

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL

MUMBAI

ORIGINAL APPLICATION NO.499 OF 2017

DISTRICT : MUMBAI

Shri Pradipkumar Yashawant Bhurke,)
Age 49 years, Occ. Nil, (Ex. Under Secretary) in the)
Office of below named Respondent)
R/o Gorai Vinayak CHS Ltd., Flat No.303,)
Borivali (West), Mumbai 400092)..Applicant

Versus

The Chairman/Secretary,)
Maharashtra Public Service Commission,)
8th floor, Cooperage Telephone Building, M.K. Road,)
Mumbai 400021)..Respondent

Shri G.A. Bandiwadekar – Advocate for the Applicant

Miss S.P. Manchekar – Chief Presenting Officer for the Respondent

CORAM : Shri Justice A.H. Joshi, Chairman
Shri P.N. Dixit, Member (A)

RESERVED ON : 11th February, 2019

PRONOUNCED ON : 13th February, 2019

PER : Shri Justice A.H. Joshi, Chairman

J U D G M E N T

1. Heard Shri G.A. Bandiwadekar, learned Advocate for the Applicant and Miss S.P. Manchekar, learned Chief Presenting Officer for the Respondent.

2. The Applicant was working as Under Secretary in the office of the Respondent. He submitted notice of voluntary retirement dated 9.12.2016 and the same was accepted by the Respondent by order dated 24.3.2017 w.e.f. 31.3.2017 (Exhibit A page 14 of OA). The Applicant made a representation dated 24.3.2017 (Exhibit C page 17) to revoke the request for voluntary retirement. The same was, however, rejected by the Respondent by communication dated 31.3.2017 (Exhibit C-1 page 18) stating as under:

“स्वेच्छा सेवानिवृतीची नोटीस मागे घेण्यासाठी कोणतेही ठोस/नेमके समर्थन दिलेले नसल्यामुळे आपली स्वेच्छा सेवानिवृती मागे घेण्याची विनंती महाराष्ट्र नागरी सेवा (निवृती वेतन) नियम १९८२ मधील नियम ६६(५) नुसार सक्षम प्राधिका-यांनी अमान्य केली आहे.”

(Quoted from page 18 of OA)

3. Subsequent representations by the Applicant on 7.4.2017, 19.4.2017 & 24.4.2017 did not materialize in change in the impugned order and by communication dated 22.5.2017 (Exhibit E page 27) the Respondent informed him as under:

“शासन सेवेतून स्वेच्छा सेवानिवृत्त झालेल्या अधिकारी/कर्मचा-यास पुन्हा नेमणूक देण्याची / सेवेत घेण्याची तरतूद नियमामध्ये नसल्याने, आपली संदर्भाधीन पत्रान्वये केलेली विनंती मान्य करता येत नाही-”

(Quoted from page 27 of OA)

4. The Applicant has, therefore, prayed that the impugned order dated 24.3.2017 (Exhibit A) accepting his voluntary retirement notice and order dated 31.3.2017 (Exhibit C-1) rejecting his representation for revoking the voluntary retirement notice be set aside.

5. In support of his prayer the grounds given by the Applicant are summarized below:

- (1) *He had moved the authorities for withdrawing voluntary retirement on 24.3.2017 which was before expiry of his service viz. 31.3.2017.*
- (2) *Legally the Applicant was within his right to withdraw the notice of voluntary retirement before the deadline viz. 31.3.2017 (para 6.9).*
- (3) *The contention of the Respondent that no strong and convincing reasons have been furnished by the Applicant is not the requirement under Rule 66 of the said rules. In fact the Applicant has statutory right to withdraw the notice at any time before the notice period (para 6.11).*
- (4) *The Applicant was in service till 31.3.2017 and thus was entitled to seek withdrawal of voluntary retirement notice (para 6.13).*
- (5) *As per the provisions of rule 66(5) of the said rules, the Applicant made the request for withdrawal before 31.3.2017 (para 6.14).*
- (6) *The Respondent had no authority, power and discretion to reject his request (para 6.15).*
- (7) *The Respondent did not have any discretion and the impugned order is vague, unreasoned and contrary to the principles of natural justice and thus bad in law (para 6.16).*

6. In support of the above grounds the learned Advocate for the Applicant has relied on the following judgments:

- (1) J.N. Srivastava v. Union of India & Anr., AIR 1999 SC 1571. The headnote and para 3 reads as under:

“Fact that employee has given up charge of post as per his memo relinquishing charge – Does not estop him from withdrawing his voluntary retirement notice – Employee treated to be in service till date of his service.”

