

MANU/MH/0281/2008

Equivalent Citation: 2008(6)BomCR590, [2008(118)FLR537], (2008)IIILLJ139Bom, 2008(4)MhLj449

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 521 of 2008

Decided On: 18.03.2008

Appellants: **Bombay Mercantile Co-op. Bank Ltd.**
Vs.

Respondent: **Noor Mohammed Abdul Rehman Mulla**

Hon'ble Judges/Coram:

A.M. Khanwilkar, J.

Counsels:

For Appellant/Petitioner/Plaintiff: M.M. Varma and Rajesh Gehani, Advs.

For Respondents/Defendant: S.C. Naidu and Siddharth Ingule, Advs., i/b., C.R. Naidu & Co.

Case Note:

Service - Gratuity - Payment of - Section 13 of the Payment of Gratuity Act, 1972 - Present writ petition filed against order directing petitioner to pay gratuity amount along with interest thereon @ 10% p.a. from date of entitlement till date of payment within thirty days from date of receipt of order - Held, letter of petitioner to respondent was only in nature of accepting resignation and cannot be considered as termination letter - Inasmuch as it does not even remotely suggest that petitioner/management intended to terminate services of respondent - As it is a case of acceptance of resignation, there is no provision in Act which would preclude an employee from receiving benefit already accrued to him under Act - If it were to be a case of termination or dismissal, it would have been a different matter; so as to resist claim of respondent of receiving payment under provisions of Act - On this finding, conclusion reached by two authorities below will have to be upheld - However, at same time inclined to accept grievance of petitioner that there was no justification for first authority to record as of fact that respondent has put in 36 years of unblemished service "and petitioner relieved him in a very pleasant manner - Court is in agreement with grievance of petitioner that even if it was necessary to consider factual matrix as to whether respondent employee had unblemished service record for examining claim of respondent, even then opinion so recorded by first authority that applicant has put in 36 years of unblemished service and petitioner relieved him in a very pleasant manner, is an error apparent on face of record - Inasmuch as, it is case of petitioner that respondent is facing departmental action which has been referred to in communication - It is a different matter that departmental action has been interdicted on account of interim orders passed by this Court in pending writ petition preferred by respondent - In event said departmental action was to be taken to its logical end against respondent and a finding of guilt was to be recorded against him, it would necessarily follow that service record of respondent was not unblemished - Suffice it to

observe that to extent of alleged observation made by first authority, grievance of petitioner will have to be accepted and those observations will have to be effaced from record - If employee was to be found guilty in said disciplinary proceedings and if relevant rules so permit, petitioner/management would be free to recover amount already paid to respondent by way of gratuity amount in terms of impugned orders - In circumstances, this petition is disposed off with above observations

JUDGMENT

A.M. Khanwilkar, J.

1. Rule. Rule made returnable forthwith. Mr. S.C. Naidu waives notice for respondent. By consent petition is taken up for hearing forthwith as short question is involved.

2. This petition takes exception to the order passed by the Controlling Authority under Payments of Gratuity Act namely Assistant Labour Commissioner (Central-III), Mumbai dated 20th June 2007 and the order passed by the Appellate Authority under the said Act dated 15th October 2007 confirming the order of the first authority thereby directing the petitioner to pay gratuity amount of Rs.3.50 lakh along with interest thereon @ 10% p.a. from the date of entitlement till the date of payment within thirty days from the date of receipt of the order.

3. Briefly stated, the respondent availed of Early Severance Scheme propounded by the petitioner bank and decided to opt for early retirement. That request was considered by the petitioner and it was decided by the Chairman and Administrator to treat the offer of the respondent as "resignation" and not one of "early retirement" under Early Severance Scheme of the bank. On that basis the respondent was sent communication on 28th December 2002 in the following terms:

Dear Sir,

This has reference to your letter wherein you have opted for retirement under Early Severance Scheme of the Bank, the same is not acceptable to the Management. However, the Chairman & Administrator has treated your said letter as resignation and the same is accepted with immediate effect i.e. from 28th December, 2002.

Accordingly you stand relieved from the service of the Bank from the said date.

You are requested to pay the outstanding balance in your housing loan account, festival advance and special festival advance and any other dues immediately on receipt of this letter.

