
(2011) 03 CAL CK 0002

In the Calcutta High Court

Case No : F.M.A. No. 468 of 2010 and M.A.T. No. 259 of 2010

UCO Bank

APPELLANT

Vs

Jaglal Ram

RESPONDENT

Date of Decision : 22-03-2011

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 21
Evidence Act, 1872 — Section 106

Citation : (2011) 4 CHN 715

Hon'ble Judges : Pratap Kumar Ray, J; Harish Tandon, J

Bench : Division Bench

Advocate : L.K. Gupta and Chittaranjan Baksi, for the Appellant; Soumya Majumder, Sunny Nandy and S.M. Obaidullah for the respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Pratap Kumar Ray, J.—Assailing the judgement and order dated 7th August, 2009 passed in W. P. No.2698 (W) of 2009 this appeal has been preferred. Impugned judgement and order read such :-

This writ application is filed assailing the award dated August 13, 2002 passed by the Central Government Industrial Tribunal at Calcutta in reference to No. 37 of 1999. By the impugned award, the learned Tribunal directed the petitioner bank to reinstate the respondent No, 3 in the services with full back wages.

2. The relevant facts and circumstances of this case which are to be taken into consideration for adjudication of the points of law involved in this case are recorded below. The respondent No. 3 was a Group-D" staff under the respondent-bank in the Head Office. He was absent from his duty on and from July 26, 1998. On March 14, 1998, he left Calcutta. On April 3, 1998, the respondent No. 3 sent a communication to the respondent authority with regard to the intimation of his absence from the services and that communication was received by the respondent-bank on April 28, 1998. The respondent-bank issued

a notice dated July 8, 1998 to the petitioner at the following address. "Karbalamore P.O. & Dist. Hooghly". Subsequently, a notice dated October 13, 1998 was issued by the petitioner-bank, to the respondent No. 3 under clause 17 of the Fifth Bipartite Settlement. By an order dated November 16, 1995, the name of the petitioner was struck off from the roll of the petitioner-bank. The petitioner submitted a representation dated January 6, 1999 to the respondent authority for consideration of his absence from services due to his illness and that of his wife. Ultimately, an industrial dispute was raised in the matter and the same was referred to the Central Government Industrial Tribunal, Calcutta. The Tribunal passed the impugned order, Hence, this writ application.

3. It is submitted by Mr. R. N. Mazumder, learned Counsel appearing for the petitioner-bank that the petitioner remained absent from services for a number of months without any intimation. Consequent thereupon, a notice dated October 13, 1998 was issued to the last known address of the petitioner. To substantiate the conduct of the petitioner-bank, Mr. Mazumder, relied upon the contents of the clause 19.16 of the Fifth Bipartite Settlement. According to Mr. Mazumder, the last known address of the respondent No. 1 was "Karbalamore, P.O. & Dist. Hooghly". The petitioner-bank did not receive any intimation with regard to the change of the aforesaid address of the respondent No. 3 nor was any leave address intimated to the petitioner-bank in accordance with the provision of clause 19.16 of the First Bipartite Settlement.

4. According to Mr. Mazumder, in view of the aforesaid admitted facts and circumstances of this case, there was no procedural impropriety in the decision making process of the petitioner-bank. The impugned award was passed on a sympathetic ground, without support by any reasons. Therefore, the same was perverse and liable to be set aside.

5. Mr. Mazumder, relied upon decisions of the Syndicate Bank vs. General Secretary, Syndicate Bank Staff Association, reported in 2000 SCC (L & S) 601; Punjab & Sind Bank vs. Sakkattar Singh, reported in 2001 SCC (L&S) 209 and Kerala Solvent Extraction Limited vs. A. Unnikrishnan reported in 2008(2) SCC (L & S) 155, in support of his submissions.

