(1979) 02 CAL CK 0001

Calcutta High Court

Case No: None

Aparna Kumar Dhargupta		APPELLANT
	Vs	
United Industrial Bank Ltd.		RESPONDENT

Date of Decision: Feb. 13, 1979

Acts Referred:

- Industrial Disputes Act, 1947 - Section 2

Citation: (1979) 1 LLJ 478

Hon'ble Judges: Pratibha Banerjee, J

Bench: Single Bench

Judgement

1. The plaintiff was appointed by the defendant-Bank in or about 1949 as a Senior Assistant. In his application dated 20th June, 1944, the plaintiff had given his age as "about 30 years". The letter of appointment contained the following terms:

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Mr. Aparna Dhar Gupta
214-A, Kali Charan
Ghose Road, Dum Dum,
Calcutta.
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Dear Sir,

With reference to your application and interview with the undersigned, you are hereby offered the post of a senior assistant at the Bank on a salary of Rs. 175 per mensem with effect from Saturday, the 23rd July, 1949.

Yours faithfully,

Sd/- Illegible

Director-in-Charge.

2. The plaintiff accepted the said offer. Subsequently he was promoted to the position of a Branch Manager and in June, 1960, he was posted in the Ballygunge Branch of the defendant-Bank.

3. On 7th June, 1965 the defendant directed the plaintiff to retire with immediate effect. The said letter is set out below:

P.D. No. 8

D.D. No. 3

From : No. P & C 26/45

United Industrial Bank Ltd.,

7, Wellesly Place,

Calcutta-June 7, 1965.

Shri Aparna Kumar Dhar Gupta,

Branch Manager,

United Industrial Bank Ltd.,

Calcutta.

Retirement

It has been decided by the Board that you be retired from the service of the Bank with immediate effect and that you will be entitled to one month''s pay in lieu of notice.

(2) In this connection we have instructed Shri Sachindra Chandra Banerjee, Sub Accountant at Calcutta Main Branch, who is known to you, to proceed to Ballygunj Branch immediately and take over charge from you.

(3) Your service will, therefore, stand terminated as soon as you make over charge to Shri Banerjee.

Sd./- N. L. Chatterjee,

General Manager,

4. On 10th July, 1968, the plaintiff instituted the present suit. In the plaint the plaintiff alleged that he was a "workman" within the meaning of the Industrial Disputes Act and the terms and conditions of his service were governed by the "Shastri award" as modified on 31st March, 1969 and by the "Desai award". According to the plaintiff, the retiring age of the employees of the defendant-Bank was 60 years, but the plaintiff was wrongfully forced to retire at the age of 53 only. The notice of termination was illegal, arbitrary and violative of the principles of natural justice. The defendant contested this suit. The allegations in the written

statement were that the plaintiff was not a "workman" and the "Shastri award" or the "Desai award" had nothing to do with the plaintiff''s service. There was an express or implied term that the plaintiff would retire at the age of 55, In June, 1965, the plaintiff was 56 years old according to plaintiff''s application dated 20-6-1944. According to his age given in the Calcutta Gazette dated 23-5-1923 at the time of passing matriculation examination, the plaintiff was 58 years old in June, 1965. Moreover, his efficiency was impaired due to his age and the Board took decision to retire the plaintiff. The plaintiff had accepted the notice period salary and all other benefits due up to the date of termination of his service in full and final satisfaction of all his claims against the defendant by waiving all his other alleged rights. The defendant was not obliged to observe the principles of natural justice nor the notice was illegal or arbitrary. The following issues were raised at the time of the trial:

ISSUES

1. Was the plaintiff at any time a workman who could be governed by the Shastri or Desai award as alleged in paragraphs 13 and 14 of the plaint?

2. (a) Was the plaintiff retired arbitrarily and illegally by a letter dated 7-6-1965 as alleged in paragraph 15 of the plaint?

(b) What was his age on 7-6-1965?

3. Was it an express or implied condition of service of the plaintiff that he was to retire at the age of 55 years unless the Board of Directors of the defendant in their absolute discretion otherwise permits as alleged in paragraph 7 of the written statement?

4. (a) Did the plaintiff accept his retirement unconditionally?

(b) Did the plaintiff receive and accept the sums of Rs. 490, Rs. 1,470 and Rs. 3,100.59 unconditionally and in full and final settlement of all his claims and has waived all his alleged rights as alleged in paragraphs 15, 16 and 17 of the written statement ?

