CALCUTTA HIGH COURT

Benode Behary Roy

Vs.

General Assurance Society Ltd

Suit No. 1502 of 1942

(P.B. Mukharji, J.)

05.07.1949

JUDGMENT

P.B. Mukharji, J.

1. The plaintiff sues the defendant company for the recovery of the sum of Rs. 6,134 as being the gratuity alleged to be earned by the plaintiff as an employee of the defendant company. The defendant company resists the plaintiff's claim on the ground that the bye-laws which entitled the plaintiff at one stage of his service to claim the gratuity had been altered before the termination of the plaintiff's services. The vexed question as to how far a company by altering its bye-laws can prejudicially affect an employee's contract of service has been raised in this suit.

2. The facts may be stated very briefly. The plaintiff was appointed Secretary of the Company in October 1924 at a salary of Rs. 150 per month and it is the pleading of the plaintiff that such appointment was subject to and in terms of the regulations contained in the then bye-laws of the defendant company. He thereafter rose to the position of the Officiating General Manager of the Company in 1932-33. His services were terminated in December 1939 and he was admittedly paid his Provident Fund.

3. When he joined service of the defendant company as its secretary the bye-laws of the company at the time did not entitle him to any gratuity because his salary was below Rs. 300 per month. Gratuity at that time under the bye-laws was payable only to employees of the superior service of the company drawing a salary of Rs. 300 per month and over [Bye-law 54] and such gratuity was payable in lieu of pension [Bye-law 94 under chap. 12 which Chapter deals with superior service only]. The employees of the subordinate service of the company were given only Provident Fund for which provision was made under chap. 13 of the bye-laws. The difference between the superior service and the subordinate service will appear under bye-law 54. These bye-laws were published in 1923. The plaintiff reached the grade of Rs. 300 per month on 1st January 1929.

Bye-law that governed grant of gratuity at that time is contained in clause 94 of the bye-laws published in 1923. That bye-law is in the following terms :

> "94, Gratuities at the rate of a month's pay for every year of service rendered are paid to employees on retirement in lieu of pension provided the following conditions are fulfilled :
> 1. Service must be continuous, good, efficient and faithful.
> 2. In the event of voluntary retirement before attaining the age of 55 years an employee must have rendered 15 years service.
> 3. In the event of compulsory retirement by the Society for medical unfitness,
> 4. No gratuities are granted to members of the Subordinate Staff."

4. It was clear that when the plaintiff joined the service he did not come under the bye-law granting gratuity but when he reached the grade of Rs. 300 per month on 1st January 1929 he became eligible to come under the bye-law governing gratuity. Before his services were terminated in 1939 by the Board, Resolution No. 3 of the Directors dated 12th October 1935 the bye-law granting gratuity was cancelled.

5. Mr. G.K. Mitter learned counsel appearing for the defendant company gave up all points of defense taken in the written statement except the defense that the amendment of the bye-laws cancellmg provision for gratuity as depriving the plaintiff of his right. He has confined himself to one issue which he has raised and that issue is :

> "Does the alteration of the Bye-law by the Board Resolution No. 3 dated 12th October 1935 cancelling provision for gratuity deprive the plaintiff of his right to claim any gratuity" ?

6. On that basis no evidence has been called on either side. It is admitted on both sides that when the plaintiff joined the service as secretary, under the bye-laws published in 1923 the plaintiff had no claim to be eligible to any gratuity. It is also admitted that when from 1st January 1929 the plaintiff reached the grade of Rs. 300 per month Bye-law 94 became-operative on him but that such bye-law was cancelled in 1935 before the plaintiff's service was terminated in 1939. It is also admitted that such cancellation was duly made and in accordance with the power given by the bye-laws themselves. What however has been contended on behalf of the plaintiff is that by such cancellation the plaintiff's right has not been lost. There is an admitted brief of correspondence and documents which has been marked as Ex. 'A' in this suit. The records of the plaintiff's service as well as all material facts will appear from such exhibit.

