IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1073 of 2014
IN
Civil Writ Jurisdiction Case No. 13202 of 2007

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Shiv Kumar Chhattry, Son of Late Lok Bahadur Chettery, Resident of Mohalla Hansada Road, Gandhi Nagar, Sounali Chowk, Police Station Gulabbagh, District-Purnia.

.... Appellant/s

Versus

1. The Chief General Manager, State Bank of India Local Head Office, West Gandhi Maidan, Patna.
2. The Assistant General Manager, State Bank of India, Region-1, Zonal Office, Purnia.
3. The Chief Manager (Personnel and Human Resources Development), State Bank of India, Zonal Office, Purnia.
4. The Branch Manager, State Bank of India Branch Amour (Code- 8358), District-Purnia.

.... Respondent/s

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Appearance :
For the Appellant/s : Mr. Aditya Narayan Singh, Adv.
Mr. Kundan Kumar Sinha, Adv.
For the Respondent/s : Mr. Kaushlendra Kumar Sinha, Adv.

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CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)
Date: 13-11-2017

Heard learned counsel for the parties.

2. Being aggrieved by the order dated 07.04.2014 passed by a learned Single Judge of this Court in CWJC No.13202 of 2007, the writ petitioner has preferred the present Letters Patent Appeal.

3. Learned counsel representing the writ petitioner-appellant has placed before us the facts emerging out from the pleadings exchanged by the parties before the writ Court which are

briefly stated hereinafter.

Case of the petitioner-appellant

4. Petitioner came to be appointed on the post of Messenger in the State Bank of India by virtue of compassionate appointment occasioned due to death of his father who had served in Indian Army (Gorkha Regiment) and after retirement from the services of the Indian Army, he was working as permanent guard in the State Bank of India under Zonal Office, Purnea. Father of the petitioner died in the year 1998 and thereafter petitioner was given appointment as Messenger under the Zonal Office of State Bank of India, Purnea and was posted at Amour Branch in the district of Purnea.

5. It is the case of the petitioner that while serving at Amour Branch he developed some chest problem in the month of December, 2000 and when the same became intolerable he went to consult a doctor and on pathological test, his disease was diagnosed to be Tuberculosis (TB). On being declared fit, he submitted his joining on 28.04.2001 and started performing his duties as Messenger. Again he developed certain other problem in March, 2004, consulted a doctor at Viratnagar on 10.03.2004, who after some pathological examination, diagnosed certain serious problems in his chest and stomach. According to petitioner, he still somehow managed to attend

his duty as Messenger till 30.07.2004 and thereafter was compelled to be hospitalized in Virat Nagar Nursing Home at Virat Nagar in Nepal. After sometime, he came to his village home in Nepal as he was prevented from doing any kind of physical work for one year. Petitioner has enclosed Annexure-5 and 5/A in support of his contention, these two documents are in the nature of a medical prescription normally written by a doctor and then a certificate saying that petitioner was under his treatment from 31.07.2004 to 04.04.2007 and was treated for infective hepatitis. These two documents are the sheet-anchor of the pleading of the petitioner and the same shall be discussed hereinbelow at appropriate stage.

6. Further case of the petitioner is that on 05.02.2007, the Branch Manager of the respondent Bank sent third notice to the petitioner asking him to explain the reason of his absence for such a long time otherwise the Bank will be at liberty to take any suitable action against him. A copy of the third notice dated 05.02.2007 has been annexed as Annexure-6 to the writ application. Petitioner claims that he went to the Bank on 22.02.2007 and requested the Branch Manager to accept his joining as Messenger but was refused. It is his case that again on 05.03.2007 he requested the Branch Manager to accept his joining, but the respondent Bank did not allow him to join the Bank. Petitioner has further claimed that he had no knowledge of

any earlier notice like Annexure-6, but the petitioner understood that the respondent Bank had earlier sent two notices prior to Annexure-6 to the petitioner but because the petitioner had been in Viratnagar from 30.07.2004 to 05.02.2007 he had no knowledge of the same.

7. Petitioner assailed the order dated 02.03.2007, which is Annexure-1 to the writ application, issued by the appointing authority i.e. the Assistant General Manager of the State Bank of India to the petitioner, which is quoted hereunder for easy reference:-

" FINAL NOTICE ***No.288***

(Registered AD Post)

MEMORANDUM

To	*From*
Shri Shiv Kumar Chhetri	*Asstt. General Manager*
S/O Late Lok Bahadur Cheetri	*State Bank of India,*
At-Hausda Road, Gulabbagh	*Region-I, Zonal Office,*
District-Purnea	*Purnea*
	Date:02.03.2007

UNAUTHORIZED ABSENCE FROM DUTY

We advise that you are absenting from duty unauthorizedly since 31.07.2004. In this connection, please refer to the memorandum No.21/108 dated 05.02.2007 sent to you on your last recorded address by Registered AD post calling upon you to report for duty within 30 days of that notice.

