

OD- 2 & 3

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

WPO/162/2020

PURBA MANDAL
VS
BOARD OF TRUSTEES FOR THE PORT OF KOLKATA & ORS.

WITH

WPO/52/2020
IA NO: GA/1/2020

PURBA MANDAL
VS
BOARD OF TRUSTEES FOR THE PORT OF KOLKATA, PORT TRUST

BEFORE:

The Hon'ble JUSTICE RAI CHATTOPADHYAY

Date : 21thDecember, 2023.

Appearance:

Mr. Jaydip Kar, Sr. Adv.
Mr. Saumya Majumdar, Adv.
Mr. Sourav Kumar Mukherjee, Adv.
Mr. Kaushik Mandal, Adv.
..... For the Petitioner

Mr. Kallol Bose, Adv.
Mr. Ashok Kumar Jena, Adv.
..... For the respondent

The Court : The writ petitioner namely, Purba Mandal has filed the two writ petitions being No. WPO 162 of 2020 and WPO 52 of 2020. The subject matters are related to each other. Hence, the said

writ petitions have been taken up for hearing analogously and are being disposed of by dint of a single order, as follows.

Regarding writ petition No. WPO 52 of 2020 :

Being aggrieved by an order dated 01/02.01.2020, the writ petitioner has moved the instant matter, to challenge the said order. The order says inter alia that the writ petitioner should continue in service for the time being, until further order. The factual background of the case is required to be narrated here, in a nutshell. The writ petitioner had served a notice, by dint of her letter dated 03.10.2019, expressing her intention to obtain voluntary retirement in terms of the Calcutta Port Trust Employees (Pension) Regulations, 1988. The applicable Regulation she quotes is Regulation – 28 of the same, as follows:

- “28. Retirement on completion of 30 years, qualifying service.*
(1) At any time after an employee has completed thirty years,
qualifying service:
(a) he may retire from service or
.....

Provided that-

- (a) an employee shall give a notice in writing to the appointing authority at least three months before the date on which he wishes to retire;”*

The writ petitioner has said that on 31.12.2019 she shall be completing thirty years of her service and thus according to clause 28 of the 1988 Regulations read with section 56 (k) of the Fundamental Rules, she would be entitled for obtaining voluntary retirement as desired by her. The respondent Kolkata Port Trust, though initially had consented by sending letter to the writ petitioner regarding approval of her voluntary retirement pursuant to her said application dated 03.10.2019, has ultimately retracted from its stand of allowing voluntary retirement to the writ petitioner. As a result the impugned letter as mentioned above was issued to the writ petitioner.

Mr. Kar, learned Senior Advocate who is representing the petitioner here has contended by relying on Regulation – 28 of the 1988 Regulations, that the same which has provided the scope for an incumbent to retire on completion of thirty years of qualifying service, would not actually require any approval from the authority as regards the desire of the incumbent to retire voluntarily, if expressed through a timely notice. Mr. Kar has submitted by referring to the said Regulation that in accordance with the said provision, an employee who has completed thirty years of service may retired from service subject to his giving a notice in writing to the appointing authority at least three months before the date on which he wishes to retire (Regulation 28 (1) proviso (a) has been referred to). By suitably interpreting this clause Mr. Kar, Learned Senior Advocate, has stated that the writ petitioner's case falls under this category. That, the writ petitioner when she submits a notice informing her desire for voluntary retirement three months prior to the date on which she wants to retire, and the same duly reaches the appointing authority, the same would automatically amount to her voluntary retirement on expiry of the said three months notice period. It has been argued that the said regulations have not imposed any fetter upon an employee who has the qualifying period of service and also the qualifying notice period to his/her credit, to again be subjected to any order of approval by the employer. To further clarify his points, Mr. Kar learned Senior Advocate has referred to Regulation 29A of 1988 Regulations to submit that a formal approval of the employer would be necessary in case an employee has to seek voluntary retirement after completion of twenty years of qualifying service. Very specifically Mr. Kar has mentioned about the language used in Regulation-28, as mentioned above to submit further that absence of any provision for 'acceptance' of a prayer for voluntary retirement of the incumbent, would make it abundantly clear that the employee shall be entitled to retire voluntarily after completion of thirty years of qualifying service and three months of notice period, without any further reference to the same by the appointing authority/employer.

