29 **21.09.22**

Ct. No. 04

Akd

WP.CT. 45 of 2022

Kaushal Kumar Singh
Vs.
Union of India & Ors.

Ms. Tuli Sinha.
... for the petitioner.
Mr. Kalyan Kumar Chakraborty.
... for the Union of India.

Assailing the office order dated 5th February, 2014 by which the application seeking voluntary retirement was rejected by the competent authority, the petitioner approached the Tribunal by filing OA 243 of 2014.

The Tribunal rejected the said application on two grounds; firstly there is no unfettered right of voluntary retirement after serving a notice period as it carries a pecuniary benefits, secondly the writ petitioner cannot approbate and reprobate at the same time.

The salient facts emanate from the record are that the writ petitioner was appointed as clerk, Grade-II, in the year 1989 and completed the service over a period of twenty years. Subsequently an application was taken out on 11th July, 2011 seeking voluntary retirement in terms of the Master Circular / Scheme framed in this regard by the Railway Board. The Railway authorities sat tight over the said application; meaning thereby that the writ petitioner was not communicated whether the application has been accepted or rejected until the office order dated 5th February, 2014.

Subsequently an order of transfer was issued on 8th February, 2012 and a plea was sought to be taken that the moment the Railway authorities failed to take a decision within the notice period, it severe the relationship of employer and employee and, therefore, such order of transfer cannot be given effect to. It would be relevant to notice the important fact that after the expiration of the notice period, the petitioner was granted sick leave till 19th July, 2012 upon payment of full salary and subsequently became unauthorized absent according to the Railway authorities.

The Tribunal relied upon the judgement of the Supreme Court in case of *Power Finance Corporation Ltd. vs. Pramod Kumar Bhatia* reported in (1997) 4 SCC 280, wherein it was held that unless the employee is released from his duties even upon acceptance of the prayer for voluntary retirement, it does not cease the relationship of employer and employee.

The Tribunal further relied upon a subsequent Bench decision of the Supreme Court rendered in case of *State of Uttar Pradesh & Ors. vs. Achal Singh* reported in (2019) 1 SCC (L&S) 677, wherein the Apex Court held that there is no unfettered right vested upon the employee for voluntary retirement after the service of notice, as it cannot be deemed to be automatic and, therefore, the appointing authority should either to accept the notice or refuse the prayer on the ground of public interest. It is further held that distinction is real between the case of resignation by an employee and the voluntary retirement for the simple reason that in later case it involves monetary benefits.

The question begging an answer in this regard is whether there is any provisions in the statutory documents applicable to the railway servant containing deeming provision in juxtaposition with Rule 48A of the Central Civil Services (Pension) Rules, 1972.

The reason for making the above observations is the reliance having placed by the learned Advocate for the petitioner to a judgement of the Apex Court rendered in case of *Ashok Kumar Sahu vs. Union of India & Ors (Civil Appeal No. 59 of 2004 decided on 08.08.2006)*.

The Apex Court noticed the aforesaid provision and the earlier judgement of the Supreme Court rendered in *Balram Gupta vs. Union of India & Anr.[(1987) Supp SCC 228],* which was founded upon the aforesaid Rule 48 of the Central Civil Services (Pension) Rules, 1972 and distinguished the same on the ground that after serving a notice seeking voluntary retirement and acceptance having been made subsequently, the employee changed his mind and intended to withdraw the said notice. In the above backdrop it was held that such provision should not stand in the way of withdrawal of the application for voluntary retirement.

The Apex Court further noticed another earlier decision of the Supreme Court in case of *Himachal Pradesh Horticultural Produce Marketing & Processing Corporation Ltd. vs. Suman Behari Sharma [(1996) 4 SCC 584],* where the Apex Court held that if the Rule permits that it would have effect from the date of expiration of the notice period, the employer must permit the employee to retire. However, in case of *State of Haryana & Ors. vs. S. K. Singhal [(1999) 4 SCC 293]* the Apex Court broadly divided the three categories of voluntary retirement; firstly where the voluntary retirement is automatic and comes into force on the expiry of notice period, secondly it would not come into force unless an order is passed within the notice period withholding the notice for voluntary retirement, and thirdly the voluntary retirement would not be given effect to unless the permission to this effect is granted by the Controlling Authority in the following.

> *"Jagannadha Rao, J. in State of Haryana & Ors. vs. S. K. Singhal [(1999) 4 SCC 293], interpreting sub-rule (1) of Rule 5.32 (B) of the Punjab Civil Sevices Rules (Vol. II) noticed that the same contemplated "notice to retire" and not a request seeking permission to retire. Proviso appended to the said sub-rule (2) of Rule 5.32 (B) comprehended a positive provision that "where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in sub-rule (1), the retirement shall become effective from the date of expiry of the said period". It was, thus, held that in terms of the said Rules, the rejection of offer to reitre voluntarily was to be communicated within the notice period. In view of the aforementioned provisions, the Court preferred to follow Dinesh Chandra Sangma v. State of Assam [(1977) 4 SCC 441] and B. J. Shelat v. State of Gujarat [(1978) 2 SCC 202] wherein it was held that if no order of refusal has been passed within the notice period, the voluntary retirement would take effect automatically."*

The judgement relied upon by the learned Counsel appearing for the Railways in case of Power Finance Corporation Limited (supra) is concerned, we find that the said judgement has been decided on the fact where the resignation tendered by the employee was accepted subject to the clearance of the outstanding dues. Subsequently an application for voluntary retirement was also made and the permission was granted conditionally. In the backdrop of the same it was held that permission for voluntary retirement was granted by putting condition, unless such condition is fulfilled, it would not severe the relationship of employer and employee.

