(2016) 06 BOM CK 0021

In the Bombay High Court

Case No : Writ Petition No. 2034 of 2005

A.N. Radha APPELLANT

Vs

Director of Technical Education, Maharashtra State RESPONDENT

Date of Decision : 10-06-2016

Acts Referred:

Citation : (2016) 4 AIRBomR 588 : (2016) LIC 3594 : (2016) 4 MhLJ 875

Hon'ble Judges : B.P. Dharmadhikari and Kum. Indira Jain, JJ.

Bench : Division Bench

Advocate : Shri R.S. Sundaram, Advocate, for the Appellant; Shri N.S. Khubalkar, Assistant Government Pleader, Shri A.A. Naik, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.(Oral)—By this petition filed under Article 226 read with Article 227 of the Constitution of India, petitioner, a retired Principal of Polytechnic College run by respondent no.2, seeks a declaration that her superannuation at the age of 58 years is unsustainable as the age of superannuation is 60 years. Second contention is that petitioner is entitled to change her option and avail benefit of pension and gratuity scheme and communication dated 10/8/2005 refusing that benefit is unsustainable.

2. It is not in dispute that petitioner got knowledge of her proposed superannuation at 58 years when Management moved office of respondent no.1 seeking permission to advertise the post of Principal. After filing of writ petition, this Court on 29/4/2005 issued rule in the matter and in the light of judgment of Hon''ble Apex Court in the case of Ahmedabad Education Society v. Gilbert B. Shah and others (2004 1 SCC 612) granted interim relief in terms of prayer clause (ii) of the petition, with the result, petitioner continued in employment beyond 30/4/2005 and till she reached 60 years of her age, i.e. upto 30/4/2007. She has been accordingly paid salary for the work done.

3. In this background, Adv. Sundaram appearing for petitioner submits that age of retirement in case of petitioner was always 60 years and it has been brought down for the first time by Government Resolution dated 27/2/2003. The Government Resolution itself specifically stipulates in Clause 1 that it comes into effect from 1/1/1996 insofar as revised scales of pay and higher qualifications, etc. as stipulated therein are concerned. The other terms and conditions are made effective from 30/12/1999. He submits that petitioner had joined employment on 9/9/1971 and became Principal on 25/8/1985. As such, the age of superannuation prevailing on 25/8/1985 is not altered by this Government Resolution dated 27/2/2003. To point out how terms and conditions stipulated in contract of service are treated by Hon''ble Apex Court, he is drawing support from the judgment of Hon''ble Apex Court in the case of Ahmedabad Education Society (supra).

4. To show that it is open to State Government not to accept age of superannuation as stipulated in University Grants Commission''s Regulations and the earlier age of superannuation can be maintained by the State Government, Adv. Sundaram draws support from the judgment of Hon''ble Apex Court in T.P. George and others v. State of Kerala and others (1992 Supp (3) SCC 191).

5. Our attention is also invited to orders passed in the present petition on 16/4/2007 as also on 21/4/2008 to urge that though initially there was a direction to release all terminal benefits including pension by treating age of retirement is 60 years, because of modification, that order could not be given effect to.

6. Inviting our attention to order dated 10/8/2005, he states that finality to option exercised by the petitioner as mentioned therein is not correct. Adv. Sundaram argues that petitioner gave option initially on 7/12/1985 by moving separate application and then sought to change it on 28/1/2005. The forwarding letter and the option by which petitioner wanted to shift to pension scheme as contained in Maharashtra Civil Services (Pension) Rules, 1982 is relied upon by him for this purpose.

7. In the alternative, Adv. Sundaram argues that option given by the petitioner on 7/12/1985 is redundant because Contributory Provident Fund scheme was never implemented in the establishment of respondent no.2. He has also produced before this Court Government Resolution issued on 23/6/2015 to demonstrate that so called finality to option envisaged at the time of wage revisions on various occasions has never been treated as conclusive and time to shift to pension scheme has been extended on various occasions. According to him, lastly even on 23/6/2015 time has been allowed and hence, the change sought for by petitioner on 28/1/2005 could not have been declined on 10/8/2005.