“3.
It is now well settled that even if the voluntary retirement notice is moved by an employee and gets accepted by the authority within the time fixed, before the date of retirement is reached, the employee has locus poenitentiae to withdraw the proposal for voluntary retirement. The said view has been taken by a Bench of this Court in the case of Balram Gupta v. Union of India, reported in 1987 (Supp) SCC 228 : (AIR 1987 SC 2354). In view of the aforesaid decision of this Court it cannot be said that the appellant had no locus standi to withdraw his proposal for voluntary retirement before 31.1.1990.”

- (2) Balram Gupta v. Union of India & Anr., AIR 1987 SC 2354. Head note and para 13 reads as under:

“Withdrawal of notice well within time prior to expiry of notice period – Order allowing to retire prospectively on expiry of notice period without allowing withdrawal of notice – Held, on facts order was illegal.”

“13.
In the modern and uncertain age it is very difficult to arrange one’s future with any amount of certainty, a certain amount of flexibility is required, and if such flexibility does not jeopardize Government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement in the facts and circumstances of this case. Much complications which had arisen could have been thus avoided by such graceful attitude. The court cannot but

condemn circuitous ways "to ease out" uncomfortable employees. As a model employer the government must conduct itself with high probity and candour with its employees."

7. While opposing the OA the Respondent has filed his affidavit and the relevant portion of the same is as under:

"8. *With reference to para 6.1, I say and submit that, the applicant, vide his letter dated 9.12.2016, mentioning that since he has completed qualifying service of 20 years for voluntary retirement from service, submitted notice for voluntary retirement from service. As per the provisions contained in rule 66 of MCS (Pension) Rules, 1982, as well as the fact that the applicant had in fact been enquiring about the voluntary retirement, as is evident from his letter dated 29.7.2016 to the respondent, to which a reply dated 20.10.2016 was given mentioning that he will be completing 20 years service on 2.12.2016 and immediately a week thereafter, had submitted his notice on 9.12.2016 for voluntary retirement and a personal hearing was also given to the applicant in the third week of March, wherein he again reiterated his demand for taking voluntary retirement, the applicant's notice was accepted with due consideration and he was accordingly communicated vide memorandum dated 24.3.2017. However, on the same day vide his letter dated 24.3.2017, the applicant surprisingly informed this respondent that he is going to withdraw his notice dated 9.12.2016 without mentioning any reason. In this connection, MCS (Pension) Rules, 1982, Rule 66(5) states that:*

"66. *Retirement on completion of 20 years qualifying service.-*
(5) *A Government servant, who has elected to retire under this rule and has given the necessary notice to that effect to the appointing authority, shall be precluded from withdrawing his notice except with the specific approval of such authority:*

Provided that the request for withdrawal shall be made before the intended date of his retirement."

The above rule in clear terms states that a Government servant can be permitted to withdraw the notice for voluntary retirement only with the specific approval of the appointing authority. It is to reiterate that before accepting the notice of voluntary

retirement of the applicant, the appointing authority, i.e. the Chairman, MPSC in this case, himself gave him a personal hearing in the presence of Secretary of the Commission. During this discussion, the appointing authority asked the applicant whether he is really serious about his retirement and also asked him whether there are any family problems such as serious illness etc., to which the officer (applicant) replied in the negative and he reiterated his demand for voluntary retirement. Thus after satisfying itself that the applicant really seeks to retire voluntarily from the service, the appointing authority considering that he had been enquiring about the same since long, decided to accept his notice for voluntary retirement. It is also to submit that in view of the grave mistakes committed by him and not exercising due diligence in discharge of works allotted to him, it was also contemplated to initiate proceedings against him as per Rule 8 of MCS (Discipline & Appeal) Rules, 1979, i.e. major penalty proceedings. Between the date of the notice of voluntary retirement i.e. 9.12.2016 and the date of acceptance i.e. 24.3.2017, a period of three and half month was lapsed during which the applicant has not given any serious thought, of even when he was specifically asked about his resolve to retire voluntarily. However, surprisingly, when the notice acceptance letter was handed over to him on 24.3.2017, on the office copy of the letter itself he mentioned that he is going to withdraw his notice for retirement, and on the same day i.e. 24.3.2017, he gave a letter mentioning that he wants to withdraw the notice, without giving any reason. This gives an impression that the applicant was just testing what the decision is being taken by the appointing authority. The applicant immediately on being communicated about acceptance of his notice gave the application for withdrawal of notice after the same was accepted. Since his notice for voluntary retirement was already accepted as mentioned above, he was not permitted to withdraw the notice for voluntary retirement.