6. Mr. Soumya Mazumder, learned Counsel appearing for the respondent No. 3 opposes the above submissions of the learned Counsel appearing for the petitioner-bank. Drawing the attention of this Court towards the service record of the petitioner which was an exhibit (Ext. W. 3) in the proceeding before the learned Tribunal to submit that two following addresses were made available to the petitioner-bank by the petitioner.

i) "Karbalamore, P.O. Dist. Hoooghly.....Present address.

ii) "Sunjhauli, Dist. Rohtash, Sasaram.....Permanent address".

7. No subsequent change in address was intimated to the petitioner-bank. In the communication dated April 3, 1998, the respondent No.3 had informed the

petitioner-bank of his residing at the native. Therefore, the action on the part of the petitioner-bank to invoke clause 17 of the Fifth Bipartite Settlement could not be sustained in law because it was not a case of desertion. According to the learned Counsel, in case of unauthorized absence a disciplinary proceeding was required to be initiated against the petitioner before passing the impugned order but the same was not done. As a result, the action on the part of the petitioner-bank could not be sustained in law. Drawing attention towards the communication dated October 9, 1998 (at page 85 to this writ application), it is submitted by the learned Counsel that the decision of terminating the respondent No. 3 from the services of the petitioner-bank had been taken by the respondent authority before the order of termination was passed. So, the same was an outcome of predetermined mind.

8. I have heard the learned Counsel appearing for the respective parties and I have given my anxious consideration of the facts and circumstances of this case. On a plain reading of the impugned award, I find that the learned Tribunal took into consideration the communication dated April 3, 1998 of the respondent No. 3 as an intimation of his residing at the native village at the material point of time. The fact of receipt of the above communication was also taken into consideration by the learned Tribunal. As a result, the learned Tribunal arrived at a conclusion that the order of termination could not be sustained in law.

9. In examining the decision making process of the impugned award, the provision of clause 17 of the Fifth Bipartite Settlement are quoted below :

17. Voluntary Cessation of Employment by the Employees.-

The provisions relating to the voluntary cessation of employment by the employee in the earlier settlements shall stand substituted by the following;-

a) When an employee absents himself from work for a period of 90 or more consecutive days, without submitting any application for leave or for its extension or without any leave to his credit or beyond the period of leave sanctioned originally/subsequently or when there is a satisfactory evidence that he has taken up employment in India or when the management is reasonably satisfied that he has no intention of joining duties, the management may at any time thereafter give address calling upon him to report for duty without 30 days of the date of the notice, stating inter alia the grounds for coming to the conclusion that the employee has no intention of joining duties and furnishing necessary evidence, where available. Unless the employee reports for duty within 30 days of the notice or given an explanation for his absence within the said period of 30 days satisfying the management that employment or avocation and that he has no intention of not joining duties, the employee will be deemed to have voluntarily retired from the bank's service on the expiry of the said notice. In the event of the employee submitting a satisfactory reply, he shall be permitted to report for duty thereafter within 30 days from the date of the expiry of the aforesaid notice without prejudice to the bank's right to take any action

under the law or rules of service.

b) When an employee goes abroad and absents himself for a period of 150 or more consecutive days without submitting any application for leave, or for its extension or without any leave to his credit or beyond the period of leave sanctioned originally/subsequently or when there is a satisfactory evidence that he has taken up employment outside India or when the management is reasonably satisfied that he has no intention of joining duties, the management may at any employee at his last known address calling upon him to report for duty within 30 days of the date of the notice, stating, inter alia the ground for coming to the conclusion that the employee has no intention of joining duties and furnishing necessary evidence, where available. Unless the employee reports for duty within 30 days of the notice or gives an explanation for his absence within the said period of 30 days satisfying the management that he has not taken up another employment or avocation and that he has no intention of not joining duties, the employee would be deemed to have voluntarily retired from the bank's service on the expiry of the said notice. In the event of the employee submitting a satisfactory reply, he shall be permitted to report for duty thereafter within 30 days from the date of the expiry of the aforesaid notice without prejudice to the bank's right to take any action under the law or rules of service.

