

REPORTABLE

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ WRIT PETITION (C) NO. 2263 OF 2001

% Date of Decision : 9th July, 2008.

HARISH CHANDRA DHUPAR Petitioner
Through Mr. Bharat Bhushan, Mr. Harish
Sharma & Mr. B.K. Saini, Advocates.

Versus

UOI & ORS. Respondents
Through Mr. R.S. Mathur, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be
allowed to see the judgment?

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported
in the Digest ? YES

SANJIV KHANNA, J:

1. The petitioner, Mr. Harish Chandra Dhupar was an employee of Punjab National Bank. The respondent-Bank had introduced PNB Employees' Voluntary Retirement Scheme, 2000, which was a non statutory scheme. Under Clause 6 of the said Scheme, an employee seeking voluntary retirement was entitled to ex gratia amount

specified therein. Under Clause 7, an employee seeking voluntary retirement was also eligible for benefits specified therein, in addition to the ex gratia payment. Clause 7(2) provided as under:-

“ii) a) Pension (including commuted value of pension) as per PNB (Employees’) Pension Regulations 1995.

OR

b) Bank’s contribution towards PF as per existing rules. ”

2. It is admitted case of the parties that the petitioner was a pension optee and was covered by PNB (Employees’) Pension Regulations- 1995. The relevant portion of the Pension Regulations has been filed by the petitioner. Regulation 28 of the Pension Regulations deals with superannuation pension and Clause 29 deals with pension on voluntary retirement. Regulation 28 of the Pension Regulations relating to superannuation will obviously not apply to the petitioner as he had not retired on attaining age of superannuation. Clause 29, which deals with pension on voluntary retirement, states that the said provision will apply to an employee, who on or after 1st day of November, 1993 has completed 20 years of qualifying service and gives notice of not less than three months in writing to the appointing authority to voluntarily retire from service. Sub-Clause 5 of Clause 29 stipulates that an employee retiring voluntarily under this Regulation shall be entitled to an addition of a period not exceeding five years to the qualifying service subject to the condition that the

service rendered by such employee shall not exceed 33 years.

Regulation 28 and relevant portion of Regulation 29 read as under:-

“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 Regulations or Settlements.

29. Pension on Voluntary Retirement

1) On or after the 1st day of November, 1993, at any time after an employee has completed twenty years of qualifying service he may, by giving notice of not less than three months in writing to the appointing authority retire from service;

x x x x x x

5) The qualifying service of an employee retiring voluntarily under this regulation shall be increased by a period not exceeding five years, subject to the condition that the total qualifying service rendered by such employee shall not in any case exceed thirty three years and it does not take him beyond the date of superannuation.”

3. The question which arises for consideration is whether Regulation 28 or 29 will apply to the case of the petitioner in terms of Clause 7 of the PNB Employees' Voluntary Retirement Scheme, 2000. It is the case of the respondent-Bank that Regulation 28 will apply, whereas the case of the petitioner is that Regulation 29 is applicable.

4. It may be relevant to state that the parties should have been ad idem on the date when the agreement to voluntarily retire was

entered into, to have a legally enforceable contract under the Contract Act, 1872.

5. Regulation 28 deals with superannuation pension, which is granted to an employee when he retires on attaining age of superannuation as specified in service regulations. The said Regulation is not applicable to the petitioner. Regulation 29 deals with pension on voluntary retirement. There is merit in the contention of the petitioner that under Clause 7(2) of PNB Employees' Retirement Scheme, 2000 when reference was made to Pension Regulations and entitlement of the petitioner to get pension, reference was made to Regulation 29 and not to Regulation 28. The effect thereof was that the petitioner will be entitled to pension under the Pension Regulations as payable in case of voluntary retirement i.e. Regulation 29. Accordingly, the petitioner will be entitled to benefit of addition of five years to his qualifying service for the purpose of calculation of pension payable to him.

6. The respondent-Bank was the author of the contractual scheme called, Voluntary Retirement Scheme, 2000. The respondent-bank if it wanted should have clarified in Clause 7 that pension which would be payable would be in terms of Regulation 28 and on satisfaction of the conditions specified therein and not in terms of Regulation 29. In case there is any doubt or ambiguity, the question should be decided in favour of the petitioner, the employee. *Rule of Contra Preferentum*

states that in law every man's grant shall be taken by construction of flaw most forcibly against him. (See, Chitty on Contracts, page 620 (12-081), Vol. 1, 28th Edn.)

