

(1996) 09 CAL CK 0012
In the Calcutta High Court
Case No : Matrimonial No. 1230 of 1995

Director of School Education	Vs	APPELLANT
Amarendra Nath Mukherjee		RESPONDENT

Date of Decision : 30-09-1996

Acts Referred:

Constitution of India, 1950 — Article 162
West Bengal Services (Revision of Pay and Allowances) Rules, 1990 — Rule 23, 28

Citation : (1997) 2 ILR (Cal) 281

Hon'ble Judges : Vidya Nand, J; Satyabrata Sinha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Satyabrata Sinha J.

1. Although this appeal was preferred against an interim order dated April 13, 1995, with the consent of the parties the entire writ application was heard.
2. The writ Petitioner initially filed the application for issuance of a writ of or in the nature of Mandamus directing the Respondents not to disturb his; service till he reaches the age of 65 years.
3. The fact of the matter lies in a very narrow compass.
4. The Petitioner is an approved Headmaster of Baranagar Narendra Nath Vidyamandir (hereinafter referred to for the sake of brevity as the said School).
5. Admittedly the said school is an aided school. The State Government issued ROPA, 1980 which was implemented in relation to the teaching and non-teaching staff of the aided schools also. It is also admitted that the age of retirement of the teachers of the aided schools was 65 years whereas that of a teacher of the Government school was 60 years. The State Government issued a policy decision to the effect that those teachers who intended to superannuate at the age of 65 years will have to revert back to the pre-revised scale of pay or otherwise the

age of superannuation will be 60 years. The aforementioned notification issued by the State of West Bengal was the subject-matter of a writ application wherein the West Bengal Headmasters' Association was the Petitioners. In the said writ petition certain interim orders were passed from time to time and pursuant thereto, the State Government also issued requisite notification, one of them being Memo No. 33-Edn.(B) dated March 7, 1990. The said writ application was dismissed and an appeal was filed which was registered as F.M.A.T. No. 1425 of 1990.

6. By reason of a judgment dated August 6, 1991 N.P. Singh C.J. (as His Lordship then was) speaking for the Division Bench while allowing the appeal observed as follows:

We are informed that during the pendency of the writ application by an order passed by this Court teachers were directed to exercise their option in form prescribed in Annexure VIII B aforesaid without prejudice to their rights and contentions raised in the writ application. Now in view of the present judgment it is only just and proper that a fresh opportunity should be given to such teachers to exercise their option in accordance with paragraph 5(2) in the form prescribed in Annexure VIII B within a specified time to be fixed by the State Government. Thereafter the State shall take a decision on the basis of option so exercised. Those teachers who exercise their option in the form aforesaid, shall be deemed to have waived their statutory right under Rule 23 for being considered for extension of their service after superannuation. Those who do not exercise their option in the form and opt to continue in service with the existing scale of pay shall be considered for extension of their service in accordance with Rule 28 after superannuation at the age of 60 years.

7. It appears that the Petitioner submitted an option form in terms of the aforementioned Memo No. 33-Edn.(B) dated March 7, 1990 for getting revised scale of pay and thus waiving his right to apply to pray for extension after 60 years.

8. However, in the meantime, the State Government amended Rule 28 in the years 1991 and 1992. So far as 1992 Notification is concerned, validity thereof has been upheld by a Division Bench of this Court in the case of West Bengal Headmasters' Association and Ors. v. State of West Bengal and Ors. 1995 Lab. I.C. 112. It appears that in the meanwhile the State of West Bengal issued another Circular letter being Memo No. 196-Edn.(B) dated April 27, 1992 which reads thus:

The undersigned is directed to say that in view of the judgment delivered by the Hon'ble High Court at Calcutta on 6.8.91 in F.M.A.T. No. 1425 of 1990 and CO. No. 6605 (W) of 1990 some of the teaching and non-teaching staff of the educational institutions mentioned in the Memo. No. 33-Edn.(B) dated 7.3.90 who opted for the revised scales of pay introduced with effect from 1.1.86 may feel inclined to withdraw their option and revert to their pre-1986 scales of pay

with a view to enjoy the benefit of the extension of service on a year to year basis subject to fulfillment of other conditions.

2. In view of the above noted judgment, the State Government in the Education Department has been considering the question for some time past as to whether such staff as aforesaid will be permitted to revert to the scale of pay prevalent prior to 1.1.86.