c) If an employee against absents himself within a period of 30 days without submitting any application after second notice shall be given after 30 days of such absence giving him 3 days time to report. If he reports in response to the second notice, but absents himself a third time from duty within a period of 30 days without application, his name shall be struck off from the establishment after 30 days of such absence under intimation to him by registered post deeming that he has voluntarily vacated his appointment. Clause 19.16 of the first Bipartite Settlement dated 19th October, 1966 was as follows :-

19.16. Any notice, order, charge-sheet, communication or intimation which is meant for an individual employee, shall be in a language understood by the employee concerned. In the case of an absent employee, notice shall be sent to him by registered post with acknowledgment due. If an employee refuses to accept any notice, order, chargesheet, written communication or written intimation in connection or within intimation in connection with disciplinary proceedings when it is sought to be serviced upon him, such refusal shall be deemed to be a good service upon him, provided such refusal takes place in the presence of at least two persons including the person who goes to effect service upon him. Where such notice, order, chargesheet, communication or intimation is sent by registered post with acknowledgment due, the same shall, at the discretion of the officers of the bank concerned, be deemed to have been duly served upon the employee, if the same has been refused by the employee.

10. In order to ascertain the purports of the above clause, the provision of clause 19.16 of the First Bipartite Settlement has modified by clause XIV (4) of the Fourth Bipartite Settlement are also set aside.

4. In partial modification of clause 19.16 of the First Bipartite Settlement of any bank, where any notice, order, chargesheet, intimation or any other official communication which is meant for an individual employee is sent to him by registered post acknowledgment due at the last recorded address communicated in writing by the employee and acknowledged by the bank, the same is to be deemed as good service.

11. I have recorded hereinabove that the respondent No.3 intimated his cause of absence from duty to the petitioner-bank on April 3, 1998, i.e. within 90 days from the first date of his absence from duty. Therefore, it does not lie on the mouth petitioner-bank that the change of address of the respondent No.3 was not intimated. Therefore, in view of the above provisions, the notice dated October 13, 1998 was not a proper notice which has been issued in this case. I find substance in the submissions made by the learned Counsel appearing on behalf of the respondent No.3 that the notice dated October 13, 1998 was not a valid notice because even after getting the information of the fact that the petitioner was residing at his native village at the material point of time, no notice was sent to his permanent address, as recorded in his service record (Annexure R-1 at page 16 to the affidavit in opposition). I do not find any substance in the submissions on behalf of the petitioner-bank that the address of "Karbalamore, P.O. & Dist. Hooghly" was the last known address of the respondent No.3 because two addresses namely the present address and permanent address were disclosed by the petitioner in one and same service record.

12. In the above facts and circumstances of this case, learned Tribunal was not in error in holding that it was not a case of desertion that takes us to the provision of Clause-XVIII of the clarification to the provision of Fifth Bipartite Settlement (at page 40 to the affidavit in opposition) which are quoted below:

XVIII. Voluntary Cessation of Service

Clause-17 of the Settlement will apply only in cases of desertion i.e. where there is absence from duty without from the employee but the absence is unauthorised otherwise, the bank should taken action in terms of disciplinary procedure laid down in previous Settlements and not in terms of Clause- 17 of the 5th Bipartite Settlement 30 days in response to the first notice served on him after 90 days or 150 days absence, he can be given notice only after 90 days of absence as given in Clause-17.

13. In view of the above provision, the learned Tribunal correctly held that the petitioner-bank was in error in not initiating appropriate disciplinary proceeding against the petitioner.

14. From the above discussions, it is clear enough that the impugned award was not passed out of any sympathy. Rather, the same was backed by reasons. I have no hesitation to uphold those reasons.

15. The decisions referred by the learned Counsels are also distinguishable.

16. The decision of Syndicate Bank (sttpa) relates to a case of service of a valid notice upon the delinquent employee unlike this case.

17. The decision of Punjab & Sind Bank (supra) relates to a case where delinquent employee failed to offer any explanation upon receipt of the notice.

In our case, the respondent No.3 did not receive the notice dated April 3, 1998, for the reasons discussed hereinabove.

