
(1994) 04 AHC CK 0037

In the Allahabad High Court

Case No : Special Appeal No. 225 (M/B) of 1993

Director of Education (Secondary), U.P.Lucknow

APPELLANT

Vs

Krishna behari bajpai

RESPONDENT

Date of Decision : 13-04-1994

Acts Referred:

Citation : (1994) 04 AHC CK 0037

Hon'ble Judges : S.H.A.Raza, J and B.K.Singh, J

Final Decision : Allowed

Judgement

B K. Singh, J.—This Special Appeal has been preferred by the Director of Education (Secondary) U. P. Lucknow & the District Inspector of Schools, Rae Bareli against the Judgment and order dated 7101993 passed by Hon"ble the Single Judge in writ Petition No. 5366 (s/s) of 1992 whereby a writ of mandamus has been issued directing the appellants to reinstate Dr. Krishna Behari Bajpai, the respondent as Lecturer in Hindi and to let him continue in service till he attains the age of 60 years on 30th June 1994 and to pay him the arrears of salary together with benefit of increment and increased dearness allowarce with effect from 171992 and interest @ 12% per annum.

2. The relevant facts giving rise to Special Appeal may be stated.

3. Dr. Krishna Behari Bajpai the respondent preferred a writ petition praying for quashing of the order dated 2761992 by which he was directed by the Principal of the institution to retire at the age of 58 years. Further prayer for issue of mandamus was also made to direct the appellants to allow him to serve as Lecturer in Hindi in Wasi Naqvi National Inter College, Rae Bareli and to pay him his salary every month together with allowances until 30694 or till the pendency of the writ petition. The averments made by the petitioner in the writ petition were that normal age of retirement of teaching Baffin aided Secondary Educational Institution including that of a Lecturer is 60 years and in the Government order dated October,6, 1990 as amended by Government order dated November 4, 1991 it has been provided that teachers retiring on attaining

the age of 60 years will be entitled to all the benefits of service and the offer given by any teacher in pursuance of Government order dated August 10, 1978 would not be enforced against him. The Petitioner further averred that in pursuance of the Government order dated 6101990, the petitioner had opted to retire on attaining the age of 60 years and as such he is entitled to continue in service as Lecturer in Hindi in the College until 3061994. As against the above the Principal of the College had been compelled to issue a notice of retirement to the petitioner under pressure from the authorities of the Education Department and that petitioner is being superannuated on 3061992. The petitioner in support of his case placed reliance on a judgment dated 1641992 passed by Hon''ble Vijay Bahuguna, J. in writ petition No. 20260 of 1991 Yogeshwar Prasad Swami v. Deputy Director of Education and others. On the allegations made in the petition the petitioner raised the ground that since he has given an option in pursuance of the Government Order dated 6101990 to retire on attaining the age of 60 years, he is entitled to remain in service till 3061994. The prayers referred to above were thus claimed in the writ petition.

4. The writ Petition was preferred on 1081992 but it came up for preliminary hearing on 1181992. The Division Bench which considered the matter directed that the petition be put up on 20th August, 1992 for orders and the opposite parties 3 & 4 i.e. the Committee of Management and Principal were ordered to be served outside by the petitioner. The writ petition was thereafter listed on number of dates and finally the impugned judgment was passed by Hon''ble the Single Judge. The Director of Education and the District Inspector of Schools, Rae Bareilly who were to implement the order passed by Hon''ble the Single Judge, have preferred this Special Appeal. The counsel of the respondent was served and he has filed an application together with an affidavit for dismissal of the Special Appeal.

