

(2012) 05 AHC CK 0121

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 43687 of 2006

Shashthi Dutt Shastri and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 15-05-2012

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2012) 8 ADJ 156

Hon'ble Judges : Sunil Hali, J

Bench : Single Bench

Advocate : Manish Goyal, for the Appellant;

Final Decision : Allowed

Judgement

Hon"ble Sunil Hali, J.—All the petitioners retired upon completion of 60 years of age prior to 1.7.2003. Case set out by the petitioner is that the State Government vide its G.O. dated 31.3.1978 put the teachers in non-Government aided Institution at par with the teachers in the Government Institution for the purpose of drawing pension and gratuity. Aforesaid parity was made effective from 1.3.1977. It was also provided that those teachers who are retiring on or after 1.3.1977 would be entitled to pension calculated at the same rate and in the same manner as was admissible to their counter part employees in Government Colleges except the benefit of death-cum retirement gratuity. State Government issued another G.O. dated 10.8.1978 with the prior permission of the Governor whereby death-cum-retirement gratuity was made applicable to teachers serving in non-Government aided Institutions to bring them at par with the teachers serving in Government Institution. The age of retirement of teachers in the Government Institution was 58 years whereas the age of retirement of teacher in the non-Government aided Institution was 60 years. The aforesaid parity was available only in case teachers opted to retire at the age of 58 years instead of 60 years. Homogeneous class was formed by the State Government for the teachers as a whole whether they served in the Government

Institution or in the non-Government aided Institution. This parity was brought about w.e.f. 30.6.1978. The parity was permissible in case the teachers working in the non-Government aided Institution opted to retire at the age of 58 years which would entitled them to get death cum retirement gratuity.

2. State Government issued the G.O./ notification dated 28.11.2001 with prior consent of the Governor whereby the age of superannuation of Government Servant was increased from 58 years to 60 years. Consequently, G.O. dated 20.6.2002 was issued by the Government to the effect that all service benefits i.e. payable to Government servant at the age of 58 years will be payable at the age of 60 years w.e.f. 28.11.2001. Consequence of this order was that the death-cum-retirement gratuity would be payable to the teachers working in Government Institution who retired at the age of 60 years. Same benefit was to be given to the persons working in non-Government Institution who opted to retire at the age of 58 years instead of 60 years which was date of retirement of Government teachers prior to this order.

3. Government issued G.O. dated 4.2.2004 extending this benefits to non-Government teachers who would opt to retire at the age of 60 years instead of 62 years which is the age of retirement fixed for non-Government Institutions. Condition No. 3 of this order provides that the benefit would be effective from 1.7.2003. By means of the said G.O. the superannuation of the teachers in the non-Government aided Institution was increased from 60 to 62 years and the service benefits available at the age of 58 years were made payable at the age of 60 years. However, instead of giving the aforesaid parity from the date when it was given to the counterparts in the Government, it has been delayed uptill 1.7.2003, as a result of which the benefit has been denied to the teachers who have retired during the period from 28.11.2001 till 1.7.2003, the date fixed for giving such benefits. Representations made by the petitioners in questioning the impugned paragraph No. 3 of the G.O. dated 4.2.2004 was rejected vide order dated 13.6.2006. It is under these circumstances the present writ petition has been filed.

4. Heard learned counsel for the parties and perused the material on record.

5. Three fold contentions have been raised by learned counsel for the petitioners in this behalf.

(a) that the petitioners who were working in the non-Government Institution constituted homogeneous class with teachers working in the Govt Institutions and they have been discriminated by conferring the benefit w.e.f 1.7.2003 while allowing the same to the Government teachers w.e.f. 28.11.2001.

(b) There is no rational classification as there is no material on the basis of which justification can be given for grant of benefit only from 1.7.2003 instead of 28.11.2001. Consequence of such arbitrariness is that the teachers in the non-Government aided Institution performing the same duty have not been treated at par with the Government teachers with whom they constituted homogeneous

class.

(c) That the petitioners have been deprived of the death cum retirement gratuity which was payable to them for having retired at the age of 58 years whereas the counter part of the petitioners in the Government Institution have been accorded this benefit at the age of 60 years the date of retirement fixed in their case vide order dated 28.11.2001.

6. It is contended by learned counsel for the petitioners that the discrimination meted to the petitioners cannot be sustained as they constitute one homogeneous class with Government teachers as they have been allowed the benefit of death cum gratuity w.e.f. 31.3.1978. Law is well-settled that between the homogeneous class artificial discrimination cannot be made in the matter of grant of pensionary rights.