18. The decision of Kerala Solvent Extraction Limited (supra) relates to a case of granting relief to the delinquent employee out of sympathy. In our case, it has already been held hereinabove that the impugned award was not passed out of any sympathy.

19. With the above observations and discussions, this writ petition fails and the same stands dismissed.

20. There will be, however, no order as to costs.

Later

A prayer is made by the learned Counsel appearing for the petitioner bank to stay of operation of the impugned judgement. I do not think that there is any scope for staying the operation of this judgement because this is a case of dismissal of the writ petitioner. Therefore, the prayer is rejected.

Urgent xerox certified copy of this order, if applied for, be given to the parties within a week from date.

Sd/- D. Kar Gupta, J

21. Aforesaid writ application was moved assailing the award dated 13th August, 2002 passed by Central Government Industrial Tribunal at Calcutta in reference No.37 of 1999 wherein learned Tribunal below directed the appellant bank to reinstate the respondent employee in service and to pay compensation in lieu of back wages. Learned Trial Judge did not interfere with the award.

22. The respondent is a Group "D" staff of the appellant bank suffered a decision of voluntary cessation of employment on application of clause 17 of the Memorandum of Settlement dated 10th April, 1989 entered into in between the management of 54A+ Banks as represented by Indian Banks' Association and their workmen as represented by All India Bank Employees Association and the National Confederation of Bank Employees. The settlement is popularly called as 5th Bipartite Settlement. Relevant portion of clause 17 of the said settlement read such:

17. Voluntary Cessation of Employment by the Employees.- The earlier provisions relating to the voluntary cessation of employment by the employee in the earlier settlement shall stand substituted by the following :-a) When an employee

absents himself from work for a period of 90 or more consecutive days, without submitting any application leave or for its extension or without any leave to his credit or beyond the period of leave sanctioned originally/subsequently or when there is a satisfactory evidence that he has taken up employment in India or when the management is reasonably satisfied that he has no intention of joining duties, the management may at any time thereafter give a notice to the employee at his last known address calling upon him to report for duty within 30 days of the date of the notice, stating inter alia the grounds for coming to the conclusion that the employee has no intention of joining duties and furnishing necessary evidence, where available. Unless the employee reports for duty within 30 days of the notice or given an explanation for his absence within the said period of 30 days satisfying the management that he has not taken up another employment or avocation and that he has no intention of not joining duties, the employee will be deemed to have voluntarily retired from the bank's service on the expiry of the said notice. In the event of the employee submitting a satisfactory reply, he shall be permitted to report for duty thereafter within 30 days from the date of the expiry of the aforesaid notice without prejudice to the bank's right to take any action under the law or rules of service.

23. Learned Tribunal below and the learned Trial Judge came to a finding that notice was not duly served due to reason that once said notice under clause 17 as was posted at the present address of district Hooghly within the State of West Bengal was returned by postal authority with endorsement "not found", the appellant bank ought to have served another notice under clause 17 informing the respondent workman to join the duty failing which voluntary cessation clause would be applicable, by serving through postal department to the permanent address as recorded in the bank's record within District Rohtash, Sasaram. Learned Trial Judge accordingly held that no notice was served under clause 17. It is an admitted fact that two addresses were recorded in the Bank's address book, one of District-Hooghly within State of West Bengal and another within District Rohtash, Sasaram. The address of district Hooghly was recorded as present address whereas address of Rohtash, Sasaram was recorded as permanent address. It is an admitted position that wife of respondent workman on 3rd April, 1998 submitted a stamped Inland letter which was not posted containing the address of Chief Officer, Uco Bank, SS & SB Department, Dena Bank Building, 16A, Brabourn Road, Kolkata-700 001 without any sender's name and address therein, save and except in the letter portion at the top mentioning of a word "Manthiya" with date 3rd April, 1998. This letter was written in Hindi, the translated copy as filed before us read such:

Manthiya

3.4.98

"To

The Chief Officer,

Respected Sir,

Since the day I left office, distressing situations surrounded me as if it would swallow me. My wife was ill and she underwent medical treatment. After that my jaundice aggravated, due to which I had become very upset. Anyhow I got rid of but my mental situation is not good.