6. In ***John Lee & Son (Grantham) Ltd versus Railway Executive*** reported in (1949) 2 All ER 581, it was observed as under :-

“We are presented with two alternative readings of this document and the reading which one should adopt is to be determined, among other things, by a consideration of the fact that the defendants put forward the document. They have put forward a clause which is by no means free from obscurity and have contended.... That it has a remarkably, if not an extravagantly, wide scope, and I think that the rule *contra preferentem* should be applied.”

7. The justification for the said rule is that “ a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not.” (See, ***Tam Wing Chuen versus Bank of Credit Commerce Hong Kong Ltd.*** Reported in (1996) 2 BCLC 69).

8. The Supreme Court has also applied the said doctrine in the case of ***United India Insurance Co. Ltd versus Pushpalaya Printers*** reported in (2004) 3 SCC 694.

9. It may be relevant to state here that the petitioner had submitted the application dated 31st October, 2000 for voluntary retirement on 2nd November, 2000. The application was processed and was accepted on 16th December, 2000, unconditionally and irrevocably. The petitioner was also discharged/retired from service on the same date. A concluded and a binding contract came into existence on the said date. The stand taken by the respondent bank is that after 16th December, 2000, Pension-Regulation 28 was amended and proviso to Regulation 28 was introduced under which pension was payable on pro rata basis. In other words, employees who adopted for voluntary retirement, were not entitled to benefit of Regulation 29 but would be entitled to pension in terms of Regulation 28 and that too on pro rata basis. This amendment was with retrospective effect from 1st September, 2000.

10. Rules and Regulations normally have prospective effect. Rules and Regulations cannot be amended with retrospective effect unless power to the same effect is conferred by express words or by necessary implication by an enactment. In absence, a subordinate legislation or a mere administrative instruction cannot have retrospective effect to take away or defeat a vested right and modify a concluded contract. The concluded contract dated 16th December, 2000 by which the petitioner and the respondent-Bank had ended the employer and employee relationship, cannot be altered and modified

unless there is clear statutory mandate under which such right and power is conferred. The respondent-Bank has failed to show any such power to retrospectively amend the Pension Regulations. (Refer ***Bejgam Veeranna Venkata Narsimloo vs. State of Andhra Pradesh*** reported in AIR 1998 SC 542).

11. Almost a similar controversy had come up for consideration before the Supreme Court in the case of ***Bank of India and Others versus O.P. Swarankar and Others***, reported in JT 2002 (10) SC 436 , wherein in paragraph 68 of the judgment it was held as under:-

“67. Furthermore, a large number of employees have withdrawn their offer only when a proviso is sought to be added to regulation 28 aforementioned. In terms of the scheme the employees, who expected to get benefits of clause 4 of regulation 29 would be deprived therefrom. It is not in this dispute that the qualifying period for pension qualifying for receiving pension was 20 years. Only upon completion of 20 years, in terms of the statutory regulation contained in regulation 29, an employee could opt for voluntary retirement and in terms thereof, he would be entitled to the benefits specified therein. The said regulations had specifically been mentioned for the purpose of computation which would include invocation of sub-regulation 4 of regulation 29 providing for relaxation of 5 years towards the qualifying period. The employees must have proceeded on the basis that despite the fact they have merely rendered 15 years of service which was not a qualifying service under the regulations, they would be entitled to the pensionary benefits in terms of the scheme. By introducing the proviso to regulation 28,

pension was sought to be made pro rata in place of full pension.

68. The basic concept of the scheme, therefore, underwent a change which also goes to show that the banks had sought to invoke its power of amending the scheme. Once the scheme is amended and/or an apprehension is created in the mind of the employees that they would not even receive the entire benefits as envisaged under the scheme, they were entitled to revoke their offers. Their action in our considered opinion is reasonable. It may be that some of the employees only opted for the provident fund benefit which did not undergo any amendment but the same would not change the attitude on the part of the banks.