5. To what relief, if any, is the plaintiff entitled?

5. According to the plaintiff''s counsel, the plaintiff was a "workman" within the meaning of the Industrial Disputes Act and he was entitled to all the reliefs prayed for in the present suit. The counsel for the defendant contended that the plaintiff was not a "workman" and his service was terminable by one month''s notice on either side. He pointed out Section 2(s) and Section 2(s)(iv) of Industrial Disputes Act in support of his contention:

Section 2(s) "Workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, and for the purposes of any proceeding under this Act in relation to an industrial

dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge, or retrenchment has led to the dispute, but does not include any such person....

(i) to (iii) .

(iv) Who, being employed in a supervisory capacity, draws wages exceeding Rs. 500 per mensem or exercises either by the nature of duties attached to the officer or by reason of all the powers vested in him, function mainly of a managerial nature.

6. It is undisputed that the plaintiff was the Branch Manager in Ballygunge Branch at the time of the notice of termination on 7thJune, 1965. The scope of his authority will clearly appear from defendant''s letter dated29th June, 1960 (Ext. D) ,where it was recorded that the then branch manager of the Ballygunge Branch was transferred to Patna and in his place the plaintiff was promoted on the following terms:

We have instructed Shri Aparna Dhargupta, assistant accountant at the Head Office, to take over complete charge of the branch from the permanent incumbent....

7. In his evidence, the plaintiff admitted that he was enjoying all the powers and privileges which were vested in all other branch managers (Q. 85). The plaintiff was exercising all managerial powers vested in him. On account of the nature of the duties attached to the post of a manager, the plaintiff could not come under the definition of " workman " as given in this Act. Mr. Sinha thereafter submitted that the plaintiff was brought into the category of "workman" by the bipartite agreement between the management and the employees of the defendant-Bank which included branch managers. This agreement is dated20th June, 1968 and came into existence long after the plaintiff''s service under the defendant was terminated. The plaintiff cannot take advantage of this agreement. In the premises. I hold that the plaintiff was not a workman and his service was terminable by notice. Mr. Sinha thereafter submitted that plaintiff''s service was not terminable by notice because his service was for a fixed period. The age of 60 years was the age of superannuation fixed by the defendant-Bank. If the plaintiff''s service was terminated before the expiry of this period, without any allegation against him, then the termination would be entitled to the damages for the unexpired period of his service and the damages should be awarded on that basis. But the plaintiff failed to prove that there was any age of superannuation fixed by the defendant-Bank. His evidence was that some of the employees were retained by the defendant-Bank even after they reached the age of 60 years. The defendant also failed to prove that there was any express or implied terms in the service conditions of the plaintiff whereby he was bound to retire at the age of 55 years. As a matter of fact the defendant did not adduce any evidence on this issue. In the letter of appointment dated 23rd July, 1949, there was no mention about any period of service or the age

of superannuation, In my opinion the plaintiff''s service under the defendant was for an indefinite period, terminable by reasonable notice on either side. This construction of the agreement in suit is supported by the following cases:

8. In Prafulla Ranjan Sarkar Vs. Hindusthan Building Society Ltd., the plaintiff was appointed as the Secretary of the society on almost similar terms as that of the plaintiff in the present case (at p. 215):

Resolved that Mr. Prafulla Ranjan Sarkar be appointed secretary of the society on a salary of Rs. 750 (Rupees Seven Hundred and Fifty) only per month and undertake such duties as may be assigned to him by the Managing Director.

9. In that case the plaintiff''s service was terminated on 1st Oct.,1954 and he was offered one month salary in lieu of the notice. It was held that the plaintiff''s terms of service was for indefinite period and it was terminable by reasonable notice of 9 months. In [1938] 4 All ER 467 {Fisher v. Dick & Co.), the plaintiff was appointed by the defendant-company from 1st December, 1933 at a commencing salary of ₹400 per annum plus out of pocket and travelling expenses. The plaintiff sued the defendant for damages for wrongful dismissal. It was held in that case that the plaintiff''s service was for indefinite period subject to termination by reasonable notice of 3 months on either side.

10. Even the terms such as " substantive and permanent" in the letter of appointment have been construed in Bimalacharan Batabyal Vs. Trustees for the Indian Museum, as mere descriptive of the nature and character of the appointment than indicative of the duration of that appointment and the proper construction of the contract was held to be subject to termination by giving reasonable notice on either side.

11. Mr. Sinha then submitted that considering the position occupied by the plaintiff at the time of termination of his service one month''s notice was arbitrary, illegal and wrongful. Mr. Roy submitted that on the facts and circumstances of the present case one month''s notice or salary in lieu of notice was legitimate and proper. In Bimalacharan Batabyal Vs. Trustees for the Indian Museum, , it has been held:

The question of what is reasonable notice is a question of fact and depends largely upon the circumstances of each particular case.