9. *With reference to para 6.2, I say and submit that, besides the personal details, the service record of the applicant on the whole cannot be termed as 'excellent'. In fact, considering the grave mistakes committed by him and not exercising due diligence in the discharge of works allotted to him, proceeding against him in accordance with Rule 8 of MCS (Discipline & Appeal) Rules, 1979 (Major penalty proceedings) had also been contemplated. A copy of memo dated 13.2.2017 issued to applicant as well as the reply to*

this given by him dated 20.2.2017 which smacks of insubordination as well as tacit admission of the mistakes committed by him are attached herewith.

12. *With reference to para 6.5, I say and submit that the statements of the applicant that, there was no reason and occasion for the respondent to accept such notice of the petitioner before 31.3.2017 is not correct and hence denied. The applicant vide his notice dated 9.12.2016 had requested to retire him voluntarily from 31.3.2017. Therefore, his request had to be decided before 31.3.2017, which was accordingly decided and communicated to the applicant mentioning clearly that he would stand retired from government service with effect from 1.4.2017 (FN) and not before that as alleged.*
13. *With reference to para 6.6, I say and submit that, the contents in this para are factually incorrect. Vide his letter dated 24.3.2017, he only sought for withdrawal of voluntary retirement notice dated 9.12.2016. He did not request for cancellation of order dated 24.3.2017.*
14. *With reference to para 6.7, I say and submit that, the applicant's notice dated 9.12.2016 for voluntary retirement was accepted vide memo dated 24.3.2017 and since his representation dated 24.3.2017 seeking withdrawal of voluntary retirement notice dated 9.12.2016 was not accepted and he was accordingly informed, he stood retired from the service with effect from 1.4.2017. As such, accepting the applicant's representation dated 7.4.2017 and 24.4.2017 would have amounted to reinstating him in the service for which there is no provision in relevant rules. Thus the action of the respondent is just and proper.*
16. *With reference to para 6.9, I say and submit that, as per the rule 66(5) of the MCS (Pension) Rules, 1982, the government servant can withdraw his notice for voluntary retirement only with the specific approval of the appointing authority. Withdrawing the notice of voluntary retirement is not the sole right of the government servant. Since, the applicant's notice for the voluntary retirement was accepted with due consideration and that too after satisfying that the applicant was really interested in taking voluntary retirement, as was also evident from the fact that he had been enquiring about the completion of his qualifying service for taking voluntary retirement*

since long and sufficient opportunity for personal hearing was also given to him, his representation seeking withdrawal of the notice for voluntary retirement after its acceptance was rejected.

18. *With reference to para 6.11, I say and submit that, before accepting the applicant's notice dated 9.12.2016 seeking voluntary retirement, he was given opportunity of personal hearing in the matter by the appointing authority. During this discussion, the appointing authority satisfied itself that the applicant really desires to take voluntary retirement. Thus, a conscious decision was taken and his notice was accepted with due consideration. However, the applicant made representation for withdrawal of the notice. Bare reading of his representation makes it clear that the same is devoid of any subsequent cogent reasons. Moreover, in accordance with the provisions, accepting the representation for withdrawal of notice is the sole discretion of the appointing authority. Hence, the contentions are denied.*
19. *With reference to para 6.12, I say and submit that the applicant's notice dated 9.12.2016 for voluntary retirement was accepted vide memo dated 24.3.2017 and since his representation dated 24.3.2017 seeking withdrawal of voluntary retirement notice dated 9.12.2016 was rejected, and accordingly informed, he stood retired from the service with effect from 1.4.2017 (FN). As such, accepting the applicant's representation dated 7.4.2017 and 24.4.2017 would have amounted to reinstating him in government service for which there is no provision in the relevant rules. Thus the action of the respondent is just and proper.*

(Quoted from page 29-35 of OA

8. Thus, the Respondent has submitted that OA be, therefore, dismissed.

9. Ld. PO has relied on the judgment of the Hon'ble Supreme Court in the case of Director General of ESIC & Anr. v. Puroshottam Malani, Civil Appeal No.4611 of 2008 decided on 22.7.2008. The relevant portion of the same reads as under:

“10. *The government service is not contractual. It is a service which confers status and a person who opts for voluntary retirement and later on wants to revoke the same before the expiry of the period of notice has to satisfy the authorities why he is seeking to revoke the notice of voluntary retirement. Rule 48(2) of the Central Civil Services (Pension) Rules, 1972 clearly states that the incumbent can seek withdrawal of the notice of voluntary retirement but with the specific approval of the authorities. Therefore, as per sub-Rule (2) of Rule 48 of the CCS (Pension) Rules, 1972 specific approval of the authority is required for withdrawal of the notice of voluntary retirement. If the incumbent does not provide any reason or material for revoking his notice of voluntary retirement then it is always open for the authority to decline the request for withdrawal of notice of voluntary retirement. If such discipline is not read into the Rule then perhaps every employee can send a notice for voluntary retirement and revokes the same at his sweet will. This cannot be permitted. The Rule mandates that there should be a specific approval of the appointing authority. Clearly, the Rule provides that the appointing authority can certainly approve or disapprove a request for withdrawal of notice of voluntary retirement.”*
(Quoted from judgment of Hon. Supreme Court in [2008] INSC 1201)

10. The Applicant has filed rejoinder denying the contentions raised by the Respondent and reiterating his earlier stand.

11. The issues for consideration are as follows:

- (i) *Whether the Applicant had legal right to withdraw his notice of voluntary retirement before he actually retired?*
- (ii) *Whether the Respondent had the discretionary authority in the nature and has absolute power to reject applicant's request for withdrawal of notice for voluntary retirement because the Applicant did not get approval from the Respondent for withdrawing the same?*

Discussion and findings:

12. It is necessary to refer to Rule 66(5) of the MCS (Pension) Rules, 1982, which reads as under:

“66. Retirement on completion of 20 years qualifying service.-

(5) A Government servant, who has elected to retire under this rule and has given the necessary notice to that effect to the appointing authority, shall be precluded from withdrawing his notice except with the specific approval of such authority:

Provided that the request for withdrawal shall be made before the intended date of his retirement.”

13. Plain reading of Rule 66(5) expressly saves in favour of Government servant absolute right to withdraw the notice of voluntary retirement with an exception or a rider that such withdrawal shall be dependent upon competent authority's power to approve or disapprove it.

14. This Tribunal consider that it is necessary to recall and recount the record of present Original Application.

15. On 12.6.2017 it had transpired during hearing that the decision to refuse to allow the applicant to withdraw the notice of retirement was apparently arbitrary and high handed, and the Secretary of MPSC was asked to remain present and argue the case himself. On 13.6.2017 Shri Pradeep Kumar, I.A.S, the Secretary remained present and took time to reconsider the matter. On 20.6.2017 affidavit was filed to justify to maintain and adhere to the decision and refusing to reconsider the same.

16. This Tribunal again gave an opportunity to MPSC by order dated 22.1.2019 and wanted MPSC to dispassionately examine the matter. All the judgments viz. judgment in *J.N. Srivastava Vs. Union of India* and

Balram Gupta Vs. Union of India (supra) were also handed out. The MPSC has remained stubborn on its stand and surprisingly kept on relying on the judgment in the case of *Director General of ESIC & Anr. v. Puroshottam Malani* (supra). It is shocking as to how MPSC could insistently stick up to an extremely one sided stand and remain with closed eyes to eloquent and varying judgments.

17. The Respondent has furnished reason in the affidavit in reply in support of this contention, namely that applicant was given opportunity to reconsider, yet he persisted. M.P.S.C has persisted on relying on the judgment in *Director General of ESIC & Anr Vs. Puroshottam Malani* (supra) and declined to read and apply mind to the cases *J.N Srivastava & Balram Gupta supra*.

18. This ground assigned by MPSC leans in favour of subjective element than objective reasons, which in the result would lean towards arbitrariness. In our point of view this could happen only when the authorities sit in the office not only with complete opaqueness occurred due to closed mind.

19. Going by general principle of law power to approve pre supposes, means and includes power to disapprove, however, this power is not a synonym or equal to a “veto” or sole power to refuse.

20. While rejecting applicant’s right of withdrawal of resignation the MPSC has placed reliance on *Director General of ESIC & Anr. v. Puroshottam Malani* (supra) as quoted in foregoing para 9. While MPSC has placed reliance on para 10 and at that time it has lost sight to the fact that, on facts of the said case claimant has received all retiral benefits and thereafter claim to withdraw the voluntary retirement notice. By no

stretch could any prudent person use the said case of *Director General of ESIC & Anr. v. Puroshottam Malani* (supra) as a precedent and stubbornly adhere to the decision to be unshaken to reconsider its own action despite eloquent expression contained in para 9 of said judgment, which is quoted below for ready reference:-

“9. However, in the present case, we find that the incumbent who has given the notice of voluntary retirement on 31.12.1999 and wanted to revoke the same on 22.3.2000, i.e., before the last date 31.3.2000, has not given any explanation whatsoever for revoking the notice of voluntary retirement and has got all the benefits which he was entitled to get on the basis of voluntary retirement. After having received all the benefits of voluntary retirement, the Respondent approached the Tribunal for setting aside the order dated 17.4.2000 accepting the notice of voluntary retirement. This conduct of the Respondent also dis-entitles him any benefit.”