Yours, Sd/- JAGLAL RAM

Hence I pray to you with folded hands that please save me anyway.

24. It is an admitted position that though there was no leave application when the workman left office, but on 28th April, 1998 the said letter from wife was received by hand. Hence, the appellant bank got knowledge about the reason for which the workman was absenting himself for the period 14th March, 1998 to 3rd April, 1998. It is true that despite filing of said letter by the wife by hand in the office of the appellant bank which was duly received on 28th April, 1998, the workman did not resume duty till 16th November, 1998 when his name was struck off from master roll after expiry of notice period in terms of clause 17 aforesaid.

25. Considering service of notice as good service, decision was taken to strike off the name of workman from the master roll after expiry of the said notice period. Learned Tribunal addressed the issue by considering the material evidence on record i.e. the deposition of the witnesses and held that notice was not duly served under clause 17. Learned Trial Judge considered the issue in another angle that there was no scope even to proceed under clause 17, in view of clarification of 5th Bipartite Settlement dated 10th April, 1989, by Indian Bank Association clarifying different clauses including the clause 17 aforesaid under Clause XVIII of the said clarification letter. It is clarified that clause 17 could be resorted to when there is absence from duty without any intimation, but if there is an intimation, absence is unauthorised otherwise and bank may take action in terms of disciplinary procedure laid down in the previous settlement and not in terms of clause 17 of 5th Bipartite Settlement. The said clause XVIII of the clarification letter read such:

XVIII. Voluntary Cessation of Service.-

(1) Clause-17 of the Settlement will apply only in cases of desertion i.e. where there is absence from duty without any intimation. If there is an intimation from the employee but the absence is unauthorised otherwise, the bank should take action in terms of disciplinary procedure laid down in previous Settlements and not in terms of clause-17 of the Fifth Bipartite Settlement.

26. Having regard to the positive findings by the learned Tribunal below who is the adjudicatory body to deal with facts and when from records, it appears that there were two addresses recorded one permanent and another present, in service record kept by bank, we are of the view that there was no illegality committed for judicial review of the decision of learned Tribunal below and of the

learned Trial Judge. As two addresses were recorded in the bank's address book and when the bank had knowledge from the letter dated 3rd April, 1998 about absence from present address as quoted above, bank had the duty to serve notice under clause 17 in the permanent address also and on that basis the appellant Bank could have proceeded with decision making process under clause 17.

27. Clause 19.16 of bipartite settlement dated 19th October, 1966 was modified providing a provision of "deeming clause" to consider service by registered post with acknowledgement due at the last recorded address as good service. Still then the appellant bank cannot support its decision. Modification of clause 19.16 as pleaded by the appellant bank in the writ application at pages 17 & 18 of the paper book read such:

Clause 19.16 of the First Bipartite Settlement dated 19th October, 1966 was as follows:

19.16 Any notice, order, chargesheet, communication or intimation which is meant for an individual employee, shall be in a language understood by the employee concerned. In the case of an absent employee, notice shall be sent to him by registered post with acknowledgement due. If an employee refuses to accept any notice, order, chargesheet, written communication or written intimation in connection with disciplinary proceedings when it is sought to be served upon him, such refusal shall be deemed to be a good service upon him, provided such refusal takes place in the presence of at least two persons including the person who goes to effect service upon him. Where such notice, order, chargesheet, communication or intimation is sent by registered post with acknowledgement due, the same shall, at the discretion of the officers of the bank concerned, be deemed to have been duly served upon the employee, if the same has been refused by the employee.

4. In partial modification of clause 19, 16 of the First Bipartite Settlement dated 19th October, 1966 and corresponding provision in any award or Settlement of any bank, where any notice, order, charge-sheet, intimation or any other official communication which is meant for an individual employee is sent to him by registered post acknowledgement due at the last recorded address communicated in writing by the employee and acknowledged by the bank, the same is to be deemed as good service.

