
(1987) 11 BOM CK 0015

In the Bombay High Court

Case No : Writ Petition No. 2212 of 1987

Hanumansingh Thakur

APPELLANT

Vs

Municipal Council and Others

RESPONDENT

Date of Decision : 02-11-1987

Acts Referred:

Constitution of India, 1950 — Article 226

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 2(20)

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 17, 17(1)

Citation : (1989) 2 BomCR 129

Hon'ble Judges : H.W. Dhabe, J;G.G. Loney, J

Bench : Division Bench

Advocate : A.P. Deshpande, for the Appellant; R.L. Khapre, for the Respondent

Final Decision : Allowed

Judgement

H.W. Dhabe, J.—The parties by Counsel. Rule, heard forthwith.

The petitioner, who is working as a teacher in the secondary school run by the respondent No. 1 Municipal Council, was given a notice of retirement on 27-5-1987 on the ground that he would be completing 58 years of age on 31-10-1987 which is the age of retirement prescribed under the bye-laws framed by the Municipal Council in that regard. The petitioner has filed the instant writ petition challenging the notice of retirement on the ground that by the Maharashtra Act No. XXX of 1987 the Maharashtra Employees of Private Schools (Conditions of service regulation) Act, 1977 (for short, "the Act"), is amended and by the said amendment the secondary schools run by the Municipal Councils are included within the definition of the expression "private school" given in section 2(20) of the Act with the result that all the provisions of the Act and the Rules framed there under which are applicable to the "private schools" would be applicable now to the secondary schools of the Municipal Councils also. It is necessary to state that the aforesaid amendment has come into force on

7-8-1987 i.e. after the notice of retirement was given to the petitioner on 27-5-1987. However, since the actual retirement was to take place on 31-10-1987, the submission on behalf of the petitioner is that the provisions of the Act are applicable to the retirement of the petitioner working in the secondary school run by the respondent Municipal Council.

2. It may be seen that under the proviso to Rule 17(1) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules 1981 (for short, "the Rules") framed under the Act, the age of retirement for the teachers in the Vidarbha region who are permanent in service on 31-12-1966 is 60 years. It is, therefore, the submission on behalf of the petitioner that since he was a teacher working in the recognised secondary school in the vidarbha region who was permanent in service on 31-12-66, he is entitled to continue upto 60 years of age as per the aforesaid rule which is applicable to him in view of the aforesaid Amending Act No. XXX of 1987.

3. The learned Counsel for the respondent Municipal Council has urged before us that the exception carved out in the proviso to Rule 17(1) of the Rules is applicable to those teachers only who were originally governed by the regulations framed under the M.P. Secondary Education Act, 1951 (for short, "the M.P. Act") and not to the teachers of the local authorities who were not governed by the above regulations framed under the M.P. Act. According to him the date 31-12-1965 has relevance to the M.P. Act applicable in the Vidarbha region till then because it stood repealed with effect from 1-1-1966 by virtue of section 40(1) of the Maharashtra Secondary and Higher Secondary Education Act, 1965 which was brought into force with effect from 1-1-1966 by a notification issued u/s 1(3) of the said Act. The submission, therefore, is that after repeal of the M.P. Act with effect from 1-1-1966, the age of retirement of the school teachers governed by the said Act was protected firstly by the exception carved out u/s 821 of the Maharashtra Secondary Schools Code and thereafter by the proviso to Rule 17(1) of the Rules in respect of the teachers of the Private Secondary Schools only and not the teachers of the local authorities. The learned Counsel for the respondent Municipal Council has urged that the benefit of the enhanced age of superannuation provided for in the proviso to Rule 17(1) of the Rules is not intended to be conferred upon the school teachers employed by the local authorities even though they are put on par with the school teachers of the private schools of the amendment made in the Act by the Maharashtra Act No. XXX of 1987.

4. In support of his submission the learned Counsel for the respondent has pressed into service a canon of construction that the definitions given in the statutes are subject to context otherwise. The submission is that in the context of the above object of the proviso to Rule 17(1). viz., to protect the school teachers governed by the M.P. Act, the expression "private school" used therein should be read in its ordinary meaning and not as per the meaning given to the said expression after its amendment by the Maharashtra Act No. XXX of 1987. In

our view, when the definition of the expression "private school" was amended by the Maharashtra Act No. XXX of 1987, and the teachers working in the secondary schools of the local authorities were included in the said definition the intention of the Legislature was to extend all the benefits and privileges under the Act and the Rules to the teachers of the secondary schools employed by the local authorities and thus put them on par with the teachers of private secondary schools. If any particular benefit such as the higher age of retirement for a particular class of school teachers was not intended to be made applicable to the teachers of the Municipal Secondary Schools there would have been a clear provision made in that regard in the Act when the Maharashtra Act No. XXX of 1987 amended it.