21. As stated by the Respondent the service of the Applicant may not be unblemished and DE is in contemplation but that does not give rise to the Respondents “to ease out” the Applicant taking benefit of residuary power available under Rule 66(5) and refuse request for withdrawal of notice of voluntary retirement.

22. The Respondent’s discretion of rejecting the request for withdrawal of notice is not to be read as absolute power and it will be wrong on the part of the Respondent to say that, ‘there is no approval’ for reinstating the Applicant after accepting his voluntary retirement notice.

23. The Applicant being a government servant has the legal right to withdraw the notice of voluntary retirement at any time before the last date and the Respondent cannot stop him from withdrawing his voluntary retirement notice as has been observed by the Hon’ble Supreme Court in *Balram Gupta* (supra), to the effect that:

“administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement..... The court cannot but condemn circuitous ways "to ease out" uncomfortable employees. As a model employer the government must conduct itself with high probity and candour with its employees.”

(Quoted from judgment of Hon’ble Supreme Court in Balram Gupta v. Union of India, AIR 1987 SC 2354)

24. On the other hand, we noticed that the Respondent has referred to the observations of the Hon’ble Supreme Court in *Director General of ESIC* (supra). If we read para 10 of this judgment it is in total disjuncture to para 9, which reads as under:

“9. However, in the present case, we find that the incumbent who has given the notice of voluntary retirement on 31.12.1999 and wanted to revoke the same on 22.3.2000, i.e., before the last date 31.3.2000, has not given any explanation whatsoever for revoking the notice of voluntary retirement and has got all the benefits which he was entitled to get on the basis of voluntary retirement. After having received all the benefits of voluntary retirement, the Respondent approached the Tribunal for setting aside the order dated 17.4.2000 accepting the notice of voluntary retirement. This conduct of the Respondent also dis-entitles him any benefit.”

25. In the case of *Director General ESIC* (supra) referred to by Ld. PO, the Appellant had received all the pensionary benefits and subsequently requested the Tribunal to permit him to revoke the application for voluntary retirement. The facts in the present case are different from the same and, therefore, the judgment referred to by the Respondent is not relevant.

26. The authorities have to consider and work with a belief that the power to govern presupposes to govern fairly, but it is totally lost sight.

The attitude exhibited by M.P.S.C demonstrates mis-governance than good governance and is most unfortunate.

27. Be it as it may, it is very unfortunate that in spite of giving notice and opportunity to correct its decision, from the very first day of hearing of the case, the respondents are still stubborn in their attitude or like a simple tone arrogating to oneself the monarchical powers. This Tribunal may view towards the difficulties of executive towards and extempore decision on account of the point of view, as may have been begetted by the executive at the given moment and due to certain problems which could at times not be capable of eloquent disclosure. This, however, does not exempt them from fair and reasonable application of mind and being open to suggestions and corrective measures, whenever an opportunity is afforded.

28. In the result, we hold that the power of “approval” connoted by Rule 66(5) of MCS (Pension) Rules does not presuppose absoluteness of refusal to approve. The term approve means and presupposes assent based on legitimate reasons and any power or absolute right of refusal does not find place in the scheme of Rule 66(5) supra. The power of approval to include “disapproval” has to be guided by fairness than by personal views and ideas else it would mean an absolute and unchanalised and unbridled power to refuse which cannot be the scheme of law. If absoluteness of power to “disapprove” is assumed it shall be openly violative of Article 14 of the Constitution of India.

29. While answering para 6.15 of OA, MPSC has pleaded in para 22 as follows:-

22. With reference to para 6.15, I say and submit that, as per rule 66(5) of the MCS (Pension) Rules, 1982, the request for the

withdrawal of notice for voluntary retirement can be accepted only with the specific approval of the appointing authority, and the right to withdraw cannot be construed as absolute.”

Respondents plea that right to withdraw notice of voluntary retirement is not “absolute”, however, it is amazing as to how right to “disapprove” is absolute as a corollary.

30. In view of the foregoing, OA is allowed in terms of prayer clause 9(a) and the impugned order is set aside, as if not issued.

31. Parties are directed to bear own costs.

(P.N. Dixit)
Member (A)
13.2.2019

(A.H. Joshi, J.)
Chairman
13.2.2019

Dictation taken by: S.G. Jawalkar.