
(2019) 02 CAL CK 0022

In the Calcutta High Court

Case No : Writ Petitions (Wp) No. 12944 (W) Of 2018

Ajit Kumar Mandal

APPELLANT

Vs

State Of West Bengal & Others

RESPONDENT

Date of Decision : 07-02-2019

Acts Referred:

Citation : (2019) 02 CAL CK 0022

Hon'ble Judges : Samapti Chatterjee, J

Bench : Single Bench

Advocate : Prahlad Chandra Ghosh, Subir Hazra, Tuli Sinha

Final Decision : Allowed

Judgement

Samapti Chatterjee, J

1. The following issues are to be determined in the present writ petition :

(i) Whether the petitioner is entitled to get the benefit under rule 7 (e)(iv) of the death-cum-retirement benefit scheme of 1981 thereby condoling the shortfall of 2 months 27 days of deficiency in qualifying service to enjoying the pensionary benefit.

(ii) Whether the Government has the discretionary power under proviso of the said rule not to condone the short fall of the teacher in qualifying service of 10 years to enjoy the pensionary benefit ?

FACT OF THE CASE

2. The petitioner case in nutshell is as follows :

The petitioner initially appointed as an assistant teacher in Primary School under Malda District Primary School Council on 12th September, 2011 at New Sabdalpur Primary School under District Malda and thereafter transferred to Chandra Narayanpur Primary School under Golabganj Circle.

3. On 1st February, 2006 the service of the petitioner was confirmed . On 8th March, 2013 petitioner made representation before the Chairman, District Primary School Council Malda and prayed for condonation of the period of 2 months 27 days qualifying for getting pensionary benefit. After rendering 9 years 9 months and 3 days of service the petitioner retired from the service. The Assistant director Pension Provident Fund and Group Insurance, Government of West Bengal returned the pension case of the petitioner along with connected documents to the District Inspector of School (P.E) Malda.

Being aggrieved by the impugned order the petitioner earlier filed the writ petitioner being W.P No.7867 (W) of 2016. That writ petitioner was disposed of on 16th May, 2016 thereby directing the respondent authorities to revisit the issue within a stipulated period after giving an opportunity of hearing to the petitioner or is authorised representation and thereafter communicate the decision to the petitioner.

Accordingly, by the impugned order dated 6th March, 2017 the Principal Secretary rejected the petitioner's prayer for condonation of 2 months 27 days of shortfall of qualifying service to enjoy pensionary benefit.

SUBMISSIONS OF THE LEARNED ADVOCATES

3. Mr. Prahlad Chandra Ghosh Learned Advocate appearing for the petitioner submitted that note/proviso appended to the clause 7(e)(iii) and clause 7(e)(iv) can not be supplemented by the note appended thereto. He further vehemently contended that under clause 7(e)(iii) and 7(e)(iv) of the said scheme clearly provides that the government should condone up to six months of deficiency to complete qualifying service of 10 years.

4. Mr. Ghosh further contended that unfortunately in the present case in hand the respondent authority with some ulterior motive failed/neglected to act on the basis of the said clause. On the other hand they the respondent authority has rejected the petitioner's prayer thereby giving weightage to the proviso appended to the said clause.

In support of this condonation Mr. Ghosh also relied on an Hon'ble Division Bench decision reported in 2013(1) CHN (Cal)438, paragraphs 18, 19 (Subash Chandra Chakraborty Vs. State of West Bengal).

5. Mr. Ghosh further argued that under clause 7 (e) (iii) & Clause 7 (e) (iv) of the said scheme respondent authority is under obligation to condone the deficiency of 26 days for completion of qualifying service of 10 years without giving weightage to the proviso appended to the said clause.

In support of this contention Mr. Ghosh also relied on the government circular dated 2nd February 2009 wherein it has been clarified that for the purpose of calculation of retrial benefit fraction of a year is equal to, 3 months and above shall be treated as completed six months period of service and to be reckoned as qualifying service for determining retrial benefits.

