

(2010) 04 CAL CK 0037
In the Calcutta High Court
Case No : Writ Petition No. 13460 (W) of 2008

Sri Shiw Kumar Ram

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-04-2010

Acts Referred:

Citation : (2010) 2 CALLT 601 : (2010) 126 FLR 1049 : (2011) 2 LLJ 561

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : Subrata Kumar Roy Karmakar and Somnath Roy Chowdhury, for the Appellant; A.K. Routh, A. Dasgupta and S. Pal Chowdhury, for the Respondent

Judgement

I.P. Mukerji, J.—On 6th January 1997 the writ petitioner was appointed as a messenger in the Bally Durgapur Branch of the State Bank of India. This appointment was on probation but subsequently his service was made permanent.

2. His case is as follows.

Trouble for the writ petitioner started from the end of April 2006. He was a resident of Ballia, Uttar Pradesh. On 29th April 2006 he received a telephone call from his home in Ballia that his father was very ill. He informed this to the Branch Manager. He immediately left for his home town without submission of any leave application. From 10th May 2006 to 15th April 2007 he was psychiatrically ill and under the treatment of one Dr. B.K. Sribastava. He was suffering from acute depression. In the meantime, on 13th February 2007 his father expired which aggravated his mental illness. He came back to Bally Durgapur and tried to rejoin the service sometime around April 2007 but was not allowed to do so.

3. The Bank tells a different story. The writ petitioner was a habitual absentee. On and from 29th April 2006, he was absent without authorisation. Several letters were written by the Bank to him dated 1st July 2006, 2nd August 2006,

5th August 2006, 12th September 2006 alleging such absence and asking him to resume duty or explain absence but most of the letters were undelivered with the remark of the postal authorities that he refused to accept them or was not available.

4. There is a Service Rule of the Bank termed Bank Employees Service Rules as a result of the Eighth Bipartite Settlement 2005. The Bank took recourse to Rule 33.

Rule 33 reads thus:

33. Voluntary Cessation of Employment (i) When an employee absents himself from work for a period of 90 or more consecutive days without prior sanction from the Competent Authority or beyond the period of leave sanctioned originally including any extension thereof or when there is satisfactory evidence that he has taken up employment in India or outside, the management at any time thereafter may give a notice to the employee at his last known address as recorded with the Bank calling upon him to report for work within 30 days of the date of notice.

Unless the employee reports for work within 30 days of the notice or gives an explanation for his absence within the period of 30 days satisfying the management inter alia that he has not taken up another employment or avocation, the employee shall be given a further notice to report for work within 30 days of the notice failing which the employee will be deemed to have voluntarily vacated his employment on the expiry of the said notice and advised accordingly by registered post.

In the event of the employee submitting a satisfactory reply, he shall be permitted to report for work thereafter within 30 days from the date of expiry of the aforesaid notice without prejudice to the bank's right to take any action under the law or rules/conditions of service.

If the employee fails to report for work within this 30 days period, then he shall be given a final notice to report for work within 30 days of this notice failing which the employee will be deemed to have voluntarily vacated his employment on the expiry of the said notice and advised accordingly by registered post.

5. According to this rule if an employee is absent for over 90 days or more consecutively without approval, the Bank will issue a notice calling upon the employee to report for work within 30 days of the notice. If he does not do so or offer any explanation for the absence, another notice is to be issued asking him to report for duty within 30 days of notice. Upon expiry of the 30 days time of the second notice he would be deemed to have voluntarily vacated his employment.

6. The notice of 5th August 2006 was followed by another notice dated 10th January 2007, stating that if the writ petitioner did not report for duty, he would be deemed to have voluntarily retired.

7. Finally by the notice dated 12th February 2007 the writ petitioner was treated as deemed to voluntarily retire from service on 11th February 2007. According to the Bank such decision is irreversible. In this writ, the petitioner prays for appropriate orders of reinstatement in service.