7. Stand of the respondents is that G.O. dated 4.2.2004 was made applicable to the teachers of non-Government aided colleges affiliated to the State Universities. The Government Order refers to the decision taken by the State Government to increase the age of superannuation of teachers in the non-Government aided colleges affiliated to the State Universities working on the posts sanctioned by the State Government. Para 2 of the Government Order states that Governor of U.P. has been pleased to increase the age of superannuation of these teachers from 60 years to 62 years. While increasing the age of petitioners the post retirement benefits in the shape of death cum retirement gratuity would continue to be operative provided the petitioners had given their option to retire at the age of 60 years. This benefit was, however, given w.e.f. 1.7.2003 thereby allowing the teachers working in the non-Government aided institution to exercise their option to retire at the age of 60 years at par with the teachers of Government Institution. Thus all those retiral benefits payable at the age of 60 years will also be made applicable in case of the petitioners. It is further stated in para-3 that those teachers, who are continuing on session's benefit regulation after 1.7.2003, will be entitled to the benefits of the enhanced age of superannuation and to that effect all previous Government Orders will be considered to be amended. The remaining conditions will be the same.

8. Petitioners have retired on 30.6.2002 after getting the benefit of Regulation 21 of Chapter III of U. P. Intermediate Education Act, 1921. Service conditions of the teachers working in recognized aided private Institutions are different than the service condition of the State Government as such did not constitute same class for the purpose of seeking parity with the state employees.

9. Regulation 21 of Chapter III of the Regulations framed under the Intermediate Education Act, 1921 relates to the extension of service which reads as under :

21. Superannuation age of Principal, Head-master, Teacher and other employees would be 60 years. If above said superannuation age of any Principal, Head-master and Teacher falls on any date in between 2nd July and 30th June, except

in the condition when he himself, before two months of the date of superannuation, furnishes in writing the information for not seeking extension of service, extension of service upto 30th June shall be deemed to be conferred on him so that after summer vacation, substitute can be arranged in the month of July. In addition to this, extension of service could be granted only in such special cases, which may be decided by the State Government.

If date of superannuation of any clerk or fourth class employee falls in the middle of any month, his extension of service would be deemed to be given up to the last date of that month. But if the date of appointment of any employee falls on the first date of any month, he shall be retired on the last date of the preceding month.

10. It is further contended that the benefit to extend the retirement age from 58 years to 60 years was given to the Government teacher by invoking the provisions of UP Intermediate Education Act 1921. Petitioners cannot claim the benefit of this order under the present writ petition.

11. The Government Order dated 4.2.2004, was clear to the effect that the benefit of enhanced age of retirement will be available with the same conditions as were made applicable, when the retirement age was increased from 58 years to 60 years. The conditions applicable to the enhanced age of retirement were thus the same as were applicable in terms of the Government Order dated 30.3.1978.

12. The benefit of the enhancement in age of superannuation was clearly in terms with the conditions, which were provided in Government Order dated 4.2.2004 that those teachers of the non-Government aided colleges, who retire at the age of 62 years, will not be entitled to the benefit of gratuity. The petitioners are not entitled to be allowed to take both the benefits, namely to avail the benefit of retirement at the enhanced age of 62 years, and at the same time avail both pension, sessions benefit, as well as gratuity. Having taken the benefit of enhanced age of retirement, which was dependent upon the options to be exercised and which stage in any case had long expired. The Government Order dated 4.2.2004, does not admit any such interpretation, that those persons, who were not asked to give option and had continued up to 62 years, will be entitled to both the benefits of pension with session's benefit and gratuity.

13. I have examined the rival contentions.

14. Justification for seeking option at the age of 58 years from the non-aided Government teachers was to bring them at par with Government teachers whose age of retirement at that point of time was 58 years. In order to grant parity with their counter parts in the Government option was given to seek retirement at the age of 58 years so as to get the benefit of death cum retirement gratuity. It was specifically notified that a person who seeks to retire at the age of 60 years would not be given such benefit. From the facts, it reveals that while conferring the benefit of death cum retirement gratuity, it was made obligatory that the

option has to be exercised by the teachers seeking their retirement at the age of 58 years. It is only in those cases where the option was given to retire at 58 years the benefit of death cum retirement gratuity was applicable. The basis for creating this homogeneous class had basic distinctive features that all those teachers who seek benefit of scheme must opt to retire at the age of 58 years which was prescribed for Government teachers. Those persons who had opted to exercise this option constitute homogeneous class with teachers working in the Government Institution. The basic feature of this classification was based upon the age of retirement of govt. teachers which at that point of time was 58 years.

15. The question that calls for consideration in this writ petition is that while extending the age of govt. teachers from 58 years to 60 years w.e.f 28.11.2011 could the petitioners be discriminated by treating them as separate class only on the pretext that they had retired before similar benefit was given w.e.f. 1.7.2003.

