
(2016) 06 CAL CK 0027
In the Calcutta High Court
Case No : W.P. No. 25761 (W) of 2014

Rabindra Nath Muni

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 15-06-2016

Acts Referred:

West Bengal Comprehensive Area Development Act, 1974 — Section 38
West Bengal Comprehensive Area Development Corporation Employee s (Death-cum-Retirement) Benefit Regulations, 2008 — Regulation 2

Citation : (2016) LIC 3037 : (2016) 6 WBLR 103

Hon'ble Judges : I.P. Mukerji, J.

Bench : Single Bench

Advocate : Mr. Ashok Kr. Banerjee, Senior Advocate and Mr. Surajit Sen, Advocate, for the Appellant; Mr. L.K. Gupta, Addl. Advocate General Mr. Tapan Mukherjee, Mr. Jayak Gupta and Mr. Ayan Banerjee, Advocates, Mr. Subir Kr. Bhattacharya, Advocate, for the Responden

Final Decision : Allowed

Judgement

I.P. Mukerji, J.—The West Bengal Comprehensive Area Development Corporation was established by the West Bengal Comprehensive Area Development Act, 1974. It is under the administrative control of the Panchayat and Rural Development Department, Government of West Bengal. This writ application has 71 petitioners. They were all officers or otherwise employed with the Corporation. They retired on various dates between 1994 and 2008. The vast majority of them retired between 2007 and 2008. The dates of retirement are mentioned in the cause title itself. They were all beneficiaries of a Contributory Provident Fund Scheme. At the time of retirement they received the provident fund amount together with gratuity and leave encashment. The Corporation gives them no pension. They get a meagre amount of pension from the provident fund authority. It is in most cases a little over rupees one thousand per month. In some cases it is as low as Rs. 594 per month. They have come to this court complaining of the West Bengal Comprehensive Area Development Corporation

Employee's [Death cum Retirement] Benefit Regulations 2008. They were made applicable with retrospective effect from 1st April, 2008. It was published at a much later date on 10th December, 2008. It was not a statutory enactment but an administrative decision. The benefit was extended to all whole time employees, permanent and temporary who were in the service of the Corporation on 1st April, 2008 and also to those who were appointed on and after that date. The employees, by these Regulations became entitled to pension after ten years of qualifying service. This pension was payable on superannuation or on voluntary retirement after 20 years of qualifying service and in some other contingencies.

2. This writ challenges the fixation of the cut-off date. The writ petitioners express their willingness to deposit the entire amount of the employer's share towards the Contributory Provident Fund together with interest if this court extends the benefits of these Regulations to them.

3. A very short but important legal issue falls for consideration in this application. It is trite law that a government organisation is entitled to announce a policy for payment of pensionary benefits to a class of its employees, based on the period of service rendered, fixing a cut-off date. On fixation of this cut-off date only those employees who were in employment on or after the cut-off date would be entitled to the benefit. It is within the bounds of the government to exclude a class of employees from the benefit because no government has such an amount of excess fund in its hands so as to take under its umbrella the entire body of employees, current and retired. But this cut-off date has to be fixed with great application of mind and reasonably. The exercise should not be arbitrary or discriminatory. It should not manifest any malafide intention on the part of the government.

4. The Supreme Court has enunciated the principles which should be followed in these cases. In the case of Special Reference No. 1 of 1978 reported in (1979) 1 SCC 380 cited by Mr. Ashok Kr. Banerjee, learned senior Advocate, the Supreme Court said:

"7. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

8. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring

privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned.

9. if the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the Legislature, its action can be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory, irrespective of the way in which it is applied."