28. It is admitted position from paragraph 22 of the writ application that the notices dated 8th July, 1990 and dated 13th October, 1998 being Annexure "P-V and "P-2" of the writ application posted in the present address of workman which came back with endorsement namely " not found re-directed to the sender" and "not found" respectively. This noting will not be considered as a presumption for good service as pleaded in paragraphs 22 and 23 of the writ application due to the reason that those were not served to permanent address when admittedly bank had knowledge that workman left his present address. Paragraphs 22 and

23 thereof read such:

22. Your petitioner states and submits that the respondent No.1 failed to appreciate that the notices dated 8th July, 1998 and 13th October, 1998 being Annexure "P-1" and "P-2" hereof respectively were sent on the correct address of the respondent No.3 as last recorded with the petitioner bank and the said notices were received back with the postal endorsement "Not found redirected to the sender" and "not known" respectively and as such a clear presumption arose in favour of the petitioner bank and against the respondent No.3 in respect of services of the said notices.

23. Your petitioner states and submits that the respondent No.1 failed to appreciate that the notices dated 8th July, 1998 and 13th October, 1998 being Annexure "P-1" and "P-2" hereof respectively were sent on the correct address of the respondent No.3 as last recorded with the petitioner bank by registered post with acknowledgement due and as such the same god services in terms of clause IXV(4) of the 4th Bipartite Settlement as extracted in paragraph 4 hereinbefore this petition.

29. It is vehemently urged by the learned Advocate for the appellant that clarificatory note of Indian Bank Association has no binding effect upon the appellant to follow the disciplinary proceeding. Since the clarification was circulated by the Deputy General Manager (Personnel). Uco Bank, Head Office, Personnel Department, Kolkata to all branches/officers in Indian Union by circular No. CHO:PAS:13:89 dated 12th September, 1989 requesting all the branches/offices to follow the said guidelines, the same has a binding effect upon the officers of the appellant. The letter of UCO Bank dated 12th September, 1989 as circulated by Deputy General Manager (Personnel) being Bank circular"s, read such:

UCO BANK HEAD OFFICE PERSONNEL DEPARTMENT 12, OLD COURT HOUSE STREET Calcutta-700 001

CRN 1196/89 Dated: 12.9.89

Circular No.CHO: PAS: 13:89

To

All branches/ offices in Indian Union

Sub: Clarification on the provisions of 5th Bipartite Settlement dated 10th April, 1989

We forward herewith for your guidance a set of clarifications/explanations related to the 5th Bipartite Settlement received from Indian Banks" Association. This contains replies to the various queries on the implementation of the 5th Bipartite Settlement.

All branches/offices are requested to be guided accordingly and in case of any

doubt, they may seek guidance/clarification from their respective zonal offices in the matter.

Sd/- Deputy General Manager Personnel

30. Having regard to the clarificatory note of the Indian Bank Association who was party to the settlement, appellant bank cannot refuse to follow the said guideline.

31. It appears from clause XVIII, clarified by the said Indian Bank Association that disciplinary proceeding would follow where absence from duty is unauthorised but there was any intimation of the employee otherwise. It appears that there was an intimation from the workman respondent being the letter dated 3rd April, 1998 where he prayed to save his family from distress situation due to his suffering from jaundice. It is true that there was no formal leave application with medical certificate as a proof of the same. Even if we assume that the factual matrix of absence unauthorisedly would attract clause 17 of the said bipartite settlement, still then as there was no valid and proper notice the purpose of which was to make the workman aware about the drastic step of striking out his name from the roll would be the consequence failing to resume duty, being a serious consequence, bank ought to have been fair and reasonable in its action, to follow the procedures thereof strictly by serving notice to the addresses recorded in the bank's address book.