2. Now that you have failed to report for duty it is deemed that you have voluntarily retired from service on 31.07.2004. you hereby called upon to pay to the Banks within 15 days of the date of this notice, one month's pay and allowances in lieu of notice failing which the Bank will be constrained to file a suit for recovery of the same without prejudice to its right to set off terminal dues and any required to pay to the Bank.

ASSTT. GENERAL MANAGER
(APPOINTING AUTHORITY)"

8. Before the learned Single Judge, the petitioner filed a supplementary affidavit with which he brought on record a letter dated 27.10.2007 said to have been written by Branch Manager of the respondent Bank calling upon him to join within one month from the date of issuance of the letter. He submits that, pursuant to the said letter, which is Annexure-8 to the supplementary affidavit, when he went to join in the branch office on 19.11.2007, the respondent Branch Manager did not accept his joining. Submission is that the impugned order, which is Annexure-1 to the writ application, seems to be inoperative in view of the letter dated 27.10.2007 (Annexure-8) because the respondent Bank had itself called upon the petitioner to submit his joining and, therefore, there was no plausible reason for the Branch Manager to refuse acceptance of joining of the petitioner.

Case of the respondent-Bank

9. A counter affidavit was filed on behalf of the respondent Bank and its authorities being respondent nos.1 to 4 in the writ application. The counter affidavit discloses completely the number of occasions when the petitioner-appellant went on unauthorized absence which will place in the category of a habitual absentee. According to the respondents, immediately after joining service the petitioner started remaining absent from his duty regularly without any prior information to the Bank. Vide Annexure-A/1 to the counter affidavit, the Bank for the first time served a notice/letter dated 8.9.2000 asking the petitioner to report on duty within three days from the receipt of the letter and to explain the reasons for his absence from duty. The petitioner resumed his duty on 24.09.2000, but he again became absent from 03.10.2000 to 18.04.2001 i.e. for 198 days without taking leave or giving prior information to the Bank. As the petitioner came to the Branch for resumption of his duty after such a long time, the Branch sent the leave chart of the petitioner to the higher authorities and sought approval for allowing resumption of duty by the petitioner after such a long period of absence. The Bank's letter with leave chart is Annexure-A/2 to the counter affidavit.

10. It is the specific submission of the respondent Bank that in order to support his case for his long and continued

unauthorized absence from the Bank's duty the petitioner was submitting medical certificate which were not to the satisfaction of the Bank. The petitioner sought his transfer from Mansi Branch to Amour Branch which was accepted and he was transferred from Mansi Branch to Amour Branch with effect from 18.06.2003. Even at the Amour Branch, the petitioner did not change his habit and started remaining absent from his duty. Hence, Amour Branch of the State Bank of India vide its letter dated 27.09.2003 asked him to explain the reasons as to why he remained absent from his duty in the said Branch from 25.08.2003 to 30.08.2003 and from 04.09.2003 to 20.09.2003 without any information to the Bank. The said letter was served upon the petitioner on 27.09.2003, but despite personal service he did not submit any explanation to the Bank. A copy of the Bank's letter dated 27.09.2003 has been annexed as Annexure-A/4 to the counter affidavit. Petitioner resumed his duty after 27th September, 2003, but he again became absent from duty since 7th October, 2003. The Bank vide its memorandum served a notice dated 11th November, 2003 for unauthorized absence of the petitioner and asked him to report for duty within three days and to explain the reasons for his absence. The unauthorized and habitual absence of the petitioner from his duty was also reported by Amour Branch to the higher authorities vide letter dated 14.01.2004, which is Annexure-A/6 to the counter affidavit.

11. It is the further stand of the respondent Bank that despite the Bank's letter dated 11th November, 2003 calling upon the petitioner to report for his duty, the petitioner neither made his presence in the Bank since 07.10.2003 nor submitted his explanation for his unauthorized absence, thereafter the Bank sent another letter dated 16th March, 2004 which is in the nature of second notice upon him to report for his duty within thirty days of the said notice failing which he shall be deemed to have voluntarily retired from his service on expiry of the period stipulated in the notice. A true copy of the Bank's letter dated 16th March, 2004 is annexed as AnnexureA/7 to the counter affidavit. Thereafter, the petitioner did not report for his duty till 18.07.2004, but on 19.07.2004 he submitted two applications before the Bank separately. He sought post facto sanction of leave for his unauthorized absence from his duty and also admitted his absence from the Bank since 07.10.2003 to 31.05.2004. He sought leave from the Bank for resuming his duty in the Bank, but thereafter nothing was heard from the petitioner and he continued to remain absent, the Bank sent last letter/notice dated 05.02.2007 asking him to explain the reasons for his unauthorized absence from duty since 31.07.2004, failing which it shall be open for the Bank to take any appropriate action against him. The petitioner did not make any response to the Bank's letter dated 05.02.2007, which ultimately led to issuance of the

