

Writ Appeal

PRESENT: The Hon'ble Mr. Justice Bhaskar Bhattacharya

And

The Hon'ble Mr. Justice Prasenjit Mandal

Judgment on: 29th January, 2010.

M.A.T. No. 971 of 2009

With

C.A.N. 9323 of 2009

The Chairman, State Bank of India & Ors.

Versus

Mihir Kumar Nandi & Anr.

And

C.O.T. No. 78 of 2009

Mihir Kumar Nandi

Versus

Union of India & Ors.

Point:

Fraud: Silence maintained by the employer to inform the employee about the future amendment of pension rules inducing the employee by entering into voluntary retirement scheme whether amounts to fraud and the contract is unfair and arbitrary- Constitution of India –Art 14

Fact: The cross-objector/writ petitioner, opted for voluntary retirement by a letter dated 15th January, 2001 which was accepted by the authority and such acceptance was conveyed to him by a letter dated 17th March, 2001 and it was

informed that he would be relieved on 31st March, 2001. By a letter dated 2nd August, 2001 the cross-objector/ writ petitioner was granted pension. However, by a further letter dated 30th August, 2001, the pension payment-order together with payment of the commuted value thereof was stopped in view of amendment of Rule.

The writ application, filed by the cross-objector/ writ petitioner, challenging such action of the Bank was allowed by the Ld. Single Judge and set aside the order dated 30th August, 2001 with a direction upon the appellant/Bank to pay 12% interest to the writ petitioner from the date of filing of the writ-petition on all arrears of pension and further directed to pay pension month by month.

Being aggrieved, appellant/Bank preferred the instant appeal. The cross-objector/ writ petitioner has filed a cross-objection being dissatisfied with the refusal of grant of pre-proceedings interest as also damages claimed in the writ-application.

Dismissing the appeal and allowing the cross-objection filed by the cross-objector/ writ petition thereby awarding interest also on the arrears amount of pension from the date of stoppage of pension till the filing of the litigation @ 12 % p.a., the High Court,

Held: It was the duty of the employer to inform the employee about the future amendment of the pension rules which would deprive the employee of his right to get pension by entering into the voluntary retirement scheme. Therefore, the silence maintained by the employer in such a situation amounted to fraud on its part. (Paragraph – 10)

Apart from the aforesaid fact, the contract on the part of the bank which is a “state” within the meaning of Article 12 of the Constitution of India in inducing some of the employees to enter into agreement for voluntary retirement scheme and at the same time, not disclosing to them that there will be future amendment on the last date of their service by which their right to get pension would be taken away cannot but be said to be unfair and arbitrary. (Paragraph – 11)

If the proposed amendment was disclosed to the writ-petitioner in advance, he would not have accepted such prejudicial terms of voluntary retirement scheme and offered for the scheme. The contract was completed by acceptance of the offer of the employee under the scheme as laid down in the case of Bank of India vs. O.P. Swaranakar reported in AIR 2003 SC 858 but the appellant having committed fraud upon the writ-petitioner by adopting silence in the matter of proposed amendment of the pension rules on the last date of the service of the employee, the writ-petitioner is entitled to the relief claimed by taking aid of Article 14 of the Constitution of India. (Paragraph – 12)

It is now settled position of law that the direction for payment of interest is not an imposition of any penal measure but it is natural accretion to the principal amount. The bank has retained that amount and has been benefited by investing the said amount in course of his business and at the same time, the writ-petitioner has been deprived of his right of enjoyment of that amount and the interest that would have accrued thereon. (Paragraph – 14)

Once violation of Article 14 of the Constitution of India has been established, delay cannot be a ground for depriving the writ-petitioner of his just dues. It is now a settled law that there cannot be any waiver of fundamental right guaranteed under Article 14 of the Constitution of India. (Paragraph – 16)

Cases cited:

1. Food Corporation of India Vs. Kamdhenu Cattle Feed Industries reported in AIR 1993 SC 1601
2. Bank of India vs. O.P. Swaranakar reported in AIR 2003 SC 858
3. Alope Shanker Pandey vs. Union of India reported in AIR 2007 SC 1958
4. Basheshar Nath vs. Commissioner of Income-tax, Delhi and Rajasthan and another M/s. Model Knitting Industries Ltd., Interveners reported in AIR 1959 SC 149.)

