & 22.4.2005. As there is no leave to your credit, your entire absence is treated as "Extra Ordinary Leave on Loss of Pay".

You are, hereby instructed to report for duty alongwith the fitness certificate from the attending physician and submit satisfactory explanation for your absence within 10 days from the date of receipt of this letter by you. failing which appropriate disciplinary action for unauthorized absence against you which please note.

Please acknowledge receipt on the duplicate of this letter and return the same to us immediately.

(Emphasis supplied)

A reading of the said letter would firstly indicate that as of that date, the entire absence is treated as "Extra Ordinary Leave on Loss of Pay". That would include leave for the period between 23-4-2005 to 22-7-2005. Even if we presume that the undated letter did not treat the period from 23-4-2005 to 22-7-2005 as Extra Ordinary Leave on Loss of Pay, there is nothing on record to indicate that the petitioner was informed that the leave for the period 23-4-2005 to 22-7-2005 has been rejected. If we proceed on the footing that leave for the period 23-4-2005 to 22-7-2005 has been rejected, even then the requirement under Rule 40(3) would require the bank to serve a notice, calling upon the petitioner to report for duties within 30 days. The letter which we have reproduced above requires the petitioner to submit satisfactory explanation for absence within 10 days from the date of receipt of the letter, failing which appropriate disciplinary action for unauthorised absence shall be initiated against the petitioner. In other words, it would be clear that at no point of time, the respondent No. 1 brought to the notice of the petitioner that action under Rule 40(3) was being contemplated and her absence would be treated as she having deemed to have voluntarily vacated her employment. The notice served sought explanation for her absence and failing which disciplinary action would be initiated. Disciplinary proceedings can be initiated under Rule 68.

The law is now well settled that when there be a power conferred by an Act or Rules or other form of subordinate legislation, then that power must be exercised in that particular manner. See : Gujarat Urja Vikash Nigam Ltd. Vs. Essar Power

Ltd.,

It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner vide Chandra Kishore Jha Vs. Mahavir Prasad and Others, , (Dhananjaya Reddy v. State of Karnataka) 2001(Supp. 2) Bom.C.R. 597(S.C.) : 2001 DGLS 433 : 2001(4) S.C.C. 9 : AIR 2001 S.C. 1512, (S.C.C. para 23 : AIR para 22, etc..). Section 86(1)(f) provides a special manner of making references to an arbitrator in disputes between a licensee and a generating company. Hence by implication all other methods are barred.

13. On behalf of the respondent No. 1, learned Counsel has sought to draw our attention to the judgment of the Supreme Court in the case of Syndicate Bank Vs. The General Secretary, Syndicate Bank Stff Association and Another, , to contend that in case of voluntary vacating of employment, the question of conducting inquiry would not arise. We have no dispute in respect of the said proposition. The question however, is whether on the facts of these cases, the case of the petitioner can be considered to be a case of voluntary vacating office, as contemplated under Rule 40(3). Once there is a Rule which results in civil consequences of loss of employment, in our opinion, the Rule will have to be strictly construed. This, more so, as in the ordinary course an officer absenting herself without permission such action would amount to misconduct. A Rule like Rule 40(3) which results in a deemed termination without holding an inquiry, must be strictly construed. The expression "may "at any time" is whether the bank choose to exercise its power under Rule 40(3). In other words the Bank is not mandated in case of absence for the period set out in the Rules to invoke Rule. But once it invokes the Rules, the requisites of the Rule must be strictly complied. Rule 40(3), in our opinion, will have to be satisfied for the respondent to contend that the services of the petition were deemed to have been vacated.

14. Before answering the issue, we may also refer to the judgment of the Supreme Court, relied upon by the petitioner, in the case of Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, . There was a case of termination of service of a probationer. The issue before the Supreme Court was whether the termination of service was punitive or simplicitor. In our opinion that is an entirely different issue, unconnected with issue which we have been called upon to answer. Similarly reference was made to the judgment of the Supreme Court in the case of State of U.P. and Others Vs. Ashok Kumar, . The issue before the Supreme Court was, whether the action of termination was simplicitor or punitive, considering Article 311 of the Constitution of India. In our opinion, that judgment will not be applicable to the facts of the present case.

15. Lastly, reliance was placed on the judgment in the case of V.C., Banaras Hindu University and Others Vs. Shrikant, . The issue before the Supreme Court in the case was of automatic termination/deemed abandonment of service in case of employee availing leave without sanction and overstaying after expiry of

sanctioned leave. The Supreme Court held that considering the service conditions, provisions in the matter of abandonment of service could not be laid down by an executive direction and must be governed by a statute and ordinances. Further an action on the provision as to deemed abandonment of service must be fair and reasonable, so as to satisfy the requirement of Article 14 of the Constitution. In the instant case, there is no challenge to Rule 40(3) of the Rules on the ground of violation of Article 14 of the Constitution of India. We have to, therefore, proceed on the footing that Rule 40(3) is not arbitrary. The test however, still would be that considering the test of fairness to be applied, the provisions of Rule 40(3) of the Rules must be complied with. In other words, they must be construed as mandatory and failure to comply with the said requirements must result in holding that it is not open to the respondent employer to treat the services of the petitioner and/or an employee as having "deemed vacated her employment". In the instant case respondent No. 1 was strictly bound to comply with the Rule 40(3) of the Rules.

16. Considering the language of Rule 40(3) which we have reproduced and the letter served upon the petitioner, based upon which an order of deemed vacation of employment is supposed to have been passed, the same does satisfy the tests of Rule 40(3) of the Rules. The petitioner was not informed that her services would stand as deemed vacated if she did not resume, nor she was given time of 30 days to resume. The notice issued was calling the petitioner to explain the previous absence within 10 days, failing which disciplinary action would be taken against the petitioner. We may also note that the petitioner has placed on record correspondence to show that from time to time she had applied for leave and that was accompanied by necessary medical certificates. It is for the respondents to consider the said application till the date of her purported termination by letter dated 22nd July, 2006.

17. In our opinion therefore, the action of respondent No. 1 in treating the services of the petitioner as having been deemed vacated, by order dated 22nd July, 2006 is liable to be set aside, and consequently also the Order dated 12th May, 2007 which was passed in the appeal. The order dated 20th December, 2007 rejecting the petitioner's application for "Exit Option" also will have to be set aside with a direction to respondent No. 1 to consider the same.

18. In the light of the above, the petition is made absolute in terms of prayer Clause (a). The respondent No. 1 is also directed to treat the application of the petitioner dated 19th October, 2006 for "Exit Option" according to the Rules/Scheme. As the order of 22nd July, 2006 and 12th May, 2007 are set aside, the petitioner is entitled to the wages for the period from the said date and is also entitled for other benefits, as if the petitioner was in employment during the said period.

Rule made absolute accordingly. There shall be no order as to costs.