8. Though the facts are not on record, according to Adv. Sundaram, amount of Rs. 2,30,690/- only has been deposited in CPF Account with State Bank of India

without any contribution of State Government. He submits that petitioner is ready and willing to refund that amount to State Government with 5% interest, if benefit of pension scheme is extended to her.

9. Shri Khubalkar, learned Assistant Government Pleader for respondent nos.1 and 3, submits that reliance upon Government Resolution dated 23/6/2015 should not be accepted as he is not fully aware of the contents thereof or further developments in relation thereto. Without prejudice, he has attempted to assist the Court only by explaining the scheme thereof from its express language. He has further submitted that the fact that Contributory Provident Fund scheme was never implemented in respondent no.2 College is not on record. Similarly, amount in deposit with State Bank of India and alleged no contribution towards it by State Government are the events not pleaded on record.

10. He points out that as per Government Resolution dated 20/2/1985 for the first time Pension and Death-cum-Retirement Gratuity scheme was made applicable to employees like petitioner and vide Clause 5 age of retirement was then stipulated to be 60 years. He submits that the said age was prevalent even as per earlier Government Resolutions dated 19/5/1983 and 28/11/1984. This was continued till coming into force of revision of pay scales as per Government Resolution dated 27/2/2003. The said Government Resolution expressly brings out the age of superannuation to 58 years vide its Clause 15 and petitioner having taken benefit of that Government Resolution cannot be permitted to urge that Clause 15 should not be applied to her. He submits that it is a package scheme, which petitioner has to take as it is or then reject wholly. Acceptance only of beneficial part and rejection of prejudicial part is legally not permissible. According to him, this controversy about the age of superannuation is settled by judgment of this Court dated 14/6/2006 in Writ Petition No.413/1998 where the judgment delivered at Bombay on 30/9/2005 in Writ Petition No. 6529/2005 has been followed.

11. Shri Khubalkar, learned Assistant Government Pleader has attempted to distinguish the judgment of Hon''ble Apex Court in the case of T.P. George and others (supra). He has also invited our attention to the judgment of Hon''ble Apex Court in B. Bharat Kumar and others v. Osmania University and others [(2007) 11 SCC 58] to urge that it is not obligatory for the State Government to accept the entire scheme of University Grants Commission as it is. The judgment of the Hon''ble Apex Court in the case of Ahmedabad Education Society (supra) relied upon by petitioner is sought to be explained by urging that there appointments were on contract specifically, which prescribed age of superannuation also. To urge that this Court has very limited jurisdiction in such matters, support is drawn from the judgment of Division Bench of this Court in Shri Vasantrao Vishnu Mangore v. State of Maharashtra (2004 (2) ALL MR 674).

12. He has placed reliance upon reply-affidavit filed in this Court while replying to Civil Application No.5166/2008. He submits that as mentioned therein, State Government after introduction of Pension and Death-cum-Retirement Gratuity

scheme has given various opportunities to employees like petitioner to shift to that scheme and petitioner has accordingly exercised the option. The option once exercised is made final. He relies upon Government Resolution dated 10/9/1996 for the said purpose.

13. Commenting upon Government Resolution dated 23/6/2015, he submits that it has been issued for entirely different purpose and it does not extend time limit for furnishing options.

14. Advocate Sundaram for petitioner, in reply arguments, submits that Government Resolution dated 27/2/2003 revises wages and which, according to respondents brings down the age of superannuation, does not modify the earlier Government Resolution dated 20/2/1985 and arrangement in that Government Resolution is left intact. This stipulation that age of superannuation in case of petitioner shall be 60 years is not affected by latter Government Resolution. He further submits that when perusal of recent Government Resolution dated 23/6/2015 reveals that time to furnish option has not been treated as final and difficulties faced by the employees have been looked into and redressed therein, the request made by the petitioner for change of option on 28/1/2005 could not have been rejected and in any case in the light of said Government Resolution, the request can now be entertained and allowed.