32. The appellant bank is a Central Government undertaking and it is an authority under Article 12 of the Constitution of India hence the Bank must act as a model employer and it cannot act unfairly, unreasonably and arbitrarily. Clause 17 of the said bipartite settlement requires a positive conclusion that the concerned employee has no intention to resume duty, to take a decision under the deeming clause thereof to this effect that the employee voluntarily retired from the Bank's service on expiry of the notice period. The concept of model employer and its action in litigation, discussed in the judgement passed in the case Urban Improvement Trust, Bikaner Vs. Mohan Lal, wherein a judgement of three Judges Bench passed in the case Bhag Singh and Others Vs. Union Territory of Chandigarh through the land acquisition collector, Chandigarh, was relied upon. Paragraph 3 of report of Bhag Sing (supra) read such:

.....3. State Government must do what is fair and just to the citizen and should not and as far as possible except in cases where tax or revenue is received or recover without protest or when the State Government would otherwise be irrevocably be prejudice, take up a technical plight to divide the legitimate and just claim of the citizen.

33. The central point of adjudication to declare that an employee ceased service voluntarily, is the satisfaction of the bank authority that the employee has no intention to join. To know intention of joining duty which is sine qua non to pass a decision of voluntarily cessation of employment, mandates proper information to the employee concern bringing his notice about serious civil consequences of

deeming clause regarding cessation of service. The notice as sent to the present address admittedly came back with postal endorsement "not known", hence the concern workman got no intimation that failing to join within 30 days from the date of notice he would face fatal consequence of voluntary cessation of service, a grave civil consequence under the service jurisprudence. When somebody may suffer a civil consequence due to action of an authority under Article 12 of the Constitution of India, natural justice must be followed. This point has been considered in depth by the Apex Court in the cases *State of Maharashtra Vs. Public Concern for Governance Trust and Others*, , a Constitutional Bench judgement, and in an election dispute under the Representation of Peoples Act in the case *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, The same view reiterated by the Apex Court in the case *S.L. Kapoor Vs. Jagmohan and Others*, a judgement of three Judges Bench, where *Mahinder Singh Gill* (supra) was relied upon.

34. Right to work though not fundamental right but once person is appointed to any post/office, be it Government or private, the right has to be dealt with as per public element, is the view expressed in the case *Air India Statutory Corporation vs. United Labour Union & Anr.* reported in AIR 1997 SC 045. This view was expressed by dealing with the issue of workman's mean to development and source to earn livelihood. In this case also right of workman to post to be dealt with accordingly. Articles 14 and 21 will squarely be applicable in the instant case where a workman has suffered consequence of voluntary cessation of employment under the deeming clause on the plea of his failing to resume duty after the notice period as served being a notice under clause 17. Unauthorised absence is otherwise misconduct under the model standing order of the workman applicable to the appellant Bank. Without resorting to full fledged disciplinary proceeding on the charge of unauthorised absence from duty which requires a decision following the principle of natural justice namely framing of charge, opportunity of hearing, service of enquiry report and thereafter final order of the disciplinary authority and when such procedure could be bypassed taking resort to clause 17 of voluntary cessation of employment which is a settlement under the Industrial Dispute Act, naturally it requires to be followed strictly in letter and spirit, so that a reasonable positive satisfaction could be reached by the employer that the workman has no intention to resume duty. The foundational ground of satisfaction requires satisfaction of proper and valid intimation to the concern workman/employee. In the instant case no intimation was at all received by the workman as the notice came back as was sent to the present address, recorded in the bank's register with postal endorsement "not known". The higher degree of satisfaction on compliance of provision of clause 17 should be there on principle of fair and reasonable action, when employer without initiation of any disciplinary proceeding wants to declare a workman voluntarily retired under the deeming clause of Clause 17.

35. As already discussed bank is a model employer whose action to be tested and pass through the constitutional mandate of Articles 14 & 21 of the

Constitution of India. The workman has been deprived of livelihood without fair procedure in terms of Article 21 of Constitution of India despite his intimation about distress condition of family and his suffering from jaundice, by sending a letter which was duly received by the Bank authority. As a model employer bank authority ought to have resorted the steps of disciplinary proceeding by sending charge memo of unauthorised absence, in the permanent address recorded in the bank's register. In the instant case admittedly it has not been done, and accordingly, it has caused constitutional breach of Articles 14 and 21 both.