3. In the circumstances, after careful consideration of the matter, the Governor is pleased to order that such teaching and non-teaching staff as aforesaid be permitted to withdraw their option and revert to the scale of pay prevalent prior to 1.1.86, subject to the condition that they will have to refund to the Government the excess amount, if any, drawn by them consequent upon fixation of their pay in the revised scales of pay introduced with effect from 1.1.86. Such withdrawal of option may be effected by submission of a written statement to the concerned authorities to that effect in the enclosed form within 90 days from the date of issue of this order and also of an undertaking to refund the excess amount, if any, drawn by them as stipulated above within 60 days from the date of submission of the written statement and undertaking.

9. By reason of the said notification the Memorandum No. 33-Edn.(B) dated March 7, 1990 stood amended to the aforementioned extent.

10. Although some teachers like the Petitioner had earlier submitted his option in form VIIIB it appears that there existed certain confusion in the mind of the teachers as well as the State Government. Furthermore no procedure for exercise of option and refund of the excess amount was prescribed. By a Circular letter bearing Memo No. 300-Edn.(B) dated August 13, 1992 the State Government for the first time prescribed the procedure for refund of such over payments made to such employees of the Educational Institutions who had earlier been paid their salaries in terms of ROPA, 1980.

11. A similar notification was issued by a Memo dated January 7, 1993. By another circular letter being Memo No. 209-Edn.(B) dated June 16, 1994 the State directed as follows:

The undersigned is directed to refer to his memo No. 5-GA dated 1.1.93 and subsequent reminder in his letter No. 1482-GA, dated 8.4.94 and to inform him that all employees who have exercised option to come over to the scale of pay introduced under Memo No. 33-Edn.(B) dated 7.3.90 if exercised option to revert back to the scale prevailing prior to 1.1.86 should be allowed to get back provided conditions laid down in Education Department Memo No. 196-Edn.(B) dated 22.4.92. The decision in this regard was taken in the light of spirit of the judgment to offer a chance to an optee no matter whether the employee concerned was writ Petitioner or not and no matter whether the optee exercised option in form VIII or VIIIC as such there should be no confusion.

12. It appears that thereafter by a letter dated July 21, 1994 the writ Petitioner

withdrew his option exercised by him as per ROPA, 1990 and inclined to revert back to the pre-1986 scale of pay. He also sought permission to allow him to the protection of para. (1) of G.O. 10-Edn.(B) dated January 7, 1993 as he was ready to refund the excess amount drawn by him within such period as has been stipulated in the aforementioned order. The said application of the Petitioner was referred to the Director of School Education and the District Inspector of Schools. The Petitioner again on September 24, 1994 filed an application before the Secretary of the School concerned for extension of his service in terms of the amended Rule 28 of 1969 Management Rules as amended by a Circular letter dated April 27, 1992. The said circular letter is contained in annexure "F" to the writ application. The Petitioner filed a writ application before this Court questioning the action on the part of the District Inspector of Schools and by an order dated January 11, 1995 Tarun Chatterjee, J. directed the Director of School Education to consider the prayer of the Petitioner. The Petitioner contends that despite several representation no decision was taken and communicated to him by the Director of School Education. In the meantime by a resolution dated March 19, 1995 the Managing Committee took a decision to allow the extension of service of the Petitioner with effect from April 21, 1995 subject to the retention of pre-86 scale of pay and refund of excess money which was received by the office of the District Inspector of School on March 22, 1995 but no action was taken thereon. The Petitioner filed the instant writ application on April 4, 1995. However, during the pendency of the said writ application the Petitioner was communicated with the order of the Director of School Education dated March 28, 1995 whereby and where under his prayer for reversion to the pre-86 scale of pay was rejected. The Petitioner brought the said subsequent event to the notice of this Court by filing a supplementary affidavit annexing a copy of the aforementioned resolution.

13. By reason of an interim order dated April 13, 1995 the learned single Judge of this Court allowed the Petitioner to continue in service.

14. Mr. Pratap Roy, learned Counsel appearing on behalf of the writ Petitioner/ Respondent has raised a number of contentions in support of this appeal. The learned Counsel submits that the option filed by the Petitioner in terms of Memo. No. 33-Edn.(B) dated March 7, 1990 having been amended by reason of the aforementioned Memorandum dated April 27, 1992 and the Petitioner having exercised his option within 60 days there from and having refunded the entire amount within 90 days from the date of the said order, the impugned order passed by the Director of School Education must be held to be bad in law. Mr. Roy, has urged that the option being a contract, the same can be revoked and/or amended and by reason of exercise of such option once, no finality is reached. The learned Counsel contends that the option exercised by the Petitioner must be held to be on a mistaken option and thus he will be entitled to go back there from. In any event, the learned Counsel contends that the State Government had issued subsequent circulars giving a prospective effect thereto which goes to show that a right has been conferred upon ail concerned who exercised their

option and in view of the fact that the Petitioner has exercised such a right, the same cannot be taken away relying on or on the basis of a subsequent circular letter dated December 28, 1995. In any event, the learned Counsel contends that in view of the fact that the Petitioner has also been granted two extensions, the equity demands that he be allowed to continue till he attains the age of 65 years.

