

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C)7834/2003 & CM No.13124/2003 (u/S 151 for stay), CM No.15128/2008 & CM No.1529-1530/2009.

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Date of decision: 26th February, 2010

PUNJAB NATIONAL BANK

..... Petitioner

Through: Mr. Rajat Arora, Advocate.

Versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. U.P. Singh, R-2/workman in person.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The challenge in this writ petition is to the award dated 27th August, 2003 of the Central Government Industrial Tribunal-cum-Labour Court. The facts which are not in dispute are that the respondent workman was appointed permanently in the service of the petitioner Bank at its Branch Office Barabanki (U.P.) on 20th June, 1977, thereafter he was transferred to Branch Office Zaidpur, Barabanki and then to Shahjanhanpur in August, 1978. On 14th June, 1982 the Branch Manager of the Shahjanhanpur Bank suspended the respondent from services of the Bank; on 30th July, 1982 the respondent was charge sheeted and in September, 1982 departmental inquiry ordered. The said inquiry found the respondent guilty of all the charges and vide order dated 28th September, 1983 of the Disciplinary Authority of the

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petitioner/Bank, the punishment of stoppage of two graded increments with cumulative effect was imposed on the respondent workman. It was further ordered that the respondent will not be paid anything except subsistence allowance already drawn as per rules during the period of suspension. The said order dated 28th September, 1983 further provided as under:-

“You are accordingly advised to report for further duties to the Manager, Branch Office Bhagwantnagar, Unnao immediately. You will be deemed to have been reinstated in the bank’s service from the date you report for the duty at Branch Office Bhagwantnagar, Unnao.”

2. The respondent in spite of service of the aforesaid order dated 28th September, 1983 did not join duties at Bhagwantnagar, Unnao Branch of the petitioner Bank, though he claims to have made representations there against.

3. It is the case of the petitioner Bank that upon the failure of the respondent to join the duties, a letter dated 12th May, 1984 was sent to the respondent at his permanent and last known address by Registered AD and under certificate of posting, advising him to join the duty. Upon the failure of the respondent to report for duty without any cogent reasons, show cause notice dated 18th August, 1984 proposing punishment of warning under minor misconduct is also stated to have been published in the newspaper on 24th August, 1984; that on continued default of the respondent in joining the employment and the respondent having not submitted any application for leave and having absented himself for a period of 90 or more consecutive days beyond any leave, in accordance with the clause in the Bipartite Agreement between the petitioner Bank and its workmen, notice of 30 days was given to the respondent on 5th October, 1984 and also by publication in the

newspapers on 8th October, 1984 that unless he join the duties, he will be deemed to have voluntarily retired from the Bank's services on the expiry of the said period. Upon the respondent having failed to respond to the said notice also, vide order dated 5th December, 1984, the respondent was deemed to have voluntarily retired from the services of the Bank in accordance with Clause XVII of the Fourth Bipartite Settlement dated 17th September, 1984. The petitioner Bank paid the subsistence allowance as being paid to the respondent till the said date i.e. 5th December, 1984 and thereafter stopped payment thereof also.

4. The respondent after maintaining a quietus for six years thereafter, on 28th August, 1990 raised a dispute before the Assistant Labour Commissioner and ultimately on 15th November, 1991 the following reference was made.

“Whether the action of the Management of Punjab National Bank in treating Shri U.P. Singh, Clerk/Cashier as deemed to have retired voluntarily w.e.f. 5.12.1984 is justified? If not, to what relief is the workman entitled to?”

5. The Labour Court has vide award challenged in this petition, held the action of the petitioner Bank of treating the respondent voluntarily retired to be bad and ordered his reinstatement in service with full back wages w.e.f. 28th September, 1983, along with interest at 9% p.a. thereon and all consequential benefits.

6. The reasoning given in the award can be succinctly stated as under-

a. That the respondent had been continuously filing applications/letters with different authorities for his reinstatement and thus the industrial dispute raised by him after six years could not be said to be barred by laches. It was further observed that

there was no period of limitation prescribed for raising dispute and making a reference under Section 10 of the I.D. Act.

