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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.11.2021

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THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P. No.8917 of 2010
and
W.M.P. No.787 of 2019

S.Mohan

... Petitioner

Vs.

1.The Indian Overseas Bank,
Rep. by its Chairman & Managing Director,
763, Anna Salai, Chennai-600 002.

2.The Deputy General Manager,
Industrial Relations Department,
Indian Overseas Bank,
Central Office, 763, Anna Salai,
Chennai-600 002.

3.The Chief Manager,
Indian Overseas Bank,
Egmore Branch,
Chennai-600 008.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the records relating to the proceedings of second respondent in his proceeding No.IRD/184/346/2008-2009 dated 23.01.2009 and quash the same and direct the first respondent Bank to include the petitioner in the Pension Scheme under Indian Overseas Bank (Employees) Pension Regulation 1995 dated 29.09.1995.

For Petitioner : Mr.Balan Haridas

For Respondents : Mr.N.G.R.Prasad



ORDER

The writ petition is filed challenging the impugned proceedings of the 2nd respondent in proceedings No.IRD/184/346/2008-2009 dated 23.01.2009, insofar as it rejects the petitioner's request to be included in the Pension Scheme dated 29.09.1995 in terms of the Indian Overseas Bank (Employees') Pension Regulations 1995 (herein after referred to as 'The Regulations').

2. Briefly, the facts that may be relevant are as under:

i) The petitioner was an employee of the 1st Respondent Bank. He had joined the 1st Respondent Bank on 25.01.1973 at its Central Office in Chennai and worked in its various branches.

ii) On 29.10.1993, a Memorandum of Settlement was reached between the management of about 58 Banks including the 1st respondent Bank and their workmen represented by various Unions of workmen in Banks for evolving a Pension Scheme in Banks for its employees.

iii) The said settlement provided for pension to the Bank Employees other than SBI as second retirement benefit to be given to workmen in lieu of Bank's share of contributory Provident Fund.

The relevant portions of the Regulations and the instructions are extracted hereunder:

"3. Application

These regulations shall apply to employees who,

1) (a) were in the service of the Bank on or after the 1st day of January, 1986 but had retired before the 1st day of November, 1993; and

(b) exercise an option in writing within one hundred and twenty days from the notified date to become member of the fund."

(c)....."

iv) Pursuant to the above Regulations, a Circular was issued by the respondent Bank clarifying various aspects relating to the Pension Regulations while also setting out the Operational Instructions, the relevant portion of the Operational Instructions is extracted below:

"1.....

2. In case of employees who have already opted for pension they should authorise the Trustees, Indian Overseas Bank Staff Provident Fund to transfer the Bank's Contribution of Provident fund together with interest accrued to Indian Overseas Bank (Employees') Pension Fund. The letter of authorisation should be



given to PAD(PENSION CELL) Central office within 60 days from the notified date as per specimen enclosed to the circular."

v) Importantly, Clause 22(4)(b) of the Regulations provides for Forfeiture of Service under certain circumstances including participation in a strike. The relevant portion is extracted below:

(4)(a).....

(4)(b) Nothing in clause (a) shall apply to interruption caused by resignation, dismissed or removal from service or for participation in a strike; provided that before making an entry in the service record of the Bank employee regarding forfeiture of past service because of his participation in strike, an opportunity of representation may be given to such bank employees.

vi) Further, Clause 22(4)(b) of the Regulations was removed vide a Circular dated 07.12.2000. The relevant amendment is extracted below:

"Amended

Regulation 22(4)(b)

Nothing in Clause (a) shall apply to interruption caused by resignation, dismissal or removal from service."

