

(2009) 10 MAD CK 0169

Madras High Court

Case No: Writ Petition No. 37681 of 2006 (O.A. No. 5936 of 1998)

V. Chandrasekaran

APPELLANT

Vs

Director of Elementary
Education, District Elementary
Educational Officer and
Additional Assistant Elementary
Educational Officer

RESPONDENT

Date of Decision: Oct. 8, 2009

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: L. Chandrakumar, for the Appellant; A.C. Manibharathi, G.A., for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K. Chandru, J.

The petitioner was working as Headmaster of a Panchayat Union Elementary School at Veeranakupam, Uthangarai Taluk. He filed O.A. No. 5936 of 1998 before the Tamil Nadu Administrative Tribunal, seeking to challenge the order of the third respondent dated 20.05.1998 and for a consequential direction to the respondents to treat the period from 06.01.1990 to 22.09.1998 as duty and confer all the benefits of salary, annual increment, promotion with other consequential benefits.

2. By the impugned order dated 20.05.1998, the petitioner was informed that with reference to the treating of the period of eight years from 05.01.1990 till the date of restoration of service, the matter was pending consideration. The department wanted to find out whether the Police Department had taken any action on the acquittal of the petitioner. But however, the petitioner's request for Voluntary Retirement was rejected.

3. The claim of the petitioner was that he gave a notice to go on voluntary retirement by his notice dated 23.02.1998 and three months notice which was required under the Rules comes to an end on 25.5.1998. He sent a letter dated 25.05.1998 to the third respondent stating that since there was no rejection of his request to go on voluntary retirement, it was deemed to have been accepted. Therefore, he stopped attending work from 25.05.1998. It was also the case of the petitioner that the rejection order which was challenged dated 20.05.1998 was received by him only on 02.06.1998 i.e. after the period of expiry of the notice.

4. On notice from the Tribunal, the respondents have filed a reply affidavit dated 05.10.2009. In the reply affidavit, it was stated that the petitioner was suspended pursuant to the registration of a criminal case in Crime No. 2/90 by the Sub-Inspector of Police, Dharmapuri Police Station. The said case was tried as Calendar Case 14/92 before the Judicial Magistrate No. I, Dharmapuri. The said case ended in acquittal in favour of the petitioner by a judgment dated 16.08.1995. Thereafter, on the representation of the petitioner, he was restored to service on 23.02.1998. After joining duty for one day, he gave notice to go on voluntary retirement. It was further stated that so far as the regularisation of the period of suspension from 6.1.90 to 22.9.98 was concerned, as it was for more than eight years, necessary orders will have to be obtained from the Government. The petitioner was also informed by them that he should submit necessary documents to enable them to forward the petitioner's request to the Government for regularising his service. The respondent denied the statement made by the petitioner that the order was ante dated. The petitioner was also informed that before getting relieved, prior permission should have been obtained by the petitioner, but he never informed the department about his leaving service nor handed over charge. The Rule requires clearance from the Vigilance Department for going on Voluntary Retirement and the petitioner's service during the interregnum period of suspension was also not regulated.

5. In view of the abolition of the Tribunal, the matter stood transferred to this Court and was re-numbered as W.P. No. 37681 of 2006.

6. Mr. L. Chandrakumar, learned Counsel for the petitioner submitted that once notice period under Fundamental Rule 56(3) is given, unless the competent authority refuses the same, Rule 56(3)(f) enables the Government Servant that he shall be deemed to have been retired voluntary from service.

7. Fundamental Rule 56(3) no doubt enables a Government servant to go on voluntary retirement on completion of 58 years of age or who has completed 20 years of service by giving notice of not less than three months in writing, but however, the notice will have to be given to the appointing authority and the date of notice is only from the date of receipt of the notice by the appointing authority. Rule 56(3)(e) enjoins the authority to accept the notice only when they are satisfied namely;

- i) that no disciplinary proceedings are contemplated or pending against the Government servant for the imposition of a major penalty;
- ii) that no prosecution is contemplated or pending in a Court of law against the Government Servant concerned;
- iii) that a report from the Director of Vigilance and Anti-Corruption has been obtained to the effect that no enquiry is contemplated or pending against the Government servant concerned;
- iv) that no dues which cannot be recovered from his Death-cum-Retirement Gratuity are pending to be recovered from the Government Servant concerned;
- v) that there is no contractual obligation to serve the Government during the period in which the Government servant concerned seeks to retire voluntarily.

8. Only when these conditions were satisfied, the appointing authority will have to issue orders before the date of expiry of notice either accepting the voluntary retirement or not. Therefore, Rule 56(3)(f) says if there is no denial by the authority, then the fiction found in the said Rule will come into operation.