Discussions and Conclusions:

It is absolutely true that after the writ petitioner left for Ballia, it was for the first time only on 21st April 2007, more than about two and half months after the writ petitioner was deemed to have retired, that he wrote a letter to the Branch

Manager, State Bank of India. It is here for the first time he disclosed his above alleged medical condition. It is also true that the Bank's letter dated 1st July 2006 was returned with the postal remark "refused to accept". The remark of the postal authorities to the letter dated 2nd August 2006 was to the effect that the petitioner was not available. Similar was the remark in the acknowledgement to the letter dated 5th August 2006. It is alleged by the Bank that the letter dated 12th September 2006 was received but there was no response. The letter dated 10th January 2007 was also not received. There is no satisfactory explanation in the affidavit-in-reply to the above allegations of the bank about the absence of the writ petitioner and his inability to receive the several letters.

8. In *Syndicate Bank Vs. The General Secretary, Syndicate Bank Staff Association and Another*, cited on behalf of the respondent the Supreme Court considered absence of an employee for a considerable period without explanation. In that case also similar notices were issued asking the employee to rejoin duty which were refused or could not be delivered. In that case also after issue of appropriate notices the Bank treated him as retired. When the question of breach of the principles of natural justice was raised alleging that the employee was dismissed without giving him a hearing, the Supreme Court held that the rules complied with the requirement of natural justice and that the employee had been rightly discharged from service. In *The Regional Manager Central Bank of India v. Vijay Krishna Neema and Ors.* reported in 2009(4) Supreme 44, the Supreme Court relying on the above decision said in paragraph 15 as follows:

15. Principle of natural justice, it is trite, does not operate irrespective of the statutory provisions.

It was not a case where like *Uptron India Limited Vs. Shammi Bhan and Another*, and *Scooters India Ltd. v. M. Mohd. Yaqub* (2001) 1SCC 61 no notice was required to be issued.

Clause 16 of the Shastri Award provides for issuance of such notice. If despite service of notice the employee did not report for duty, the consequences therefore would ensue.

In *V.C., Banaras Hindu University and Others Vs. Shrikant*, upon referring to *D.K. Yadav Vs. J.M.A. Industries Ltd.*, and *Scooters India Ltd.* (supra), it was opined:

57. The matter may, however, be different in a case where despite having been given an opportunity of hearing, explanation regarding his unauthorised absence is not forthcoming or despite giving him an opportunity to join his duty, he fails to do so, as was the case in *Pubjab & Sind Bank v. Sakattar Singh*.

This Court upon considering *Vivek Sethi (supra)*, held as under:

60. A provision relating to abandonment of service came up for consideration yet again in *Viveka Nand Sethi v. Chairman J & K Bank Ltd.* before a Division Bench of this Court. This Court opined that although in a case of that nature, principles of natural justice were required to be complied with, a full-fledged departmental enquiry may not be necessary, holding:

A limited enquiry as to whether the employee concerned had sufficient explanation for not reporting to duties after the period of leave had expired or failure on his part on being asked so to do, in our considered view, amounts to sufficient compliance with the requirements of the principles of natural justice.

61. Mr. Dwivedi placed strong reliance upon the decision of this Court in *Aligarh Muslim University v. Mansoor Ali Khan*. In that case, interpretation of Rule 5(8) (ii) came up for consideration which is in the following terms:

5(8)(ii) An officer or other employee who absents himself without leave or remains absent without leave after the expiry of the leave granted to him, shall, if he is permitted to rejoin duty, be entitled to no leave allowance or salary for the period of such absence and such period will be debited against his leave account as leave without pay unless his leave is extended by the authority empowered to grant the leave. Wilful absence from duty after the expiry of leave may be treated as misconduct for the purpose of Clause 12 of Chapter IV of the Executive Ordinances of AMU and para 10 of Chapter IX of Regulations of the executive council.