letter dated 2nd March, 2007 informing him inter alia that since he had failed to report his duty, it is deemed that he has voluntarily retired from his service as he has been absenting from duty unauthorizedly since 31.07.2004. The respondent Bank has also filed another affidavit in which it has been categorically stated that once the letter dated 2nd March, 2007 had already been issued by the Assistant General Manager who happened to be the appointing authority, the Branch Manager had no authority to issue notice to the petitioner for joining his duty. The respondent Bank justified the letter dated 2nd March, 2007 (Annexure-1 to the writ application) stating that the petitioner will be deemed to have voluntarily retired from service as per existing Leave Rules based on Fifth Bipartite Settlement.

Finding of the writ Court

12. In the aforementioned background of the facts and pleadings on the record, the learned Single Judge, as a matter of fact, found that the petitioner had made a false statement in paragraph 11 of the writ application that he did not have any knowledge of any earlier notice as mentioned in the letter dated 05.02.2007. In fact, the petitioner himself had stated in his letter dated 19.07.2004 addressed to the Branch Manager, State Bank of India that he absented himself from the Branch from 07.10.2003 to 31.05.2004 without any intimation to the Bank and in his representation, he referred to memo

dated 16.03.2004 which was sent to him in form of a second notice due to his unauthorized absence from duty. The learned Single Judge found that the petitioner had withheld the second notice dated 16.03.2004 at the time of filing of the writ application and concealed the material fact as also made false statement that he had no prior knowledge of the other two notices. The learned Single Judge further rejected the contention of the petitioner that the letter dated 27.10.2007 issued by the Branch Manager of Amour Branch after issuance of the impugned order by the appointing authority would take away the effect of the impugned order dated 02.03.2007 or will be deemed to have superseded the order issued by a senior officer to whom the said Branch Manager was only a subordinate officer.

13. The learned Single Judge also rejected the contention of the petitioner that if the petitioner has been declared to have voluntarily retired because of his absence from duty since 31.07.2004, then the notice issued prior to 31.07.2004 should not have been counted for the purpose of invoking Clause 2.7 of the Fifth Bipartite Settlement. Taking note of the habitual nature of absence from duty by the petitioner, the learned Single Judge held that the petitioner does not deserve any consideration by the Court in exercise of prerogative writ jurisdiction under Article 226 of the Constitution of India and in the facts and circumstances of the case the writ application was

dismissed.

Submission of the appellant

14. Sri Aditya Narayan Singh, learned counsel representing the appellant has submitted before us that no doubt deemed voluntary retirement has been envisaged under the Leave Rules of the Bank, but before effecting the voluntary retirement under Clause 4.15(B)(ii), the authorities concerned were obliged to serve at least three notices giving 30 days each to the petitioner to join his duties. According to him, in the present case, since three notices were not served upon the petitioner, deemed voluntary retirement caused by letter dated 02.03.2007 (Annexure-1 to the writ application) would be bad in law and the same is liable to be set aside. Learned counsel further submits that the voluntary retirement of the petitioner is also in violation of the Fifth Bipartite Settlement. He, however, admits that the deemed voluntary retirement as envisaged under the Leave Rules is not a punishment under the Service Rules of the Bank and hence no disciplinary proceeding would be required to be conducted where a deemed voluntary retirement takes place in accordance with Leave Rules. Learned counsel also relies upon a judgment of the Hon'ble Supreme Court in the case of **Krushnakant B. Parmar Vs. Union of India & Anr. reported in (2012) 3 SCC 178**. He relies upon paragraph 16 of the said judgment in support of his contention that

unless it is held that unauthorized absence from duty is willful, the voluntary retirement as envisaged under the Leave Rules cannot be effected.