69. We, therefore, do not find any error in the judgment of the High Court on this score.”

12. The Supreme Court in the aforesaid case also dealt with the question of estoppel. The said question had arisen in the context that the optees had withdrawn their applications but had accepted payment of ex gratia benefits. It was held that the employees, who have accepted ex gratia payment or any other benefit under the Scheme, cannot resile therefrom and claim that they had withdrawn their applications seeking voluntary retirement.

13. Doctrine of Estoppel is based on equity. In such cases, the Court is required to ascertain whether in particular circumstances, it would be unconscionable for a party to deny that which, knowingly or unknowingly, he had allowed or encouraged a third party to assume to his detriment. (Ref. **Jai Narain Parasrampuriah versus Pushpa Devi Saraf** reported in (2006) 7 SCC 756). In **O.P. Swarankar**

(supra), the Supreme Court referred to the right of waiver and a party's right to waive advantage of law or rules for the benefit and protection of the individual in his private capacity. The Supreme Court referred to the principle of approbate and reprobate and estoppel by acceptance of benefits whereunder a person who has accepted benefits is not permitted to assume inconsistent positions. In the said case, as stated above, the optees had withdrawn their applications for voluntary retirement and claimed that they were still in service but had accepted ex gratia payments or other benefits under the scheme. They had therefore taken up inconsistent and contradictory pleas. Principle of Estoppel by accepting benefits under the contract was therefore applied and it was held that such applicants were barred from raising the plea that no concluded contract had come into existence as they had accepted benefits under the said contract itself.

14. I have quoted paragraph 67 of the Judgment in the case of **O P Swarankar** (supra) above. The said paragraph indicates that Regulation 28 was amended after 16th December, 2000 and effect thereof was that all applicants were fully aware and conscious of the fact that they will be governed by Regulation 28 and they would not be entitled to benefit of 5 years relaxation towards qualifying service as provided in Regulation 29. There was no dispute and parties in the case of **O P Swarankar** (supra) were ad idem in their understanding that under the voluntary retirement scheme the optees would be

entitled to benefit under Regulation 28 on fulfilling the conditions mentioned therein and not under Regulation 29. Thus Doctrine of Estoppel by acceptance of benefits was applied as the optees had accepted benefit fully conscious of the fact that Regulation 28 applied, yet the optees accepted benefits. The factual position in the present case is different. The petitioner herein never withdrew his request or offer for voluntary retirement. The same was accepted on 16th December, 2000 when a binding contract came into existence. As on that date, i.e. 16th December, 2000 the petitioner had no grievance. The claim of the petitioner rightly is that a concluded contract came into existence on the said date and he is entitled to payment as per the terms of the said concluded contract. Any subsequent amendments made in the Pension Regulations after 16th December, 2000 are not relevant in this case as these have been made after the concluded contract had come into existence. It is well settled that a concluded contract cannot be modified and amended unilaterally by a party and requires mutual consent of both the parties. The Supreme Court in the case of ***DDA versus Joint Action Committee Allottees of SFS Flats*** reported in (2008)2 SCC 672, has held that a concluded contract cannot be novated unilaterally and any change to a concluded contract has to be brought to the knowledge of the other party and his acceptance to the same has to be taken. In the absence of the same, any new condition would not

be demed to be part of the contract and the other party cannot be forced to be bound by contractual obligations that he had not agreed to.

15. I may also note here that in ***O.P. Swarankar*** (supra) the Supreme Court had also observed that the pension scheme/regulations were non-statutory in nature. The case made out by the respondent-Bank herein is that on 19th December, 2000 a fresh circular was issued to all the officers informing the employees that there was some doubt with regard to the eligibility of pension under the pension regulations for optees under the Voluntary Retirement Scheme, 2000. It was stated that clarification had been received from Government of India and accordingly in such cases only pro rata pension shall be payable and the Bank was advised to make amendment to Regulation 28. It is further stated that steps for amendment to Regulation 28 were being taken. Paragraph 5 of the said letter indicates that the officer in charge of the individual branches was to ensure that the retirement benefits were disbursed in accordance with the amended Regulation 28. It was also stated in the letter that pending the amendment to the Regulation 28 the retirement benefits could be granted on the basis of Punjab National Bank Employees Voluntary Retirement Scheme 2000 (PNBEVRS 2000). It is accordingly stated in the letter that all employees seeking voluntary retirement should be informed that they