- b. That the order of transfer of the respondent could not legally be passed by the Disciplinary Authority while passing punishment order in a quasi judicial proceeding and the transfer order was thus punitive and bad.
- c. That there was no reason for keeping the respondent under suspension even after termination of disciplinary proceedings and till he joins his duties at the transferred place.
- d. The respondent was not given any joining time nor lawfully reinstated in service and the Bank by payment of subsistence allowance till 5th December, 1984 treated the respondent to be under suspension till then.
- e. That during suspension the terms of contract of employment remain suspended; hence, until the suspension was revoked and he was reinstated in the service, neither the Bank was bound to pay him any amount of wages or travelling allowance to go to resume his duties nor he was entitled to get it from the Bank. Therefore, without revocation of suspension and order of reinstatement in service, the respondent was not legally bound to obey the direction of joining service at the transferred place.
- f. That though till 1st October, 1983 both Shahjahanpur and Bhagwant Nagar Unnao were under one Regional Office but thereafter fell in different region and the 30 days notice under Clause XVII of the Bipartite Agreement and the final order deeming the respondent as voluntarily retired from service passed

by Regional Manager of the Branch where the respondent had not joined were bad.

- g. That there was no case for applying Clause XVII of the Bipartite Agreement inasmuch as the respondent was under suspension till then.

7. The counsel for the petitioner/bank has contended that:-

- (i) The reference to the Labour Court was with respect to the action of retirement of the respondent w.e.f. 5th December, 1984 only and the Labour Court has travelled beyond the reference in awarding the relief of reinstatement with full back wages w.e.f. 28th September, 1983 i.e. the date of punishment of the respondent. Reliance is placed on judgments holding that the award beyond reference is liable to be quashed.
- (ii) That the dispute had been raised by the respondent belatedly and should not have been entertained by the Labour Court. Reliance is placed on judgments in this regard.
- (iii) The action of the bank of deeming the respondent to have voluntarily retired from the employment is valid as per the bipartite settlement and which settlement has been upheld by the Courts. Reliance is placed on the judgment of the Supreme Court in *Punjab & Sind Bank Vs. Sakattar Singh* 2001 LAB I.C. 301.
- (iv) That the relief of reinstatement with full back wages is not an automatic relief and the Labour court ought to have at best, even if finding in favour of the respondent granted only monetary compensation.

- (v) That the respondent who has since enrolled as an advocate has been harassing the petitioner / bank as would also be evident from some of the orders in the present case and ought not be permitted to take undue advantage of the situation.

8. The respondent, who as aforesaid had enrolled himself as an advocate, has argued his own case and relied upon the detailed counter affidavit filed by him to the writ petition. However, the crux of his submission is that he was under suspension and from the payment of subsistence allowance by the petitioner / bank till 5th December, 1984, also it is evident that the petitioner / bank also treated him as under suspension till then; that during the suspension he could neither have been transferred nor could he have been treated as absent and the clause of the bipartite agreement of deeming an employee to have voluntarily retired from the employment could not have been invoked against him. On enquiry he states that he registered as an advocate in the year 1984 but explains that he has been handling only the cases of other employees of the bank. He further contends that the petitioner / bank has till date not complied with the orders dated 29th April, 2009 and 2nd December, 2009 in these proceedings directing it to produce the relevant records containing the decision of the petitioner/ bank to sever the relationship with the bank.

9. This Court, after hearing, did not feel the need to await the production of any records by the petitioner/bank and as such the hearing was concluded and the order reserved.

10. The reference to the Labour Court was only qua the justification of the action of the petitioner/bank of deeming the respondent to have voluntarily retired in terms of the bipartite agreement. It is not in dispute that in accordance with the bipartite agreement, upon the employee

absenting from work for a period of 90 or more consecutive days without submitting any application for leave, the petitioner/bank is entitled to after a 30 days notice conclude that the employee has no intention of joining the duties and the employee is deemed to have voluntarily retired from the bank's service on the expiry of the notice of 30 days. The Labour Court has not held the said bipartite agreement to be bad or not applicable to the respondent (save on ground of being under suspension) or the procedure prescribed therein to have been not followed. However, the Labour Court because of the preceding events held the petitioner/bank not entitled to invoke the provisions in the bipartite agreement for such voluntary retirement. The Labour Court has held that the respondent, at the time when the bank applied the aforesaid procedure, was under suspension and had not been reinstated.

11. I may notice that what was referred to the Labour Court was only the justification of voluntary retirement and not of transfer or whether the suspension of the respondent had come to an end or not. However, instead of proceeding on the said technicalities, I have wondered whether the findings of the Labour Court that notwithstanding the communication dated 28th September, 1983 of the Disciplinary Authority to the respondent advising the respondent to report for duty to the transferred place of work and the failure of the respondent to so report for duty, it can be said that the suspension of the respondent continued. It is significant that the respondent did not challenge or raise any dispute with respect to the order dated 28th September, 1983 of the Disciplinary Authority. The said order has become final. Similarly, the respondent did not challenge before any fora the order of his transfer. That has also attained finality. Thus the decision hinges on the merits of what the respondent has argued i.e. that he remained under suspension having not joined the duties and during such suspension could not be deemed to have voluntarily retired.