5. The Special Appeal details certain facts and then grounds have been taken. The appellants have disclosed in Special Appeal that a new scheme of post retirement benefit has been enforced by the State Govt. by Govt. Order dated August 10, 1978. The teachers of the Aided Non Govt. Higher Secondary Schools were given the option of retirement at the age of 58 years. In this regard the State Government had also framed Rules called. The above mentioned rules were enforced on 3061978. The said rules have been annexed alongwith the Special Appeal. It has been stated that the respondent submitted an option in Prescribed Form on 981982 opting to retire at the age of 58 years, under the aforementioned Government Order of 1978 and the rules. The Petitioner's form of option has been attached as Annexure 3 to the Special Appeal. Under the provisions of the aforesaid Rules the option is irrevocable. The respondent was accordingly bound to retire at the age of 58 years. It has also been brought on record that on attaining the age of 58 years and his superannuation the respondent has been granted entire pensionary benefits including Provident fund, Gratuity, etc. The petitioner's pension has been fixed at Rs. 643/ per month including dearness allowance and the petitioner accepted Rs. 40,91.90(sic) on

291992 on account of commutation of pension. The respondent also received a sum of Rs. 30000/as gratuity and on the same date and again on 9101992 he received a sum of Rs. 73406.00 as G P F. He further received a sum of Rs. 3307.10 P. as Group Insurance, all the post retirement benefits. In this manner by the judgment and order passed by Hon"ble the Single Judge, the petitioner has become entitled to get double benefits. It has also been averred that in the above circumstances there was no wrong or illegality in petitioner being directed to retire on 3061992 i.e. on attaining the age of 58 years. The appellants have also stated that the respondent concealed the material facts mentioned above from the Court in his writ petition and gave the impression that he has opted for retiring at the age 60 years as per his option given under Government Order dated October 6, 1990. It has also been stated by the appellants in the factual assertion that no proper opportunity had been afforded to the State Government to controvert the false allegations mentioned in the writ petition and that the respondent is estopped to claim retirement at age of 60 years which runs against the option submitted by him on 991982 and after having accepted all the post retirement benefits.

6. The Special Appeal challenges the judgment and order passed by Hon"ble the Single Judge on the ground that the judgment is rendered bad in law as the respondent in his writ petition had concealed the material fact that he had opted to retire at the age of 58 years on the enforcement of Government Order dated Aug. 10, 1978 that the respondent having availed the benefit under the rules mentioned above stands precluded from challenging option subsequently. One ground is also this that no opportunity was given to the state Government to controvert the false allegations mentioned in the writ petition, that Government Order dated 6101990 did not open another opportunity for changing the earlier option and that respondent having received all the post retirement benefits which were admissible to only those teachers who had opted to retire at the age of 58 years is estopped to claim the reliefs which are contrary to the Rules.

7. We have heard the learned Standing Counsel and Sri S. D. Singh, the learned Counsel of the respondent.

8. The learned Standing Counsel has submitted that the petitioner was not entitled to the reliefs as claimed in the writ petition because he did not disclose the material facts of having given his option under the Government Order of 1978 and the Rules that were framed under the Government Order. It has also been urged that having accepted the post retirement benefits which are admissible only to those teachers who had given the option of retirement at the age of 58 years, the respondent was estopped from claiming the relief contained in writ petition. He has further submitted that the Government Order of October 6, 1990 did not envisage any such condition that the teachers who had given their option earlier could change it. His contention is that the Government Order is clear on the subject that opportunity of option was again offered by the State Government to only those teachers who were for various reasons unable to give

their option under the Government Order of 1978. In this regard the Standing Counsel has also placed reliance on a decision of this Court reported in 1994 HVD (Alld.) Vol. 1 page 97 Chandra Kishore Dubey v. Deputy Director of Education, Jhansi and others. Hon''ble R A. Sharma, J. while interpreting the Government Order dated 6101990 has held as under :

"The second submission also lacks merit. By the Government Order dated 4111991 only those teachers, who could not give option earlier under the first Government Order dated 6101990 have been permitted to give option. The persons, who had given option under the first Government Order are not entitled to give option again under the later Government Order dated 4111991. This is clear from paragraph 2 of the later Government Order itself."

