(2016) 03 KL CK 0097

In the High Court Of Kerala

Case No : W.P. (C). No. 20100 of 2014 (J), W.P.(C) Nos. 2365, 12807, 14879, 15471, 15946, 16206, 16600, 17100, 17465, 22878, 25594, 26299, 29517, 29593, 31233, 31234, 31244, 31290, 32946, 33245, 39062, 39068, 39833 of 2015 and W.P.(C) Nos. 907, 1348 of 2016

K.S. Balachandran APPELLANT

Vs

State of Kerala and Others RESPONDENT

Date of Decision : 16-03-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 56
Electricity Act, 2003 — Section 131, Section 133, Section 133 (2), Section 133(2)

Citation : (2016) 03 KL CK 0097

Hon'ble Judges : K. Vinod Chandran, J.

Bench : Single Bench

Advocate : P.V. Mohanan, Advocate, for the Appellant; M.J. Rajasree, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K. Vinod Chandran, J.—1. A perceived vacuum due to the alleged absence of rules and regulations governing the service conditions of employees, is the projected cause of the above writ petitions. The absence of a rule for superannuation is the immediate motivation of the petitioners, who are on the verge of retirement. They seek directions commanding the respondent Board to bring in regulations enhancing the age of retirement of the employees of the Board from 56 years to 60 years. The services continued under the erstwhile Board was terminable on superannuation at 56 years. This Court had also granted an interim order that the retirement effected of the petitioners at the age of 56 years would be subject to the result of the writ petition.

2. I have heard the learned Counsel appearing for the petitioners in the different writ petitions as also the learned Standing Counsel appearing for the respondent Board.

3. Admittedly, the Board, by virtue of a process of vesting (S.R.O. 990 of 2008) and re-vesting (S.R.O. 871/2013) of its assets, has been re-organised into a Company, a fully owned Government Company. It is also an admitted fact that there existed a Standing Orders for the Board (Order No. B4-19007/92 dated 26.12.1996), certified by the Certifying Officer under the Industrial Employment (Standing Orders) Act, 1946 (for brevity ''Standing Orders Act''). The Standing Orders specifically prescribed the superannuation age of a workman of the Board to be 55 years or such age fixed by the Board as the age of retirement. The Kerala Service Rules (for brevity ''KSR'') have been adopted to the services of the Board by a decision of the Full Board, with the amendments made from time to time also being made effective to the services of the Board. As per the prevailing age of retirement in the KSR, the employees would retire at the age of 56 years. This was the admitted term of superannuation of the employees of the erstwhile Board.

4. The learned Counsel for the petitioners would first point to Section 131 of the Electricity Act, 2003 (for brevity ''Act of 2003''), which deals with the re-organisation of the Board. As per sub section (1) of Section 131 of the Act of 2003, all properties, including any interest there at, and the rights and liabilities of the Board would vest with the State Government, on such terms agreed on between the parties, with effect from the date on which a transfer scheme is prepared by the State Government, to make effective the provisions of the Act of 2003. As per sub-section (2) of Section 131 of the Act of 2003, what has been vested with the State Government, in pursuance of the transfer scheme, would be re-vested by the State Government in a Government company or companies, in accordance with the transfer scheme published. On such re-vesting of property, the Board ceases to be charged with any of the functions earlier enjoined upon it and the same would be the functions of the Company so constituted. The re-organisation so contemplated has been occasioned and the Board now is a Government Company, which legal entity has been impleaded in all the writ petitions as the respondent; referred to as the Board.

5. The learned Counsel for the petitioners contend on the strength of Section 133 of the Act of 2003 that the transfer scheme also provides for transfer of officers and employees to the transferee and the service conditions of such personnel would have to be determined in accordance with the transfer scheme. The Board, admittedly, has not come out with any service conditions as of now, after the re-organisation has been effected, and neither the earlier Standing Orders nor the KSR could be made applicable to the Company, is the argument. In such circumstance, by reason only of the default of the Board in framing such regulations, there is a vacuum and this necessitates the continuance of the petitioners beyond the age of retirement, as prescribed under the erstwhile Board. In contemplation of framing of new regulations, the petitioners contend that they ought to be continued till the age of 60 years, which is the norm available as of now in many other employments, more specifically other public sector undertakings owned by the State. The Model Standing Orders is also

referred, to contend that the age of retirement therein prescribed is 58 years and the Board, now being re-organised as a Company, having no Standing Orders, would be obliged to follow the Model Standing Orders. This would necessitate the continuance of the employees at least till the age of 58 years. The petitioners also referred to the provisions of the two transfer schemes, the Memorandum of Understanding (MOU) and Articles of Association (AOA) of the new Company, to buttress their contentions.