7. Before I notice the arguments in this case it will be necessary to refer to bye-law 4 which remained all the time without amendment and which was continued although bye-laws were amended from time to time. In my judgment the decision in this case will depend on a

consideration of the effect of that bye-law on the construction of the contract of service. Bye-law 4 runs in the following terms :

> "4. The Board of Directors reserve to themselves the right of altering or adding to at any time, the rules contained in these Bye-laws."

8. This bye-law 4 was in the bye-laws of 1923 and was there at the time when the Board Resolution of 12th October 1935, was passed. It was an operative bye-law at all material time.
9. The argument for the defendant company is this. Bye-law 4 gives the Board of Directors of the Company the right of altering or adding to at any time the Rules contained in the bye-laws. The relevant contract of appointment of the plaintiff is contained in letter dated 28th September 1924. The letter provides "you are to act according to our instructions and orders issued to you from time to time and the Bye-laws, a copy thereof is supplied herewith and deductions towards Provident Fund contributions and security deposit shall have to be made out of your monthly dues as usual." That letter of appointment does not make gratuity an express term in the contract of service. The claim for gratuity therefore can only be based, on the bye-laws. The company has a right to alter the bye-laws providing for gratuity at any time by reason of bye-law 4. As the bye-law was cancelled as a result of the Resolution of the Board of Directors dated 12th October 1935 the plaintiff has no claim. That in brief is the contention of the company.

10. Mr. P.C. Mullick appearing for the plaintiff has ably put forward his case. His first argument is that although bye-law 4 is in very wide terms it does not permit the company to alter the provision for gratuity in such a manner as to deprive the plaintiff from earning the gratuity granted by the previous bye-law of 1929 he having once come under its operation, In support of this submission Mr. Mullick has relied on the observation of Lindley M.R. in *Alien v. Gold Reefs of West Africa Ltd*[1]*.,* and on the judgment of Sargant, J. in *British Syndicate Ltd. v. Alperton Rubber Co. Ltd*[2]*.,* which followed and adopted at p. 193 of that Repeat the observation of Lindley M.R. Both these cases however are cases concerning the rights of a member and shareholder of a company as against the company. They are not cases as between an employee of the company and the company. It may be observed that they are cases where the statutory right of alteration, of Articles of a Company under the Company Law was one of the considerations. No questions of Company Law or of the statutory rights of the Company to alter Articles arise in this case.

11. Special emphasis was laid by Mr. Mullick on the following passage in the judgment of Lindley *M.R. in Alien v. Gold Reefs of West Africa Ltd*[3]*.,*

> "the power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the Company's Memorandum of Association, Wide however as the language of Section 50 is the power conferred by it must like all other powers be exercised subject to those

> general principles of law and equity which are applicable to all powers conferred on the majority and enabling them to bind minority. It must be exercised not only in the manner required, by law but also *bona fide* for the benefit of the company as a whole and it must not be exceeded. These conditions are always implied and are seldom if ever expressed."

Mr. Mullick invokes that passage in the judgment of the Master of the Rolls and asks me to construe the wide powers of bye-law 4 as "subject to those general principles of law and equity." In my opinion, the general principles of law and equity which the Master of the Rolls considered in that case were, (1) that the power must be exercised in a manner

[1](1900) 1 Ch. 656 at pp. 671 to 674 : (69 LJ Ch. 266) [3](1900) 1 ch. 656 at p. 671 : (69 LJ Ch. 266)
[2](1915) 2 Ch. 186 : (84 LJ Ch. 665)

"required by the law" and (2) *bona fide* for the benefit of the company and not in breach of the principle that the majority should not oppress the minority. No scope of the application of the first principle exists in the present case as the amendment is not suggested to have been made illegally or in a manner not justified by law. Indeed Mr. Mullick for the plaintiff has conceded that the cancellation has been duly and lawfully made according to bye-law 4. The second principle that in company law the majority cannot oppress the minority has no concern with the facts of the present case. If that be as I cannot put any fetter on the unrestricted right of altering or adding to at any time the Rules contained in the Bye-laws and which right is conferred under bye-law 4, indeed, the Master of the Bolls in the passage that follows the observations on which Mr. Mullick relies says this

> "but if they [the two principles I have referred to above] are complied with I can discover no ground for judicially putting any other restriction on the power."