Submissions of the respondents

15. On the other hand, Mr. Kaushlendra Kumar Sinha, learned counsel representing the respondent Bank submits that the appellant was a habitual absentee and right from beginning he was absenting from his duties intermittently for a long time without any information to the employer. Learned counsel submits that, in the writ application, petitioner has stated that after leaving the hospital from Viratnagar he went to his native place where his mother resides. This is the place where Bank was sending the notices. Further the petitioner has not shown any courage to make a specific statement that he had not received earlier two notices, he has very cautiously used the word 'knowledge' in the writ application, but later on he has himself referred the memo number of the earlier letter regarding which the learned Single Judge correctly recorded in his order. He further submits that, in fact, the whole argument of the learned counsel representing the appellant that three notices would be required to be served upon the petitioner every time whenever the petitioner goes on unauthorized absence from duty is a completely misplaced submissions and the same is not envisaged under the Leave Rules of

the Bank. Referring to clause 4.15 (B) and (C) of the Leave Rules, learned counsel submits that, in fact, there is a distinction between deemed voluntary retirement as envisaged under sub-clause (B) (ii) and a case of voluntary vacation of the appointment as envisaged under sub-clause (C) (ii) of the Leave Rules. According to him, three notices are required to be issued where there is a case of voluntary vacation of the appointment. So far as deemed voluntary retirement is concerned, the relevant clause requires only one notice of thirty days which condition has been fulfilled in the present case and more than one notice have been issued and served upon the petitioner. Learned counsel has placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Aligarh Muslim University & Ors. Vs. Mansoor Ali Khan reported in (2000) 7 SCC 529** to submit that conduct of the employee in ignoring the employer's warning disentitled him to relief under Article 226 of the Constitution of India.

Consideration

16. We have considered the rival submissions at the bar and perused the records. The facts emerging out from the pleadings of the parties are clearly suggesting that right from beginning petitioner was taking his service very casually and on more than three occasions he had unauthorizedly absented himself for months and months together. The last unauthorized absence began from 31.07.2004 which

ultimately led to passing of the impugned order by the appointing authority of the appellant. The contention of the learned counsel representing the appellant that three notices of 30 days each would be required to be served upon an employee such as petitioner before taking action as envisaged under the Leave Rules for deemed voluntary retirement seems to be totally misplaced, impractical and an erroneous submission. We quote the relevant provisions of the Leave Rules 4.15 which is nothing but a reproduction of the provisions contained in the Fifth Bipartite Settlement effective from 01.11.1987:-

"Relevant provisions contained in the Fifth Bipartite Settlement effective from 01.11.1987 are as under:-

> *(A) When an employee absents himself from work for a period of 90 or more consecutive days:-*
>
> *i) Without submitting any application for leave or for its extension or without any leave to his credit; or*
>
> *ii) Beyond the period of leave sanctioned originally/subsequently; or*
>
> *iii) 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 Bank 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 interalia, the grounds for coming to the conclusion that the employee has no intention of 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 expiry of the aforesaid notice without prejudice to the Bank's right to take any action under the law or rules of service.

(B) i) When an employee goes abroad and absents himself for a period of 150 more consecutive days without submitting any application for leave or for its extension without any leave to his credit or beyond the period of leave sanctioned originally/subsequently; or

ii) When there is 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 time after giving a notice to the employees 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 gives an explanation for his absence within the said period of 30 days satisfying the management that he has not taken up another employment of a vocation 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 expiry of the aforesaid notice without prejudice to the Bank's right to take any action under the law or rules of service.

(C) i) If an employee again absents himself within a period of 30 days without submitting any application after reporting for duty in response to notice given after 90 days or 150 days absence, as the case may be, the second notice shall be given after 30 days of such absence giving him 30 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.

ii) The above procedure is not in suppression of the provisions laid down in the Sastry Award for taking disciplinary action against employees. As disciplinary action and voluntary retirement are mutually exclusive, a habitually irregular employee may be proceeded against as per the provisions of the Sastry Award. Thus, if an employee is absent without leave or overstays the sanctioned leave, without sufficient grounds, such action can be initiated against him even before the expiry of the period of 90 or 150 days, as indicated above."

17. A bare reading of the relevant provisions would show

that for purpose of deemed voluntary retirement only one notice of 30 days would be required, but for passing an order deeming that the employee has voluntarily vacated his appointment three notices would be required separately on the first absence, the second absence and the third absence from the duty. The effect of deeming that he has voluntarily vacated his appointment would be that his name shall be struck off from the establishment. In the present case, the action has been taken by issuing order deeming that the petitioner has voluntarily retired from the Bank's service. The Bank had sent notices to the petitioner thrice which is more than the requirement, but the petitioner did not turn up to join. Annexure-5 and 5/A which we have noticed above would not inspire confidence because not only a vague statement regarding health issues has been made in the writ application, but even enclosure as Annexure-5 is nothing but a medical prescription of doctor without there being any pathological report or certificate of hospital treatment for such continued long period. Annexure-5/A is a certificate of the doctor that the petitioner was under his treatment for infective hepatitis, but this certificate alone cannot be taken as a bona fide proof of the fact.

