
(2015) 09 CAL CK 0042

In the Calcutta High Court

Case No : Writ Petition Nos. 808, 809, 810 and 837 of 2009

Juthika Rani Mondal (Das) and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 23-09-2015

Acts Referred:

Constitution of India, 1950 — Article 141

Citation : (2016) 148 FLR 109 : (2015) 4 LLN 82

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Syed Shamsul Arefin, for the Appellant; Amitesh Banerjee and Tarak Karan, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Debangsu Basak, J—Four writ petitions involving the same issues are taken up for hearing analogously by consent of the parties. All the writ petitioners seek to change their option from Contributory Provident Fund to General Providence Fund including family pension in terms of Revision of Pay and Allowances, 1990 (ROPA, 1990).

2. The reliefs sought for by the writ petitioners have been opposed on behalf of the State. Although directions for filing affidavits had been given, the State has not filed any affidavit in any of the writ petitions.

3. It is submitted on behalf of the writ petitioners that, they had filed an option form under Clause 17(1) of ROPA 1990 for Contributory Provident Fund Scheme when ROPA 1990 had come into force. The writ petitioners had also given an undertaking not to seek extension of service till 65 years of age. They had retired from service on attaining the age of 60 years. It is submitted on behalf of the writ petitioners that, Circular No. 496 dated December 16, 1991 was not widely circulated and that the period for changing the option was very short.

4. It is submitted on behalf of the writ petitioners that, the Division Bench in

State of West Bengal and Others Vs. Biswanath Koley, (2008) 3 CHN 358 has held that notwithstanding a person not having opted under the Government Memorandums dated May 15, 1985 and December 16, 1991 he could not be deprived of the benefits accruing to him under the relevant ROPA Rules, if he has chosen to exercise his option under such Rules. Since the writ petitioners had exercised their option under ROPA, 1990 they are governed by the ratio of Biswanath Koley (supra). It is also submitted that, Biswanath Koley (supra) is good law and that the Special Leave Petition against it had been dismissed. Reference is also made to the Full Bench decision in District Inspector of Schools (SE) and Others Vs. Abhijit Baidya and Others etc. etc., (2013) 3 CHN 711 , in this regard.

5. On behalf of the State it is submitted that, the writ petitioners did not exercise their option in terms of Government Memorandum dated December 16, 1991. Subsequent to Abhijit Baidya (supra) the State Government had published a notification in terms of the directions contained in Abhijit Baidya (supra). The writ petitioners did not apply in terms of such notification. Consequently, the writ petitioners are not entitled to the reliefs as prayed for.

6. On behalf of the State it has been submitted that the Special Leave Petition against Biswanath Koley (supra) had been dismissed by the Supreme Court. The doctrine of merger will not apply in this regard and reliance has been placed on 2010 Volume 15 Supreme Court Cases page 649 (Haryana State Electricity Board & Anr. v. Rajbir Singh & Ors.), 2011 Volume 4 Supreme Court Cases page 602 (Gangadhara Palo v. Revenue Divisional Officer & Anr.) and Jalpat Rai and Others Vs. State of Haryana, AIR 2011 SC 2719 : (2011) 3 Crimes 289 : (2011) 8 JT 55 : (2011) 7 SCALE 348 : (2011) 7 SCR 1037 : (2011) AIRSCW 4222 : (2011) 5 Supreme 739 in support of such proposition.

7. I have heard the rival contentions of the parties and have considered the materials made available on record.

8. The writ petitioners were employed as primary school teachers and had retired on attaining the age of 60 years. They had exercised option under ROPA, 1990 as stated in the writ petition when it came into force. This fact has not been denied on behalf of the State.

9. Biswanath Koley (supra) is of the view that, it was not necessary for the teachers who were in service when ROPA Rules 1990 came into force and who have opted under the ROPA Rules to exercise option under the 1991 Memorandum as the same was applicable to only those teachers who did not opt under the ROPA Rules 1990 and those who had opted to continue to serve up to 65 years of age.

10. In Rajbir Singh & Ors. (supra) the Supreme Court has held that when a Special Leave Petition to the Supreme Court is dismissed by a non-speaking order, such dismissal neither attracts the doctrine of merger nor amounts to declaration of law by the Supreme Court under Article 141 of the Constitution of

India. Similar view has been expressed by the Supreme Court in Jalpat Rai & Ors. (supra) and Gangadhara Palo (supra). The contention of the State with regard to Biswanath Koley (supra) cannot be accepted in view of paragraph 69 of Abhijit Baidya (supra).

11. Biswanath Koley (supra) has been considered by Abhijit Baidya (supra). With regard to Biswanath Koley (supra) it has been held in Abhijit Baidya (supra) as follows:--

"69. The view expressed on provisions of para 17 of ROPA 1990 is correct. The aforesaid decision in Biswanath Koley (supra) has been affirmed by the Hon"ble Supreme Court. Apart from that, effect of substituted provisions of ROPA 1990 and 1998 has been considered by us."