For the Respondents/Appellants: Mr. L.K. Gupta, Mr. S.K. Sinha, Mr. A. Dasgupta, Mr. A.K. Routh, Mr. S. Pal Chowdhury.

For the Writ-Petitioner/Respondent/ Cross-objector: Mr. Siddhartha Chowdhury, Mr. Srimanta Dutta, Mr. S. Bandyopadhyay.

For the Union of India: Mr. Nishith Mukhopadhyay.

Bhaskar Bhattacharya, J.:

1. Both the appeal and the cross-objection are taken up together.
2. This appeal is at the instance of the Chairman, State Bank of India and others and is directed against an order dated 28th August, 2009 passed by a learned Single Judge of this Court by which His Lordship allowed an application filed by the cross-objector/respondent and set aside the order dated 30th August, 2001 with a direction upon the appellant/Bank to pay 12% interest to the writ petitioner from the date of filing of the writ-petition on all arrears of pension within six weeks from the said date. His Lordship further directed that the pension month by month should be paid to the writ-petitioner in accordance with the Rules.
3. Being dissatisfied, the State Bank Authority has preferred the appeal and the writ-petitioner has filed a cross-objection being dissatisfied with the refusal of grant of pre-proceedings interest as also damages claimed in the writ-application.
4. The following facts are not in dispute:
 - (a) The writ-petitioner was appointed in a clerical cadre by the State Bank of India with effect from 21st May, 1988. He opted for voluntary retirement by a letter dated 15th January, 2001 which was accepted by the authority and such acceptance was conveyed to the writ-petitioner by a letter dated 17th March, 2001. By the said letter, he was informed that he would be relieved of his duties at the close of the business of the Bank on 31st March, 2001.

(b) The voluntary retirement scheme by which the parties are governed contained the following provision as regards pension:

“Pension in terms of State Bank of India Employees’ Pension Fund Rules on the relevant date (including commuted value of pension).”

The expression “relevant date” as defined in the scheme is as follows:

“Relevant Date” means the date on which the employee ceases to be in service of the Bank as a consequence of the acceptance of the request for voluntary retirement under the Scheme.”

(c) By a letter dated 2nd August, 2001 which is Annexure P-8 of the writ application,

the writ-petitioner was granted pension @ Rs.1,024/-.

However, by a further letter dated 30th August, 2001, the pension payment-order together with payment of the commuted value thereof was stopped in view of the recent amendment of Rule 22 of the Pension Fund Rules.

(d) Such action on the part of the Bank gave rise to filing of the writ application.

(e) According to the writ-petitioner, the amended Rules came into force on 31st March, 2001, whereas the acceptance of offer to retire voluntarily was communicated and received by the writ-petitioner on 17th March, 2001.

The writ-petitioner complained that by offer and acceptance a concluded contract came into existence and any subsequent change in the Pension

Fund Rules could not have adversely affected the right of the writ petitioner which existed on the date of acceptance of the agreement. The other point taken by the writ-petitioner was that no retrospective effect to the amended Rules could have been given so as to prejudicially affect the right of the writ-petitioner, particularly, in view of the fact that the Bank had itself issued a clarificatory note, as would be found in the notification dated 9th March, 2001. The said explanatory memorandum is quoted

below:

“It is certified that no employee/pensioner of the State Bank of India is likely to be affected adversely by the notification being given retrospective effect.”