12. In my opinion I feel the same way and I consider that I cannot judicially put any restriction on the right conferred under bye-law 4.

13. In the recent decision of the House of Lords, *Southern Foundries Ltd. v. Shirlaw reported in*[4] a very great divergence of judicial opinion is expressed. In that case the contract of appointment of the Managing Directors was "for ten years from 1st December 1933," Article 91 of the Company whose Managing Director the plaintiff was, provided that the Managing Director

> "shall be subject to the provisions of any contract between him and the company but subject to the same provision as to resignation or removal as the other Directors of the company and if he ceased to hold the office of the Director he shall ipso facto and immediately "cease to be a Director."

By an amendment of the article, the plaintiff was removed under the amended article before the period of ten years expired. The plaintiff claimed damages for wrongful repudiation of the contract and before the trial Judge succeeded in obtaining a decree for damages. The Court of appeal affirmed the decree for damages although Sic Wilfred Greene M.R. dissented. The

company appealed to the House of Lords and the appeal was dismissed by the majority of the members although here again both Viscount Maugham and Lord Romer dissented. That case does not assist the plaintiff here. There the contract was expressly for ten years and the articles relating to the removal of the Managing Director were expressly "subject" to the contract. Here the letter of appointment does not expressly include any term in the contract regarding payment of gratuity to the plaintiff, and the Bye-laws were not made subject to the contract of appointment. On the contrary it expressly incorporates the bye-laws in the terms of the contract. It is only in the bye-laws that the provision for gratuity had been made and such bye-laws also provided expressly that they could be altered or added to at any time by the Board of Directors. The question therefore resolves to a question of construction of the particular contract of service.

14. The principle laid down by Cockburn, C.J., in *William Stirling v. Maitland*[5] that if a party enters into an arrangement which can only take effect by the continuance of such an

[4]1940 AC 701: (1940-2 All England Reporter 445)

[5](1864) 5 B. and S. 840 at p. 852: (34 LJ QB 1)

existing state of circumstances there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstance under which alone the arrangement can be operative and the principle laid down by Kennedy L.J. in *Measures Bros. Ltd. v. Measures*[6], that it is elementary justice that one of the parties to a contract shall not get rid of his responsibilities there under by disabling the other contractor from fulfilling his pact of the bargain are well established. But before these principles can be applied, the more fundamental question is what is the contract between the parties. If the contract is that the very Bye-laws under which gratuity can be claimed and paid are subject to alterations or additions at any time then such a question resolves itself in my opinion into one of true construction of the agreement or contract of service. There is in, my judgment nothing repugnant to the law of contract to have as one of the express terms of the contract itself that it will be alterable at the instance of one party alone. If one contracting party gives to the other contracting party the right to alter the terms of the contract between them the Court is not justified in my view to apply the principles of Cockburn, C.J. and Kennedy, L.J. which were approved by the House of Lords in *Southern Foundries Ltd. v. Shirlaw*[7], In the majority opinion of the House of Lords the reference to these principles are made by Lord Atkin and Lord Potter. But the speech of neither of these two learned Lords discusses the context in which the principles are to be applied. It is only in the dissenting speech of Viscount Maugham that it reference is made to such a consideration. Indeed at p. 712 of that Report, Viscount Maugham observes on the principle laid down in the statement of Cook-burn, C.J. :

> "This is not a rigid rule. It is capable of qualification in any particular case. and it is a rule the application of which depends on the true construction of the agreement."