12. The aforesaid stand of the respondent leads me to also wonder whether the respondent could be permitted to create a situation whereby he remains under suspension in perpetuity and whether the contention of the respondent that during suspension the procedure of deemed voluntary retirement could not be invoked. The consequence of the stand of the respondent would lead to a highly inequitable result. Even if the contention of the respondent that the Disciplinary Authority could not have transferred him or that he could not have been asked to rejoin at a transferred place were to be correct in law, the respondent if aggrieved therefrom ought to have challenged the same rather than allow the same to attain finality. However, it appears that the respondent who must have been pursuing a law course by then, was not interested in joining the duty with the bank and thus was happy to remain under suspension and to thereby contend that the provisions of deemed voluntary retirement also could not be invoked against him.

13. The Labour Court has relied on *Hotel Imperial Vs. Hotel Workers Union* AIR 1959 SC 1342 to hold that during suspension, the contract of employment is suspended and consequently held the rules of the Bank including the bipartite agreement containing the provision for deemed voluntary retirement not applicable to respondent. This proposition rather forms the backbone of the award and the arguments of the respondent. I do not find the said proposition to be correct and in my view, the award is liable to be quashed on this ground alone.

14. A five judge bench of the Supreme Court in *Khem Chand Vs. Union of India* AIR 1963 SC 687, though not noticing the earlier judgment of the three judge bench in the *Hotel Imperial* (supra) case nevertheless held that the real effect of the order of suspension is that though the employee continued to be a member of the government service he was not permitted to work and further that during the period of

his suspension he was paid only the subsistence allowance instead of the pay and allowances he would be have been entitled to if he had not been suspended. It was further held that there is no basis for thinking that because of the order of suspension the employee ceases to be a member of the service. A six judge bench of the Supreme Court in ***V.P. Gidroniya Vs. The State of Madhya Pradesh*** AIR 1970 SC 1494, though noticing the earlier judgment in the case of ***Hotel Imperial*** but not noticing the aforesaid judgment of the five judge bench in ***Khem Chand*** (supra) held that the employer is regarded as issuing an order to the employee of suspension and which the employee must obey because the contract is subsisting. When an employee is suspended in this sense, it means that the employer merely issues a direction to him that he should not do the service required of him during a particular period. In other words, the employer is regarded as issuing an order to the employee which because the contract is subsisting, the employee must obey.

15. I find that the Supreme Court in ***Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd.*** AIR 1999 SC 1416 has held:

“To place an employee under suspension is an unqualified right of the employer. This right is conceded to the employer in service jurisprudence everywhere. It has even received statutory recognition under service rules framed by various authorities.....Even under the General Clauses Act, this right is conceded to the employer by Section 16 which, inter alia, provides that power to appoint includes power to suspend or dismiss.

The order of suspension does not put an end to an employee's service and he continues to be a member of the service though he is not permitted to work and is paid only Subsistence Allowance which is less than his salary”.

16. Again, in *Ram Lakhan Vs. Presiding Officer* 84(2000) DLT 147 (SC) and 2001 (3) SCC 161, it was reiterated that during the period of pendency of the management's application, for permission to dismiss the workmen, before the Tribunal the relationship of master and servant between the parties subsists and it does not cease. The Supreme Court held that "while it is open to the employer to receive work from the employees or not and the option not to receive any work may be exercised by the former by placing the employees under suspension, it has to pay the wages to the workmen at the usual rate or subsistence allowance at reduced rate." The Supreme Court also held that the judgment in *Hotel Imperial* case does not lay down any different proposition and held the same as an authority only for the proposition of the right of management to place an employee under suspension and as not laying down severance of contract of employment during suspension.