(f) The aforesaid contention of the writ-petitioner was opposed by the Bank Authority by contending that the voluntary retirement scheme itself provided that payment of pension was dependent upon the Rules prevalent on the date the employee would cease to be in the service of the Bank and admittedly, the writ-petitioner having ceased to be an employee on 31st March, 2001, the amendment of the Pension Rules effective from that day was binding upon him and as such, he was not liable to get any pension. According to the Bank, the decision to amend the Pension Rules had earlier been taken in the month of January, 2001 though publication of the amended rule was made on 31st March, 2001.

(g) It was further contended on behalf of the Bank that the writ-petitioner voluntarily retired on 31st March, 2001 and the pension payment order dated 2nd August, 2001 was wrongly issued and, therefore, there was nothing illegal in staying the operation of that order.

(h) In view of the aforesaid disputes raised in the writ-application, the learned Single Judge formulated the following two points:

“a) Whether the right of the petitioner to receive pension as per the existing rules could have been taken away by the amended rules which became effective on 31st March, 2001?

b) Is the writ petitioner estopped from espousing his cause of action due to delay, laches and acquiescence?”

5. As pointed out earlier, the learned Single Judge by the order impugned in this appeal answered both the points in negative and in favour of the writ petitioner.

However, His Lordship refused to grant any interest for a period prior

to the institution of the writ proceeding on the ground of delay and, at the same time, did not consider the prayer for damages made in the writ-application at all.

6. Therefore, the first point that arises for determination in this appeal is whether the learned Single Judge was justified in passing the order impugned with a direction upon the Bank to pay the pension to the writ-petitioner on the ground that the amendment of the Pension Rules did not affect the right of the writ-petitioner which existed on the date of acceptance of the offer by the bank.

7. After hearing the learned counsel for the parties and after going through the materials on record, we find that there is no dispute that at the time of offer of the writ-petitioner to retire voluntarily which was accepted by the employer on March 17, 2001, the writ-petitioner, according to then pension rule, was eligible to get pension. In the voluntary retirement scheme, however, it is provided that the benefit including commuted value of pension would be payable in accordance with rules which would be prevalent on the day the employee would cease to be in the service of the bank i.e. March 31, 2001. It appears that on that very day of retirement, the amended rule was published which took away the then existing right of the writ-petitioner to get pension.

8. It further appears from record that the decision to amend the rules had already been taken in the month of January, 2001 but the same was not communicated to the employees when the scheme of of voluntarily retirement was declared or even when the offer of the employees for voluntary retirement was accepted by the bank. It is not even the case of the bank that the writ petitioner had any means of knowledge about the future amendment of the pension rules which would be detrimental to the interest of some of the employees in the matter of entitlement of the pension.

9. We find that the learned Single Judge in the facts of the present case rightly relied upon Section 19 of the Contract Act, particularly, the illustration (d) to Section 19 which along with Section 17 of the said Act is quoted below:

“17. “Fraud” defined.—“Fraud” means and includes any of the following

acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract—

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations

- (a) *A* sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.
- (b) *B* is *A*'s daughter and has just come of age. Here, the relation between the parties would make it *A*'s duty to tell *B* if the horse is unsound.
- (c) *B* says to *A*—"If you do not deny it, I shall assume that the horse is sound". *A* says nothing. Here *A*'s silence is equivalent to speech.
- (d) *A* and *B*, being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*.

19. Voidability of agreements without free consent.—When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent

was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party of whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

“B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A’s ignorance B is enabled to buy the estate at an undervalue. The contract is voidable at the option of A.”

