
(2008) 07 KL CK 0045
In the High Court Of Kerala
Case No : W.A. No. 1882 of 2005

Pillai K.D.

APPELLANT

Vs

Chairman-cum-Managing Director, ONGC

RESPONDENT

Date of Decision : 03-07-2008

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 32

Citation : (2009) 121 FLR 480 : (2008) 3 ILR (Ker) 591 : (2008) 3 KLJ 179 : (2008) 4 KLT 199

Hon'ble Judges : P.N. Ravindran, J;J.B. Koshy, J

Bench : Division Bench

Advocate : K. Ramakumar, C.S. Gopalakrishnan Nair and Chandini G. Nair, for the Appellant; P. Parameswaran Nair, ASG, K.P. Mujeeb, ACGSC, P.R. Venketesh and P. Gopinath, for the Respondent

Final Decision : Allowed

Judgement

J.B. Koshy, J.—The writ petitioner in this case is a retired employee of Oil and Natural Gas Commission, the first respondent. He retired from service after continuous service of more than 37 years. The Post Retirement Benefit Scheme (PRBS) was promulgated with effect from 1.4.1990, which is an optional scheme. The petitioner became a member of the PRBS and remitted contributions accordingly. The petitioner retired on 30.4.1998. After his retirement with effect from 30.6.1998 another scheme was formulated. There is variance of rate of contribution. The only dispute is whether the petitioner is entitled to get the benefits under the old scheme as he retired when the old scheme was in force.

2. The petitioner filed O.P. No. 18359 of 2001 for getting the retiral benefits and a learned single Judge of this Court by judgment dated 16.10.2001 allowed the Original Petition along with another Original Petition O.P. No. 18358 of 2001 filed by another similarly placed employees (Ext.P5 judgment). As the direction was not complied with a C.C.C. No. 183 of 2002 was filed, which was closed on 2.4.2002 with liberty to the petitioner to work out the remedies. After filing the

Contempt of Court Case, part of the retiral benefits were paid to him. Thereafter the petitioner filed the present Original Petition. Thereafter the petitioner filed O.P. No. 14614 of 2002 and a learned single Judge decided that he is entitled to the benefit of the scheme existing at the time of his retirement following the decision in another judgment (O.P. No. 14551 of 2002).

3. Meanwhile, against both the judgments (O.P. Nos. 14551 and 14614 of 2002), appeals were filed by the ONGC. But the appeal filed in this case not was taken by the ONGC. But the appeal filed in this case not was taken up due to certain defects regarding the service of notice. The appeal, W.A. No. 21 of 2004 filed against the judgment in O.P. No. 14551 of 2002 came up before the Division Bench and the matter was considered in detail and dismissed the appeal by judgment dated 13.1.2004 (Annexure A7). Identical contentions raised in the Original Petition were raised in the above appeal and 1990 scheme was considered by the Division Bench and it is held as follows:

5. Paragraph 7 of the 1990 scheme, a copy of which has been produced by the learned Counsel before us during the course of hearing, provides as under:

Trustees may, however, review the availability of funds annually or at such other intervals as may be fixed by the Trustees to decide whether any revision in the maximum entitlement and/or rate of employees' contribution under the Scheme is warranted.

A perusal of the above provision clearly shows that it may be possible for the Trustees to revise the rates, at which the contribution has to be made by the employees or the payment has to be made by the employer. However, this provision does not permit the Trusteed to review the Scheme with retrospective effect.

The Division Bench also held as follows:

6. In the present case, it is the admitted position that the respondent had retired from service on April 30, 1996. On retirement, his entitlement to various benefits had matured. It had to be determined in accordance with the provisions of the Scheme as it existed on that date. This is precisely what has been held by the learned single Judge. We find no infirmity in the view taken by the Judge.

In paragraph 8, it is further held as follows:

8. A perusal of Clause 7 as noticed above, clearly shows that the Trustees have not been empowered to review the Scheme or to revise it to the disadvantage of the employees with retrospective effect. Thus, the plea that the respondent was bound by the revised Scheme cannot be sustained. The accrued rights cannot be taken away by passing an executive order with retrospective effect. No provision has been brought to our notice which may empower the Trustees to vary the terms of the Scheme so as to deprive the employees of the accrued rights.

