
(2007) 12 CAL CK 0030

In the Calcutta High Court

Case No : A.P.O. No's. 425 of 2006 and WP No. 1307 of 2004

State of West Bengal and Others

APPELLANT

Vs

Biswanath Koley

RESPONDENT

Date of Decision : 18-12-2007

Acts Referred:

Revised Scale of Pay of Teachers and Nontaching Staff" Rules, 1990 — Rule 17(2)

Citation : (2008) 3 CHN 358

Hon'ble Judges : S.S. Nijjar, C.J; Tapen Sen, J

Bench : Division Bench

Advocate : Himangshu Bose, in APO No. 425 of 2006 with K.N. Mukherjee, in APO Nos. 425, 451 and 452 of 2006, for the Appellant; S.S. Arefin, for the Respondent

Judgement

Tapen Sen, J.—In all these 3 (Three) Appeals, the State Appellants have challenged the 3(three) Orders of the learned Single Judge passed on (a) 24.9.2004 (in W.P. No. 1307 of 2004); (b) 7.1.2005 (in W.P. No. 2034 of 2004); and (c) 7.1.2005 (in W.P. No. 1907 of 2004) respectively, whereby and whereunder he was pleased to hold that the Petitioners therein would be entitled to get the benefits in terms of the ROPA Rules upon refund of their respective employees' share of the contribution made towards Contributory Provident Fund together with interest at the prescribed Government rate.

2. The learned Single Judge then directed the Inspector of Schools to inform the concerned Petitioners about the quantum of money required to be refunded to the Government within a period of 8 weeks from the date of communication of the order.

3. All these (3) three Appeals have been argued and taken up together as all of them involve a common question as to whether, the Petitioners having not exercised their options under Government Memorandums dated 15.05.1985 and 16.12.1991, and instead, having chosen to exercise their options, while still in service, under the relevant ?Revised Scale of Pay of Teachers and Non-teaching

Staff? Rules (hereinafter referred to wherever so required and for the sake of brevity as the 'ROPA Rules of 1990' and 'ROPA Rules of 1998'), can they be deprived of the benefits accruing under the provisions of the relevant ROPA Rules?

4. The facts of the three Appeals would appear from the following paragraphs:

This Appeal arises out of WP No. 1307 of 2004, in which the Petitioner (Biswanath Koley) had pleaded that he was initially appointed as an Assistant Teacher in the Bhanjipur High School in the District of Hooghly which was approved with effect from 1.1.1980. Thereafter he was promoted to the post of a Headmaster on 7.12.1981 which was also subsequently approved by the concerned authority. At the time of his appointment, he was under a Contributory Provident Fund Scheme and he did not exercise his option in terms of either the Notification/Memo dated 15.5.1985 or in terms of the Memo dated 16.12.1991 by which the Government had allowed the teaching and non-teaching employees under the Contributory Provident Fund-cum-Gratuity Scheme to exercise their options for Pension including Family Pension-cum-Gratuity. According to pleadings made in Para-2, he is still continuing to serve as a Headmaster.

5. We may notice here at this stage itself that this Petitioner had exercised his option on 19.7.1999 in a Form described as ANNEXURE-VII to the ROPA Rules of 1998 although in Paragraph 12 of his Writ Petition, he has stated 'that your petitioner submitted option as per ROPA 96 and his pay was fixed in the revised scale of pay with effect from 1.4.96'.

6. However, it was the ROPA Rules of 1998 which was given effect to notionally from 1.1.1996. Moreover, having exercised his option on 19.7.1999, it is obvious that he did so under the ROPA Rules of 1998, because even in the School Code (4th Edition, 1999) which was produced before us, we found that the 'Contents' portion between Pages XXXII and XXXIII shows that after the ROPA Rules of 1990, the only other revision of pay and allowances that was given, was through the ROPA Rules of 1998.

7. After coming into force of the said ROPA Rules of 1998, which notionally became effective from 1.1.1996 and but which was actually given effect to from 1.4.1997, the Petitioner, Biswanath Koley, as noticed earlier, exercised his option on 19.7.1999 in terms of Para 6 and in the manner prescribed under the said Rules praying for benefits thereunder. Para 6 of the said Rules is reproduced below:

6. Option.- (1) The option under the provision of para 5 shall be exercised within one hundred and eighty days from the date of issue of this order.