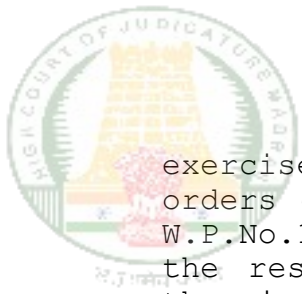
vii) Admittedly, the petitioner had not applied within the time prescribed under the original Regulations which mandated that the option may have to be exercised within 120 days from the notified date.

viii) Nor, had the petitioner chosen to opt / apply immediately after removal of the restriction contained in Clause 22(4)(b) vide Circular dated 07.12.2000.

ix) Importantly, on 30.08.2010 another option was extended to the employees of the Respondent Bank to shift from Provident Fund to Pension Scheme.

x) On 29.10.2010, the petitioner had submitted his option Form under the 2010 Scheme and has been drawing pension since 28.02.2011. However, the petitioner who availed of the option under the extended Scheme dated 30.08.2010 had to comply with the condition of paying 2.8 times of the petitioner's revised pay for the month of November 2007 towards initial funding gap.

xi) It is undisputed that the petitioner had made a representation requesting the Respondent Bank to permit him to



exercise the option only on 25.02.2004, and as there was no orders on the said representation, a writ petition was filed in W.P.No.12978 of 2005. This Hon'ble Court was pleased to direct the respondent to consider the representation and pass orders therein. Pursuant thereto, the impugned orders have been passed by the 2nd respondent rejecting the request to be included under the 1995 Pension Scheme, which is the subject matter of challenge in the present writ petition.

3. The thrust of the petitioner's argument is that the Respondent Bank has extended the benefit of the Pension Scheme to certain other employees who had opted to the Scheme after the expiry of the period prescribed under the original Scheme viz., 120 days from the notified date and in support thereof, reference is made to one L.Balasubramanian in the affidavit filed in support of the writ petition. It is alleged that the Respondent Bank has surreptitiously included the name of L.Balasubramanian and a few others while rejecting the petitioner's request vide his representation dated 25.02.2004.

4. Against the above background, the following questions of law may arise for consideration:

a) Whether the Respondent Bank had extended the benefit of the Pension Scheme to other employees even after the expiry of the period prescribed under the Pension Scheme.

b) Whether assuming that such extension have been made overlooking the conditions under the 1995 Scheme, is it permissible for this Court to extend such benefits to the petitioner on the strength of the fact that similarly placed employees have been extended/permitted to exercise option while the petitioner is deprived of such benefit.

5. It is submitted by the learned counsel appearing on behalf of the petitioner that failure on the part of the Respondent Bank in not permitting the petitioner to exercise the option of Pension Scheme only on the premise that such an option was not exercised within the period prescribed while permitting few others including L.Balasubramanian would foul of Article 14 of the Constitution of India. It is the further submission of the learned counsel appearing on behalf of the petitioner that the Pension being a beneficial Scheme, once there is a relaxation of the condition to some employees, not extending such relaxation to few other employees would fall foul of the equality Clause contained in Article 14 of the Constitution of India. In support of the above submissions, reliance was sought to be placed on the following judgments:-

a) Order in W.P.No.39431 of 2005 in the case of K.Padmanabhan vs Central Administrative Tribunal and others, wherein the decision of the Hon'ble Supreme Court in the case of



Ajay Jadhav vs. Government of Goa reported in (1999(4)L.L.N.,73) was relied upon and the relevant portion of the judgment reads as under :

"11..... In the present case, as already noticed, since the concerned authorities had given benefits to similarly placed employees, there was no reason to deny the similar benefits to the present petitioner in part and to treat the petitioner differently."

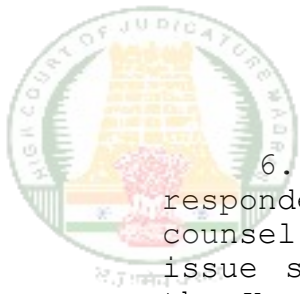
b) State of Karnataka and others vs. C.Lalitha, wherein it was held that:

"29. Service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean that persons similarly situated should be treated differently. It is furthermore well settled that the question of seniority should be governed by the rules. It may be true that this Court took notice of the subsequent events, namely, that in the meantime she had also been promoted as Assistant Commissioner which was a Category I post but the direction to create a supernumerary post to adjust her name must be held to have been issued only with a view to accommodate her therein as otherwise she might have been reverted and not for the purpose of conferring a benefit to which she was not otherwise entitled to."

c) Man Singh vs. State of Haryana reported in (2008 (4) LLN 113), wherein it was held that :

"20.....The concept of equality as enshrined in Article 14 of the Constitution of India embraces the entire realm of State action. It would extend to an individual as well not only when he is discriminated against in the matter of exercise of right, but also in the matter of imposing liability upon him. Equals have to be treated equally even in the matter of executive or administrative action...."