36. Having regard to such situation and the findings above we are not finding any merit to interfere with the award passed by the learned Tribunal below about reinstatement in service, as confirmed by the learned Trial Judge in the writ application moved by the appellant bank unsuccessfully.

37. Regarding direction to pay Rs. 30,000/- as compensation in lieu of back wages now to be dealt with. There is no finding by the learned Tribunal that the workman during said period of absence was not gainfully employed. No witness deposed to that effect and there is no material submitted in the form of written statement before the learned Tribunal below claiming back wages by the workman.

38. Once there is an order of reinstatement back wage is automatic, was the earlier view of the Court of Law, which now has suffered a sea change in view of different judgements passed by the Apex Court in that angle. Reliance is placed to the judgement passed in the case Novartis India Ltd. Vs. State of West Bengal and Others, In this case, the Apex Court dealt with the issue by applying the principle that burden of proof on factual matrix that workman remained unemployed, lies to him, by shifting onus to proof, as prevailed earlier, on application of section 106 of Evidence Act. In Ashok Kumar Sharma Vs. Oberoi Flight Services, , even if dismissal was wrongful and reinstatement order was passed, but back wages was not granted, save and except compensation of some amount. In the case Senior Superintendent Telegraph (Traffic) Bhopal Vs. Santosh Kumar Seal and Others, , the Apex Court held back wages is not automatic even if there is illegal order of termination but payment of compensation of certain amount would be sufficient. Paragraphs 9 and 11 of the said report read such:

9. In the last few years it has been consistently held by this Court that relief by way of reinstatement with back wages is not automatic even if termination of an employee is found to be illegal or is in contravention of the prescribed procedure and that monetary compensation in lieu of reinstatement and back wages in cases of such nature may be appropriate. 11. In view of the aforesaid legal position and the fact that the workmen were engaged as daily wages about 25 years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice. In our considered view, the compensation of Rs. 40,000/- to each of the workmen(respondent Nos. 1 to 14)

shall meet the ends of justice. We order accordingly. Such payment shall be made within 6 weeks from today, failing which the same shall carry interest at the rate of 9% per annum.

39. We are not unmindful of the fact that there is slight departure of said view as discussed above, in the case Harjinder Singh Vs. Punjab State Warehousing Corporation, , wherein the Court held that back wage issue to be considered in a different angle. The relevant portion of the said report namely paragraphs 30 and 31 read such:

30. Of late, there has been a visible shift in the Court's approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalisation and liberalisation are fast becoming the *raison d'être* of the judicial process and an impression has been created that the Constitutional Courts are no longer sympathetic towards the plight of industrial and unorganised workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman/employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The Courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood. 31. It need no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the Courts must be compatible with the Constitutional philosophy of which the directive principles of State policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer-public or private.

40. In this case, said view cannot be applied, as it is the case of unauthorised absence resulting a decision of cessation of service by the bank and unauthorised absence was for a longer period and only due to fault of serving notice properly the applicability of clause 17 has been denied by us. As workman did not lead evidence that he was not gainfully employed during that period, we are of reasoned opinion that in the instant case back wage is not an automatic outcome. There is no whisper that the concerned workman was not gainfully employed otherwise during this long period from the year 1998 till the date of order of reinstatement in service. Hence, the award on compensation in lieu of back wages passed by Tribunal and confirmed by learned Trial Judge was justified. It is made clear that from the date when the order of reinstatement

passed by learned Tribunal, the workman respondent will be entitled to have full wages and that amount must be paid by the bank within two months from this date. The workman will be paid only compensation amounting to Rs. 30,000/- which to be paid by two months from this date by the appellant bank, which in our view is sufficient to compensate the injury sustained by workman.

With the aforesaid findings and observation the appeal stand dismissed.

However, there will be no order as to costs.

Later:

Stay as prayed for stand rejected.

H. Tandon, J.

41. I agree.