15. We have carefully considered the rival arguments. The fact that pension and death-cum-retirement gratuity scheme has been made applicable to employees like petitioner for the first time on 20/11/1985 is not in dispute. Clause 5 of Government Resolution dated 20/2/1985 is on age of retirement and it stipulates that age of retirement for employees in non-Government aided Technological Colleges, Polytechnics, Pharmacy Institutes shall be 60 years in case of Teachers and 58 years in case of non-teaching employees. This age has been accepted as mentioned in earlier Government Resolutions dated 19/5/1983 and 28/11/1984. Stipulation of age of retirement in the earlier Government Resolutions is not relevant here because in case of petitioner, pension and death-cum-retirement gratuity scheme has become applicable only on 20/2/1985 and, therefore, age of retirement has been prescribed for the first time by that Government Resolution.

16. Government Resolution on which respondents placed reliance to urge that said age has been brought down to 58 years is issued on 27/2/2003. This Government Resolution is on revision of pay scales of Teachers/Librarians in Government/non-Government and other Colleges including Polytechnics. The said Government Resolution is looked into by Division Bench of this Court while deciding Writ Petition No. 413/1998 on 14/6/2006. There the question was identical. In paragraph 3, Division Bench has noted that Counsel for the petitioner fairly accepted the settled legal position in this respect and as such, this judgment does not contain any adjudication on the issue of age of superannuation. In paragraph 2 of the judgment dated 30/9/2005 delivered at Bombay in Writ Petition No.6529/2005 it is observed that University Grants Commission''s recommendations on the retirement age have to be held as

directory and State Government and University concerned has fixed the age of retirement as 58 years in Government Colleges. Thus, the issue regarding age of superannuation in non-Government Polytechnic College is not specifically looked into even in this judgment.

17. However, perusal of Government Resolution dated 27/2/2003 vide Clause 15 specifically shows that age of superannuation of Teachers would be 58 years and thereafter no extension can be given to them. This Government Resolution is issued to implement recommendations of 5th Pay Commission and revised pay scales. Paragraph 2 of the Government Resolution shows that A.I.C.T.E. had forwarded its recommendations about revision of pay scales and service conditions of teaching staff of Polytechnic Institutions to State Government and the State Government has considered it as a package scheme. Decision of State Government also reveals that it was being implemented as a package scheme. Thus, revision of pay scales has been clubbed with and associated with terms and conditions of service. As per Clause 4, this Government Resolution applies to all Teachers. Clause 5, which deals with date of effect, prescribes that revised pay scales, career advancement scheme and incentives for higher qualification given under the scheme become effective from 1/1/1996. All other terms and conditions become effective from 30/12/1999. The superannuation and re-employment are dealt with in Clause 15 and as stipulated in Clause 5, it becomes effective from 30/12/1999. In view of this express provision, it is apparent that after issuance of this Government Resolution on 27/2/2003, the age of superannuation has been brought down to 58 years in case of Teachers like petitioner in Polytechnic Colleges. We find substance in the contention of learned Assistant Government Pleader that A.I.C.T.E. as also State Government have examined the issue of wage revision and service conditions together. The decision to implement wage revisions and other service conditions has been taken as a package scheme and, therefore, age of superannuation as 58 years forms an integral part of wage revision scheme. Petitioner having taken advantage of that scheme, cannot turn back and contend that her age of superannuation remained or continued to be 60 years even after 27/2/2003.