It was held that a show-cause notice and reply would be necessary. If no show-cause notice had been given, this Court held that the principles of natural justice would be held to be complied with." Yet again in *U.P. State Bridge Corporation Ltd. and Others Vs. U.P. Rajya Setu Nigam S. Karamchari Sangh*, it was held as under:

23. *D.K. Yadav* is an authority for the proposition that the principles of natural justice would have to be read in the standing orders. That was a case where there was a standing order similar to CSO L-2.12 except that 8 days' margin was required to return and satisfactorily explain the reasons for his absence or inability to return after the expiry of leave. This view was reiterated in the later decision of this Court in *Lakshmi Precision Screws Ltd. v. Ram Bahagat* where it was held that the element of natural justice was an inbuilt requirement of the standing Orders. 24. In this case, the appellant Corporation had issued two notices calling upon the workmen represented by the respondent to return to duty. The workmen did not respond to either of the notices. As we have noted it

was not pleaded that the advertisement did not sufficiently comply with the principles of natural justice. The notice was issued giving an opportunity to the respondent to show cause why the presumption should not be drawn under CSO L-2.12. The respondent did not show cause. In the circumstances, the management drew the presumption in terms of the CSO.

9. In my opinion, Rule 33 was very properly applied by the bank. Several notices were given to the employee at the disclosed residential address to show up for duty. Almost all of these notices were returned undelivered. The reason for not being delivered was not that the notice did not reside in those premises but either he refused to accept the notices or the notice was unavailable. One such notice as stated earlier was received but not replied to.

10. In those circumstances, it is not expected that the bank will keep on issuing notices which were not even being received or replied to and wait for the time the writ petitioner would ultimately receive a notice and respond to it. In my opinion, they applied the rule correctly in treating the writ petitioner as having voluntarily retired.

But after making that decision the bank receives a letter dated 21st April 2007 enclosing a medical certificate relating to the writ petitioner alleging mental illness. The medical certificate stated that the writ petitioner was suffering from ? mental disbalance? and was under the treatment of the doctor who issued it from 10th May 2006 to 15th April 2007.

11. A confidential report of the bank on 20th November 1999 has also been brought on record which says that the writ petitioner is a dedicated and hard working employee who is conscious of his role and discharges his duties effectively assisted the Branch and Inspection team deserves all encouragement" issued by the Manager.

Ordinarily, when an employee absent himself without any reason or cause and refuses to report for duty in spite of notice, it is to be presumed that he is not interested to work. Therefore, according to the above rule he can be treated as voluntarily retired. The above rule was framed or agreed to in the Bipartite agreement keeping the above kind of absence only, in mind, in my opinion.

But when an employee had a good confidential report, as stated above and discloses, after a period of absence that the absence was due to mental illness, then the decision ought to have been considered reasonably. It ought to have been determined by the bank whether that employee was in a position to receive such notices, whether he had refused such notice deliberately or whether there was good cause namely, medical treatment etc. for his not being available in the residential address. Further, it ought to have been enquired into by the bank whether the employee was in a position to reply to such notice or was in position to report for work further to such notices. In my opinion, when such an extraordinary case had been put forward by the employee before the bank, refusal to reverse the order of voluntary retirement without giving him a chance

to defend himself is most unreasonable. I repeat that the order of voluntary retirement was properly passed in accordance with rules. But it is quite another thing to say that once an order of voluntary retirement has been passed or a decision taken, that decision becomes irreversible, no matter what cause is shown. Therefore, it was not proper on the part of the bank to maintain that the decision to treat the employee as retired was irreversible and that his service would remain terminated. On these grounds, the facts of this case are different from those in the above Supreme Court decisions.

12. In those circumstances, in my opinion, a more humane and reasonable attitude of the bank was called for in the circumstances.

In the circumstances without interfering with the order of voluntary retirement I direct the bank to reconsider the case of the petitioner, by giving him an opportunity of filing a written application and by hearing him and by a reasoned order within a period of three months from the date of communication of this order. In passing this order I observe and hold that if the absence is properly explained there is no bar in recalling or setting aside the decision to treat the writ petitioner as retired.

13. The writ application is accordingly allowed in part.

14. There will be no order as to costs.

Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.