9. The learned Standing Counsel placing reliance on the judgment referred to above, has said that this fact is further borne out from para 2 of the Government Order dated 4111991 that the option was allowed to be exercised by only those teachers who had failed to give their options earlier. The learned Standing Counsel has submitted that appellants were not afforded any opportunity to file a counter affidavit also the case was decided before material facts relating to petitioner's case could be placed before the Hon''ble Single Judge. In this manner the view taken by the Hon''ble Single Judge suffers from manifest error of law. He has further submitted that the Special Appeal being a continuation of the writ petition, and then this Division Bench exercising the same power as has been exercised by Hon''ble the Single Judge under Article 226 of the Constitution of India can rectify the legal error that has crept into the impugned judgment because of material facts having been not disclosed. Emphasis has also been laid on the respondent's own conduct that he in the writ petition did not give any inkling that in pursuance of the earlier Government Order of 1978 he had submitted his option. Besides the Government Order of 6101990 as annexed with the writ petition is also an incorrect one. The Government order as issued on 6101990 has not been correctly produced in Annexure2. According to the learned Standing Counsel he has filed the correct copy of Government Order dated 6th October 1990 which will indicate that the Government Order dated 6th October 1990 attached to the writ petition, as Annexure2 is materially incorrect. The incorrect Government Order (Annexure2 to the writ petition) led the Hon''ble Single Judge to take the view that the Government Order dated 6101990 once again opened to the respondent the opportunity to submit option. The relevant rules were also not brought to the notice of the Hon''ble the Single Judge. In this manner the impugned judgment passed by the Hon''ble Single Judge is based on wrong assumptions of both fact and law and is liable to be set aside and the respondents' writ petition is liable to be dismissed.

10. The learned counsel for the respondent has submitted that Government Order dated 6th October, 1990 has rightly been interpreted by Hon''ble the Single Judge. According to him, the Government Order did reopen the question of option irrespective of the fact that the concerned teacher had given his option

under the Government Order of 1978. According to the learned counsel, judgment passed by Hon''ble the Single Judge, is based on earlier decision rendered by Hon''ble V. Bahuguna, J. who too has identically held that the Government order of 1990 as explained by Government order of 1991 again reopens the opportunity of tendering option. In such a situation the petitioner who had under the Government Order of 1990 opted to retire at the age of 60 years has rightly been granted the relief by Hon''ble the Single Judge. The learned Counsel for the respondent submitted that if the respondent accepted the post retirement benefits then that would not come in respondents way on continuing in service till he attains the age of 60 years because the amount paid to the petitioner can be adjusted towards his admissible salary. The learned Counsel did not explain as to why the fact of earlier exercise of option was not mentioned in the writ petition or that the fact of acceptance of post retirement benefits was not brought to the notice of the Hon''ble Single Judge.

11. We have considered the above submissions of the learned Counsel for the parties.

12. It is now undisputed that the respondent had earlier on 991982 submitted option in printed form to the Principal of the College and the District Inspector of Schools accepted his option to retire at the age of 58 years. Thus the respondent claimed the benefit of the new pension scheme enforced under the Rules mentioned above. It is also undisputed that the respondent as per his option after attaining the age of 58 years & accepting himself to have been superannuated, accepted the post retirement benefits (mentioned above). The above fact strangely has not been brought on record by the respondent of the writ petition. What is noteworthy is that the respondent in his writ petition has merely averred that since he claimed the option under the Government Order of 1990 for retiring at the age of 60 years he cannot be retired on attaining the age of 58 years and that he is not covered by the earlier Government Order 1978. It is also noteworthy that the writ petition was filed on 1091992 and the respondent accepted the post retirement benefits as admissible to him under the new pension Scheme envisaged under the above mentioned Rules during the pendency of writ petition.

13. In our opinion, if these facts would have been brought to the notice of Hon''ble the Single Judge, the relief that has been granted to the petitioner would not have been granted As such in our opinion, the Special Appeal is liable to succeed on the above ground alone.