6. Therefore, in conclusion Mr. Ghosh submitted that Court should direct the respondent authority to disburse the pension in favour of the petitioner thereby condoning deficit of 26 days for completion of 10 days qualifying service.

7. Per contra, Ms. Tuli Sinha, learned Advocate appearing for the respondent authority submitted that the petitioner cannot claim as a matter of right to condon 26 days of deficit to complete the qualifying service of 10 years in terms of Clause 7 (e) (iii) and Clause 7 (e) (iv) of the said death-cum-retiral benefit scheme of 1981 because as per note appended to the said clause the authority from the note appended to the said clause. The authority has every right to reject the petitioner prayer for condonation of completion of qualifying the service.

8. Ms. Sinha further contended that as a matter of right teacher cannot claim that his shortfall of completion of qualifying service should be condoned by the authority just to avail pensionary benefit.

9. Ms. Sinha also contended that in the said clause the word "may" was used. Now the question to be determined by the Hon'ble Court is whether "may" used as mandatory or discretionary. Furthermore, Ms. Sinha argued that "may" can not be used as "shall."

Therefore, before parting with her argument Ms. Sinha submitted that there is no infirmity, illegality or ambiguity in the impugned order or rejection dated 3rd April 2018 which deserves interference by this Hon'ble Court. Therefore, this Court should dismiss the present writ petition with exemplary costs.

DECISION WITH REASONS

10. Considering the submissions advanced by the learned Advocates appearing for the respective parties and after perusing the record and the decision cited above in my opinion under Rule 7 (e) (iv) of

the Death-cum-Retirement scheme 1981 (supra) provides for condonation of deficiency of six months but the note appended to it curtails the operation of the said Clause. But the said scheme is a beneficial one and the benefits pertinent to the said scheme cannot be curtailed or denied to the petitioner mechanically.

On this issue reliance was placed in Memo No.26-SE(B)/IM-13/08 dated February 2, 2009 by Government of West Bengal, School Education Department, Budget Branch which is quoted below :-

"GOVERNMENT OF WEST BENGAL

School Education Department, Budget Branch

No.26-SE(B)/IM-13/08

Dated : February 2, 2009

Sub: Calculation of the length of qualifying service for Retirement Benefits-Modification of the West Bengal Recognised Non-Government Educational

Institution Employees (DCRB) Scheme, 1981.

In terms of para 7 (e) (iii) of the West Bengal Recognised Non-Government Educational Institution Employees (DCRB) Scheme, 1981, fractions of a year equal to six months and above shall be treated as a completed six monthly period for the purpose of calculation if any pension under the said Scheme in case of Government employees, a fraction of a year equal to three months and above is treated as completed six monthly period of Service and reckoned as Qualifying Service for the purpose of pensionary benefits in terms of Memo No.14791-F dated 16.12.83 Government in School Education for sometime past was considering extension of the said benefit to employees of Non-Govt. Aided Educational Institutions.

After careful consideration of the matter the Governor is pleased to decide that a fraction of a year equal to three months and above shall be treated as completed six monthly period of service and reckoned as qualifying service for determining retirement benefits and the period of service below three months will be ignored.

This order shall be deemed to have taken effect from the date of issue of this order.

This order issues with the concurrence of Finance Department vide their U/O/ No.896 Pension Br. Dated 17-12-08.

The Pension Cases already settled need not to be re-opened.

Sd/-

O.S.D. & E.O. Joint Secretary."

Therefore, by the aforesaid memo dated 2nd February, 2009 it has been clarified that for the purpose of calculation of retirement benefits fraction of a year is equal to three months and above shall be treated as completed six months period of service and to be reckoned as qualifying service for determining retirement benefits.

If I accept the submission of the learned Advocate appearing for the state authority that weightage should be given to the note appended to the original Clause 7 (e) (iv) which clearly provides that the deficiency should not be condoned with a view to make up minimum prescribed qualifying service for the purpose of disbursement of retirement benefits then in my opinion two different stands cannot be applicable for the purpose of calculation of length of qualifying service under Clause 7 (e) (iii) and Clause 7 (e) (iv) and the benefits under the scheme cannot be settled by specifying the period of condonation as well as restriction would hit the discrimination and unfair practice adopted by the Government.