12. The issues that have been considered in Abhijit Baidya (supra) have been enumerated in paragraph 9 thereof and the same are as follows:--

"9. Considering various issues involved in the matters, we framed the following questions for our determination:

i) Whether a person who has opted for revised pay scale under ROPA, 1990 becomes entitled to pension by virtue of operation of para 17 of ROPA 1990?

ii) Whether an incumbent who has exercised an option under ROPA 1990 can still be conditioned to the rider of option to be exercised under W. Ben. Recognized Non-Government Educational Institution Employees DCRB Scheme, 1981, particularly in view of the amendment effected in paragraph 17(2) vide G.O. 226-SE (B)/1M-102/98, dated 16th May, 2007 and whether the amendment made in paragraph 17(2) can be said to be valid law; that too with retrospective effect?

iii) Whether para 13 of Revision of Pay & Allowance Rules, 1998 as amended by Notification dated 13th July, 1999 relating to the employee of W. Ben. Recognized Non-Government Aided Institutions can be said to be valid in law?

iv) Whether after amending the para 13 of ROPA 1998 on 13.07.1999 and para 17 of ROPA 1990 in 2007, it was necessary to give fresh opportunity to employees to revise option under W. Ben. Recognized Non-Government Educational Institution Employees (Death-cum-Retirement Benefit) Scheme, 1981?

v) Whether the time-limit fixed under the DCRB Scheme, 1981 to submit option can be extended in suitable cases?"

13. Answering such five issues it has been held in Abhijit Baidya (supra) are as follows:--

"74. Thus, we answer the five questions in the following manner :

1) An employee who has opted for revised pay scale under ROPA, 1990 becomes entitled to pension and gratuity by virtue of operation of para 17 of ROPA 1990. It was not necessary for him to exercise fresh option as per Memo dated 16th

December, 1991, which was applicable to employees who had not opted for ROPA 1990. Benefit of Pension-cum-Gratuity was conferred due to acceptance of reduced age of superannuation of 60 years under para 17(1) of ROPA 1990 and his right for Pension-cum-Gratuity so accrued could not have been taken away retrospectively by substitution of the provisions of para 17 in 2007 or by substitution of para 13 of ROPA 1998 in 1999.

2) Once option has been exercised under ROPA 1990, a person cannot be subjected to the rider of the option exercised under the DCRB Scheme, 1981 as the invitation of the option under the said Scheme was with respect to the employees who elected to continue in service till the age of 65 years and to have the benefit of the old scheme. For such employees, opportunity was given to submit fresh options as per Memo dated 16th December, 1991.

The amendment made in para 17(2) of ROPA 1990 on May 16, 2007 cannot be said to be valid piece of law as such provisions cannot be substituted with retrospective effect to take away the rights already accrued to an employee. So as to validate provisions of para 17(2) of ROPA 1990, as substituted, it was necessary to invite option for switching over to Pension-cum-Gratuity from CPF-cum-Gratuity when the substitution of para 17(2) of ROPA 1990 was made on 16th May, 2007 with retrospective effect.

3) Para 13 of the ROPA 1998 as amended on 13th July, 1999 cannot be said to be valid in the eye of law as it has the effect of taking away benefit conferred by para 17(2) of ROPA 1990, as the ROPA 1998 was made applicable to the employees who had opted for ROPA 1990 and the benefit conferred could not have been taken away by substitution of provisions contained in para 13 of ROPA 1998. It was clearly arbitrary and an unreasonable exercise of power and to treat it as valid and legal, it was necessary to invite fresh option under the DCRB Scheme, 1981 for switching over to Pension-cum-Gratuity as the provisions had been amended drastically which could not operate to the prejudice of the employees in whose favour right to claim Pension-cum-Gratuity had accrued. The substituted provisions of para 13 of ROPA 1998 fail to qualify Wednesbury principles of reasonableness. The action was in utter violation of fair play and justice.

4) In our opinion, after substitution of para 13 of ROPA 1998 on 13th July, 1999 and para 17 of ROPA 1990 on 16th May, 2007, in order to save the provisions from the vice of arbitrariness, it was necessary to give an opportunity to the employees to submit fresh option under DCRB Scheme, 1981. As the option exercised earlier in terms of the DCRB Scheme, 1981 was made applicable, it was necessary to give fresh opportunity to exercise an option for switching over to Pension-cum-Gratuity and the State could not have acted to the detriment of the employees opting for ROPA 1990 who chose the rider of reduced age of superannuation i.e. 60 years under para 17(1) of ROPA 1990.

5) In our opinion, as there was drastic change of provisions of para 17(2) of

ROPA 1990 made by way of substitution in 2007, and ROPA 1998 also interfered with the rights conferred upon the employees under para 17(2) of ROPA 1990, all the employees who opted for ROPA 1990 ought to be given fresh opportunity to submit the option to switch over to Pension-cum- Gratuity."

14. In the facts of this case the writ petitioners as teachers having opted for revised pay scale under ROPA 1990 have become entitled to pension and gratuity by virtue of operation of paragraph 17 of ROPA Rules, 1990. It is not necessary for them to exercise fresh option as per the Memorandum dated December 16, 1991. The writ petitioners are, however, liable to refund the employers provident fund received by them along with interest.

15. In such circumstances, the relevant authorities are directed to inform the writ petitioners the amount required to be refunded by the individual teacher for Government share of the provident fund along with the amount on account of interest specifying the rate of interest. The concerned authority will also specify the time period within which the individual writ petitioner will make such refund. Upon receipt of such refund the concerned authorities will disburse the pension cum gratuity to the writ petitioners within a period of four weeks from the date of receipt of the refund.

16. With the aforesaid directions the four writ petitions are disposed of. No order as to costs.