Yours faithfully,
Sd/(Z.A. Menon)
Asst. General Manager
(HRD & Personnel)

4. Thereafter, however, the gratuity amount remained unpaid and the respondent pursued that claim. The petitioner in its communication dated 8th May 2005 informed the respondent as follows:

Dear Sir,

This refers to your letter dated 25th April 2005 addressed to the Chairman & Administrator of the Bank. I am directed to inform you as under:

You were informed vide letter No. 66/STF/ 1909 dated 9th May 2003 that during the course of your employment with the Bank, certain Show Cause Notices were issued to you for irregularities committed by you while sanctioning/ recommending advances at various Branches/ Departments, where you were functioning. The list of some of the Accounts of Advances along with the outstanding as on date was annexed with the aforesaid letter. Your attention was also drawn to the Resolution passed in the Annual General Meeting held on 30th December 2002 which was passed unanimously by the said Body, which inter alia reads as follows:

Despite the resignations, retirements and terminations of the staff members, the concerned Officials will continue to be held responsible for the malfeasance and acts of omission and commission that he/she might have committed. The concerned Officers should continue to be responsible even after leaving the Bank. You were issued Show Cause Notice on 27th September 1996 for initiating a de novo inquiry about your involvement in the grant of loan to M/s.Mercantile Traders, which Account became bad and irrecoverable thereby the Bank suffered a loss to the extent of Rs.2.47 crores approximately. You have filed a Writ Petition in the Bombay High Court to challenge the de novo inquiry and obtained injunction restraining the Bank from proceeding with the inquiry against you.

The Bank has filed an FIR with the Crime Branch in this regard. The police submitted a Charge Sheet before the 19th Metropolitan Magistrate Court, Esplanade, Mumbai, in which you have been made one of the accused and the said case is still pending before the Court.

You were also issued Show Cause Notice No. 61/MD/105 dated 16th June 1998 pertaining to housing facility availed by you and irregularities in the Account of M/s.Nikhilene Synthetics Private Limited and M/s.V.V.Traders and Show Cause letter No. 61/MD/107 dated 17th June 1998 in respect of the following Accounts:

1. M/s.Nupur Trading Co.
2. M/s.Vrishab International.
3. M/s.Skin Affairs.
4. M/s.Nakhuda Exports.
5. M/s.Colaba Exports.
6. M/s.Akhtar Mohd. Quddus & Sons.
7. M/s.Zaiba Exports.
8. M/s.Ramsons Corporation.
9. M/s.White-Way Exports.
10. M/s.Vijay Kumar & Co.

Besides, Show Cause letter No. 68/MD/191 dated 19th March 1999 was issued to you in the matter of irregularities noticed in the Accounts of M/s.Hollywood Health and Beauty Clinic, M/s.Hollywood Beauty Centre, M/s.Hollywood Beauty Concept (P) Ltd. It is a well established fact that you, being one of the senior officers of the Bank, has caused huge losses to the Bank by sanctioning and recommending for sanction various credit facilities in numerous borrowal accounts. You are responsible to the Bank for the loss to the extent of Rs.13,34,87,736.10 approximately in some of the Accounts scrutinized by the Bank as informed to you by the aforesaid letter. The Bank is still in the process of scrutinizing the files of Accounts sanctioned/recommended by you which are classified as NPA and these losses caused to the Bank on your account will be in the neighbourhood of Rs.30.00 crores. We will, therefore, be sending charge memos to you with a view to realize these amounts from you in due course.

In view of the financial losses caused to the Bank through your various acts of omission and commission, you have lost your right to claim Gratuity from the Bank. As a matter of fact, the Bank is contemplating to file recovery proceedings before the Competent Forum against you, besides adopting criminal action for the loss suffered by the Bank.

Yours faithfully,
Sd/
Chief Officer Legal Department

5 . As the amount towards gratuity remained unpaid, the respondent carried the matter before the Controlling Authority who, in turn, after considering the rival stand, issued direction to the petitioner to pay the gratuity amount of Rs.3.50 lakh along with interest @ 10% p. as aforesaid, vide order dated 20th June 2007. Before the controlling authority the principal objection on behalf of the petitioner was that although the communication sent to the respondent bank dated 28th December 2002 mentions that the respondents letter of resignation has been accepted with immediate effect i.e. on 28th December 2002, however, that, in fact, was in the nature of termination of respondent having regard to the antecedents of the respondent -as the petitioner was anxious to get rid of the respondent by taking opportunity of offer sent by the respondent to opt for retirement under Early Severance Scheme. That contention did not find favour with the controlling authority. Consistent with the opinion recorded by the controlling authority, impugned direction was issued to the petitioner to pay the amount of gratuity along with interest. That decision was carried in appeal by the petitioner before the Appellate Authority, who, in turn, has confirmed the view taken by the first authority vide his order dated 15th October 2007. These decisions are subject matter of present writ petition.