5. It may be seen that unless the language of the rule conferring the benefit showed that it was not and could not be made applicable to the teachers of the Municipal Secondary Schools, they cannot be deprived of any benefit conferred under any rules. There is nothing in the language of the provision to rule 17(1) to show that it cannot be made applicable to the teachers of the Secondary Schools of the Municipal Council. There is, therefore, no reason why it should not be made applicable particularly when the purpose of the Mah. Act No. XXX of 1987 is to confer upon the teachers of the Municipal Secondary Schools the same benefits which are enjoyed by the teachers of the private schools. In fact the canon of construction which should be followed in construing the instant legislation is that being a welfare Legislation it should be construed liberally in favour of the teachers for whose benefit it is enacted. The above submission on behalf of the Municipal Council, therefore cannot be accepted.

6. Be that as it may in our view, the basic postulate of the above submission made on behalf of the respondent Municipal Council, viz .,that the regulations framed under the M.P. Act are not applicable to the teachers in the secondary schools of the local authorities and, therefore, the benefit of the proviso to rule 17(1) of the Rules cannot be extended to them is not correct. It is necessary to see that the M.P. Secondary School Code is incorporated as Chapter XII of the Regulations framed by the State Government by virtue of the power conferred upon it u/s 20 of the M.P. Act which empowers the State Government to frame the first regulations which are deemed to have been made by the Board under its power to frame regulations conferred by section 19 of the said Act. The Board itself is a statutory authority constituted under the M.P. Act and the Regulations framed by it u/s 19 of the said Act are thus statutory in nature. The expression "school or high school" is defined in clause 6 of Chapter I of the Regulations and it would clearly include the school run by a local authority. It may be seen that such a school has to be a recognised school in accordance with the provisions of Chapter XI of the Regulations and regulation 11 thereof requires that every recognised school should comply with the provisions of the school Code as laid down in Chapter XII of the Regulations unless the board with the previous approval of the State Government permits relaxation of the said provisions in exceptional cases.

7. It may next be seen that the preamble i.e. the statement of objects and reasons of the M.P. School Code incorporated in Chapter XII of the Regulations shows that it is applicable to non-government secondary schools which would include the schools run by a local authority. Rule 2, however, relating to composition of the school committee, does not apply to such a school because a specific exclusion is made in rule 2 of the said Code. As regards the conditions of service of teachers it is provided in rule 7 of the said School Code that on confirmation of teachers they will have to execute a contract of service in the form prescribed in Form No. IV appended to the said Code. It is para 9 of the said form No. IV which provides that the age of superannuation of the school teacher shall be 60 years. It is after considering the above provisions of the M.P. School Code that this Court has held in the case of N.J. Katakwar v. Municipal Council, Tumsar 1975 Mh.L.J. 298 that if the said form of contract is executed by both the parties the condition of service relating to superannuation on reaching the age of 60 years incorporated in para 9 of the aforesaid Form No. IV would be binding upon the parties; otherwise not.

8. As regards the view taken by this Court in the above case that unless and until the contract is executed in the prescribed Form No. IV between the parties it would not stipulate a binding condition of service, the said view is no more a good law because of the decision of the Full Bench of this Court in the case of Premlata v. Gov. Body of G.S. Tompe College 1981 Mh.L.J. 332 in which it is held that even though no written contract in the form prescribed in Schedule A of the College Code which is statutory in nature is signed by the parties the conditions of service contained in the said statutory form of agreement would still be binding between the parties because the execution of such form is mandatory as is indicated by the use of the word "shall". On similar reasoning since the expression used in rule 7 of the M.P. School Code is "shall" and since the said School Code is statutory in nature the conditions in the statutory Form No. IV are mandatory and are binding between the parties even though a contract is not actually executed by the parties in the said prescribed Form No. IV. Thus the provision relating to age of retirement contained in the prescribed form No. IV was applicable to the teachers working in the Secondary Schools of the local authorities since they were governed by the M.P. School Code as held by this court in the case cited supra.

9. It may be seen that it is also held in N.J. Katakwar's case, cited supra, that unless there was a condition of service relating to the age of retirement fixed under a statutory provision made under the Municipalities Act, the exception carved out in rule 82.1 in relation to the teachers in Vidarbha Region was applicable to the teachers of the secondary schools run by the local authorities because there was nothing to show in the Secondary School Code of the State of Maharashtra that the provisions therein were not applicable to the secondary schools of the local authorities. The fact that a secondary school run by a local authority requires recognition under the School Code and that as per the conditions of recognition such a school has to abide by the conditions of service

in the School Code would show that unless exempted the secondary school of a local authority is bound by the conditions of services laid down in the School Code.