9. In this context, it is necessary to refer to a decision of the Supreme Court in [Padubidri Damodar Shenoy Vs. Indian Airlines Limited and Another](#). The Supreme Court in the said decision referred to various types of Rules enabling the Government servant to go on voluntary retirement. In Paragraph 25 referred to the earlier judgment of the Supreme Court in [Tek Chand Vs. Dile Ram](#). The Supreme Court in that judgment referred to three categories of Rules relating to voluntary retirement after notice. It is necessary to refer to paragraph 25 of the said judgment, which is as follows:

25. In [Tek Chand Vs. Dile Ram](#), a three Judge Bench of this Court considered S.K. Singhal in paragraph 34 of the report and then went on to hold as follows:

35. In our view, this judgment fully supports the contention urged on behalf of the appellant in this regard. In this judgment, it is observed that there are three categories of rules relating to seeking of voluntary retirement after notice. In the first category, voluntary retirement automatically comes into force on expiry of notice period. In the second category also, retirement comes into force unless an order is passed during notice period withholding permission to retire and in the third category voluntary retirement does not come into force unless permission to this effect is granted by the competent authority. In such a case, refusal of permission can be communicated even after the expiry of the notice period. It all depends upon the relevant rules. In the case decided, the relevant Rule required acceptance of notice by appointing authority and the proviso to the Rule further laid down that retirement shall come into force automatically if the appointing authority did not refuse permission during the notice period. Refusal was not communicated to the respondent during the notice period and the Court held that voluntary

retirement came into force on expiry of the notice period and subsequent order conveyed to him that he could not be deemed to have voluntarily retired had no effect. The present case is almost identical to the one decided by this Court in the aforesaid decision.

36. This Court in *B.J. Shelat v. State of Gujarat* while dealing with a case of voluntary retirement, referring to the Bombay Civil Service Rules, Rule 161(2)(ii) proviso and Rule 56(k) of the Fundamental Rules, in a similar situation, held that a positive action by the appointing authority was required and it was open to the appointing authority to withhold permission indicating the same and communicating its intention to the Government servant withholding permission for voluntary retirement and that no action can be taken once the Government servant has effectively retired. Paras 9 and 10 of the said judgment read thus:

9. Mr. Patel next referred us to the meaning of the word "withhold" in Webster's Third New International Dictionary which is given as "hold back" and submitted that the permission should be deemed to have been withheld if it is not communicated. We are not able to read the meaning of the word "withhold" as indicating that in the absence of a communication it must be understood as the permission having been withheld.

10. It will be useful to refer to the analogous provision in the Fundamental Rules issued by the Government of India applicable to the Central Government servants. Fundamental Rule 56(a) provides that except as otherwise provided in this Rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. Fundamental Rule 56(j) is similar to Rule 161(aa)(1) of the Bombay Civil Services Rules conferring an absolute right on the appropriate authority to retire a Government servant by giving not less than three months' notice. Under Fundamental Rule 56(k) the Government servant is entitled to retire from service after he has attained the age of fifty-five years by giving notice of not less than three months in writing to the appropriate authority on attaining the age specified. But proviso (b) to sub-rule 56(k) states that it is open to the appropriate authority to withhold permission to a Government servant under suspension who seeks to retire under this clause. Thus under the Fundamental Rules issued by the Government of India also the right of the Government servant to retire is not an absolute right but is subject to the proviso where under the appropriate authority may withhold permission to a Government servant under suspension. On a consideration of Rule 161(2)(ii) and the proviso, we are satisfied that it is incumbent on the Government to communicate to the Government servant its decision to withhold permission to retire on one of the grounds specified in the proviso.

In this decision effect of Rule 56(k) of the Fundamental Rules is also considered which answers the argument of the learned Counsel for the respondent on this aspect. It may also be noticed that under Rule 48A in the Government of India's

decision giving instructions to regulate voluntary retirement it is stated: "Even where the notice of voluntary retirement given by a Government servant requires acceptance by the appointing authority, the Government servant giving notice may presume acceptance 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.

In the very same judgment, the previous judgment of the Supreme Court in B.J. Shelat v. State of Gujarat was also referred to where a similar Rule was came to be considered by the Supreme Court.

10. If it is seen in the said context, then it can be assumed that if there is no rejection within the notice period, then there is a presumption for going on voluntary retirement. But on the contrary in the present case, the petitioner himself had filed the order rejecting the case of the petitioner, which was dated 20.05.1998. In the Original application, he had stated that he had received the said order only on 02.06.1998. Though he contended that the said order was ante dated but the same was denied by the respondents in the reply statement.

11. The further question arises for consideration was that if the competent authority rejects the request of the petitioner within the notice period, whether it should be communicated before the expiry of the notice. Fundamental Rule 56(3)(f) merely says that the appointing authority shall issue orders before the date of expiry of notice and nowhere the Rule contemplates that the rejection order must be communicated to the petitioner. Presumably having that in mind, the petitioner had made a statement that the order was ante dated. When the respondents have refused about any ante dating of the order, this Court has no other reason to disbelieve the statement made in the reply affidavit.

12. In the light of the above, the writ petition stands dismissed. However, With reference to the regularisation of the period of suspension was concerned, as already stated in the reply affidavit, it is for the petitioner to co-operate by giving appropriate documents for sending proposals to the competent authority. The dismissal of the writ petition will not dis-entitle the petitioner from pursuing the remedy for getting his suspension regularised. No costs.