6. The petitioners rely on The U.P. State Electricity Board v. Hari Shankar Jain - , (1978) 4 SCC 16 to urge the position that regulations made with respect to the conditions of service would be subservient to the provisions of the Standing Orders Act, on the principle expounded by the maxim ''generalia specialibus non derogant''. Further support is garnered to the above position from Harwindra Kumar v. Chief Engineer, Karmik - , (2005) 13 SCC 300. The petitioners also refer to M/s. British Paints (India) Ltd. v. Workmen - , (1966) 2 S.C.R. 523 to emphasize that even at that point the Hon''ble Supreme Court had considered the improvement in the standard of health and increased life expectancy to hold that the age of retirement at 60 years is quite reasonable ''in the present circumstances''(sic). The circumstances referred to was of 1966 and there is considerable development in the half a century we have crossed and at least now, the retirement age should be specified as 60 years, is the argument. Reliance is also placed on U.P. State Electricity Board v. Labour Court - , (1984) 1 SCC 147.

7. The learned Standing Counsel would contend that no fresh regulations have to be framed and the earlier Standing Orders would be the one applicable. The Act of 2003 and the Tripartite Agreement entered into between the Government, the Company and the Employees have ensured that the service conditions of the officers and employees are not detrimentally affected and it remains the same. They continue to be retired at the age of 56 years, one year in excess of that prescribed under the Standing Orders. The Model Standing Orders have no application and there is no statutory mandate that the Model Standing Orders ought to be followed, argues the Board.

8. We will first examine the law on the subject as laid down in the decisions relied on. , (1978) 4 SCC 16 (supra) was a case in which a private undertaking, which had the license for the distribution of electricity under the Indian Electricity Act, 1910, was purchased by the State Electricity Board (SEB). The employees thus became the employees of the SEB. Though, the erstwhile licensee had a certified Standing Orders, that did not prescribe any age of superannuation for the employees. After the purchase by the SEB, the Governor of Uttar Pradesh notified, under Section 13B of the Standing Orders Act, a regulation made by the U.P.SEB under Section 79C of the Electricity Supply Act, 1948, prescribing the retirement age at 58 years. The Full Bench of the High Court in its decision, which was in appeal before the Supreme Court, found that the Standing Orders framed in an industrial establishment do not cease to be operative on the

purchase or on framing of regulations under the Electricity Supply Act. It was also found that Section 13B of the Standing Orders Act applied only to industrial establishments of the Government and not to other establishments. The notification was found to be inoperative.

9. Section 13B did not confine its applications to industrial undertakings employing government servants and any employee having the common characteristic of a public servant, enjoying a statutory status and governed by statutory rules and regulations, would be covered under the provision, was the finding of the Hon''ble Supreme Court. It was held that the employees of a statutory body have a statutory status and the regulations, made under the statutes creating these bodies, have the force of law. The contention of the SEB that the regulations would override the Standing Orders, was negatived on the maxim "Generalia specialibus non derogant". It was categorically held that the Standing Orders Act was the special legislation and it overrides the regulations under the Electricity Supply Act, which was held to be a general legislation. Still, the notification issued under Section 13B of the Standing Orders Act, overrides the provision as to retirement in the Standing Orders. The contention of the workmen was that there being no provision for retirement, the employee ought to have been continued till he is unfit for such employment. It was found that there is no mandate in Section 13B that, under it, there could only be framed a set of rules and regulations, and not a mere rule or regulation regarding retirement. The non obstante clause in Section 13B was interpreted to hold that:

"the language of Section 13B is that a rule or regulation, if notified by the Government, will exclude the applicability of the Act to the extent that the rule or regulation covers the field. To that extent and to that extent only ''nothing in the Act shall apply''."