There is nothing in the majority opinion which can be said to dissent from this statement of Viscount Maugham on this particular point. The principle that Courts should uphold the sanctity of a contract makes it all the more necessary in my opinion for the Courts to examine with care

the terms and true construction of such contract or else there is the risk or danger of misdirected righteousness in the name of sanctity of contract.

15. From the point of view of construction the contract in the particular case before the House of Lords was different from the contract that is before me. As Lord Atkin pointed out at p. 721 of that Report :

> "Article 91 was thus expressly subject to the provision of the agreement so far or rather if in any event it should conflict with the provisions of the agreement such as the ten years' term of engagement."

Secondly, Lord Atkin also observed at p. 723 of that Report that the articles in that case gave the Directors "power to dismiss but the power to dismiss is to be distinguished from the right to dismiss." Neither of these considerations is applicable to the present case before me. Bye-law 4 in expressed terms gives "the right" to alter or add to the Rules contained in the Bye-laws. Secondly, the letter of appointment does not make it any

[6](1910) 2 Ch. 248 at p. 258 : (79 LJ Ch. 707)

[7]1940 AC 701 : (1940-2 All England Reporter 445)

express term of the contract of service that the plaintiff should receive any gratuity or that the Bye-laws are to be subject to the contract of service. Nor indeed the plaintiff could come under that provision as at the time of appointment his salary was not of the grade which could come under the operation of the Bye-law providing gratuity.

16. In my judgment the true construction of the plaintiff's contract of service with the defendant company is that the contract of the plaintiff was "to act according to the instructions and orders issued from time to time and the Bye-laws." The result is that the contract of service incorporated the Bye laws. Consequently, one of the terms of the contract is that the plaintiff gave to the Board of Directors the right to alter or add to at any time the Rules contained in the Bye-laws by virtue of bye-law 4. As gratuity could only be claimed under bye-law 94 it was a term of the contract according to my construction that bye-law 94 providing for gratuity could be altered at any time, If, therefore, it has been cancelled as a result of the Board Resolution No. 3 dated 12th October 1935 that was by virtue of the terms of the contract and was not in breach thereof. It is therefore not appropriate in my view to invoke the precedents to show that a Company cannot alter its Articles of Association to commit a breach of contract.

17. The next argument of Mr. Mullick for the plaintiff is that even if bye-law 4 justifies alteration, no alteration could be made which affects a vested right and the plaintiff according to him had acquired a vested right. I do not consider that on 12th October 1935 when the Resolution of the Board of Directors cancelled bye-law 94 providing for gratuity the plaintiff had any vested right in fact or in law to the gratuity. The right to claim gratuity is by terms of bye-law 94 could only arise "on retirement". But the plaintiff was in service on that date and had not retired he being retired four years there, after in 1939. There is therefore no question of vested right. Again

whether a vested right in particular circumstances can be altered is in my view a question of construction of the contract with reference to the Bye-laws in a particular case. A somewhat similar argument was advanced in *Smith v. Galloway*[8], at p. 75 by the learned counsel for the plaintiff and I can do no better than quote the observation of Wright, J. in that case at p. 77 of the Report and which observations I respectfully follow :

> "Then the second point made by the plaintiff was that if the plaintiff did by joining the Society assent to a subsequent alteration of the Rules he did so subject to this limitation, that the alteration should not affect a vested interest and should not deprive him of any benefit to which he has already become entitled at the time of alteration made. But I can see no ground for introducing any such limitation into his contract. It is a matter of every day occurrence for the Society such as this to make alterations in the Rules. Where the only contract between the Society and the member in the original contract under which he became a member and that as is the case here, provides for alterations of the Rules he is bound by any subsequent alterations that may be made within the power of alteration, whatever the extent of that alteration may be."