(2) A teacher or a non-teaching employee of a Government Aided/Sponsored Educational Institution who was in service on the 31st December, 1995 and who did not retire on the afternoon of that day may, at his discretion, retain his existing scale of pay (as is applicable to him on the 1st January, 1996) upto the

1st January, 1997.

(3) The option once exercised shall be final.

Note 1. The aforesaid option shall not be admissible to any employee appointed to a post on or after the 1st January, 1996 for the first time in service. Such an employee shall draw pay in the revised scale of pay of the post with effect from the date of his appointment.

Note 2. The aforesaid option shall be applicable only in respect of the existing scale of the employee as on the 1st January, 1996. If the employee has got appointment to higher scale of pay with effect from any date prior to the 1st January, 1997, he may exercise option to come over to the revised scale corresponding to his existing scale (as on the 1st January, 1996) from a date not later than the date with effect from which he got appointment to the higher scale.

Note 3. An employee, who on the date of issue of this memorandum is on leave or on deputation or on foreign service, shall exercise the said option in writing so as to reach the Head of the Office/Institution within one hundred and eighty days from the date of his return from such leave or deputation or foreign service.

Note 4. An employee, who is under suspension on the date of issue of this memorandum, shall exercise the said option so as to reach the Head of Office/Institution within one hundred and eighty days from the date of his return to duty/reinstatement.

Note 5. If an employee, who was in service on the 31st December, 1995 and to whom this order applies, does not exercise option under the proviso to para 5 of this order, shall be deemed to have elected to be governed by the revised scales of pay with effect from the 1st January, 1996.

Note 6. An employee, who died on or after the 1st January, 1996 and could not exercise option within the prescribed time-limit shall be deemed to have exercised option for the revised scale of pay from the 1st January, 1996, or from such subsequent date as is considered most beneficial to him.

Note 7. The Form in which option shall be exercised has been set out in Annexure-VII.

8. In the Writ Petition, this Petitioner had stated that in spite of having opted under the said ROPA Rules, no positive steps were taken. His Option has been brought on record at running Page 40 of the Paper-book and we may notice that the same is in terms of the prescribed Form which is contained in the Compendium known as the SCHOOL CODE. At Page 1117 of Volume II of the 4th Edition, 1999 of the same, the said Form being ANNEXURE-VII (Form of Option) has been included and the same is extracted as under:

ANNEXURE VII

Form of Option

(i) I...hereby elect for the revised scale of pay of Rs...of my substantive/officiating/temporary post with effect from 1st January, 1996.

(ii) I...hereby elect to continue in the existing scale of pay of Rs...of my substantive/officiating/temporary post mentioned below till...19...and to come over to the revised scale of pay of Rs...with effect from...19....

Declaration : I hereby undertake to refund to the Government any amount which may be drawn by me in excess of what is admissible to me on account of erroneous fixation of my pay in the revised scale of pay as soon as the fact of such excess drawal comes to my notice or is brought to my notice.

Station Signature Name: Date: Designation: (Substantive/Officiating/temporary) Name of the Institution: District: Signature: Head of the Institution: Note: (1) Separate option should be exercised in respect of the scale, if pay has to be fixed on more than one scale.

(2) The option once exercised is final. The employees should opt to come under the revised scale on any day between 1st January 1996 and 1st January 1997, after reading carefully the provisions of the Memorandum No. 25-SE(B)/IM-102/98 dated 12.2.99. No changes of option shall be allowed under any circumstances.

9. The Petitioner, Biswanath Koley, apparently filled up the aforesaid Form and submitted it on 19.07.1999. This was well within the time fixed under Para-6 of the ROPA Rules, 1998 quoted above and which provided that the option should be exercised within one hundred and eighty days (i.e. 6 months) from the date of issuance of the Order. The date of publication of the ROPA Rules of 1998, was 12.02.1999 and therefore the period of 6 months would have lapsed on 12.08.1999 but he exercised his option on 19.07.1999.

10. This Petitioner had pleaded before the learned trial Judge that since the Authorities did not take any positive steps, he filed the Writ Petition wherein he prayed that the Respondents be directed to change his option. On 24th September 2004, the learned Single Judge passed the impugned Judgment disposing of W.P. No. 1307 of 2004 as indicated at the outset.