The above judgments were relied upon by the learned counsel for the petitioner only to show that one L.Balasubramanian has been extended the benefit even after the expiry of the period prescribed under the 1995 Scheme and that similar treatment must be extended to the petitioner, for failure, would render the action of the respondent vulnerable under Article 14 of the Constitution of India. Further, any action of the State or its instrumentalities must be guided by fairness and denying the benefit to the petitioner may not satisfy the said test.



6. The learned counsel appearing on behalf of the respondents in response to the submissions made by the learned counsel appearing on behalf of the petitioner submitted that the issue stands covered by the judgment of the Division Bench of the Karnataka High Court in the case of Shri.H.Sakharama Shetty and others vs. Bank of India and others dated 02.09.2005 wherein while considering the very same Scheme in a batch of matters filed by employees of various Banks including the Respondent herein, held that a number of employees who had taken part in strike had not opted for the Pension Scheme in view of the forfeiture Clause 22(4)(b). Apparently, thereafter negotiations were held between the Union and the Bank wherein it was agreed to delete the forfeiture clause in the Pension Regulations due to participation in strike and the same was also approved by the Government and the Regulations stood amended and notified on 22.06.1999. The petitioners therein had filed writ petitions contending that the benefit of the Pension Scheme has been denied for no fault on their part and sought for a declaration that the period of 120 days stipulated as per Regulation 3 (3) of the Pension Regulations for exercising option was only declaratory and that having regard to the beneficial nature of the amendment/changes made to the Pension Regulations in 1999, the Banks be directed to extend the benefit to the employees opting for the Pension Scheme along with all consequential benefits, even though option was not exercised within the prescribed period. The Division Bench of the Karnataka High Court in the case of Shri.H.Sakharama Shetty and others vs. Bank of India and others after recording the submissions of the Banks and petitioners therein held as under:

Submission of Respondent Banks :

a)The petitioners on their own having opted for being paid terminal benefits under the Provident Fund Scheme cannot be permitted to seek fresh option that is not contemplated under the Regulations.

b) No scheme much less the pension scheme or regulations governing payment of terminal benefits can be open ended forever and subject to change in their applicability even at the option of the ex-employees contrary to the option exercised by them earlier.

c) The petitioners have derived financial benefits under the Special Voluntary Retirement Scheme and after ceasing to be the employees, have come forward seeking an opportunity to opt for pension which was not even claimed when they were in service.

d) The Union of India also resisted the claim made by the petitioners contending that the petitioners were those employees who chose on their own will not to opt for pension scheme and therefore they were estopped from raising the said claim.



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e).... With the depleting returns, the pension had become more lucrative than CPM. As per the actuarial calculations got done by the IBA, if a fresh option were to be given to the non-optees, the Banks' would be required to contribute Rs.10,160 crores as on 31.03.2003..."

Submissions of the petitioner/employees :

"a. Having realised their mistake when they decided to delete the strike clause it was incumbent upon them to provide one more option to the appellants.

b. Once the offending clause which was a stumbling block for the employees to exercise their option was removed, as a natural corollary the right to exercise option should have been revised and failure to do so has resulted in a raw-deal being meted out and an unfair and arbitrary treatment handed down to the appellants."

7. The Division Bench of the Karnataka High Court in the case of Shri.H.Sakharama Shetty and others vs. Bank of India and others finally held as under:

"17.....The explanation sought to be offered by the appellants herein contending that they were agitating the matter through their Union and once they were successful in getting the strike clause deleted by way of an amendment to the scheme, they have immediately approached this Court cannot be accepted for the reason that the deletion would enable only such of those employees who had exercised the option pursuant to the draft scheme or under the scheme finally framed to take advantage of the deletion. The deletion cannot automatically open up the gate for the others who have in fact taken the benefit under the existing provident fund scheme and retired from service. Such an approach would apart from throwing open several areas of uncertainties in the economics of the Banks would result in recognising a right that is unavailable under the scheme. The learned Single Judge was right in declining the relief sought by the petitioners in this regard.