18. Perusal of judgment in the case of Shri Vasantrao Vishnu Mangore v. State of Maharashtra (supra) reveals that there challenge was to a Resolution of Government re-introducing 58 years as age of superannuation. The question was of power or jurisdiction of employer and it is in that background the Division Bench of this Court has observed that it is a policy matter. Here, the contention of the learned Counsel for the petitioner is that the age of superannuation already settled on 20-02-1985 could not have been reduced by the later Government Resolution dated 27-02-2003 which is essentially on wage revision. Perusal of judgment of the Hon?ble Apex Court in the case of T.P. George and others v. State of Kerala and others, reported at 1992 Supp (3) Supreme Court Cases 191 shows that the Hon?ble Apex Court has found that the scheme of UGC fixing 60 as age of superannuation was not binding either on the State Government or the Universities functioning under the relevant statutes in the

State and the Government, therefore, has discretion either to accept it in full or in modified form or not at all. Here, on 27-02-2003, the State Government has accepted the scheme as a package scheme and therefore essentially co-related service conditions with age of superannuation. The judgment of Hon?ble Apex Court in the case of Ahmedabad Education Society v. Gilbert B. Shah and others, reported at (2004) 1 Supreme Court Cases 612, is the judgment where the terms and conditions of the employment were laid down by contract and in terms of contract the age of superannuation was 60 years as per Rule 29 of the Leave Rules framed by the employer Society. It is, in this background, the Hon?ble Apex Court has found that the contract entered into between the parties is decisive. Here, the petitioner had option not to take benefit of wage revision in terms of Government Resolution dated 27-02-2003. However, having taken benefit thereof the petitioner cannot contend that only advantageous part of it should apply to her and Clause 15 which reduces the age of superannuation should not be extended. In the judgment of Hon?ble Apex Court reported at (2007) 11 Supreme Court Cases 58 (B. Bharat Kumar and others v. Osmania University and others) follows the view noted supra while considering the judgment in the case of T.P. George and others v. State of Kerala and others.

19. Coming to the question of option exercised by the petitioner, the fact that the petitioner gave option on 07-12-1985 and opted for Contributory Provident Fund is not in dispute. She has on 28-01-2005 attempted to shift to pension scheme and forwarded a communication for that purpose along with option form. She was to reach the age of superannuation i.e. 58 years on 30-04-2005. Thus, she wanted to shift to pension scheme just three months prior to her superannuation. This request was turned down on 10-08-2005. The perusal of Government Resolution dated 10-09-1996 shows that it is expressly on the subject of grant of extended time limit for furnishing such option. Various extensions earlier allowed are mentioned therein and as per Clause 2 thereof the time of three months was given to everybody including those who had already superannuated to change their option. It is expressly stipulated that option thus exercised would be final and time limit for that purpose would not be extended again. Thus, the petitioner could have changed her option after 10-09-1996 within three months. This opportunity was not availed of by her. As such, we are unable to find any perversity in order of rejection dated 10-8-2005.

20. The copy of Government Resolution dated 23-06-2015 produced during the course of arguments is marked as Exhibit-?X?. It is subject to the objection of learned Assistant Government Pleader that he does not have any instructions about the said Government Resolution or further developments in pursuance thereof. Perusal of this Government Resolution shows that it is on the subject of extending benefit of pension scheme to full time employees like present petitioner. In preamble it is mentioned that the cases of change of option by certain employees who had deposited the amount of Management contribution with State Government were pending due to condition that option once exercise would be final. Thus, this Government Resolution envisages those employees

who had changed their option and also refunded the amount of the Management contribution to the State Government. In the present matter, the petitioner could not do so because of the impugned communication dated 10-08-2005.

21. The stipulation mentioned supra in the said Government Resolution itself raises certain disputes. However, as the learned Assistant Government Pleader is not fully instructed in the matter, we are not observing anything in relation thereto. We find that in the present situation, the petitioner can be given opportunity to make appropriate representation pointing out this resolution and the rejection dated 10-08-2005 and to seek an opportunity to take benefits of the pension scheme. If such representation is made by the petitioner within three months from today, the State Government shall consider it within next four months in accordance with law.

22. With these directions to the respondents, we dismiss the Writ Petition. Rule stands discharged. No costs.