11. This Appeal arises out of WP No. 2034 of 2004, in which the Petitioner (Bithika Ghosh[Mondal]) pleaded that she was initially appointed as a Class IV Staff in Gantar B.M. High school, P.O. Gantar, District-Burdwan on 1.9.1975. The said appointment was approved by the District Inspector of Schools (S.E.) Burdwan Vide Memo No. 3363, dated 2.6.1976, and subsequently the Petitioner was appointed as a Clerk in the same school on 3.3.1981. The said appointment was approved by the District Inspector of Schools (S.E.), Burdwan vide Memo No. 1295, dated 24.3.1981. This Petitioner had pleaded that she will retire from her service on and from 31.5.2013.

12. According to her, the authorities fixed her initial pay in the revised scale, 1990 as per Memo No. 33 Edn (B) dated 7.3.1990 (i.e. as per ROPA Rules of

1990) in the substantive post with effect from 1.4.1986. Thereafter, her pay was fixed in the revised scale under Memo No. 25 SE (B) dated 12.2.1999 w.e.f. 1.1.1996 (i.e. as per ROPA Rules of 1998).

13. We find that this Petitioner also exercised her option on 31.5.1990 in the prescribed manner but under the ROPA Rules of 1990. Her option is at running page 18 (Annexure-P1) of the Paper-book showing her option to have been exercised in ANNEXURE VIII-B appended to the said ROPA Rules of 1990. The same reads as under:

ANNEXURE- VIII-B

Form of Option

[To be used by those governed by the first proviso to para 5(2) of the order]

I...have read carefully the contents of G.O. No. 33-Edn. (B) dated 7.3.1990 and I agree to abide by the terms and conditions stipulated therein and I will not apply for extension of my service on attaining the age of superannuation prescribed in para 17 of the Order.

(i) I...hereby elect for the revised scale of Rs...of my substantive/officiating/temporary post with effect from 1st January, 1986.

(ii) I?????hereby elect to continue in the existing scale of pay of Rs...of my substantive/officiating/temporary post mentioned below till...19...and to come under the revised scale of Rs...with effect from...19....

Station Signature Date: Name Designation (substantive/Officiating/Temporary Name of the Institution District Signature Head of the Institution Note: This option once exercised is final. The employees should not to come under the revised scale on any date between 1st January, 1986 and 1st January, 1990, after reading carefully the provisions of G.O. No. 33 Edn. (B) dated 7.3.1990. No change of option shall be allowed under any circumstances.

14. She has also pleaded that notwithstanding thereof, the Authorities did not take any positive action for changing her option and therefore, being aggrieved with such inaction, she filed a Writ Petition being WP No. 2034 of 2004.

In the said Writ Petition, she stated that a non-teaching staff had also filed a Writ Application before this Court and after hearing, another learned Single Judge had passed an order on 8.9.2003 in WP No. 11013 (W) of 2003 (Annexure P2 of the said Writ Petition) directing the Respondent authority to allow that Petitioner to change his option. The relevant portion of the Order is at Page 30 of the Paper-book and it reads thus:

...I find that the Petitioner has already opted for revised scale under ROPA-1990 and having given declaration in terms of Rule 17(2) thereof, she is entitled to get benefit including Dearness Allowance at per with the State Government employee.

Such being the position, in my view, Mr. Maity is quite justified in his contention that his client had no necessity to opt for switching over from contributory Provident Fund cum Gratuity in terms of the aforesaid notification. In my view, the aforesaid notification is applicable only to those teachers who had not opted for revised scale in terms of ROPA 1990 and had decided to continue upto the age of 65 years.

Such being the situation, I am of the view that there was no necessity of giving option in terms of Memo No. 96-Edn (B) dated 16.12.1991. The Petitioner is automatically entitled to get benefit in terms of Rule 17(2) of ROPA 1990.

With the above observation the writ application is disposed of.

In the facts and circumstances, there will be, however, no order as to costs.

Sd/- B. Bhattacharya-J.

(Bhaskar Bhattacharya, J)

15. On 7th January, 2005, the learned Single Judge passed the impugned Judgment disposing of W.P. No. 2034 of 2004 in the manner indicated at the outset.

16. This Appeal arises out of WP No. 1907 of 2004, in which the Petitioner (Jagabandhu Ghose) had pleaded that he was appointed as an Assistant Teacher in the Gantar B.M. High school, Gantar, Burdwan on 16.7.1970. The said appointment was approved by the District Inspector of Schools (S.E.), Burdwan as an Assistant Teacher vide Memo No. 8913, dated 15.12.1973. On the basis of his pleadings, it appears that this Petitioner retired from service on 30.11.2005.