18. The contentions advanced by the appellants stating that the regulation providing for option is not mandatory and was merely directory cannot be accepted. When the application of the pension scheme is made subject to complying with certain conditions and certain consequences for non-compliance with the conditions are prescribed, question of treating the



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same as directory does not arise. The validity of 1995 Regulations was not called in question and it operated till 1999 when it stood amended. The advantage of its deletion could be taken by those who had opted for the scheme earlier and not by those who never opted for the same."

8. This Court finds that the issue raised by the petitioner stands covered by the decision of the Division Bench of the Karnataka High Court in the case of Shri.H.Sakharama Shetty and others vs. Bank of India and others. This Court further finds that the petitioner having not exercised their option under the earlier Scheme and having exercised option in 2010 Scheme, it may not be open for the petitioner to resile therefrom.

This Court does not find merit in any of the contention of the petitioner since besides the issue being covered by the decision of the Karnataka High Court in the case of Shri.H.Sakharama Shetty and others vs. Bank of India and others, the above contention of the petitioner overlooks the following aspects:

a) Pension Regulations / Scheme is statutory in nature and constitutes "Law" within the meaning of Article 13 of the Constitution of India. The Preamble to the Regulation / Scheme would make this clear and reads as under:

"No.PAD/179/2097 in exercise of the powers conferred by clause(f) of sub section (2) of Section 19 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970), The Board of Directors of Indian Overseas Bank after consultation with the Reserve Bank of India and with the previous sanction of the Central Government hereby makes the following regulations"

b) While Article 14 of the Constitution of India frowns upon, any action which is arbitrary or discriminatory, however, the equality clause in Article 14 is a positive concept and cannot be the basis for perpetuating an illegality. The Scheme in issue is hedged by conditions overlooking or disregarding such conditions would constitute an illegality. Illegality in the sense of extending a benefit though there is failure to comply with the conditions. More so, when the Division Bench of the Karnataka High Court in the case of Shri.H.Sakharama Shetty and others vs. Bank of India and others has held the conditions to be mandatory. In this regard, the following decisions are relevant:-

i) M.D.University vs. Jahan Singh, reported in (2007) 5 SCC 77 the relevant portion of the order reads as under:

"28. Even assuming the respondent and the said Shri Taneja were similarly situated, we may observe



that Article 14 of the Constitution of India carries with it a positive concept. Article 14 of the Constitution cannot be invoked, for perpetuating illegality."

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ii) Shanthi Sports Club vs. Union of India, reported in (2009) 15 SCC 705 the relevant portion of the order reads as under:

"71. Article 14 of the Constitution declares that:

"14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

The concept of equality enshrined in that article is a positive concept. The Court can command the State to give equal treatment to similarly situated persons, but cannot issue a mandate that the State should commit illegality or pass wrong order because in another case such an illegality has been committed or wrong order has been passed. If any illegality or irregularity has been committed in favour of an individual or a group of individuals, others cannot invoke the jurisdiction of the High Court or of this Court and seek a direction that the same irregularity or illegality be committed in their favour by the State or its agencies/instrumentalities. In other words, Article 14 cannot be invoked for perpetuating irregularities or illegalities.... "

iii) Chandigarh Admn. v. Jagjit Singh reported in [(1995) 1 SCC 745], the relevant portion of the order reads as under:

"8. ... We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent Authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling



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the respondent Authority to repeat the illegality or to pass another unwarranted order. (emphasis in original) The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent Authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law—indeed, wherever it is possible, the court should direct the appropriate authority to correct such wrong orders in accordance with law—but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. (emphasis supplied) By refusing to direct the respondent Authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law.....”

c) Though, under Article 226 of the Constitution of India, the High Court is a Court of equity, nevertheless, there cannot be any direction even in exercise of the power under Article 226 of the Constitution of India, which is contrary to law. In this regard, the following decisions are relevant:

i) Council for Indian School Certificate Examination v. Isha Mittal, reported in (2000) 7 SCC 52, the relevant portion of the order reads as under:

“4. Considerations of equity cannot prevail and do not permit a High Court to pass an order contrary to the law.”

ii) In the case of Union Bank of India v. Rajat Infrastructure (P) Ltd., reported in (2020) 3 SCC 770, the relevant portion of the order reads as under:

“14. Furthermore, we may add that the High Court has no powers akin to powers vested in this Court under Article 142 of the Constitution. The High Court cannot give directions which are contrary to law.”

