

(2014) 08 KL CK 0191
In the High Court Of Kerala
Case No : Writ Appeal No. 1238 of 2013

Abdulla

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 27-08-2014

Acts Referred:

Constitution of India, 1950 — Article 136

Citation : (2014) 4 ILR 207 : (2014) 4 KHC 58 : (2014) 4 KLT 37

Hon'ble Judges : Ashok Bhushan, Acting C.J.; A.M. Shaffique, J

Bench : Division Bench

Advocate : P. Gopalakrishnan Nair and M. Sreekumar, Advocate for the Appellant; Girija Gopal, Spl. Government Pleader and Jawahar Jose, Advocate for the Respondent

Judgement

Ashok Bhushan, Actg. C.J.

1. Heard learned counsel for the appellant, learned Special Government Pleader appearing for the first respondent and the learned Standing Counsel appearing for the second respondent. This Writ Appeal has been filed against the judgment, dated 19th December, 2012 in Writ Petition 4590 of 2009 by which judgment the Writ Petition filed by the petitioner seeking a direction for the disbursement of gratuity to the petitioner as paid to the State Government employees has been dismissed. Being aggrieved by the dismissal of the Writ Petition, petitioner preferred this Writ Appeal. Brief facts giving rise to this Writ Appeal are as follows:

The petitioner joined the service of second respondent institute as a Proof Reader on 1.7.1969. Subsequently, he was promoted. By virtue of the relevant decision taken by the Board, the petitioner was entitled to continue till attaining the age of 58 years. While so, the Government passed an order dated 10.7.1984, whereby the retirement age was brought down to 55 years; on the basis of which, steps were taken to retire the petitioner at the age of 55 years on 31st July, 1999. This was challenged by the petitioner in O.P. No. 17987/2000, which

was finally decided in favour of the petitioner by judgment of this Court dated 11th October, 2000 holding that the petitioner was entitled to continue till attaining the age of 58 years. While so, the State Government vide G.O.(MS) 29/2000/CAD dated 8.9.2000, decided to implement the Pension Scheme in respect of the employees of the cultural institutions such as the second respondent/Kerala State Institute of Languages as well as certain other institutions. Rules were framed namely, "Kerala Government Cultural Institutions Employees Pension and Gratuity Rules 2000" (for short "the Rules 2000") which came in force from 1st April 2000. As per the Rules, the age of superannuation of the employees in the cultural institutions shall be 55 years from January, 2000. A right was given to the employees to give option of retirement within one month from the date of enforcement of the Scheme to avail the benefit of pension and those employees who opt to continue in service till the age of 58 shall not be eligible for the pensionary benefits admissible under the Rules. Certain other rules were made with regard to gratuity, provident fund, etc., which shall be considered in detail later. Petitioner, after the enforcement of the Rules 2000, submitted his option to retire from service and he was allowed to retire from service on 31st October, 2000. Petitioner received a communication dated 27.2.2001 informing that pension has been sanctioned. The petitioner was, however, given an amount of Rs. 25,000/- towards DCRG (Death Cum Retirement Gratuity) stating that he was not eligible to have gratuity as payable to the State Government employees, Petitioner accepted the said amount in protest and submitted a representation claiming gratuity at the rate of Government employees. It is also pertinent to note that by order dated 27.3.2003, a similarly situated person namely, Dr. M.R. Thampan, former Director of the Institute, was granted gratuity in par with Government employees. But the petitioner's claim was turned down as per Ext.P10 order, dated 29.2.2008, stating that since the appellant attained the age of 55 years on 31.7.1999 he would be considered as retired before 1.4.2000 and hence he is not entitled for DCRG as per Ext.P3 Rules. Challenging the said order, petitioner preferred Writ Petition and the same was dismissed by the learned Single Judge.

2. Learned counsel for the appellant in support of the appeal contended that Clause 5 of the Rules 2000 clearly contemplated a cut off date for payment of DCRG i.e., those who retired till 31st March 2000 and those who retires from service from April 2000. He submits that the petitioner having retired on 31st October, 2000 is clearly entitled for gratuity as payable to the State Government employees and therefore the payment of an amount of Rs. 25,000/- was not appropriate. The petitioner has been paid pension, which fact is not disputed. Hence, there was no occasion to deny the gratuity at the rate admissible to the State Government employees. It is also contended that the learned Single Judge did not correctly appreciate the Rules 2000, especially, Clauses 5 and 6 while dismissing the Writ Petition.