10. In the case before us, on the date of acceptance of the contract, it was known to the bank that it had already decided to amend its pension rules by which the appellant would be deprived of his right to get pension although on the date of acceptance if he retired he would be entitled to get pension. The employee had no means of knowledge of such change of pension rules at the time of agreement. In such a situation, the relation between the parties being that of employer and employee, it was the duty of the employer to inform the employee about the future amendment of the pension rules which would deprive the employee of his right to get pension by entering into the voluntary retirement scheme. If he had known this fact, he would not definitely enter into the scheme because if he had retired in due course without opting for voluntary retirement, he would be entitled to get pension even under the amended rules. Therefore, the

silence maintained by the employer in such a situation amounted to fraud on its part. As pointed out in illustration (b) to Section 17 of the Contract Act, if it becomes a duty of a father to disclose the defect of the horse proposed to be sold to his just grown up daughter, in the same manner, it is also the duty of the employer to inform his employee about the future amendment of the pension rules causing prejudice to his employee at the last stage of his service-life before accepting the terms of the voluntary retirement scheme declared by it when such source of prejudice is known to the employer and the employee had no manner of knowledge of such perilous condition.

11. Apart from the aforesaid fact, the contract on the part of the bank which is a “state” within the meaning of Article 12 of the Constitution of India in inducing some of the employees to enter into agreement for voluntary retirement scheme and at the same time, not disclosing to them that there will be future amendment on the last date of their service by which their right to get pension would be taken away cannot but be said to be unfair and arbitrary. The learned Single Judge, it appears from record, has appropriately quoted the following observations of the Supreme Court in the case of Food Corporation of India Vs. Kamdhenu Cattle Feed Industries reported in AIR 1993 SC 1601:

“In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Art. 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is ‘fairplay in action’. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interacting with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider

and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.”

12. Therefore, on that ground also the writ-petitioner is entitled to get the pensionary benefit which was available to him on the date of declaration of the scheme and also on the date of acceptance of the offer of the employee under voluntary retirement scheme. If the proposed amendment was disclosed to the writ-petitioner in advance, he would not have accepted such prejudicial terms of voluntary retirement scheme and offered for the scheme. We do not for a moment dispute the submission of Mr. Gupta, the learned Senior Advocate appearing on behalf of the appellant that the contract was completed by acceptance of the offer of the employee under the scheme as laid down in the case of Bank of India vs. O.P. Swaranakar reported in AIR 2003 SC 858 but the appellant having committed fraud upon the writ-petitioner by adopting silence in the matter of proposed amendment of the pension rules on the last date of the service of the employee, the writ-petitioner is entitled to the relief claimed by taking aid of Article 14 of the Constitution of India.

13. The next question is whether the learned Single Judge was justified in refusing to grant pre-litigation interest on the arrears amount of pension payable to the writ-petitioner.

14. Once we hold that the writ-petitioner is entitled to get the arrears amount of pension which was unjustly refused, in our view, the learned Single Judge should have awarded interest on the aforesaid amount. It is now settled position of law that the direction for payment of interest is not an imposition of any penal measure

but it is natural accretion to the principal amount. The bank has retained that amount and has been benefited by investing the said amount in course of his business and at the same time, the writ-petitioner has been deprived of his right of enjoyment of that amount and the interest that would have accrued thereon.

15. At this stage it will be apposite to refer to the following observations of the Supreme Court in the case of Alope Shanker Pandey vs. Union of India reported in AIR 2007 SC 1958 about the concept of grant of interest: *“It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B.”*

16. Once violation of Article 14 of the Constitution of India has been established, delay cannot be a ground for depriving the writ-petitioner of his just dues. It is now a settled law that there cannot be any waiver of fundamental right guaranteed under Article 14 of the Constitution of India. (See: Basheshar Nath vs. Commissioner of Income-tax, Delhi and Rajasthan and another M/s. Model Knitting Industries Ltd., Interveners reported in AIR 1959 SC 149.)

17. Thus, there was no valid reason for not granting interest for the prelitigation period on the amount of pension.

18. We, therefore, dismiss the appeal and allow the cross-objection filed by the writ-petitioner thereby awarding interest also on the arrears amount of pension from the date of stoppage of pension till the filing of the litigation @ 12 % p.a.

19. In the facts and circumstances, there will be, however, no order as to costs.

(Bhaskar Bhattacharya, J.)

I agree.

13

(Prasenjit Mandal, J.)