15. The learned Counsel has drawn our attention to various decisions of this Court in terms whereof the Petitioners thereof were allowed to exercise their options.

In particular our attention has been drawn to a judgment in CO. no, 19563 (W) of 1995 and CO. No. 19564 (W) of 1995 disposed of on December 6, 1995 whereby and where under the Petitioners thereof exercised their options prior to August 7, 1992 but did not refund the excess amount in question but despite the same were permitted to do so by February 28, 1996. The learned Counsel contends that the judgment passed by this Court having been accepted by the State Government and pursuant to the circular letter having been issued by the State, the Petitioner cannot be discriminated against.

16. Reliance in this connection has been placed on the decisions G.C. Ghosh v. Union of India 1991 Suppl. (2) S.C.C. 497 ; Abid Hussain and Others Vs. Union of India (UOI) and Others, and Sengara Singh v. Shib of Punjab AIR 1984 S.C. 1499 . In any event the learned Counsel contends that justice warrants that procedural law should not stand in the way of doing substantial justice to the writ Petitioner and thus according to the learned Counsel the Court can mould the relief. Reference in this connection has been made to the decisions Kalipada Das alias Mahanto and Others Vs. Bimal Krishna Sen Gupta (Dead) by Lrs.,

17. Mr. Pabitra Kumar Basu, the learned Counsel appearing on behalf of the Appellant, on the other hand, submitted that the option once exercised by the Petitioner was final and, thus he could not have been gone back there from. The learned Counsel submits that the Petitioner's application dated July 21, 1994 as contained in Annexure "E" to the writ application would show that he had not applied in the prescribed form nor he had given undertaking in terms thereof. The learned Counsel contends that the Petitioner had filed two writ applications in relation to the self-same subject. According to the learned Counsel, in the first writ application the Petitioner did not rely on the circular letter dated August 7, 1992 whereupon reliance had been placed in the second writ application. It has been submitted that keeping in view the fact that the said circular letter dated August 7, 1992 has been cancelled by a subsequent circular letter dated June 16 1994, the Petitioner's application must fail. According to the learned Counsel, the said circular letter dated August 7, 1992 was issued on wrong premises and, thus the same is not binding upon the State which clarifies the position in terms of its circular letter dated June 16, 1994. The learned Counsel in this connection has relied upon decisions of the Supreme Court in Dr. Arundhati Ajit Pargaonkar Vs. State of Maharashtra and others, and Dr M.A. Haque and Others Vs. Union of

India (UOI) and Others,

18. The learned Counsel further submitted that in the instant case the conduct of the writ Petitioner is also relevant inasmuch he even did not honour his own "inclination" by withdrawing the revised scale of pay till April 20, 1996.

19. The question which falls for consideration in this application is as to whether in view of the facts and circumstances of this case, the Petitioner was entitled to exercise fresh option in terms of the aforementioned circular letter dated August 7, 1992. The factual matrix of the case, as noticed hereinbefore, would clearly show that there had been a confusion in the mind of all concerned including the authorities of the State of West Bengal as to whether the directions issued by the Division Bench of this Court in West Bengal Head Masters' Association v. State of West Bengal F.M.A.T. 1425 of 1990 disposed of on August 6, 1991 for benefits of all the teachers or not.

20. In terms of G.O. No. 33 Edn.(B) dated March 7, 1990 the Petitioner opted for grant of revised scale of pay. It is true that such option in terms of the circular letter was stated to be final. However, as indicated hereinbefore at that point of time a contention was being raised on behalf of the teachers represented by various Association that they were entitled to both revised scale of pay in terms of ROPA Rules as also their age of superannuation would be 65 years. The High Court had passed several orders and as indicated hereinbefore by a circular letter dated April 27, 1992 as contained in Annexure "D" to the writ application an amendment was made to the aforementioned circular letter dated 33(Edn)B dated March 7, 1990 the details whereof have been noticed hereinbefore. The State, therefore, issued the aforementioned circular letter in view of the decision of this Court and, thus another opportunity was given to the concerned teachers to withdraw their option with a view to enjoy the benefit of the extension of service on a year to year basis subject to fulfillment of other conditions.