3. Learned counsel for the second respondent refuting the submission of learned counsel for the petitioner contended that the petitioner has rightly been denied

the gratuity as payable to the State Government employees, since his retirement is to be deemed to have taken place on the date when he attained the age of superannuation i.e., on 31st July 1999. He submits that the deeming Clause with regard to retirement has to be read from Clause 6 of the Scheme and hence since the petitioner shall be deemed to have retired prior to 31st March, 2000 he is not entitled for gratuity as payable to Government employees. He has placed reliance on a judgment of the Apex Court reported in Vice Chairman and Managing Director A.P.S.I.D.C. Ltd. and Another Vs. R. Varaprasad and Others, .

4. Learned Government Pleader also supported the order impugned passed by the institute denying the gratuity equivalent to the Government employees. It is submitted by learned Government Pleader that under the Rules those who were continuing were given option to retire and those who accepted option shall be deemed to have retired at the age of 55 years. Hence, the benefit of gratuity could not have been available to those who deemed to have retired at the age of 55 years. It is submitted that granting gratuity treating the retirement of the petitioner after 1st April 2000 shall be contrary to the scheme as delineated by the Rules 2000.

5. We have considered the submission of learned counsel for the parties and perused the records. Before we advert to the respective submission raised by the learned counsel for the parties, it is relevant to note the Scheme which was introduced by the State Government extending the pensionary benefits to various institutions including the second respondent. The employees of the second respondent and other cultural institutions were neither receiving pension nor gratuity equivalent to the State Government employees. For the first time, the Government Order dated 8.9.2000 was issued and had come into force with effect from 1st April 2000. Clauses 5 and 6 of the Scheme, which are relevant for the present case, are extracted herein below:

"5. The Pension Scheme shall be applicable to the employees of the Cultural Institutions mentioned in Para II, R.3(a) of these rules with effect from 1.4.1990. The pension of those employees who retired from service from April 1990 will be fixed according to the pension rules in force at the time of their retirement. The same shall be notionally updated as on 1.4.2000 by applying the principles of revision of pension ordered by Government from time to time. They will be eligible for the monetary benefit with effect from 1.4.2000 only. Those retired till 31.3.2000 shall not be eligible to commute their pension and shall not be entitled for the DCRG at the rate admissible to the State Government employees. Those retiring from service from April 2000 shall be eligible to commute their pension as per rules in part III of K.S.R. They shall be eligible for the DCRG at the rate applicable to the State Government Employees.

6. The age of superannuation of the employees in the Cultural institutions mentioned in Part II, R.3(a) of these rules shall be 55 (fifty five) from January 2000. Those employees, who, by virtue of any of the existing rules, eligible to continue in service till the age of 58 shall have the right to opt the pension

scheme and to retire from service within one month from the date of publication of these rules or to continue in service till the age of 58 except the Heads of the Cultural Institutions referred to in Part II, R.3(a) in whose case the appointing authority is Government and their age of superannuation shall also be 55. Those who opt to continue in service till the age of 58 shall not be eligible for the pensionary benefits admissible under these rules. The pension of those who opt for pension shall be fixed on the basis of their average pay as per provisions in KSR Part III at the age of 55 as 55 is the age of superannuation of State Government employees.

Those who exercise option to continue in service till the age of 58 will indicate in their option that they will not make any claim for pension in future."

6. The facts as noted above indicate that the petitioner was continuing in service at the time when the Government Order dated 8.9.2000 was issued and implemented the Scheme with effect from 1st April 2000. Clause 6 provided that the age of superannuation of the employees in the institute shall be 55 years from January 2000. It is also provided that those employees, who, by virtue of any of the existing rules, eligible to continue in service till the age of 58 shall have the right to opt the pension scheme and to retire from service within one month from the date of publication of these rules or to continue in service till the age of 58 years, in which case they shall not be entitled for the pensionary benefits admissible under these Rules. Petitioner opted to retire as per Clause 6 and has actually retired with effect from 31st October 2000. There is no dispute with regard to the date of actual retirement of petitioner which is 31st October 2000. The submission which has been pressed on behalf of the respondent is that petitioner's retirement has to be deemed to have taken place with effect from the date when he attained 55 years of age i.e., 31st July, 1999. Petitioner's appointment will be deemed to have taken place on 1st July 1969 and he shall be treated to have retired before 31st March 2000 disentitling him from receiving the gratuity.