Furthermore, in my opinion an explanatory note cannot supplant the provisions of the substantive clause under the scheme. It has to be read in the context of the substantive provision and not in derogation thereof.

In support of this reliance is placed on decision passed by the Hon'ble Supreme Court of India on 10th April, 2007 delivered by Hon'ble Division Bench in Civil Appeal No.1870 of 2007 (V.B. Prasad vs manager, P.M.D.U.P. School & Ors) reported in 2007 (3) Supreme Page-534. Some portion of this judgment is quoted below :-

"Note-The language/specialist teachers, according to their seniority in the combined seniority list of teachers shall also be appointed as Headmaster of U.P School or Schools under an Educational Agency provided the teacher possesses the prescribed qualifications for promotion as Headmaster of U.P School on the date of occurrence of vacancy.

The said rule, thus, provides for essential qualification. Rule 45 is in three parts. The first part provides for the qualification of a teacher who can be appointed in the post of Headmaster. He must be graduate with B.Ed. or other equivalent qualification and must have at least five years' experience in teaching after acquisition of B.Ed degree. The second part of the rule provides for consideration of such teachers only in the event a graduate teacher is not available. Indisputably, Respondent No.6 fulfils the educational qualification as also five years' experience in teaching after acquisition of B.Ed. degree. Ignoring her claim, Respondent No.2 was appointed whose case comes within the purview of the second part of Rule 45, as she did not have the qualification specified in the first part thereof. Appellant was a Drawing teacher. He, therefore, was a specialist teacher. According to him his case comes within the purview of the 'note' appended to Rule 45.

For the time being, we may assume that in view of fact that he had also acquired the qualification of B.Ed. in April 1989, his case also could be considered in terms of Rule 45; although it is well-settled principles of law that the note appended to a statutory provision or the subordinate legislation must be read in the context of the substantive provision and not in derogation thereof. Five years' teaching experience for appointment to the post of Headmaster was a sine qua non. Such teaching experience was to be 'teaching experience' and not a deemed teaching experience.

In Punjab State Electricity Board Ltd. v. Zora Singh and Others [(2005) 6 SCC 776], this Court noticing a decision of a Full Bench of the Andhra Pradesh in A.P. SRTC v. STAT [ILR 2001 AP 1], observed : "23. In A.P. SRTC v STAT a Full Bench of the Andhra Pradesh High Court has noticed this : (An LT p.544, para-31) 31 [24]. The meaning of note as per P. Ramanatha Aiyars Law Lexicon, 1997 Edn. Is a brief statement of particulars of some fact, a passage or explanation.

24. The note, therefore, was merely explanatory in nature and thereby the rigour of the main provision was not diluted."

(Emphasis supplied)

11. Considering the above discussion and also perusing Clause 7 (e) (iii) and

Clause 7 (e) (iv) and the Memo No. 26-SE(B)/IM-13/08 dated 2nd February, 2009 and decision in V.B. Prasad case(supra) (emphasis supplied) I am not in a position to accept the contention of the respondent authority that the authority has been empowered to give weightage to the note appended to the provisions of the substantive clause under the scheme.

12. Accordingly, the impugned order dated 6th March, 2017 passed by the Principal Secretary of the West Bengal School Education Department cannot be sustained. Resultantly, the impugned order dated 6th March, 2017 is hereby quashed and set aside. Further, respondent authority is directed to condone the deficiency of 2 months 27 days in the qualifying service of the petitioner and to disburse the pensionary benefit in favour of the petitioner along with all arrears of pension within a period of Eight (8) weeks from the date of communication of this order and to carry on making payment of pension to the petitioner month by month.

13. With this direction, the present writ petition is allowed without any order as to costs.

14. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties after fulfilling all formalities.