5. This was a broad and general principle. The land mark decision came in 1982. It was D.S. Nakara and Others v. Union of India reported in (1983) 1 SCC 305 also cited by Mr. Ashok Kr. Banerjee. I read paragraphs 50, 58 and 65 of the judgement:

"50. There is nothing immutable about the choosing of an event as an eligibility criteria subsequent to a specified date. If the event is certain but its occurrence at a point of time is considered wholly irrelevant and arbitrarily selected having no rationale for selecting it and having an undesirable effect of dividing homogeneous class and of introducing the discrimination, the same can be easily severed and set aside. While examining the case under Art.14 the approach is not: "either take it or leave it", the approach is removal of arbitrariness and if that can be brought about by severing the mischievous portion the court ought to remove the discriminatory part retaining the beneficial portion. The pensioners do not challenge the liberalised pension scheme. They seek the benefit of it. Their grievance is of the denial to them of the same by arbitrary introduction of words of limitation and we find no difficulty in severing and quashing the same. This approach can be legitimised on the ground that every Government servant retires. State grants upward revision of pension undoubtedly from a date. Event has occurred revision has been earned. Date is merely to avoid payment of arrears which may impose a heavy burden. If the date is wholly removed, revised pensions will have to be paid from the actual date of retirement of each pensioner. That is impermissible. The State cannot be burdened with arrears commencing from the date of retirement of each pensioner. But effective from the specified date future pension of earlier retired Government servants can be computed and paid on the analogy of fitments in revised pay-scales becoming

prospectively operative. That removes the nefarious unconstitutional part and retains the beneficial portion. It does not adversely affect future pensioners and their presence in the petitions becomes irrelevant. But before we do so, we must look into the reasons assigned for eligibility criteria, namely, "in service on the specified date and retiring after that date". The only reason we could find in affidavit of Shri Mathur is the following statement in paragraph 5:

"The date of effect of the impugned orders has been selected on the basis of relevant and valid considerations."

58. Now if the choice of date is arbitrary, eligibility criteria is unrelated to the object sought to be achieved and has the pernicious tendency of dividing an otherwise homogeneous class, the question is whether the liberalised pension scheme must wholly fail or that the pernicious part can be severed, cautioning itself that this Court does not legislate but merely interprets keeping in view the underlying intention and the object, the impugned measure seeks to subserve? Even though it is not possible to oversimplify the issue, let us read the impugned memoranda deleting the unconstitutional part. Omitting it, the memoranda will read like this:

"At present, pension is calculated at the rate of 1/80th of average emoluments for each completed year of service and is subject to a maximum of 33/80 of average emoluments and is further restricted to a monetary limit of Rs. 1,000/- per month. The President is, now, pleased to decide that with effect from 31st March, 1979 the amount of pension shall be determined in accordance with the following slabs."

If from the impugned memoranda the event of being in service and retiring subsequent to specified date is severed, all pensioners would be governed by the liberalised pension scheme. The pension will have to be recomputed in accordance with the provisions of the liberalised pension scheme as salaries were required to be recomputed in accordance with the recommendation of the Third Pay Commission but becoming operative from the specified date. It does therefore appear that the reading down of impugned memoranda by severing the objectionable portion would not render the liberalised pension scheme vague, unenforceable or unworkable.

65. That is the end of the journey. With the expanding horizons of socio-economic justice, the socialist Republic and welfare State which we endeavour to set up and largely influenced by the fact that the old men who retired when emoluments were comparatively low and are exposed to vagaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs, we are satisfied that by introducing an arbitrary eligibility criteria: "being in service and retiring subsequent to the specified date" for being eligible for the liberalised pension scheme and thereby dividing a homogeneous class, the classification being not based on any discernible rational principle and having been found wholly unrelated to the objects sought to be achieved by grant of

liberalised pension and the eligibility criteria devised being thoroughly arbitrary, we are of the view that the eligibility for liberalised pension scheme of being in service on the specified date and retiring subsequent to that date" in impugned memoranda, Exhibits P-I and P-2, violates Article- 14 and is unconstitutional and is struck down. Both the memoranda shall be enforced and implemented as read down as under: In other words, in Exhibit P-1, the words:

"that in respect of the Government servants who were in service on the 31st March, 1979 and retiring from service on or after that date"

and in Exhibit P-2, the words:

"the new rates of pension are effective from 1st April 1979 and will be applicable to all service officers who became/become non-effective on or after that date."

are unconstitutional and are struck down with this specification that the date mentioned therein will be relevant as being one from which the liberalised pension scheme becomes operative to all pensioners governed by 1972 Rules irrespective of the date of retirement. Omitting the unconstitutional part it is declared that all pensioners governed by the 1972 Rules and Army Pension Regulations shall be entitled to pension as computed under the liberalised pension scheme from the specified date, irrespective of the date of retirement. Arrears of pension prior to the specified date as per fresh computation is not admissible. Let a writ to that effect be issued. But in the circumstances of the case, there will be no order as to costs."