14. However, we propose to examine the points raised in the Special Appeal on merit of the matter also. The typed copy of the Government Order of 1990 that has been annexed as Annexure2 to the writ petition clearly conveys an incorrect message. The last seven lines of paragraph1 as occurring in the Annexure2 & those occurring in the Government Order, are being reproduced below :

15. As against the above in the Government order the following words find place :

16. Thus it is clear that the following words do not find place in the Annexure2.

17. Clearly the material that was typed in Annexure No. 2 without the words quoted above presents altogether a different picture. It is this .that the Government Order opens the opportunity of reexercising the option to even those persons who had submitted their option earlier. Thus in the circumstances of the case the reasoning in the impugned judgment makes it clear and we cannot but assume that the Hon''ble Single Judge has been led to accept the respondent's version on incorrect materials.

18. It is not known from the copy of the judgment attached as Annexure5 to the writ petition passed by Hon''ble V. Bahuguna, J. as to what material was placed before him to interpret the Government Order of October 6,1990 that it opens again the opportunity of tendering option to even those who had submitted their option earlier.

19. In this regard we wish to bring on record the relevant rules whose title has been referred in the earlier part of this judgment. It has been filed alongwith the Special Appeal and reliance has been placed on it in ground No. B, of the Special Appeal and the learned Standing Counsel has laid emphasis that the respondent having tendered his option under 1978 Government Order, is governed by the said rules and under those rules, the respondent has availed the benefits and he could not again change his option. Interpreting the Government Order of 6th October, 1990 it is clear that the Government extended the said facility to only those teachers of Aided Non Government Higher Secondary Schools who had been deprived of the benefit under the earlier Government Orders and the rules. Such teachers had been raising the demand of affording them the benefit of tendering option and as such the benefits was once again offered. Necessarily it would mean that 6101990 Government Order opened an opportunity to only those teachers who had not earlier tendered their option. This also is clear from para 2 of the Government Order dated November 14, 1991.

20. Hon''ble R. A. Sharma. J. in the case of Chandra Kishore Dubey (Supra) has rightly interpreted the Government Order of 6101990 in his judgment whose relevant para has been quoted above & we are unanimous that the interpretation made by Hon''ble R. A. Sharma, J, of the Government Order dated 6101990 is perfectly correct. The respondent could not have under the said Government order again submitted a different option other than exercised by him in 1982.

21. Looking into the record of the writ petition it is borne out that the Standing Counsel or the appellants were never called upon to file their return. The writ petition no doubt was listed from 2081992 to 2791993 for at least eight times but on no occasion any direction appears to have been issued to the Standing Counsel representing the State Government or to the appellants to file their counter affidavit. The ordersheet dated 2791993 merely mentions " arguments have been heard". It does not indicate that the arguments on behalf of appellants were also heard. In this manner it appears reasonable to believe that

the appellants did not deliberately fail to file the counter affidavit. In our opinion, the appellants were not given adequate opportunity to put forth their case before Hon"ble the Single Judge. For this reason too the Special Appeal deserves to succeed.

22. We accordingly hold that the respondent appears to have misled the Hon"ble Single Judge by suppressing the material facts and by filing incorrect Annexure2. The judgment, therefore, proceeds on such considerations which, if correct facts would have been brought to the notice of Hon"ble the Single Judge, would have gone against the respondent. We are in total agreement with the decision of Hon"ble R A.Sharma,J. in Chandra Kishore Dubey's case as also of his finding that Government Order dated 6101990 does not give opportunity to again exercise the option. It is also our conclusion that the petitioner having earlier exercised his option to retire at the age of 58 years and having accepted the post retirement benefit is estopped from challenging the order of Principal to superannuate him on 3061992.

23. In view of what has been stated above, we allow the Special Appeal, set aside the judgment dated 7101993 passed by Hon"ble the Single Judge and dismiss the writ petition with costs.

(Appeal allowed)