12. It appears that the doctrine of "reasonable notice " is based upon the hypothesis that the period of notice allowed is the time during which a fresh employment may be obtained by the employer concerned. Each case must, therefore, depend upon the nature of the service and the difficulty in obtaining similar nature of service. No custom appears to have been judicially established in this country as to the length of the notice required in any particular class of employment. What is reasonable notice must be determined upon the nature of each employment in question. The employee has the duty to mitigate the damages. But the employee is not bound to

accept any job less in status or remuneration than what he has been enjoying under the former employment. Of course, the employee cannot be unreasonable in his demands. The onus is on the employer to adduce evidence of the opportunities open to the employee to obtain another employment as good or better than the former one and K.G. Hiranandani Vs. Bharat Barrel and Drum Mfg. Co. Pvt. Ltd., is an authority on this point. The period of notice will depend upon the nature of service as also on the availability of similar type of job.

13. In [1952] 2 All E.R. 1121 (Bauman v. Hulton Press Ltd.) the plaintiff, a journalist and photographer and appointed as the chief photographer on the staff of periodical entitled " Picture Post". The plaintiff''s service was terminated. In an action for wrongful dismissal, it was held that the reasonable notice on the fact of that case would be six months'' notice and damage was awarded on that basis. In Prafulla Ranjan Sarkar Vs. Hindusthan Building Society Ltd., , the plaintiff as the secretary of the defendant-company, occupying the highest position among the employees and in charge and control of the entire business of the company was held to be entitled to nine months'' notice. In (1916) 33 ITR 77 (Grandgy v. Sunprinting and Publishing Assn.) the plaintiff was the editor of the Newspaper and reasonable notice for termination of his service was held to be one year''s notice. In K.V. Abdu, Manager C.M.S. Pottichira School, Oorakam village and Others Vs. Madhavi Appassi Amma, , the plaintiff was a teacher in an aided school and was wrongfully dismissed. It was held that her service was from year to year and she was entitled to one year''s notice.

14. The plaintiff was the branch manager and he was occupying the highest position among all the employees in that branch and was in complete charge of that branch. The position of a branch manager in a Bank is full of risk and responsibilities. Three months'' notice would be reasonable on the facts and circumstances of this case. The defendant did not adduce any evidence that the plaintiff had the opportunity of getting a similar or better job at that time. On the facts and circumstances of this case I hold that the termination of plaintiff''s service by one month''s notice without any justified ground was wrongful and illegal. The plaintiff was entitled to six months'' notice for termination of his service.

15. One of the issues for decision is what was plaintiff''s age on 7th June, 1965. The plaintiff had given three different ages on three different occasions. According to his application dated 20th June, 1944, he would be about 56 years in June, 1965. According to the age given by him at the time of his matriculation examination, he would be over 58 years in June, 1965. In the plaint he had alleged that he was only 53 years'' old on 7th June, 1965. The plaintiff did not disclose any horoscope or birth certificate or any other reliable documentary evidence for establishing his correct age. I am unable to accept the evidence of the plaintiff explaining the discrepancy in his age as given by him in his application and at the time of his matriculation examination. The only reliable documentary evidence before me is the Calcutta

Gazette (Ext. 5) and on that basis I hold that the plaintiff was over 58 years'' old in June, 1965.

16. Mr. Roy submitted that the plaintiff had accepted the termination of his service without any protest and had received the salary for the notice period and all other benefits available to him unconditionally in full and final satisfaction of all his claims against the defendant by waiving all his other alleged rights. Mr. Sinha on the other hand submitted that the plaintiff never accepted the termination as alleged. According to him the plaintiff could not be vocal in his protest as that would have resulted in stoppage of payment of all benefits by the Bank. That would have caused extreme hardship to the plaintiff. The submission to the order of termination of service or acceptance of benefits under critical financial condition by the employee cannot amount to waiver of all rights by the plaintiff. He relied on P.S. Desikachari and Others Vs. Associated Publishers, Madras (P) Ltd. and Another, in this connection. In this case the question was whether the petitioners had voluntarily retired or their services were terminated wrongfully by the respondents. The employment of the petitioners were terminable by notice by the respondent-company, and were in fact terminated. At the request of the petitioners, however, the date fixed for discharge was extended by the respondent-company. Thereafter the petitioners filed a writ petition for quashing the order passed by the company. It was submitted on behalf of the respondent-company that although the initiative came from the respondent at the first instance the petitioners had asked for extension of time for discharging from service which was granted by the company. The petitioner''s service came to an end on the expiry of the extended date. Under the circumstances it was a case of voluntary retirement by the petitioner. It was held (at p. 331):
A mere submission of the employee to the termination of service by the employer cannot be said to be a voluntary act of the former. This is particularly so in a case where the employer has the power under the terms of the employment to terminate the service although such power has to be exercised after notice or giving pay in lieu of notice. A voluntary retirement is the act of the employee, just as dismissal or removal from service is the act of the employer. Neither apathy nor submission on the employee''s part would alter the essential character of the termination of service of an employee.