10. The notification brought out under Section 13B of the Standing Orders Act was found to have effect not withstanding the fact that the retirement age was a matter which could be the subject matter of the Standing Orders. The retirement of the workmen, at the age of 58 years, as per the notification, was found to be proper. , (1984) 1 SCC 147 (supra) again was on identical facts wherein a notification under Section 13B of the Standing Orders Act, was upheld in the context of the Standing Orders, certified for the Board, not having the provision for age of retirement. It was held so:

"In view of the admitted fact that the regulations framed by the Board under Section 79-C of the Electricity (Supply) Act, 1948 have been notified by the Government under Section 13-B of the Industrial Employment (Standing Orders) Act, 1946 we hold that the second respondent is bound by those regulations in which the age of retirement has been admittedly fixed at 58 years and that he has no reason to complain against his retirement on that basis with effect from March 31, 1979. The appeal is accordingly allowed."

We are not, herein concerned with a like situation and here the defect perceived is the total absence of regulation as to retirement on the re-organisation of the Board.

11. , (2005) 13 SCC 300 (supra) was a case in which a Corporation, constituted under a Statute, was vested with the entire assets of the Local Self-Government Engineering Department. The employees were also transferred to the Corporation called ''Utter Pradesh Jal Nigam'' (for brevity ''Nigam'') and their service conditions were to be the same as that in the Government department, unless otherwise revised or altered by the Nigam. The Nigam had also brought out regulations by which the service conditions of the employees of the Nigam were to be governed by such rules, regulations and orders which were applicable to other government servants functioning in the State. At the time of the vesting, as per the regulation applicable to government servants, the retirement age was 58 years, which could be extended, in exceptional circumstances, up to the age of 60 years. The Government, subsequently, after the Nigam was formed, enhanced the retirement age of the government servants to 60 years. The Nigam sought a clarification as to whether that would apply to the Nigam employees. The Government categorically stated that it would not apply and the Nigam resolved not to enhance the superannuation age of its employees. The challenge was made to such resolution of the Nigam.

12. The Hon''ble Supreme Court found that in the teeth of the regulation providing for application of the rules and regulations applicable to the Government, the Nigam could not have issued administrative instructions refusing to accept the enhancement carried out in the Government. The Government''s refusal to approve the enhancement of retirement age to the Nigam employees, was also found to be not a proper exercise. While holding that the Nigam could make appropriate modification of the regulations after getting approval from the Government; it was declared that as per the regulations then existing, the Nigam employees could be superannuated only at the age of 60 years. This decision also has no application since, on re-organisation, the contention of the Board is that the Standing Orders framed for the erstwhile Board and the decision of the Board to adopt KSR and the amendments brought in thereat from time to time, prescribes superannuation of the Board employees at 56 years.

13. The petitioners also rely on Ext. P2 judgment in W.P.(C) No. 39833/2015, wherein a learned Single Judge of this Court declared that the employees of an industrial establishment was found to be regulated by the Standing Orders Act and the Model Standing Orders including the prescription of retirement age of 58 years, despite the governing body having prescribed service rules, with the approval of the Government. The issue arose from an application under Section 13A of the Standing Orders Act seeking relief to the effect that the Model Standing Orders applies to the respondent Society. The Society contended that the Standing Orders Act would not be applicable, for reason of it being a Society registered under the Travancore-Cochin Literary, Scientific and Charitable

Societies'' Registration Act XII of 1955 and there are specific rules governing the service conditions of the employees, which prescribe 55 years as the retirement age. The Labour Court found on the basis of the service rules that there is an implied agreement between the workers and the management, regarding the conditions of service, which inter alia includes the age of retirement. The trade Union in the said writ petition assailed the order of the Labour Court. This Court based its decision on the decision of the Supreme Court in , (1978) 4 SCC 16 (supra). The service rules relied on by the management was found to fall neither under the term ''Regulation'' or ''Rule'' as defined in the General Clauses Act, 1897, since the Standing Orders Act did not define the ''Rules'' and ''Regulations'' as spoken of in Section 13B of the said Act.

14. Herein, it is to be noticed that the contention of the Board is not based on the KSR alone. It is an admitted fact that there was a Standing Order applicable to the employees of the erstwhile Board and on re-organisation, by the process of vesting and re-vesting, the entire assets of the Board, including its personnel, have been transferred to the incorporated Company. The statutory provisions also contemplate that the personnel of the erstwhile Board be transferred to the incorporated Company without their service condition being affected detrimentally in any manner. In such circumstance, it cannot be said that there is a circumstance in the respondent Company warranting adoption of the Model Standing Orders.