21. Mr. Basu is not correct in contending that the said circular letter was unauthorised. It had been issued in the name of the Governor, It fulfils all the conditions of executive instruction which could be issued in terms of Article 162 of the Constitution of India. Furthermore, the said order was issued with the concurrence of the Finance Department.

22. Option is a contract, and thus in a changed situation, it was permissible for the Petitioner to withdraw from the said option. The submission of Mr. Basu to the effect that he was required to submit the option in Form-VIII-B does not appear to be correct as we are of the view that such option was required to be filed in terms of Memo No. 33 Edn.(B) dated March 7, 1990 which stood amended by reason of the aforementioned Memo No. 196 Edn.(B) dated April 27, 1992. Furthermore the word "inclination" which has been used by the Petitioner has also been used in the said Memorandum 196 Edn.(B) dated April 27, 1992.

23. Further, the state itself was of the opinion that no procedure had been laid down for refund of such over payment made to such employees of the

educational institution. The words used therein in no uncertain term leads to one conclusion that such procedures were to be followed in future. Again, the said notification was modified by a Memorandum dated January 7, 1993 wherein even further detailed procedures had been laid down, it is not the case of the State or the Director of School Education that the Petitioner had not deposited the extra amount drawn by him in terms of the aforementioned circulars.

24. Even the circular letter dated 209 dated June 16, 1994 would also show that the same had a prospective effect and the same had been issued in order to clear the confusion which implies that such confusion was prevailing in the mind of all concerned.

25. As by reason of the aforementioned circular letters dated April 27, 1992, August 13, 1992 as amended on January 7, 1993 and June 16, 1994 the Petitioner derived a right and he having exercised his right by opting to refund the excess amount drawn by him and having done. So, his right cannot be taken away with a retrospective effect by reason of the circular latter dated June 16, 1994 or otherwise. It is also admitted that several benches of this Court interpreted the aforementioned circulars and had held that the said Circulars would apply prospectively and, thus permission had been granted to refund the amount drawn in excess by the concerned teachers. The aforementioned decisions of this Court have been acted upon by the State. Recently S.R. Mishra J. in CO. No. 19564(W) of 1995 and other analogous case gave certain directions. It has not been stated before us that an appeal has been taken from the said order. If the State has acted upon the aforementioned judgments, there is absolutely no reason as to why the Petitioner shall be deprived of the benefit thereof. See *State of Rajasthan Vs. Shri Shyam Lal Joshi and others*, and *Gopal Krishna Sharma and Ors. v. State of Rajasthan and Ors.* 1993 Suppl. (2) S.C.C. 375 at 376.

26. The question as to whether such an option can be exercised at any time has not fallen for our consideration. However, as no date has been specified in the said Circulars till the clarification dated June 16, 1994 the Petitioner reached the age of superannuation on April 20, 1995. He had been granted two extensions. In this view of the matter there cannot be any doubt whatsoever that the matter being in a nebular state, the Petitioner should have been allowed to continue. Such orders of extension received approval of the competent authority, namely, the District Inspector of Schools. It is only on May 2, 1996 that the Petitioner received an order from the District Inspector of Schools that approval for second term of extension as accorded in terms of order dated March 28, 1996 shall be kept abeyance. The Director of School Education in his impugned order dated Mach 28, 1995 has merely held that the Petitioner's claim for reversion to pre 1986 scale of pay and extension for further five years is not entertain able in absence of any Government Order or direction from this Court in terms whereof the date of re-exercising of option has been extended upto July 21, 1994 on which date the Petitioner had exercised his option.

27. It is admitted that the aforementioned order was passed in view of the order of a learned Single Judge of this Court on the Petitioner's first writ application which was disposed of on January 11, 1995.

28. The Director of School Education having held so, further added in his own pen that he had no jurisdiction and competence to modify the State Government's policy who may, however, approach the State Government.

29. Furthermore, it is evident, that the State Government itself issued various circulars in the spirit of the judgment passed by the Division Bench and thus, the said notifications ensure to the benefit of all teachers.

30. In view of our findings aforementioned, in our opinion, the interest of justice requires that the refund of the excess amount made by the Petitioner be accepted and he may be allowed to receive his salary at pre 1986 scale of pay and exercise his option for extension of service in terms of the Government Notifications as referred to hereinbefore and subject to the condition laid down therein.

31. Keeping in view the fact that teachers similarly placed had been given the said opportunity, there is no reason whatsoever as to why the Petitioner should be deprived of the said benefit.

32. It should also be borne in mind that the Managing Committee of the said school also desires that the services of the Petitioner be extended.

33, This writ application is therefore, allowed but in the facts and circumstances of the case, there shall be no order as to costs.

Vidya Nand, J.

34. I agree.