But it is held that the judgment will not be binding in all cases in future. In the

Writ Appeal itself an undertaking was given that the amount will be paid within two months and a Review Petition was filed. By order dated 30.3.2004, the Review Petition was dismissed. It is held as follows:

It is because of his undertaking that we left the issue open and observed "that if in any subsequent case the appellants raise the appropriate pleas and produce documents, the matter shall be considered in the light of the pleading and the evidence before the Court. The present decision as given by the learned single Judge shall not constitute a precedent for all cases. The issue shall be decided in the light of the evidence that may be placed before the Court in the proceedings that may arise". Dehors the undertaking, the Bench has held that the scheme could not be amended retrospectively so as to deprive the respondent of his vested rights.

4. The appellant's case is that if the appeal filed against the judgment in his favour was heard along with it, it would have covered. After the disposal of the above appeal, in appellant's case a review petition was filed. In the Review Petition, the judgment was recalled and the present impugned judgment was passed dismissing his petition. Consequently Writ Appeal filed by the respondents in the appellant's case become infructuous. The Original Petition was dismissed only because of lack of jurisdiction. The learned single Judge held that no part of the cause of action arose within the State of Kerala and therefore, this Court cannot exercise its jurisdiction. Various decisions were also cited in the judgment. But those orders were regarding actions taken while the petitioners were working elsewhere other than the State in which the High Court was situated. But this is a case only regarding pension. The pension is receivable at the place where the employee resides after the retirement. The pensioner cannot be asked to reside in the place from where he retired from service and also cannot be asked at the old age to go and seek reliefs from the State where he was working at the time of retirement. This aspect also has to be taken into account. Here the petitioner is now aged above 70. It cannot be said that since the respondents head office is at Deradun, he should go and file petition at Deradun or in the State from where re-retired from service. We are of the opinion that he is entitled to receive his pension at his native place, namely, Kerala State where he is residing after retirement. Actually, the cause of action is non-receipt of pension which arose within the jurisdiction of this Court.

5. In Paul v. Border Security Force 2000(3) KLT 112, a learned single Judge of this Court in the case of pension of an employee who retired from Border Security Force, held that this Court has jurisdiction to decide the eligibility to get pension so long he resides here and pension is received in Kerala State is within the jurisdiction of this Court. The above facts were not disputed in the Writ Appeal also.

6. The next technical contention raised was that the petitioner was a trust and therefore not amenable to writ jurisdiction. The trust is formed with regard to the payment of pension to the employees of the ONGC, the major shares of which

are with the Government at the relevant time. According to the respondents, the scheme was amended and new scheme was framed in 1998 as per the direction of the Bombay High Court in W.P. No. 1718 of 1996. The mandates of the writ petition was not questioned and the direction in the writ petition was complied with. The learned Counsel for the appellant cited a recent decision of the Supreme Court in *Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others*, , whereby the Supreme Court held that remedy under Article 32 will not be available, but specifically held that the party can file a petition under Article 226 of the Constitution, which is wider than Article 32 of the Constitution for seeking the remedy under the ordinary course of law. Paragraphs 31 to 33 of the above decision are as follows:

31. Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32.

32. This Court in the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, has held:

Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to "any person or authority". The term "authority" used in the context, must receive a liberal meaning unlike the term in Article 12 which is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers powers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party, no matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied.

33. Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary

law but also under the Constitution, by way of a writ petition under Article 226. Therefore, merely because a non-governmental body exercises some public duty that by itself would not suffice to make such body a State for the purpose of Article 12. In the instant case the activities of the Board do not come under the guidelines laid down by this Court in Pradeep Kumar Biswas case (supra). Hence there is force in the contention of Mr. Venugopal that this petition under Article 32 of the Constitution is not maintainable.

In fact, the scheme was framed as an alternate scheme to the Employees Provident Funds and Miscellaneous Provisions Act, 1952. It is not a private trust. Large number of employees retired from ONGC are eligible to receive pension. The ONGC has got establishment in many of the States in India and the employees retired from all States opted for the scheme are coming under the trust in the matter of receiving pension. Even though the petitioner did not work in Kerala he is a resident of the State of Kerala and he is entitled to get pension in this State under the old scheme which was in force at the time of his retirement. Therefore, we are of the opinion that it is not proper for this Court to unsuit the petition on the ground that it is a trust.

7. With regard to the facts of this case, the Division Bench of this Court in W.A. No. 21 of 2004 held that similarly situated person is entitled to the benefit of the scheme in which he was a member. Further, the Writ Appeal filed by the respondents in this case was withdrawn. We follow the decision of the Division Bench in W.A. No. 21 of 2004 and hold that the petitioner is entitled to the benefits of the scheme as amended at the time of his retirement. Hence we allow the Writ Appeal. The respondents are directed to pay the pension benefits to the petitioner as expeditiously as possible, in any event, within three months from the date of receipt of a copy of this judgment.