15. It is trite that the Standing Orders Act applies to every industrial establishment wherein one hundred or more workmen are employed, except those specifically exempted under Section 1(4) of the Standing Orders Act. The Board, despite the re-organisation and the vesting and re-vesting, carries on the very same functions of production, transmission and supply of electricity. The employees too discharge the very same duties as carried on under the erstwhile Board. The functions under the erstwhile Board, then the Government and now under the Company, remains and continues to be an industrial activity, as envisaged by the Standing Orders Act. There is no substantial difference in the functions of the entity, but, for the re-organisation effected converting it from a statutory Board to a Company constituted under the Act of 2003 and registered under the Companies Act, 1956.

16. The Standing Orders, as referred to above, applies with all its force to the workmen of the establishment despite the change in the constitution of the Board. The decision of the Board, as it then was, applying the provisions of the KSR to the employees of the Board, would also continue to be in force, going by the specific provisions of the Act, the two schemes, the tripartite agreement as also the MOU and AOA, as we will presently see.

17. Section 133 (2) of the Act of 2003 provides that, after the transfer, the personnel of the erstwhile Board shall hold office or service under the transferee on such terms and conditions as may be determined in accordance with the transfer scheme. The proviso to sub-section (2) prohibits prescription of any

term or condition, less favourable than that existed before the transfer scheme. There is no mandate that surely and definitely a new set of rules and regulations be framed on re-organisation. Section 133(2) only provides that the personnel, on re-organisation, shall hold office in accordance with the transfer scheme.

18. S.R.O. No. 990/2008, the First Transfer Scheme, 2008, produced as Ext. P2 in W.P.(C) No. 20100/2014, provides clauses 6 and 11, which are extracted hereunder:

"(6) The existing officers and employees of the Board, subject to their conditions of service, will continue to discharge their duties, responsibilities, obligations and functions as was done before as per the existing delegation of powers on behalf of the Government in the place of the Board and in the name as ''Kerala State Electricity Board'' till it is re-vested in a company by the State Government in accordance with sub-section (2) of section 131 of the Act and the officers and employees who are discharging their duties under the Scheme during this period shall be deemed to be under the services of the State Government.

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(11) All orders and circulars issued by competent authorities of the Board till the date of vesting would continue to be applicable during the period till re-vesting and to the transferee on re-vesting and the managing committee shall have power to modify these circulars according to the rules and procedures as was done by the Board."

19. The reference to S.R.O. No. 990/2008 also advances the contention of the Board rather than that of the employees. Clause 6 of the S.R.O., dealing with the status of the officers and employees of the Board, after the vesting occasioned on the Government, makes the discharge of the duties and responsibilities, obligations and functions to be subject to their conditions of service, as was before. Hence, even when the entire assets and liabilities of the Board vested with the Government, the employees were regulated by the earlier conditions. Clause 11 also contemplated such continuance of all orders and circulars issued by the competent authority under the erstwhile Board, unless modified by the Managing Committee as was done by the procedure obligated on the erstwhile Board. Clause (11) enables the new management to modify the terms and conditions; which by itself postulates the continuance of the earlier terms, unless modified. The Second Transfer Scheme (Re-vesting), 2013 (Ext. P-3) also provides the very same conditions under Clause 6 : ''Transfer of Personnel by the State''.

20. The Second Transfer Scheme (Re-vesting), 2013, also defines the "Tripartite Agreement" as one entered into for protection of service conditions and payment of terminal benefits. The tripartite agreement entered into between the Government, the Board in its new avatar and the Employees'' Union and

Associations provides so under clause (2) (c):

"(c) The terms and conditions of services of the existing employees such as promotions, transfers, wages, compensations, leave, allowances etc upon transfer to KSEB Ltd. shall continue to be regulated by existing regulations/ service rules in vogue and is guaranteed to continue as indicated hereunder."

This is an agreement between the various stake holders, deciding to continue the very same terms and conditions as applicable to the employees of the erstwhile Board. The said agreement, in fact, reduces to writing the proviso to Section 133 (2) of the Act of 2003.