7. As noted above, Clause 5 makes a cut off date for the benefit of gratuity. Relevant portion of Clause 5 in this regard reads as follows:

"Those retired till 31.3.2000 shall not be eligible to commute their pension and shall not be entitled for the DCRG at the rate admissible to the State Government employees. Those retiring from service from April 2000 shall be eligible to commute their pension as per rules in Part III of K.S.R. They shall be eligible for the DCRG at the rate applicable to the State Government Employees."

8. The above provision in the Scheme if read to find out its natural meaning clearly indicate that those retired till 31st March 2000 are disentitled to get DCRG at the rate applicable to State Government employees. The second category consist of those retiring from service from April 2000. The words which have been used in Clause 5 clearly indicate that those who actually retired till 31st March 2000 falls in different category from those who are retiring from

service from April 2000. When the scheme uses the word "retiring from service from April 2000", it clearly meant an event which is to happen in future. The use of the word "retiring" indicate such concept in the Scheme.

9. Now, the submission which is pressed by the respondents based on R.6, principally on the last line of the Scheme which are quoted as below:

"The pension of those who opt for pension shall be fixed on the basis of their average pay as per provisions in K.S.R. Part HI at the age of 55 as 55 is the age of superannuation of State Government employees."

10. It is submitted that since the pension is required to be fixed on the basis of age of superannuation i.e., at the age of 55 years, those persons for whom the pension is to be fixed has to be deemed to have retired at the age of 55 years. Learned counsel for the respondent wanted us to read legal fiction in Clause 6 of the Scheme.

11. The legal fiction is a well known concept in law. Legislature to indicate a different sequence from the actual event invents the legal fiction to indicate actual facts which are not otherwise. The concept of legal fiction has been explained by the Apex Court in a large number of decisions. The Apex Court in State of U.P. Vs. Hari Ram, , while explaining the concept of legal fiction laid down as follows:

"Legal Fiction: The Legislature is competent to create a legal fiction, for the purpose of assuming existence of a fact which does not really exist. Sub-section (3) of S.10 contained two deeming provisions such as "deemed to have been acquired" and "deemed to have been vested absolutely". Let us first examine legal consequences of a "deeming provision". In interpreting the provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. This Court in Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan held that what can be deemed to exist under a legal fiction are facts and not legal consequences which do not flow from the law as it stands."

12. The words extracted from Clause 6 as quoted above cannot be led to create a legal fiction regarding the date of retirement of the persons who have actually retired after 1st April 2000. The Clause only provided for fixation of pension, since the word used are "the pension of those who opt for pension shall be fixed on the basis of their average pay as per provisions in K.S.R. Part III at the age of 55". Thus, the said Clause is only provided for computation purposes. The said Clause did not contain any legal fiction to read that the persons who opt for pension shall also be treated to have retired at the age of 55 years. No deeming fiction to hold that the person shall be deemed to have retired at the age of 55 years. The above provision is only for the purpose of fixation of pension which need not be read any more.

13. As noted above, Clause 5 contains a cut off date i.e., 31st March 2000 for the purposes of benefit of gratuity equivalent to Government employees. There is no such indication in Clause 5 which provides a cut off date for benefit of gratuity. Clause 5 clearly indicates that those who retiring from service from April 2000 shall be eligible for DCRG.

14. The petitioner admittedly has been granted the benefit of pension equivalent to the Government employees. Learned counsel for the respondent had submitted that when the pension is required to be calculated at the age of 55 years, the gratuity also required to be calculated at the age of 55 years. For the purpose of this case, we may observe that calculation of the gratuity with regard to petitioner may also be made on the basis of the provisions as mentioned in Clause 6. However, the calculation has to be made in accordance with the principles applicable to the Government employees who are paid the gratuity. We further notice that this Court vide its Ext.P1 judgment has already held that petitioner is entitled to continue till the age of 58 years.

15. Learned Standing Counsel appearing for the respondent institute has relied on a judgment of the Apex Court in Vice Chairman and Managing Director A.P.S.I.D.C. Ltd. and Another Vs. R. Varaprasad and Others, wherein VRS scheme was introduced by the company and options were accepted fixing a cut off date 28.2.1998 for the purpose of calculating the VRS claims of the employees. Due to delay in availability of funds from the State Government, the employees concerned were relieved from service on 15.11.1997. According to the employees since they continued to be in service till 31.7.1998, they were entitled to the retiral benefits and the benefits available under the VRS as on 31.7.1998, the date on which they were actually relieved. The High Court held that the respondents having continued in service on the effective date i.e., 31.7.1999 and having made the withdrawal applications before mat date, and they having not accepted the monetary benefits under the VRS Scheme, could withdraw their applications opting for VRS. In appeal, the Apex Court considered whether the terminal benefits and financial package available under the Scheme are to be calculated up to the cut off date fixed for accepting the applications of the employees who opted for voluntary retirement or they should be calculated up to the actual date of relieving them from service, and whether the respondents were entitled for notice pay of three months. The relevant portion of the judgment reads as follows:

