

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Arindam Sinha
And
The Hon'ble Justice Suvra Ghosh

F.M.A. 692 of 2019
With
IA no. CAN 2 of 2020 (Old CAN 961 of 2020)
Calcutta State Transport Corporation & Ors.
Vs.
Sri Ashit Chakraborty & Ors.

For appellant : Mr. Amal Kr. Sen, Addl. Govt. Pleader
Mr. Sabyasachi Mondal, Adv.

For respondent no.1/
writ petitioner : Mr. Manas Kr. Ghosh, Adv.
Ms. Susmita Dey (Basu), Adv.

Heard on : 05.03.2021.

Judgment on : 05.03.2021.

Arindam Sinha, J.: CAN 961 of 2020 is application by respondent/writ petitioner carrying prayer for vacating interim order dated 25th June, 2019. Parties appear and agree to have the appeal itself heard on papers disclosed in this application as well as the disposed of stay application, available in the file. By consent all formalities are dispensed with and Mr. Ghosh, learned advocate appearing on behalf of respondent/writ petitioner waives notice of appeal.

Mr. Sen, learned advocate and Additional Government Pleader appears on behalf of appellant, a State owned Corporation. He submits, impugned order dated 17th August, 2018 is erroneous, on directions given in line with respondent/writ petitioner having exercised option to be covered by Calcutta State Transport Corporation Employees' (Death-cum-Retirement Benefit)

Regulations, 1990. There is finding of fact that the option was duly exercised. However, deductions were continued to be made from his salary and employer's share also deposited, to become the pension benefit on retirement. This carried on for 27 years till respondent retired. First Court erroneously found fault with appellants for not activating the option as exercised and to treat respondent as covered by the Regulations. That was the first fault. The second fault being continuation by appellants to deduct from respondent's salary.

Coordinate Bench took view, on disposing of the stay application, respondent/writ petitioner had waived statutory right, accrued to him pursuant to exercise of option. Following extract from its order dated 25th June, 2019 is reproduced below.

“Law is well-settled that a statutory right may be waived. Prima facie, it does appear that the respondent no.1-writ petitioner had waived his right to be guided by the pension regulations. It is not that a one time deduction was made from his monthly salary; the deduction continued for 27 long years after the option was exercised.

In view thereof, operation of the order under challenge shall remain stayed until disposal of the appeal.

The application for stay (CAN 8113 of 2018) stands disposed of.

We are informed that the application for stay contains copy of the writ petition and the report filed in the form of affidavit on behalf of the appellants-applicants before the learned Judge. In such view of the matter, we do not insist for preparation of formal paper book. The

application for stay shall be treated as the paper book for use in the appeal.”

Mr. Sen submits, there has been waiver. No question arises of omission, on the part of his client, to activate the option exercised. The facts are glaring. He draws attention to the Regulations. He relies on sub-regulations (2), (3) and (4) in regulation 2. Sub-regulation (2) says the Death-cum-Retirement Benefits (DCRB) are admissible to employees, who are on pay roll of the Corporation as on 1st April, 1984. Respondent is such an employee. The admissibility is upon option exercised by such employee, as provided by sub-regulation (3). Sub-regulation (4) makes the Regulations binding upon new entrants, on and after date of official notification of it.

Referring to the report in form of affidavit, filed by his client in the writ petition pursuant to order dated 2nd July, 2018, he relies on paragraphs 8, 9 and 12 for the facts. They are, respondent joined the Corporation on 6th July, 1981. Respondent exercised option in year 1991. Time for exercising option was finally extended till 4th June, 2002 and respondent in May, 2005 submitted nomination form under Employees’ Provident Fund and Employees’ Pension Scheme, 1995. Only after retirement respondent raised purported claim of being covered by the Regulations, on having had exercised option. This claim is frivolous as respondent had waived any right that may have accrued to him, on exercise of the option, by continuing to accept salary on deduction of his share of the contribution and ultimately paid out to him, aggregate of it and the Corporation’s share.

Mr. Sen relies on section 63 in Indian Contract Act, 1872 and judgments of Supreme Court.

- i) **Galada Power and Telecommunication Limited vs. United India Insurance Company Limited** reported

in **(2016) 14 SCC 161**, paragraphs 14, 16 to 18 on waiver.

- ii) **Sri Siddeshwara Cooperative Bank Limited vs. Ikbali** reported in **(2013) 10 SCC 83**, paragraph 19, also on waiver in context of rule 9(1) in Security Interest (Enforcement) Rules, 2002.
- iii) **State of Himachal Pradesh vs. Rajesh Chander Sood** reported in **(2016) 10 SCC 77**, paragraph 90, to meet anticipated argument, as might be made by respondents, on discrimination.

He submits, impugned order has remained stayed and on this final hearing, should be reversed.

Mr. Ghosh relies on regulation 64. It is reproduced below.

“General Provident Fund : The employees of the Corporation who will exercise their option for pension, under the pension Regulations, will be guided by the General Provident Fund Rules, as applicable to the employees of the Government of West Bengal.”

He submits, the Regulations made option available to his client. The option was duly exercised. The Corporation, on exercise of option, was bound by the Regulations to activate the option. The option not activated is omission on the part of the Corporation, unexplained. This omission was not detected by his client, who in good faith continued to accept his salary. It is only after his retirement he discovered that there was this omission and therefore the writ petition. He submits, impugned order should be confirmed in appeal.

We reproduce below regulation 2.