6 . Essentially two contentions have been raised on behalf of the petitioner. First contention is that, the communication sent by the petitioner to the respondent dated 28th December 2002 is in the nature of letter of termination though worded as "accepting resignation of the respondent with immediate effect". If so, the respondent will not be entitled for payment of gratuity having regard to the extant regulations. It was next contended that the first authority proceeded on erroneous premise that the respondent has put in 36 years of unblemish service for which reason was relieved by the petitioner in a very pleasant manner. It was argued that there was no reason for the said authority to record such an opinion as that factual position was not in issue at all. Besides, it is contended that even if that issue was to

be considered, the authority has clearly glossed over the materials pressed into service on behalf of the petitioner which establishes the position that disciplinary action against the respondent was and has been resorted to by the petitioner. One such action is still pending as the same has been interdicted on account of an interim order passed in writ petition filed by the respondent before this Court which is still pending. That aspect has been explicitly mentioned in letter dated 8th May 2005, Exhibit-G, Page 27.

7. Counsel for the respondent, on the other hand, strenuously argued that no fault can be found either with the opinion recorded by the authorities below on relevant issues or for that matter the conclusion reached in issuing the direction to pay the gratuity amount to the respondent along with interest within thirty days.

8. Having considered the rival submissions, I have no hesitation in upholding the view taken by the authorities below on the first issue about the efficacy of the letter issued by the petitioner dated 28th December 2002, that it was only in the nature of accepting resignation and cannot be considered as termination letter. Inasmuch as, on plain language of the said letter which is already reproduced in its entirety in the earlier part of this order, does not even remotely suggest that the management intended to terminate the services of the respondent. Had that been the case, the respondent would have challenged that stand of the management immediately on receipt of such communication. However, the letter plainly records that the Chairman and Administrator has treated the offer letter given by the respondent as "resignation" instead of "retirement" under early severance scheme and the same has been accepted as resignation as such w.e.f. 28th December 2002. The letter also records that the respondent would stand relieved from services of the bank from the said date. Considering the language of the letter, it is not possible to countenance the stand of the petitioner that the decision of the petitioner conveyed in the said letter was to terminate the respondent. In other words, what has been conveyed to the respondent under this letter, is that, the offer of the respondent has been accepted as simplicitor resignation. No more and no less. As it is a case of acceptance of resignation, there is no provision in the Gratuity Act which would preclude an employee from receiving benefit already accrued to him under the said Act. If it were to be a case of termination or dismissal, it would have been a different matter; so as to resist the claim of the respondent of receiving payment under the provisions of the said Act. On this finding, the conclusion reached by the two authorities below will have to be upheld.

9. At the same time, however, I am inclined to accept the grievance of the petitioner that there was no justification for the first authority to record as of fact that the respondent has put in 36 years of unblemished service "and the petitioner relieved him in a very pleasant manner. That observation was wholly unnecessary, as the core issue that was required to be considered was whether the action of the petitioner was one of acceptance of resignation or of termination of services.

10. I am also in agreement with the grievance of the petitioner that even if it was necessary to consider the factual matrix as to whether the respondent employee had unblemish service record for examining the claim of respondent, even then the opinion so recorded by the first authority at page 63 of the paper book in its judgement that the applicant has put in 36 years of unblemished service and the petitioner relieved him in a very pleasant manner, is an error apparent on the face of record. Inasmuch as, it is the case of the petitioner that the respondent is facing departmental action which has been referred to in communication dated 8th May

2005. It is a different matter that the said departmental action has been interdicted on account of interim orders passed by this Court in pending writ petition preferred by the respondent. In the event the said departmental action was to be taken to its logical end against the respondent and a finding of guilt was to be recorded against him, it would necessarily follow that the service record of the respondent was not unblemished. Suffice it to observe that to the extent of the alleged observation made by the first authority, the grievance of the petitioner will have to be accepted and those observations will have to be effaced from the record.

11. It will have to be clarified that if the law permits taking disciplinary action and/or continuing the disciplinary action already resorted to against an employee whose resignation request has been accepted by the management, obviously, the management will be free to pursue such action and in that case the decision of the authorities which have been made subject matter of challenge in this writ petition, will obviously be subject to the final outcome of the said disciplinary action. In other words, if the employee was to be found guilty in the said disciplinary proceedings and if the relevant rules so permit, the management would be free to recover the amount already paid to the respondent by way of gratuity amount in terms of the impugned orders.

12. I am informed that the petitioner has already deposited the requisite amount with the first authority i.e. Controlling Authority. In view of this position, the respondent will be free to withdraw the said amount subject, however, to giving an undertaking that he will bring back the requisite amount as and when directed by the Court of competent jurisdiction. Counsel for the respondent, however, opposes issuance of this direction, placing reliance on Section 13 of the Payment of Gratuity Act, 1972. Section 13 in no way precludes the Court from issuing direction to concerned employee to give an undertaking to bring back the amount as and when ordered by the Court of competent jurisdiction. That does not entail in an order of attachment as such, which is prohibited by Section 13 of the Act.

13. In the circumstances, this petition is disposed off with the above observations. No order as to costs.

© Manupatra Information Solutions Pvt. Ltd.