It appears from Ext. 2 that in May, 1965, the defendant had asked the plaintiff about the year of his passing matriculation examination and by letter dated 29-5-1965, the plaintiff had informed them that the year was 1923. From the Calcutta Gazette dated 23-5-1923, the defendant found out the discrepancy in plaintiff''s age as given in his application dated 20-6-1944, But the defendant did not give the plaintiff any opportunity to explain this discrepancy as according to them they were not obliged to follow any principles of natural justice. Instead by a letter dated 7-6-65, plaintiff''s service was terminated with immediate effect without showing any cause. The

plaintiff must have been shocked but had no other alternative but to submit to that. He certainly could not continue in service under those circumstances. According to the plaintiff, he depended on the advice of the then General Manager of the defendant. He addressed a letter to the general manager on 10-6-65 highlighting his pitiable financial condition, and begged for reappointment (Exhibit I). This representation was rejected by the Board. The plaintiff wrote another letter dated 26-7-65 (Exhibit 3) begging for gratuity ,etc, and in his extreme exasperation claimed himself to be a " workman". The acceptance of the notice period salary, gratuity, etc. took place on this background. The plaintiff in his evidence categorically denied that he had accepted gratuity or other benefits in full and final satisfaction (Q. 152) and maintained that he did not accept the termination of service (Q. 284-285). The defendant''s witness Tarak Nath Roychowdhury did not prove defendant''s case that by accepting benefits on termination of his service, the plaintiff had agreed to accept the same in full and final satisfaction of his claims against the defendant by waiving all his other rights. I accept the submission of Mr. Sinha and hold that the submission to the order of termination and acceptance of benefits by the plaintiff did not amount to waiver of all other rights on the facts of this case.

17. Moreover in Humayun Properties Ltd. Vs. Ferrazzinis (Private) Ltd., , it was held (at p. 476):

...Where a party has two rights, the mere exercise of one right does not amount to waiver of the other but if there are alternative rights, the exercise of one right might imply that the party has waived the exercise of other....

18. In the present case, the plaintiff had two distinct and not alternative legal rights against the defendant, viz., (1) to receive all his dues in terms of the contract of service and (2) to recover damages for wrongful termination. The plaintiff has exercised one of his rights to receive his dues which did not amount to waiver of his other right to recover damages. It has been held in Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, .

The generally accepted connotation is that to constitute '' waiver'', there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege. Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right, estoppel is a rule of evidence.

19. To defeat the plaintiff''s claim for damages in this suit, the defendant has to prove that the plaintiff had knowledge that he was entitled to 3 months'' notice and had agreed to waive his right to recover damages from the defendant. The question of waiver is a mixed question of law and fact. If the plaintiff was entitled to three months'' notice, he would have worked for three months and earned three months'' salary. The right to receive salary accrues month by month and each such right

constitutes separate and distinct cause of action. The position would not change if salary is given in lieu of notice. The evidence of plaintiff''s accepting his dues including one month''s salary in lieu of one month''s notice, will not amount to waiver of plaintiff''s claim for other two months'' notice period salary on the facts and circumstances of this case. The defendant has failed to prove that the plaintiff had agreed to accept one month''s notice as reasonable notice or waived his right to recover another two months'' salary by way of damages on account of his wrongful dismissal. The plaintiff did not know that he was entitled to three months'' notice at that time. In the premises I hold that the plaintiff is entitled to recover damages against the defendant.

20. The issues are, therefore, answered as follows:

Issue No. 1--No. Issue No. 2--(a)--Yes. Issue No. 2 (b)--over 58 years on 7-6 65. Issue No. 3--No. Issue No. 4 (a)-No. Issue No. 4 (b)--No.

21. There will be a decree for Rupees 980with interim interest thereon at the rate of 9 %per annum and interest on judgment at the rate of 6% per annum until realisation and costs. Certified for two counsel.