9-A The learned Counsel for the respondent Municipal Council has however relied upon rule 67.1 of section II of Chapter II of the School Code relating to conditions of service to show that the conditions of service under the School Code are not applicable to the school teachers of the Municipal Council. Apart from the fact that rule 67.1 excludes only the government schools as it makes the conditions of service in section II applicable to all non-Government Secondary Schools which would include the schools run by the authorities, the said exclusion is only in respect of the provisions in section II of Chapter III whereas rule 82.1 relating to age of superannuation with its exception in favour of a certain class of teachers in the Vidarbha Region is contained in section (1) of Chapter III relating to rules of discipline and leave. The exception in rule 82.1 was thus applicable to the school teachers of the local authorities except where there was a statutory condition of service relating thereto as held in N.J. Katakwar's case, cited supra, because in that event the statutory conditions of service would override the administrative rule under the School Code.

10. If the age of superannuation as prescribed in the M.P. Secondary School Code or in the Maharashtra Secondary School Code was thus applicable to the teachers of the Secondary Schools of the local authorities the intention and/or the object of the Maharashtra Act No. XXX of 1987 was to remove the injustice caused by not applying the conditions of service under the Act and the rules to the teachers of the secondary schools of the local authorities. It is thus to bring uniformity in the conditions of all the teachers of the secondary schools that the Maharashtra Act No. XXX of 1987 included the secondary schools run by the local authorities in the definition of the expression "private schools" given in the Act. In this view of the matter also the proviso to rule 17.1 of the rules has necessarily to be construed to include the teachers working in the secondary schools of the local authorities who were permanent on 31-12-1965. The above contention raised on behalf of the respondent Municipal Council thus deserves to be rejected.

11. The next contention urged on behalf of the respondent Municipal Council is based upon the by-laws framed by the Municipal Council under the Notification dated 22-8-1985 known as "The Malkapur Municipal Council (Regulating the Period of Service of Secondary School Teachers). By-laws, 1985", (for short the "Bylaws"). Bylaw No. 3 prescribes the age of retirement as 58 years for the secondary school teachers working in the Municipal Council. The submission is that when a special provision is made for the age of superannuation under the Maharashtra Municipalities Act, 1965 (for short, "the Municipalities Act"), the provisions of the Act and the rules framed thereunder would not be applicable to the school teachers of the Municipal Council. In our view, so far as the conditions of service of the Teachers in the Secondary Schools of the local authorities are concerned it is the Act in question enacted for regulating the conditions of

service of all the school teachers which is a special enactment and as compared to the said Act the Municipalities Act dealing with the subject of constitution of local authorities and its functions would be a general enactment which may cover within its fold the conditions of service of its employees including the teachers working in its schools. It is held by the Supreme Court in the cases Life Insurance Corporation of India Vs. D.J. Bahadur and Others, that in determining the question whether a statute is a general or a special one the focus must be on the principal subject matter plus the particular perspective. For certain purposes an Act may be general although for certain other purposes, it may be special. It is clear that although the Municipalities Act may be a special enactment relating to the constitution, administration, functions and powers of a Municipality, it is a general enactment on the question of the conditions of service of the teachers in its secondary schools in regard to which the Act in question relating to the conditions of services of the teachers in private schools is a special enactment after its amendment by the Maharashtra Act No. XXX of 1987 which has amended the definition of the expression "private school" so as to include within its meaning the schools run by the local authorities.

12. It is true that since the above By-laws are sanctioned by the State Government it would have prevailed over the administrative rule 82.1 of the School Code as held in N.J. Katakwar's case, cited supra, but Rule 17(1) is statutory in nature and as per the above reasoning and even otherwise as is well settled by the canon of construction of subordinate legislation By-laws framed by the Municipal Council even though with the sanction of the State Government cannot prevail over the statutory rules framed by the State Government. Looking at it from another angle and applying the principle of harmonious construction keeping in mind the social objective of the Act, in matters covered by it, it will have to be held that the provisions under the Municipalities Act should apply. See in this regard the judgment of the Supreme Court in the case of Deccan Merchants Co-operative Bank Ltd. Vs. Dalichand Jugraj Jain and Others, . The above contention raised on behalf of the respondent Municipal Council cannot, therefore be accepted.