We are not concerned with such situation, as the Railway did not take any decision within the notice period putting any condition. The question, which really fell for consideration before us, is whether the Rules applicable in this regard postulates the deem severance of relationship of employer and employee or the automatic permission relating to voluntary retirement, in the event no decision has been taken by the Railway authorities within the notice period.

The Master Circular No. 35 was issued by the Railway Board and amended from time to time, which is relied upon, and it is nobody's case that the Master Circular has no statutory flavour. Paragraph 11 under the category *Voluntary Retirement* provides as under:

> *11. Based on the recommendations of the Administrative Reforms Commission, the scheme of voluntary retirement of Railway Servants after they have rendered Twenty Years of qualifying service/service, on proportionate pension and gratuity/proportionate SC to PF, with a weightage upto a maximum of five years towards qualifying service/service has been introduced with effect from 9.11.77. Under this scheme, which is purely voluntary, the initiative rests with the Railway servant and the Govt. does not have the reciprocal right to order on its own retirement of Railway servants."*

It leaves no ambiguity that the scheme of voluntary retirement of the railway servant has been accepted and promulgated by putting a condition that such railway servant must have rendered twenty years of qualifying service. The reading of the aforesaid provision does not throw any light on the fact whether the application, if not accepted or rejected by the authorities within the notice period, shall be deemed to have been accepted and the prayer for voluntary retirement would be deemed to have been granted by the Railway authorities.

However, our attention is drawn to paragraph 11.4 of the said Master Circular, which conveys a clarity in this regard, which is self-evident. The said paragraph is quoted as under:

> *"A railway servant giving notice of voluntary retirement the acceptance of which requires appointing authority's approval, may presume acceptance of the notice and the retirement shall be effective in terms of the notice, unless the competent authority issues an order to the contrary, before the expiry of the period of notice."*

Though the Rule 48A of the Central Civil Services (Pension) Rules, 1972 are couched in different language, but if the provisions, which assume the statuary character, conveys the said intention, there is no fetter on the part of the Court to draw an inspiration from the observations made by the Apex Court in case of Ashok Kumar Sahu (supra). Paragraph 11.4 of the Master Circular indicates that the notice of voluntary retirement served by the railway servant requires an acceptance or approval of the appointing authority, but further qualify that in the event the apointing authority has not taken any decision, it would be presumed that the notice has been accepted and the retirement shall take effect in terms of the said notice. It put a condition on the appointing authority to take a decision within the notice period.

What logically follows therefrom is that though the employer is not bound to give permission to the employee seeking voluntary retirement, but such decision should have been taken within the notice period. The deeming provision has to be given effect to as the laches and lapses on the part of the employer cannot act detrimental to the interest of the employee. The complete silence and the dormant and lethargic approach of the employer cannot defeat the right accrued on the basis of the statutory provision and if the mandate is manifest and in absence of any contrary decision taken by the appointing authority within the notice period, there shall be a presumption of acceptance of the notice and the retirement to take effect on the basis thereof.

In view of the deeming provision the subsequent decision of the authority taken on 5th February, 2014 is bad in law and the Tribunal ought to have set aside the same.

In view of the findings made hereinabove, since the application seeking voluntary retirement is deemed to have been accepted and such retirement would take effect in terms of the said notice dated 2nd November, 2011, even if the writ petitioner was allowed to continue availing of the leave accumulated to the service the same cannot be prejudicially applied against him. It is undisputed that such leave was on a full pay basis and the petitioner received the amount till 13th August, 2012.

Since there was no relationship between the employer and employee after the deemed retirement with effect from 2nd November, 2011, the amount, which has been credited to the account of the petitioner while on leave, is required to be refunded or adjusted.

The respondent authorities are directed to calculate the retiral or pensionary benefits attached to the service of the petitioner on voluntary retirement with effect from 2nd November, 2011 and in the event any leave, which, in fact, has been granted, is capable of being encashed, the same would also be calculated and the excess amount paid to the writ petitioner shall be adjusted from the said retiral or pensionary benefits.

However, in the event it is found that the amount already paid is less than the amount required to be paid on the accumulated encashable leave, then in that event the balance shall be paid and added to the credit of the writ petitioner.

The entire exercise shall be completed within eight weeks from the date of the communication of this order.

With the above observations the writ petition is disposed of.

There will be no order as to costs.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)