17. It will thus be seen that the judgment in *Hotel Imperial* case as interpreted in the award under challenge, is not the authority on this proposition of law. The premise in the award that during the suspension period, the contract of service cannot be enforced in wrong, though, I must record that (i) a Single Judge of this Court in *B.C.S. Balinga Vs. National Housing Bank* MANU/DE/0257/1999 has interpreted the judgment in *V.P. Gindroniya* (supra) as laying down that suspension has the effect of temporarily suspending the relationship of master and servant; and (ii) another Single Judge in *Preetam Singh Vs. Food Corporation of India* 25(1984) DLT 435, relying on the judgment in *Hotel Imperial* (supra) also held to that effect. However, the said judgments of Single Judges of this Court are not in consonance with the judgments aforesaid of the Supreme Court. The Division Bench of this Court in *Ex.-Major Gautam Sanyal Vs. Union of India* MANU/DE/9036/2006 has also held that suspension of an employee in fact and in law does not put an end to the contract of service of a person;

it continues to be a contract of service for all purpose and intents and such person continues to be under the contract and supervision of the authorities; there is no suspension of contract of service.

18. I also find that the Division Bench of the Patna High Court in ***Jahagir Khan Vs. The State of Bihar*** MANU/BH/0411/1998 has held that suspension has not been construed to be a punishment; rather it is only a temporary deprivation of office or privilege. The grade, rank and designation etc. of the delinquent employee remains the same and simply his powers, functions, privileges etc. during the period of suspension remain in abeyance, which is known as "temporary deprivation of discharging his functions in the office" though during this period as well the delinquent employee has to attend his office. It was further held that the delinquent government servant remains a government servant in office even after suspension and can be transferred during the period of suspension.

19. I also find that near similar facts as in the present case, existed in the case before a Single Judge of the Allahabad High Court in ***Deen Dayal Shukla Vs. State of U.P.*** MANU/UP/1623/2004; it was held that since the order of transfer had not been challenged and was permitted to attain finality, it could not be subsequently challenged.

20. I respectfully concur with the aforesaid views. In the present case, also the respondent is found to be taking advantage of the situation. The power of judicial review requires this Court to ensure fair treatment in a matter and to ensure that the Tribunals, whose orders are subject to judicial review of this Court, reach a conclusion which is correct in the eyes of law. The conclusion reached by the Labour Court in the present case is found to be perverse and contrary to the position in law and this Court would be failing in its duty if the matter is not set right.

21. The contention of the respondent that the terms and conditions of employment as contained in the bipartite agreement are not enforceable during the period of suspension is therefore not found to be correct. The petitioner was within its right to call upon the respondent to join back duty at a transferred place and the period of suspension of the petitioner also is deemed to have come to an end upon being asked to join back duty. The continued payment of subsistence allowance to the respondent thereafter and / or the reference by some other employees of the bank in some other correspondence / documents to the respondent as under suspension or as a suspended employee is immaterial. The Supreme Court in *DTC Vs. Sardar Singh* AIR 2004 SC 4161 held that merely marking the employee as on leave without pay in the attendance register cannot prevent the DTC from taking action against the said employee under its standing order, for absenteeism without obtaining leave in advance.

22. Upon the failure of the respondent to so join duty, the provisions of the bipartite agreement could be invoked by the petitioner/bank. It is also not the case of the respondent that he reported for joining duties at any other place of work or the place of work where he was posted at the time of suspension. It is also not in dispute that the job of the respondent was transferrable; in fact it is borne out that the respondent in the past also had been transferred. There is also prima facie nothing to show that the transfer was by way of victimization or that the same was actuated by mala fide intentions or was to the prejudice of the respondent. Considering that the charge against the respondent leading to his suspension was of misbehaviour at the branch at which he was posted, no fault can be found with the Disciplinary Authority also transferring the respondent.

23. Since the respondent during the suspension is found to have continued to remain an employee and further since the terms and conditions of employment continued to apply and the transfer is found to be valid, the reasoning of the Labour Court of the powers of voluntary retirement having not been exercised by appropriate authority of the petitioner/bank cannot also be sustained.

24. I may also notice that in *Metropolitan Transport Corporation Vs. V. Venkatesan* (2009) 9 SCC 601 the workman was held to be gainfully employed while he was pursuing the legal profession, as the respondent / workman in this case is. The back wages were not awarded to the workman holding that income earned by the workman from the legal profession has to be treated as income from gainful employment. The award in the present case on this aspect is also thus liable to be set aside.

25. The petition, therefore, succeeds. The award dated 27th August, 2003 of the Labour Court finding, the action of the petitioner/bank of deeming the respondent to have been voluntary retired, to be not justified is quashed; consequently, the award in so far as granting the relief of reinstatement in service with full back wages and consequential benefits is also quashed.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

February 26th, 2010
pp/gsr