“2. Commencement

1. These Regulations shall come into force with retrospective effect from 1st April, 1984.

2. The Death-cum-Retirement Benefits are admissible to the employees who were on pay roll of the Corporation as on 1st April, 1984 and who are on pay roll and remain on the pay roll of the Corporation till the date of actual notification of these regulations in the official Gazette of the Government of West Bengal, in lieu of the benefits of the Contributory Provident Fund, as provided in the C.S.T.C. Employees' Contributory Provident Fund Regulations, including the benefits of gratuity under Gratuity rules of the State Government. The employees permitted to retire under Disablement Retirement Benefit Scheme of the Corporation will, however, not be entitled to any gratuity under these Regulations.

3. The Death-cum-Retirement Regulations shall be optional to the employees as provided in regulation 2(2).

4. These Regulations shall be binding upon the new entrants on and after the date of Official Notification."

Sub-regulation (3) makes it mandatory on part of the Corporation to provide its existing employees with right to avail option. On existing employees opting to leave said scheme of 1995 and have their DCRB regulated under the Regulations, it would then become applicable to them. Consequent on the exercise of option the Corporation was to apply the Regulations to the opting existing employees. The Corporation was the one who was to deal with its existing employees, those who had opted to be covered by the Regulations and those who did not. We find from the facts, clear omission on part of the Corporation to have activated the option in year 1991 or soon

thereafter or at least till immediately after last extended date for exercise of the option. The Corporation, at that time, could not have known that an existing employee, who had exercised his option, would thereafter waive a right or benefit accrued to him or her under the Regulations, for it to work on achieving the waiver. There was no instruction to that effect from respondent. There is no explanation for this omission. On the contrary waiver has been argued. In this context we are to see whether **Sri Siddheswari Co-op Bank Ltd.** (supra) is applicable to this case. In the decision, Supreme Court declared the law to be settled on the position that even if a provision is mandatory, it can always be waived by a party (or parties), for whose benefit such provision has been made. The provision considered was, inter alia, rule 9(1) in Security Interest (Enforcement) Rules, 2002. Rule 9(1) states that no sale of immovable property shall take place before expiry of 30 days from publication of the notice or the notice of sale served to the borrower. The provision was not complied with and the borrower got the sale set aside, for the question to travel to said Court. Waiver was found and held. Paragraph 16 is reproduced below.

“16. In response to the above allegations, the Bank relied upon the letter dated 13-11-2006 written by the borrower to the Bank giving his express consent that the auction made in favour of the auction-purchaser may be accepted and the sale certificate be issued to him.”

Supreme Court in **Galada Power and Telecommunication Limited** (supra) referred to its earlier decisions in discussing waiver. Paragraph 16 and 17 refers to **Krishna Bahadur vs. Purna Theatre** reported in **(2004) 8 SCC 229**. We reproduce the extract in the paragraph from the referred decision.

“10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.”

Also referred, amongst others, is **State of Punjab vs. Davinder Pal Singh Bhullar** reported in **(2011) 14 SCC 770**. Here too we reproduce referred paragraph 41, one of two extracted paragraphs from the referred decision.

“41. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide Dawsons Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha, Basheshar Nath v. CIT, Mademsetty Satyanarayana v. G. Yelloji Rao, Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh, Jaswantshing Mathurasingh vs. Ahemadabad Municipal Corpn, Sikkim Subba Associates vs. State of Sikkim and Krishna Bahadur v. Purna Theatre.)”

A condition is stipulated in **Krishna Bahadur** (supra) that the waiver can be by a party for whose benefit certain requirements or conditions had been provided for by a statute, on no public interest being involved therein.

In **State of Punjab vs. Davinder Pal Singh Bhullar** (supra) it was said that there can be no waiver unless the person, who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. In this context we reproduce text in said order dated 2nd July, 2018, whereby there was direction, in the writ petition, upon appellants to file report in the form of affidavit.

“The Managing Director, i.e., the respondent no.4, or any senior official duly nominated by him, is directed to file a report in the form of an affidavit in response to the allegations made in the writ petition, on the next date of hearing.”

The Regulations were published by authority in the Calcutta Gazette Extraordinary. It was in exercise of power conferred under section 45 in Road Transport Corporation Act, 1950. It regulates employees of the Corporation, it being undoubtedly an authority under article 12 in the Constitution of India. The regulated benefit on Death-cum-Retirement is mandatory from the date of effect but optional to existing employees as on that date. The Regulations required the Corporation to allow the option to its existing employees. It omitted to act upon the option exercised in this case. It is in public interest for the Corporation to have acted in a manner fair and reasonable.

We are minded to think that there is the probability of respondent having applied his mind at the time of exercising the option and not thereafter. Filling up the nomination form is likely to have been a mechanical act and the burden of abandonment of a known right should not be attached to such act. We appreciate position of respondent/writ petitioner that he accepted his salary in good faith as opposed to a continuous informed act of waiving whatever extra or better benefit he could

have had under the Regulations. That he exercised the option in year 1991 and the authority extended time for exercise of such option thereafter till 4th June, 2002 tells us that most existing employees were not even aware that they could exercise the option.

Respondent did not argue on discrimination. We are not required to deal with **State of H.P** (supra).

For reasons aforesaid, we confirm impugned order. The appeal is dismissed and CAN 961 of 2020 is disposed of accordingly.

Mr. Sen prays for stay of operation of our judgment dictated in Court. The prayer is considered and rejected.

(Arindam Sinha, J.)

(Suvra Ghosh, J.)