13. It is then urged that if the condition of service relating to the age of retirement under the By-laws of the respondent Municipal Council is less favourable to the teachers working in its secondary schools as compared to condition of service about the age of retirement under the proviso to Rule 17(1) of the rules it is open to the Director to direct the respondent Municipal Council in writing to bring its By-laws to accord with the proviso to Rule 17(1) within the period which may be stipulated by him as provided in section 4(3) of the Act but till it is done by the Director the submission is that the By-laws of the Municipal Council about the age of retirement would be applicable to the secondary school teachers of the respondent Municipal Council. Perusal of sub section (3) of section 4 of the Act would show that it is applicable in respect of the conditions of service relating to the "scales of pay and allowances, post-retirement and other benefits", i.e., monetary benefits which are less favourable and not to the

other conditions of service including the condition of service relating to the age of retirement. There is, therefore no force in the above contention raised on behalf of the respondent Municipal Council.

14. The learned Counsel for the Municipal Council has then brought to our notice that the Maharashtra Act No. XXX of 1987 amending the definition of the expression "private school" has come into effect after the impugned notice of retirement was issued. He has, therefore urged that the said amendment would not be applicable to the impugned notice of retirement. In our view, the above contention also deserves to be rejected because through the impugned notice of retirement was issued prior to the coming into force of the Amending Act No. XXX of 1987 the retirement thereunder was actually to take place after the Amending Act had come into force and therefore, the petitioner is entitled to a right created under the Amending Act. It may also be seen in this regard that the notice of retirement given to the petitioner is merely an intimation to point out him that he completes the age of superannuation on a particular date and would, therefore, stand automatically retired from the said date under the By-laws and is thus not in that sense a notice which terminates his employment because the expression "termination" used in the provision of termination by notice would in its nature exclude such retirement on completion of the age of superannuation. There is thus no question of giving any retrospective operation to the Maharashtra Act No. XXX of 1987 nor any question of its application in a pending action. As such the decision of the Supreme Court in *Katikara Chintamani Dora and Others Vs. Guntreddi Annamaniaidu and Others*, and *Govind Das and Others Vs. The Income Tax Officer and Another*, have no relevance to the above question arising in the instant case. The above contention raised on behalf of the respondent Municipal Council is thus rejected.

15. As regards the question of alternative remedy the learned Counsel for the petitioner has relied upon the decision of the Supreme Court in the case of *S. Jagadeesan Vs. Ayya Nadar Janaki Ammal College and Another*, . The submission is that since a remedy by way of an appeal before the School Tribunal is available to the petitioner we should decline to entertain the instant writ petition. In our view, the existence of an alternate remedy is not a bar to the exercise of jurisdiction under Article 226 of the Constitution of India as is well settled by the decisions of the Supreme Court in *State of U.P. v. Mohd. Nooh*, AIR 1958 S.C. 86 and *M/s Baburam v. Antarim Zilla Parishad now Z.P. Muzaffarnagar* AIR 196 S.C. 556 in which it is held that the rule of exhaustion of statutory remedies is a rule of discretion and not a rule which affects the jurisdiction of the High Court to entertain a writ petition notwithstanding the availability of an alternate remedy. See also *Ram and Shyam Company Vs. State of Haryana and Others*, and also *Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others*, . It is true that normally the High Court does not in its discretion entertain a writ petition under Article 226 of the Constitution where there exists an adequate alternative remedy. The question therefore, has to be decided in the facts of each case in regard to the exercise of the discretion by the

High Court under Article 226 on the question whether the parties should be relegated to their statutory remedies or whether the High Court should entertain the writ petition and decide the same.

16. In the instant case the rights are claimed on the basis of the amending Act No. XXX of 1987 and several complicated questions of law relating to the applicability of the condition of the age of retirement in the proviso to Rule 17(1) of the rules are raised which require proper consideration by this Court and therefore, in the sound exercise of the discretion of this Court under Article 226 the petition does not deserve to be thrown out on the ground that there is an alternate remedy. The Municipal Council is a "State" within Article 12 of the Constitution of India and is amenable to writ jurisdiction of this Court under Article 226 and therefore, by entertaining the instant writ petition the question as to the applicability of the age of retirement prescribed under the rules framed under the Act can be settled once and for all. the above objection raised on behalf of the respondent is, therefore rejected.

17. In the result the instant writ petition is allowed. It is declared that the age of retirement of the petitioner is 60 years as per the proviso to Rule 17(1) of the rules. The impugned notice of retirement dated 27-5-1987 is set aside and the respondents are directed to continue the petitioner in service till he completes the above age of retirement Rule made absolute in the above terms. no order as to costs.