In All India Reserve Bank Retired Officers Association and Others v. Union of India and Another reported in 1992 Supp (1) SCC 664 cited by the same learned counsel the Supreme Court opined that:

"*****"

There is no doubt that whenever any rule or regulation having statutory flavour is made by an authority which is a State within the meaning of Article 12 of the Constitution, the choice of the cut-off date which has necessarily to be introduced to effectuate such benefits is open to scrutiny by the Court and must be supported on the touchstone of Article 14. If the choice of the date results in classification or division of members of a homogeneous group it would be open to the Court to insist that it be shown that the classification is based on an intelligible differentia and on rational consideration which bears a nexus to the purpose and object thereof. The differential treatment accorded to those who retired prior to the specified date and those who retired subsequent thereto must be justified on the touchstone of Article, for otherwise it would be offensive to the philosophy of equality enshrined in the Constitution. This is quite clear from the ration of Nakara case as well as the decision of this Court in B. Prabhakar Rao v. State of A.P."

6. Learned Advocate General made very pointed arguments. He said that no

differentiation was made between the same class of employees or employees who are similarly situated. He said that the benefit of pension conferred by the 2008 Regulations was applicable only to the present employees of the organisation on and from 1st April, 2008. An organisation was entitled to announce benefits for its present employees, considering all relevant factors. Therefore, the present employees and the past employees constituted two different classes. The benefit which an organisation gives its present employees cannot be given simultaneously, on all occasions to the past employees because that would create an unnecessary financial burden. The writ petitioners have all retired prior to coming into force of the 2008 regulations. The above cases cited by Mr. Banerjee related to circumstances when members of the same class were treated differently. If benefits were given to some retired employees leaving out the others, it could amount to discrimination. He cited *Union of India and others v. Lieut (Mrs.) E. Iacats* reported in 1997 (7) SCC 334 para 4 and 5. I insert those paragraphs herein below:

"4. The next question relates to payment of pension. Under Army Instruction No. 14 which was in force at the material time, the respondent, either on the date of her appointment or on the date of her retirement, or at any time during her service, did not have the benefit of pension on retirement. The terms and conditions of service were known to her at the time when she joined the service. At the time of joining service she had signed an agreement to abide by the rules and regulations governing Military Nursing Service (Local) from time to time. She has claimed that pensionary benefits which were conferred for the first time on all those who retired on or after 1.10.1983 should be given to her although she retired much prior to that date. Although she has not challenged the cut-off date as arbitrary, reliance in this connection is placed by her on the decision in the case of *D.S. Nakara v. Union of India*. This decision has been subsequently explained and distinguished in a number of cases. In the case of *Sushma Sharma (Dr.) v. State of Rajasthan*, AIR 1985 SC 1367: (AIR at p. 1379 p. 66 para 44) this Court cited with approval its earlier observations in *Union of India v. Parameswaran Match Works Ltd.* to the effect that the choice of a date as a basis of classification cannot always be dubbed as arbitrary unless it is capricious or whimsical. In the case of *State of W.B. v. Ratan Behari Dey* this court considered the pension scheme introduced by the Calcutta Municipal Corporation from 1.4.1977. It upheld the validity of the cut-off date. *Nakara* case was distinguished on the ground that in *Nakara* case by an artificial cut-off date, distinction was sought to be made between retired employees who were governed by the same rules . However, when a pension scheme is introduced from a given date, there are two sets of employees who are governed by two different sets of rules. They cannot be treated as similarly situated. As the cut-off date was retrospective, this Court also examined the reasonableness of this retrospective operation. It found the cut-off date to be reasonable, it being based upon the date of appointment of the pay commission. In a recent decision in the case of *Commander, Head Quarter v. Biplabendra Chanda* new rules reducing the