16. In order to appreciate the challenge thrown to this impugned order, it is necessary to examine the power of the State Government to classify the people on the basis of their distinctive features. In order to justify any such classification the object of legislation has to be kept in mind. Any classification must stand on two test viz. (i) that there should be valid grounds to create a class depending upon its distinctive features; (ii) that such classification must have nexus with the object which is sought to be achieved. The object of legislation assumes significance in providing legitimacy to such classification.

17. The object of conferring the benefit w.e.f. 1.7.2003 in the present case, was to accord benefit to the teachers working in aided private institution at par with the teachers of the Government Institution. It is not in dispute in the present case that similar benefits have been accorded to the teachers of the private aided Institution as had been done in the case of Government Institution. It is the date of fixation of this benefit which has created the classification in this class when the object of the legislation was to accord benefit to the private teachers to put them at par with the Government teachers. Conferment of this benefit on particular date does not justify such classification. Once the age of retirement of the Government Servant was raised to 60 years and they continued to draw the benefit of the scheme, the petitioners had also right to seek the benefit of the scheme by seeking retirement at the age of 60 years. This benefit had to be given to them from the date the age of retirement of the Government servant was raised to 60 years i.e. 28.11.2011 and not from the date fixed in the impugned notice which is 1.7.2003.

18. On the issue of petitioners age of superannuation and different service benefits, Hon"ble Apex Court in the case of B. Probhakar Rao and others v. State of Andhra Pradesh and others, AIR 1986 210, wherein the Court has observed as under:

...Now if all affected employees hit by the reduction of the age of superannuation formed a class and no sooner than the age of superannuation was reduced, it

was realist that injustice had been done and it was decided that steps should be taken to undo what had been done, there was no reason to pick out a class of persons who deserved the same treatment and exclude them from the benefits of the beneficent treatment by classifying them as a separate group merely because of the delay in taking the remedial action already decided upon...

...Legislations to remedy wrongs ought not to exclude from their purview a few of the wronged persons unless the situation and the circumstances make the redressal of the wrong, in their case, either impossible or so detrimental to the public interest that the mischief of the remedy outweighs the mischief sought to be remedied. In the instant case, there is no such impossibility or detriment to the public interest involved in re-including into service those who had retired as a consequence of the legislation which was since thought to be inequitable and sought to be remedied...

19. Principal plea of the petitioners is that by according the benefits at par with govt teachers in terms of the Govt. Order the date of giving effect to this benefit has been fixed as 1.7.2003, which is not only arbitrary but discriminatory in the nature. This plea has to be examined from the stand point of basic principles applicable under administrative law namely the Wednesbury principle and the doctrine of proportionality. Lord Greene said in 1948 in the Wednesbury case that when the statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. No interference was permissible unless following conditions were satisfied; namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered or the decision was one which no reasonable person could have taken.

20. The principle of proportionality was explained to mean that while regulating exercise of Fundamental rights the appropriate or the least-restrictive choice of measures has to be made by the legislature or the administrator so as to achieve the object of legislation or the purpose of administrative order as the case may be. What the principle contemplates is that while exercising its power to regulate the fundamental rights restriction imposed must be minimum to the extent that the object of the legislation or the order is achieved. If the restriction imposed has consequence of destroying the right itself or has adverse effects, action has to be judged on the principle of proportionality.

21. Principle of proportionality can be invoked in case where the fundamental rights are adversely effected by the intended legislation or the Govt. Order which does not conform to the objects of the intended legislation or Govt. Order. Principle of proportionality can also be invoked where the plea of discrimination under Article 14 of the Constitution has been raised. Vice of discrimination has the effect of creating a class within a class by treating equal as unequal. It is trite law that classification can be made of persons belonging to the same class provided two objects are satisfied.

(i) that there should be valid grounds to create a class depending upon its

distinctive features; (ii) that such classification must have nexus with the object which is sought to be achieved.

22. The aforesaid principle contemplates that one can permit the classification provided there is intelligible differential in the classification so made. Once the object of classification has nexus with the object of legislation meaning thereby that the restriction imposed upon the right of an individual belonging to a particular class is inconformity with the object of legislation, it cannot be said to be discriminatory.

23. Judicial review is permissible only to the extent of examining as to whether intended purpose of the legislation or the order infringes the right excessively or not. Principles of proportionality were examined by the Canadian Supreme Court in the case of *R. v. Oakes*, (1986) 26 DLR (4th) 200, the Court observed that there are three important components of the proportionality test viz. :

24. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

25. Thus, the principle that the legislation relating to restrictions on fundamental rights can be tested on the anvil of proportionality. This is called primary review by the Courts of the validity of legislation which offended the fundamental rights. Where the fundamental rights are in question, the Courts can exercise the right of primary review. Where the action is questioned on the basis of being arbitrary or un-reasonable the Courts exercise second review based on *Wednesbury* principle. To sum up, where the effect of the legislation or the order is restrictive on the fundamental rights the Courts exercise the right of primary review and where the effect is regulatory the principle of *Wednesbury* shall be applied.