Relating to the facts of the case, it has been submitted that the writ petitioner joined with the respondent employer on 01.01.1990. Since the year 2017, the petitioner has been repeatedly submitting her application for voluntary retirement, though rejected every time by

the employer/respondent. The latest of such a letter by the petitioner is dated 03 .10.2019, in which she expressed a desire to retire with effect from 07.01.2020. Consequently there has been a letter of approval of her prayer from the employer and also instructions to submit necessary papers including pension papers. Thereafter two consecutive letters were received by the writ petitioner dated 19.11.2019 and 01/02.01.2020 respectively, by dint of which the writ petitioner was advised to continue in her service. According to the petitioner, by dint of Regulation-28 of the 1988 Regulations, the appointing authority/respondent shall not be empowered or entitled and shall be precluded from issuing any such order to direct the writ petitioner to carry on in work after her submitting a notice (that is letter dated 03.10.2019), expressing a desire to retire voluntarily. It has been submitted that by operation of that Regulation, the retirement of the writ petitioner upon completion of three months notice period, is only automatic and no action on part of the appointing authority/employer would be necessary or called for in this regard, in furtherance of the notice of the petitioner for voluntary retirement.

Regarding writ petition No. WPO 162 of 2020 :

There has been certain development with respect to the writ petitioner namely Purba Mandal, subsequent to the letter issued to her by the respondent dated 01/02.01.2020, which are the basis for filing the present writ petition. The writ petitioner has challenged the purported charge sheet issued to her dated 07/10.02.2020. The charge levelled against the writ petitioner has been for absenting herself from duty on and from 07.01.2020 despite order from the Chairman advising her to continue her service and despite receiving notice directing her for resuming duty. The writ petitioner's contentions are twofold, firstly that, after her exercising right of election in terms of the governing Regulations by submitting a notice of three months for voluntary retirement, neither it was open for the respondent/employer to direct her to continue in service, nor it was within its power to consider herself as an absentee, after expiry of the three months notice period. Secondly that the purported charge sheet is only misconceived and not in compliance with the law insofar as

the respondent would not have any authority to issue a chargesheet to an employee, who has by election, retired voluntarily. In the said writ petition the petitioner has prayed for setting aside of the impugned judgment and all proceedings consequent thereto.

Regarding objections raised by the respondent:

Mr. Kallol Bose has represented the respondent Kolkata Port Trust. Mr. Bose has been vociferously contesting as regards the contentions and prayers of the petitioner, in both the said writ petitions. Mr. Bose submits that not only the charge sheet dated 07/10.02.2020, a subsequent second chargesheet has also been issued to the writ petitioner, with imputation of serious charges like dereliction in duty, misconduct and the writ petitioner's disposition with questionable integrity. He says that after completion of the departmental proceedings the writ petitioner has been found guilty and a punishment of 'compulsory retirement' has been imposed upon her. Pursuant to the same the writ petitioner is now retired.

Regarding the point urged on behalf of the petitioner in WPO 52 of 2020, as to whether her voluntary retirement is only automatic by operation of law after expiry of three months notice period, Mr. Bose's categorical contention is that the 'proviso' to the Regulation-28 should be read harmoniously with the other provisions, as the same may never be construed to be in derogation of the other clauses of the said Regulation. Mr. Bose argues that the import of Regulation 28 (1) (a) and (b) would be that the Board is bestowed with the discretionary power to withhold permission with regard to prayer of any employee, for retirement. Power of the Board to grant permission under Regulation 28 (1)(b) would include its power to withhold the same too, he says.

He has further argued that the letters of law should be meaningfully construed to uphold the rule of law and the public policy and purpose. Any interpretation which may defeat the purpose of beneficial construction of the legislation is to be discarded. Mr. Bose

has strongly relied on that gross dereliction of duty and misconduct by the writ petitioner has been proved, for which she has been duly penalised in accordance with the rules and in compliance with due process. He has emphasised that the endeavour by the writ petitioner is only to defeat and bypass consequences of her misdeeds and a misuse in a like manner cannot be allowed to happen. According to the respondent, in a public service, the rule of election, if at all provided, shall be subject to equity. That, on the anvil of the touchstone of equity, the writ petitioner's case does not stand at all. Mr. Bose has urged that both the writ petitions may be dismissed.

The very short points required to be determined in this writ petition are whether pursuant to the applicable regulations and in absence of any provision there for 'acceptance' of the letter submitted by the writ petitioner, expressing her desire to be retired voluntarily, would be termed as 'election' by her for the same, irrespective of and unaffected by whatever is the stance of the authority, with respect to the same and whether the same is irrevocable by any act of the authority whatsoever. Also it is to be seen if there is any scope for the respondent authority to 'act' or 'exercise discretion' in any manner whatsoever, with respect to the notice submitted by the writ petitioner, to retire voluntarily.

Regulation 28 of Calcutta Port Trust Employees (Pension) Regulations, 1988 as framed pursuant to the empowerment vide section 28(b) of the Major Port Trust Act, 1963 and promulgated in terms of section 124 of the said Act, is the regulatory and governing provision in a case of like nature. It is consisted within Chapter – VI, which has provided for '*regulation of amounts of pension*'.