minimum qualifying service for pension came into effect from 1.1.1986. The respondent who had retired prior to this date was not granted pension under the old rules as he did not qualify for pension under those rules. This court distinguishing Nakara case held that he cannot be retrospectively made eligible under the new rules. Pensioners under the old rules and pensioners under the new rules are not similarly situated. Each set of retiring employees will be governed by their own rules in force when they retire.

5. The respondent, therefore, cannot claim the benefit of a scheme which came into operation from a date subsequent to the date of her retirement. The respondent also did not contend either before the High Court or in the grounds of appeal before us that a cut-off date for grant of pensionary benefits is arbitrary or unreasonable. Even otherwise in view of the fact that a study team was first appointed and pursuant to its report certain benefits were given after considering the report of the study group would show that the cut-off date had a logical nexus with the decision to grant these benefits on the basis of the report of the study team. Fresh financial benefits which are conferred also have to be based on proper estimates of financial outlay required. Bearing in mind all relevant factors, if such a benefit is conferred from a given date, such conferment of benefits from a given date cannot be considered as arbitrary or unreasonable."

7. This case was followed in T.N. Electricity Board v. R. Veerasamy and Others reported in 1999 (3) SCC 414 and Government of Andhra Pradesh and Others v. N. Subbarayudu and Others reported in 2008 (14) SCC 702, all cited by Mr. Gupta.

8. I admit that the cases cited by Mr. Gupta, learned Additional Advocate General made a very important and succinct interpretation of the Nakara principle and other decisions following it. I share the view that benefits are given to the current employees, after consideration of all relevant factors like the present pay, the nature of work done, the inflationary trend, the availability of funds, the demands made by the employees and so on. After termination of their service, the retired employees cannot sit as watchdogs on the periphery of the organisation and expect that this benefit will also be extended to them in full measure.

9. But here there is a difference. This difference is most important and was pointed out almost at the close of hearing. These Regulations were made in December, 2008. But retrospective effect was given to them with effect from 1st April, 2008. A list was handed up to this court by Mr. Banerjee learned senior counsel which showed that a significant number of employees had retired after 1st April, 2008 and before 10th December, 2008 when these regulations were made. Now, if these regulations were made with prospective effect, which normally, they should have been made, these employees, who retired between 1st April, 2008 and December, 2008 would have been left out of the benefit. Following the decisions cited by the learned Additional Advocate General this writ had to be dismissed. But as Lord Denning remarked in a famous case, a little

change in the facts can make all binding ratio on an assumed state of facts, not applicable. The framers of the Regulations have consciously given it retrospective effect to include a specified class of retired employees. Thus, following the ratio in Special Reference No. 1 of 1978 reported in (1979) 1 SCC 380, All India Reserve Bank Retired Officers Association and Others v. Union of India and Another reported in 1992 Supp (1) SCC 664 this differentiation is neither intelligible nor rational.

10. Applying the ratio in the Nakara case, these regulations treat the members of the same class differently.

11. They make a discrimination between members of the same class i.e. retired employees. It confers benefits on those who retired between 1st April, 2008 and 10th December 2008 and leave out the rest.

12. The Nakara case has laid down that the court is entitled to read down an offending piece of legislation to make it compatible with the Constitution. This is not a piece of legislation at all. The regulations are administrative instructions. Applying the principle laid down in that case I am inclined to read down the regulations. In those circumstances the benefits of these regulations have to be extended to the petitioning retired employees also. The part of the Regulations fixing a cut-off date is struck down. The petitioners will be entitled to the benefits of these regulations. They will have to return the entire amount of the employer's share towards Contributory Provident Fund with interest to avail of the benefit of this judgement.

13. This writ application is allowed in terms of prayers (a) (b) iii, iv of the petition. The respondents are directed to comply with this order within three months of communication of this order.

14. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.