21. The MOU at Ext. P4, by clause 6, confers the power on the transferee to modify or frame new regulations governing the conditions of service of personnel transferred to the transferee, with the consent of the Government, however, making such modifications to be not in any way inferior to those applicable to the employees of the Board, immediately before the transfer. The Memorandum specifically refers to the Second Transfer Scheme, by which the entire assets and liabilities including every interest in property of the Board, which was vested with the Government having been re-vested with the incorporated Company. The AOA of the Board, by Article 56, mandates that inter alia matters relating to appointment of staff, officers and their service conditions would require the prior approval of the Government of Kerala.

22. None can dispute the fact that the Government of Kerala has prescribed the age of retirement as 56 years in the KSR, applicable to its employees and more or less applicable to almost all of the services, which have the tenor and character of a Government employment, de hors the fact that the same is under a statutory Corporation or an incorporated Company or any other legal entity. The thrust would be on the absolute ownership of the State Government, which necessarily would bring with such status an obligation to regulate the services in accordance with the declared policy of the Government; which ill behoves this Court to interfere with under Article 226 of the Constitution of India. The declared policy, as is evident, is retirement at the age of 56, as is available in the KSR.

23. It is an admitted fact that in some government undertakings the retirement is at 58 years and in fewer still, 60 years. But that cannot give rise to a claim of discrimination, since employment under different organisations do not give rise to an equal status. "There cannot be perfect equality in any matter on an absolute scientific basis and there may be certain inequities here and there." spoke the Hon''ble Supreme Court in H.P. Gupta v. Union of India - , (2002) 10 SCC 658. The service conditions also would depend upon the activity carried on, the financial results, the working conditions including the pay and allowances, other terms of employment as also numerous such factors.

24. The Planning and Economic Affairs (BPE) Department of the Government has also brought out Annexure R3(a), taking note of the different retirement age in

the PSU''s and the requests made for enhancement even with the approval of the respective managements; but declaring the States policy not to permit any such enhancement. A Division Bench of this Court by judgment dated 13.01.2016 in W.A. No. 2614/2007 upheld the decision of the State Government; refusing to approve the resolution of the Kerala Land Development Corporation seeking sanction of enhancement of the age of retirement of its employees from 55 years to 60 years. The policy of the Government, hence, is unassailable.

25. The reliance placed on , (1966) 2 SCR 523 (supra) is to urge the contention that five decades back the Hon''ble Supreme Court had observed that going by the improvement in standard of health, the retirement age could very well be extended up to 60 years. True, we are precisely 50 years from the said judgment and have remarkably advanced in the aspect of general health standards and life expectancy too has increased considerably, than that noticed by Their Lordships at that point of time. However, we cannot, at this moment, shut our eyes to the population explosion in the country and especially the status, acquired and maintained by the State of Kerala, of the most populous in the Country, with reference to density. Their Lordships definitely did not visualize the multiplication of population by leaps and bounds, in the half century, which, despite the best efforts put in by the Government, has not been curbed. This creates a pyramid formation with the large population of youth at the base and proportionately lesser population of the aged. The young cry out for employment, which we are unable to provide and that in turn accentuates the plight of the poverty stricken masses. The State has grappled with this problem of providing its literate masses with adequate job opportunities. Presumably, it is on such balancing considerations that the Government, as a policy, at least in the State of Kerala, has decided on maintaining the age of retirement at 56 years, which cannot be interfered with by this Court under Article 226 of the Constitution of India.

26. There can be found no arbitrariness in maintaining the retirement at 56 years of age. The varying age of superannuation under different employers, even when they are all controlled by the State, cannot lead to a valid ground for discrimination, since equality has to be maintained among equals and not un-equals. Superannuation age is a decision to be taken by the employer and the role of the employee comes only when there is a revision effected to his detriment. In the context of the State being the employer, directly or indirectly through State owned or funded Corporations, Companies or the like, it is the policy of the Government, which has preeminence. This Court would steer clear from interfering with such policy unless there be blatant arbitrariness or obvious discrimination; which this Court is unable to find in this case. The vacuum projected by the petitioners is ill-perceived, as has been found from the various documents discussed herein above. The only conclusion is that the writ petitions are devoid of merit.

The writ petitions are dismissed. Parties shall suffer their individual costs.