were eligible for pension as per Regulation 28 and accordingly their case would be processed under the said Regulation. The said Circular dated 19th December 2000, could not have affected Voluntary Retirement request that had been accepted prior to the issue of the abovementioned letter as a concluded contract between the Bank and the petitioner seeking voluntary retirement under the un-amended Regulations had already come into existence by that time. Principle of “Estoppel” and “waiver” as propounded by the respondent-Bank will not apply to the facts of the present case. Firstly, the petitioner never withdrew his application for voluntary retirement and secondly, the petitioner claims payment of his dues under the Scheme itself before its amendment by letter/Circular dated 19th December, 2000. It is the claim of the petitioner that he is entitled to substantially higher amount than what has been already paid to him. The payment received by him is admittedly due to him. Thirdly, the petitioner had no occasion to accept or reject payment made by the respondent-Bank on basis of the amended terms mentioned in the letter/Circular dated 19th December, 2000, as a concluded contract had come into existence on 16th December, 2000.

16. It has been submitted by the petitioner herein that the application for voluntary retirement was sent by him keeping mind the pensionary benefits that would have accrued to him prior to the amendments in Regulations governing pensionary benefits vide

letter/Circular dated 19th December, 2000. The application for voluntary retirement of the petitioner was accepted on 16th December 2000, thus, at that point of time a concluded binding contract had come into being between the respondent-Bank and the petitioner, ending the employer and employee relationship. Any change in pensionary benefits to the detriment of the petitioner unilaterally would be contrary to law and equity. Reference in this regard can be made to the decision of the Supreme Court in the case of ***Chairman Railway Board versus C.R Rangadhamaiah*** reported in (1997) 6 SCC 623. In the said case the retrospective changes in the pensionary benefits of railway staff was challenged. The Supreme Court held that the pension admissible to the employees would be one that was allowed at the time of retirement. In the instant case it would be the time, when the application of voluntary retirement was made (or at least the date of acceptance). Amendments made after acceptance cannot be forced upon the petitioner.

17. It is pertinent to quote here paragraph 4 of the letter dated 16th December 2000 by which the petitioner was informed that his request for voluntary retirement was accepted and he was relieved from being an employee of the Bank from the afternoon of the said date. The said paragraph reads as under:

“4. As provided in para 10.15 of the Scheme titled as PNBEVRS- 2000, the exgratia payable to you in form of cash as well as in the

form of bond, will be paid within 45 days from today. Further, the bonds which would be issued towards 50% of ex-gratia in cash, will bear stipulated interest from today. Your other terminal dues will also be settled in terms of the existing rules of the bank”

18. A plain reading of the above portion of the letter issued by the bank dated 16th December, 2000 makes it amply clear that the retirement benefits that were to accrue to the petitioner were in accordance with rules existing at that point in time on 16th December, 2000. The language is beyond any ambiguity and after having issued the said letter, the respondent-Bank cannot be permitted to change the conditions of the contract unilaterally, behind the back of the and to the detriment of the petitioner. The petitioner would be governed by the terms of the letter dated 16th December, 2000 and the latter circular dated 19th December, 2000 shall not be applicable on the petitioner and hence, the pension shall be payable to him in accordance with Regulation 29 dealing with Voluntary Retirement cases.

19. The petition has been decided on the basis of contentions raised and argued before me. Pleading in the Petition was for a somewhat different relief but prerogative writs can be issued in an appropriate manner without fetters of procedural technicalities. It is for a writ court to issue any appropriate writ to an aggrieved party, and a writ petition should not fail because the

petitioner had applied for a wrong kind of writ. (***T.C. Basappa versus T. Nagappa*** reported in (1955) 1 SCR 250).

20. In view of the findings given above and the legal propositions discussed herein, the present Writ is partly allowed. It is held that Regulation 29 will apply. Arrears shall be paid to the petitioner by the respondent-Bank within two months with interest @ 8% p.a. from the date due till payment. In case payment is not made within two months, the respondent-Bank will be liable to pay interest @ 10% p.a. after two months. However, in the facts and circumstances of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

JULY 09, 2008
VKR/P