"7. To resolve the controversies that arise for consideration in this appeal, it becomes necessary to look at the guidelines, VRS and circulars issued by the Corporation seeking the options of the employees for voluntary retirement. The claims of the parties are to be examined in the light of these documents as between them. Annexure P1 dated 1.6.1995 is a circular issued by the Corporation in which it is stated that the management is pleased to issue a Voluntary Retirement Scheme for employees of the Corporation and the Scheme will be known as "A.P. SIDC Employees Voluntary Retirement Scheme, 1995".

The relevant clauses, which have a bearing on the controversies to be resolved read:

"(c) For calculation of VRS ex gratia, as well as reckoning eligibility, the date of acceptance of the application will be taken into consideration. Any increase in the salary after the cut off point/date cannot be taken into consideration. However, for calculating the compensation for "remaining period of service" wherever applicable, no compensation shall be paid for the period for which the salary has already been drawn by the employee after submission of VRS application.

(d) The VRS option exercised is final as far as employee is concerned.

(e) There shall be no separate notice either for the employee or the Corporation in terms of service conditions mentioned in the offer of appointment/service rules/SRS.

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(f) The payments mat are due from the Corporation under the Scheme shall be released to the concerned on the date of relief subject to receipt of funds from Government."

Under the Scheme the Vice-Chairman and Managing Director shall have power to amend, modify, alter or withdraw or extend the period of operation of the Scheme at any time either in whole or in part, at his discretion, if the circumstances so warrant.

8. Annexure P2 is circular dated 4.7.1997, issued by the Corporation referring to Annexure P1 dated 1.6.1995 and other circulars inviting applications from the employees, who were eligible and willing to accept VRS to apply in the prescribed form. By memo dated 1.10.1997 (Annexure P3) the Government of Andhra Pradesh issued amendment to the Voluntary Retirement Scheme Guidelines, issued in Memo No. 1038/PE.I/A2/94-4 dated 23.1.1996. The amendment reads:

"1. (a) In the said memo, for the existing clause 6(a)(iv) the following shall be substituted, namely;

"(iv) One month's/three months" notice pay (as per the conditions of service applicable)

If an application of an employee opting for voluntary retirement is accepted instantaneously and payment is arranged by the management on the same day, the individual concerned would be entitled to payment of ex gratia along with the notice period pay. It is however clarified that payment of ex gratia for service rendered or leftover service (whichever is less) as well as the amount payable for the notice period should not exceed the basic pay plus DA that would have been paid to the employees who have opted for Voluntary Retirement Scheme till the date of his superannuation.

In the circumstances where the management takes time to take a decision about

the acceptance of an application submitted by the employee for Voluntary Retirement Scheme and allows the notice period to lapse or the individual concerned has drawn full salary during the notice period served by him, in these cases notice-period pay would not be admissible as the individual has already drawn the salary during the notice period."

This amendment came into force from the date of issue of the memo itself i.e. from 1.10.1997.

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20. It appears to us that the respondents have continued in service; may be they have attained superannuation by now or they are likely to attain superannuation in the near future; at any rate, they having been continued for all these years and taking note of the peculiar facts and circumstances of these cases, we do not think it is just and appropriate to disturb the impugned order under Article 136 of the Constitution of India in the light of what is stated above. Consequently, these appeals are disposed of accordingly but with no order as to costs."

16. We have perused the above judgment relied on by the learned Standing Counsel for the second respondent and the same do not help them since the case is entirely different from the present case.

17. In view of the aforesaid decision, we are of the opinion that the petitioner who retired on 31st October 2000, that is after the enforcement of the Rules 2000 was clearly entitled for gratuity as per the Government employees as per Clause 5 of the Scheme and the decision of the respondent refusing to pay gratuity as payable to government employees cannot be sustained. Learned Single Judge did not advert to the true scope and meaning of Clauses 5 and 6 of the Scheme. In the result, we allow the Writ Appeal setting aside the judgment of the learned Single Judge as well as Ext.P10 order dated 29.2.2008 of the second respondent. We direct the respondents to compute the gratuity of the petitioner in the same manner as the pension has been calculated as per Clause 5 equivalent to the Government employees within a period of three months from the date of production of a copy of this judgment before the respondents.

Writ Appeal is allowed.