iii) State of Bihar v. Arvind Kumar, reported in (2012) 12 SCC 395, the relevant portion of the order reads as under:

“16. In Manish Goel v. Rohini Goel [(2010) 4 SCC 393 : (2010) 2 SCC (Civ) 162 : AIR 2010 SC 1099] this Court has held that: (SCC p. 399, para 14)



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"14. Generally, no court has competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law.""

d) The petitioner having exercised the option under the Second Scheme cannot now turn around and seek relaxation of certain clauses, including the condition which would require the petitioner to pay a sum of 2.8 times the petitioner's revised pay for the month of November 2007 towards initial funding gap.

This is in view of the fact that once an option is exercised under a Scheme, it may not be permissible to pick and choose the beneficial clause/elements alone of the Scheme. Any such exercise would result in arbitrariness and therefore ought to be avoided.

9. As a matter of fact, reliance on the fact that L.Balasubramanian has been extended the benefit, appears to be wholly misplaced and contrary to the facts inasmuch as it has been clarified by the respondent in their counter that L.Balasubramanian had opted for the Scheme within time and what was submitted by L.Balasubramanian after the expiry of the period for opting under the Scheme was only an authorisation. The relevant portion reads as under:

"11. The contention of the petitioner in para 8 that during the year 1998-99 many employees including one L.Balasubramanian, clerical employee having Roll No.7482 were surreptitiously included in the pension scheme is factually incorrect. During that period the employee who have already exercised their option for pension were asked to give a letter of authorisation for transfer of employers share of provident fund to the Pension Fund. This is only a further step in the case of employees who had already exercised their option."

Thus, L.Balasubramanian had opted within the time lines prescribed under the 1995 Scheme and it was only the authorisation to the Trustees, Indian Overseas Bank Staff Provident Fund to transfer the Bank's Contribution of Provident Fund, as set out in Clause 2 of Operational Instructions dated 01.11.1995 which was submitted subsequently.

10. This Court is of the view that the case of L.Balasubramanian who had opted within the time prescribed under the 1995 Scheme and the petitioner who had not opted to under



the 1995 Scheme cannot be treated on par. This is also in view of the fact that while exercise of option is a substantive condition, the submission of authorisation is procedural in nature and thus the petitioner cannot be treated on par with L.Balasubramanian, who had complied with the substantive requirements under the 1995 Scheme.

11. This Court also finds that the petitioner has not been vigilant for despite the fact that vide Circular dated 07.12.2000, there was an amendment to the Clause 22(4)(b), the petitioner had made a representation only on 25.02.2004. The lapse of 4 years remains unexplained. It has been consistently held that relief under Article 226 of the Constitution of India is only to those who are vigilant and not those who sleep over their rights. The maxim "Vigilantibus, et non Dormientibus, Jura Subveniunt" - the law assists who are vigilant, not those who sleep over their right is relevant and has been consistently applied by the Apex Court in a catena of cases. Some of them being:

i) Delhi Airtech Services (P) Ltd. v. State of U.P., reported in (2011) 9 SCC 354.

ii) Dohil Constructions Co. (P) Ltd. v. Nahar Exports Ltd., reported in (2015) 1 SCC 680.

iii) State of U.P. v. Dayanand Chakrawarty, reported in (2013) 7 SCC 595.

12. Thus, viewed from any angle this Court finds no merit in the writ petition, and the impugned proceedings is sustained. The writ petition stands dismissed. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CJ CONF)

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Sub Assistant Registrar

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To

1.The Chairman & Managing Director,
The Indian Overseas Bank,
763, Anna Salai,
Chennai-600 002.



2.The Deputy General Manager,
Industrial Relations Department,
Indian Overseas Bank,
Central Office, 763, Anna Salai,
Chennai-600 002.

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3.The Chief Manager,
Indian Overseas Bank,
Egmore Branch, Chennai-600 008.

+lcc to Mr.Balan Haridas, Advocate SR. No.60734

+lcc to Mr.N.G.R.Prasad, Advocate SR. No.60432

W.P.No.8917 of 2010
and
W.M.P. No.787 of 2019

GPL (CO)
PR (13/12/2021)