Admittedly the writ petitioner has desired to retire on completion of 30 years of her service which is the qualifying minimum service period under Regulation 28. The specific provision under Regulation 28 (1) is that (i) an employee may retire from service at any time after completing thirty years of qualifying service or (ii) after

completing thirty years of qualifying service an employee may be required by the appointing authority to retire in the interest of Board and in that case shall be entitled to retiring pension.

Therefore the Regulation has provided for two modes by dint of which after completion of thirty years of qualifying service an employee may retire, either according to his own volition or as per requirement of the appointing authority.

The essential condition in case of the first instance would be that the employee positively serves a notice in writing about his decision, at least three months before the date on which he wishes to retire. For the employer who may require a person to retire under Regulation 28 (1) (b) there are two options available under proviso (b). The appointing authority may either give a notice of three months or pay three months allowance in lieu of such a notice.

There is no stipulation that an application by an employee under Regulation 28 (1) (a) is required to be accepted or approved by the appointing authority. The only exception is that Regulation 28 1A (a), which provides that in case the employee requires acceptance of his notice of less than three months, he needs to give reasons. The facts of the present case is different altogether and there is no dispute regarding the writ petitioner having complied with said formality in accordance with the Regulations. Regulation 28 1A (b) has provided that in that case, when the employee requests for acceptance of notice for a lesser period than three months, the scope of the appointing authority to exercise its discretionary power to consider such request arises, which may or may not culminate into relaxation of the notice period.

The other provision suggesting the appointing authority's discretionary power to consider an application of retirement and exercise discretion to accept or reject that is under Regulation 29 (A) which has provided for retirement on completion of twenty years of

qualifying service. There is stark difference between the provision of Regulation 28 and 29 as regards the authority's discretionary power for 'acceptance' of the notice of voluntary retirement, as Regulation 28 does not contain any such specific provision where as Regulation 29 has specifically provided for the same. The conscious omission as above in Regulation 28 and provision in Regulation 29A, is of ample indication about the intentions of the framers, as to what nature and characteristics has been attributed to a notice as prescribed in Regulation 28(1)(a), of 1988 Regulations.

On the premises as above the submissions made on behalf of the writ petition that the provision under Regulation 28(1)(a) for retirement of an employee after thirty years qualifying service is unfettered of any embargo, is acceptable as a correct proposition. There is no scope excepting reading Regulation 28(1)(a) and 28(1)(b) disjunctively as the same has provided differently for two different situations, mutually exclusive. A person may be required to retire in Board's interest where in an element of the Board having a persuasive force for severance of the employer employee relationship, is evident. The provision under Regulation 28 (1) (a) is founded absolutely differently, solely based on the volition of the concerned employee. He or she obtains the legal authority to quit right over the employment and for election of retiring voluntarily, according to his own volition. After 30 years of service this right has been vested with an employee, which has consciously been made absolute, without any provision for either acceptance or revocation/withdrawal, excepting for a special reason.

Therefore it is an election by the said employee and also termed as such in Regulation 28(2). By dint of Regulation 28(2), election by the employee is beyond any scope for the said employee, to retract from the same, as he shall generally be precluded from withdrawing his election. Exceptionally, he can withdraw, with specific approval of the authority. Without providing for any 'acceptance' or 'approval' of the notice, by the appointing authority and also by specifically providing that submission of notice for voluntary retirement, would be an 'election' by the concerned employee, the Regulations have

accredited the unimpeachable and irrevocable trait of a notice, submitted in time.

In the event the writ petitioner has undisputedly served a notice of three months expressing her desire to retire, the same would be final and according to the Regulations particularly Regulation 28 there would not be any scope for the appointing authority to interfere into the same for whatever reason or else the same would be in violation of the Regulation 28 of 1988 Regulations, which has a statutory force.

In the writ petition no. 52 of 2020 the impugned letter of the Senior Personnel Officer in-charge issued to the writ petitioner dated 01/02.01.2020, appears to be in contravention of the said Regulations and thus de hors the law. The same is liable to be set aside.

Hence, writ petition no. WPO 52 of 2020 is allowed. The impugned letter dated 01/02.01.2020 is set aside. It is further directed that upon expiry of the notice period in terms the notice submitted by the writ petitioner to the respondent authority on 03.10.2019, the writ petitioner should be treated as retired voluntarily from the services of respondent Kolkata Port Trust.

On the premises as above the other writ petition no. WPO 162 of 2020 is also allowed. With the directions as above both the writ petitions are disposed of.

Urgent Photostat certified copy of this order be supplied to the parties on priority basis, if applied for.

(Rai Chattopadhyay, J.)