Kennedy, J. agreed with the observations of Wright, J. in that case. In that view of the matter the second argument of the learned counsel for the plaintiff cannot also in my opinion succeed. I also find support for the conclusion to which I have arrived from the

[8](1898) 1 QBD 71

judgment of Sellers, J. in *Yeo v. Stewart, reported in*[9] and particularly the observations of that learned Judge at pp. 33 and 34 of that Report. As the learned Judge there says at p. 33 of that report relying on the observations of Rowlatt, J. in *Page v. Liverpool Victoria Friendly Society*[10], "the rules hare incorporated into this contract do provide their own terms of amendment and alteration and therefore the plaintiff fail on his contention with regard to the contract, assuming of course, that the Rules have been properly amended as required by the Rules themselves."

18. I have come to the conclusion that when an employee of a company, by the very terms of his contract of service is to act according to the Bye-laws of the Company, and one of such Bye-laws is that the Bye-laws can be added to or altered at any time by the Company, then the employee is bound by any alteration or addition of the Bye-laws that may duly be made by the Company even though such addition or alteration was made after the contract of service. This is so even if it means that the employee thereby loses any vested right i.e. any right acquired by him before such alteration or addition. The problem is never met by raising in the abstract the principle of sanctity of contract or the doctrine of vested rights. The problem in my opinion is always a problem of construction and interpretation of the true meaning and effect of the terms of a particular contract of service or employment and of the scope of the relevant Bye-laws in relation thereto. Accordingly I answer the issue in the affirmative.

19. This disposes of all the arguments of Mr. Mullick advanced on behalf of the plaintiff. Mr.

Mullick has not contended that the alteration of the Rules by cancelling the provision for gratuity has not been lawfully made. It is necessary here to observe further that Mr. G.K. Mitter for the Company makes it quite clear that if any argument was going to be made on behalf of the plaintiff that the Bye-law relating to gratuity has not been properly or lawfully cancelled under bye-law 4 then Mr. Mitter will raise the plea of estoppel as raised in para. 11 of the written statement. It is not necessary for me to deal with this point as Mr. Mullick has accepted the position that he does not contest the proposition that bye-law 94 has been properly and duly cancelled under bye-law 4 and it is on that basis that Mr. Mitter's concession on the point of estoppel has been made. It is therefore not necessary for me to decide whether bye-law 94 was duly and properly cancelled by virtue of bye-law 4. I need observe that the plea of estoppel which Mr. Mitter gave up was based on the contention that the service of the plaintiff was non-pensionable and was such that it did not attract any pension or gratuity at all. In fact as the plaintiff admits in para. 12 of the plaint he was duly paid the Provident Fund which is admitted at the bar to be a sum of Sections 12,911-1-0 when he was retired in the year 1939. The defendant's contention on the ground of estoppel is that having taken benefit of payment of Provident Fund which according to the defendant the plaintiff was entitled to by nature of his service the plaintiff could not claim the double benefit of both the Provident Fund and the gratuity. Indeed under Ch. XII of the Bye laws the distinction was clearly made between the superior service which alone was pensionable and entitled to gratuity, and the upper and lower subordinate staff which was non-pension, able under ch. XIII of the Bye-laws and entitled only to Provident Fund. I need therefore only record the fact in the judgment that Mr. G.K. Mitter learned counsel for the defendant has given up the point of estoppel only on the basis that Mr. Mullick on behalf of the plaintiff concedes that bye-laws 85

[9](1947) 2 All England Reporter 28 : (177 LT 428)

[10](1926) 42 TLR 712

and 94 could be lawfully cancelled under bye-law 4.

20. In the circumstances the suit fails and is dismissed. The defendant would have been entitled to costs. But Mr. Mullick submits that the plaintiff may be relieved from costs. Mr. G.K. Mitter consents to give up costs. Having regard to such consent I make no order as to costs in this suit.

21. I direct the two printed books containing the bye-laws one published in 1923 and the other published in 1929 with amendment slips be made exhibits in this suit, as both the learned counsel on either side have relied on them in their argument.

Suit dismissed.