18. The reliance placed by learned counsel representing the appellant on paragraph 16 of the Hon'ble Supreme Court judgment in the case of **Krushnakant B. Parmar** (supra) is of no

assistance. Paragraph 16 of the said judgment reads as under:-

> *"In the case of the appellant referring to unauthorized absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behaviour was unbecoming of a government servant. The question whether "unauthorized absence from duty" amounts to failure of devotion to duty or behaviour unbecoming of a government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances."*

19. The said case was in respect of a departmental proceeding where the charge against the delinquent employee was that he had failed to maintain devotion to duty and his behaviour was unbecoming of a government servant because of his unauthorized absence from duty. In the facts of the said case, the question whether "unauthorized absence from duty" amounts to failure of devotion to duty or behaviour unbecoming of a government servant arose for consideration by the Hon'ble Supreme Court and the Hon'ble Supreme Court held that such a question cannot be decided without deciding the question whether absence is willful or because of compelling circumstances. In the present case, the deemed voluntary retirement caused to the appellant is not a punishment and the same has been passed only in accordance with the Leave Rules based on

Fifth Bipartite Settlement. No departmental proceeding would be required for acting in accordance with the Leave Rules because a deemed voluntary retirement has not been taken as a punishment under the Service Rules of the Bank.

20. The judgment cited on behalf of the respondent Bank in the case of **Aligarh Muslim University & Ors. (**supra) as the said matter went to Hon'ble Supreme Court when the Division Bench of the High Court set aside the orders of termination of services of the respondents in the said case for their alleged unauthorized absence. In paragraph 27, the Hon'ble Supreme Court held as under:-

> *"Our reasons for saying that the case of Mr. Mansoor Ali Khan falls within the exception can be stated as follows:*
>
> *Admittedly, leave was sanctioned only for 2 years from 18-4-1979. When before the expiry of the period, Mr. Mansoor Ali Khan applied on 18-4-1981 for extension of leave by 3 more years, the University wrote to him on 17-9-1981/23-9-1981 granting extension only for one year from 18-4-1981 and also stated that he was required to resume duties by 18-4-1982. It did not stop there. It further forewarned Mr. Khan as follows:*
>
> *"Please note that no further extension in the period of your leave will be possible and you are advised to make preparation for resuming duty positively by 18-4-1982."*
>
> *In other words, he was put on advance notice that it*

would not be possible to give any further extension i.e. beyond one year on the ground of continuance in the job at Libya and he was to resume duty by 18-4-1982. In fact, thereafter some special consideration was still shown in his favour by way of granting him joining time up to 1-7-1982. It was clearly said that otherwise he would be deemed to have vacated the post. If he had, in spite of this warning, gone ahead by accepting a further contract in Libya, it was, in our view, his own unilateral act in the teeth of the advance warning given. That conduct, the learned Single Judge thought and in our view rightly to be sufficient to deny relief under Article 226."

21. In the present case, the petitioner was committing default by way of unauthorized absence one after another, the last time he went unauthorizedly from 31.07.2004 and was absenting himself from duty, he was well aware of his own unauthorized act, still the Bank was sending notices to him on his recorded village address where his mother is residing and if the third notice dated 05.02.2007 was admittedly received by the appellant and reference of second notice is also found mentioned in his letter dated 19.07.2004 it can be safely held that there was a proper compliance with the requirement of one notice. There is no proof of fact that the appellant ever reported to join within prescribed period. In the opinion of this Court, the petitioner cannot be allowed to take a plea of non-

compliance with the requirement of notice embedded to the Leave Rules in terms of Fifth Bipartite Settlement. The learned Single Judge is correct in his view that the relief under Article 226 of the Constitution of India which is in the nature of an extra-ordinary remedy cannot be granted to the petitioner in the facts and circumstances of the case. We also agree with the submission of the Bank that the letter dated 27.10.2007 issued by the Branch Manager was non-est because much before that the appointing authority who is superior to the Branch Manager had already passed order dated 02.03.2007 (Annexure-1 to the writ application) and the same had taken effect. In our considered opinion, the impugned order passed by the learned Single Judge does not suffer from any illegality or infirmity which may warrant any interference by this Court.

22. The appeal has no merit. It is, accordingly, dismissed.

(Rajeev Ranjan Prasad, J)

Ajay Kumar Tripathi, J: I Agree.

(Ajay Kumar Tripathi, J)

Arvind/-

AFR/NAFR	AFR
CAV DATE	02.11.2017
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