26. While applying this principle in the present case what is being contended by the learned counsel for the petitioner is that there is no rationale basis on the basis of which justification can be given for grant of benefit from 1.7.2003 instead of 28.11.2001. Consequence of such arbitrariness is that the teachers in the Government Institution who performs the same duty and were treated at par with the petitioners have been given the benefit from 28.11.2001 whereas the petitioners were deprived of the same from the said date.

27. Issue which crops up in this writ petition is that by according the benefit to the petitioners w.e.f. 1.7.2003 all those persons who retired after 28.11.2001 have been denied the said benefits. Case set out is that they constitute one homogeneous class with Government teachers and were enjoying this benefit till 28.11.2001. Conferment of this benefit was dependent upon the option given by

the petitioners that they would retire at the age of 58 years which was the age for retirement of the Government servant. This condition was imposed only to equate them with the teachers working in the Government department who normally retire at the age of 58 years where as in the case of the petitioner the age of retirement was 60 years.

28. Once the age of Government servant was enhanced to 60 years on 28.11.2001 petitioners also had right to give an option to retire at the age of 60 years so as to bring them at par with the Government employees.

29. Alteration in the age of retirement in the Govt. Teachers automatically creates a right in the petitioners to seek option to retire at the age of 60 years. It is not in dispute that on the relevant date i.e. 28.11.2001 the age of retirement of the petitioners was 60 years. This was enhanced to 62 years in the year 2004 but the benefit was given w.e.f. 1.7.2003 which created inequality amongst the homogeneous class created by the G.O. dated 30.3.1978. Petitioners had no right admittedly to seek enhancement of their age from 60 to 62 years but after extending the age of retirement of Government teachers they could not be denied their right to exercise the option of seeking retirement at the age of 60 years. Conversely, the option was required to be given to the petitioners when they reached at the age of 60 years but the same has not been given and it is on this pretext they have been denied the benefit to get the Death cum retirement gratuity. This option was required to be given by the respondents. Admittedly, the age of retirement in case of non-Government teachers was 60 years i.e. on 28.11.2001 when extension was granted in the age of retirement of Government teachers. Merely because their age was not enhanced to 62 years at that point of time this benefit was not given to them. Age of retirement of the petitioners had no relevance for the purpose of granting the benefit of scheme to them it was relevant only till the age of retirement of Government servant was 58 years. Once the age of retirement was enhanced to 60 years petitioners were also entitled to the same benefit which was given to the employees working in the Government Institution at the age of 60 years. Grant of benefit was co-related to the date of age of retirement of the Government teachers. Once their age of retirement was extended to 60 years petitioners were also entitled to the same benefit.

30. While applying this principle of proportionality in the present case, it is clearly visible that by fixing the date of 1.7.2003 for according this benefit suffers from vice of discrimination which is hit of Article 14 of the Constitution. Consequence of the order was that the petitioners who constituted one class with those of Government teachers have been treated unequals. The effect of this order destroys the right of the petitioners to be treated equally.

31. It may be seen that the intended object of the G.O. was to confer the benefit on the non-aided Institution at par with the State Government. The object of such legislation was to give benefit to the non-Government teachers in the matter of death cum retirement gratuity and by according the artificial date of

1.7.2003, a person who retired from 28.11.2001 and 1.1.2003 have been denied this benefit. The very intended purpose of the legislation has been destroyed by creating this artificial classification.

32. By applying this principle of proportionality in this case, it is clearly visible that it is disproportionate to the benefit which accrues to the general public. The question of proportionality was discussed by the Hon'ble Supreme Court in the case of Om Kumar and others v. Union of India, (2001) 2 SCC 386, wherein the Hon'ble Supreme Court has held in paragraph Nos. 66 & 67 of the judgment as under:

It is clear from the above discussion that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing Courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Hence the Court deals with the merits of the balancing action of the administrator and is, in essence, applying "proportionality" and is a primary reviewing authority.

But where, an administrative action is challenged as "arbitrary" under Article 14 on the basis of Royappa (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is "rational" or "reasonable" and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary.

In view of the aforesaid discussion, the writ petition is allowed. The Government Order dated 4.2.2004 is hereby quashed to the extent it grants benefits from 1.7.2003. Respondents are directed to treat the petitioners at par with the teachers working in the Government aided Institution in respect of payment of death cum retirement gratuity and other post retiral benefits to which the teachers of Government aided Institution are entitled with effect from 28.11.2001.