17. According to this Petitioner, his pay was fixed in the revised scale of 1990 as per Memo No. 33 Edn. (B) dated 7.3.1990 (i.e. as per ROPA Rules of 1990) in the substantive post with effect from 1.4.1986. Thereafter his pay was again fixed in the revised scale under Memo No. 25 SE (B) dated 12.2.1999 (i.e. as per the ROPA Rules of 1998) in the substantive post with effect from 1.1.1996.

18. He also exercised his option on 31.5.1990 under Para 17(1) of ROPA Rules of 1990 vide Annexure P1 of his Writ Petition at running page 15A of the Paper Book. This option is also under ANNEXURE-VIII B, quoted above.

19. He also pleaded that some teachers had also filed a Writ Petition before this Court and he has referred to the Order of the learned single Judge passed on 8.9.2003 in WP No. 11013 (W) of 2003 referred to above. The other statements/pleadings of this Petitioner are similar to the statements/pleadings of the other two cases and therefore, it is not necessary to deal with them save and except to record that being also aggrieved by the inaction of the Respondents in not allowing him to change his option from the Contributory Provident Fund to General Provident fund including family pension and gratuity, he filed the Writ Petition which came to the registered as W.P. No. 1907 of 2004.

20. On 7th January, 2005, the learned Single Judge passed the impugned Judgment disposing of W.P. No. 1907 of 2004 in the manner indicated at the outset.

21. Learned Counsel for the State -Appellants in all the cases have vehemently submitted and contended that the Petitioners having not exercised their options in terms of the Memorandums dated 15.05.1985 and 16.12.1991 referred to above , cannot be allowed to avail the benefits either under the ROPA Rules of 1990 or under the ROPA Rules of 1998 after so many years.

22. It is the case of the learned Counsel appearing for the State Appellants that in the year 1991, i.e. on 16.12.1991, a Circular was issued by the Government under Memo No. 496 whereby and whereunder, the Joint Secretary to the Government of West Bengal, clearly gave out that the approved teaching and non-teaching employees of the aided non-Government Educational Institutions who were under the Contributory Provident Fund-cum-Gratuity Scheme could switch over to the Pension Schemes including Family Pension-cum-Gratuity Scheme with the condition that their option would have to be exercised within 90 days from the date of issuance thereof and that no further change of the option will be entertained. The said Memo reads as follows:

GOVERNMENT OF WEST BENGAL

Education Department (Budget Bench)

No. 496-Edn (B)/IM-39/91

Dated, Calcutta, the 16th December, 1991

MEMORANDUM

Sub: Change of option in terms of memo No. 136-Edn (B) dt. 15.5.85

The undersigned is directed by order of the Governor to say that after careful reconsideration of the matter the Governor has been pleased to allow, in relaxation of the provision contained in para 5(a) of the Memo No. 136-Edn (B) dt. 15.5.85 and in partial modification of the Memo No. 148-Edn (B) dt. 31.5.90, the approved teaching and non-teaching employees of aided Non-Govt. Educational Institutions who opted for Contributory Provident Fund-cum-Gratuity, to exercise revised option for Pension including Family Pension-cum-Gratuity, subject to the condition that employer's share of contribution together with interest and additional interest shall be refunded to the Government forthwith.

2. The revised option as per this memo, will have to be exercised within 90 days from the date of issue of this memo. The fresh option so exercised shall be final and no further change of option will be allowed.

3. This order issues with the concurrence of Finance Department vide their U.O. No. Group J (Pen.)-825 dt. 31.10.91.

4. All concerned are being informed accordingly.

Sd/-H.P. Mukhopadhyay

Joint Secretary to the Government of West Bengal

23. According to the learned State Counsel, none of the Petitioners had exercised their options in terms of the aforementioned Memo within the 'cut-off date' prescribed therein. The Appellants have contended that since the Petitioners did not opt in terms of this Memo, which, according to them, was the last opportunity given, they cannot be given an extension of that privilege by a judicial Order.

24. They have also submitted that the learned Single Judge, having once recorded that 'admittedly' the Petitioners had not exercised their options in terms of the said Memorandum, it was not at all proper on his part to have then proceeded to grant relief to them by holding that they were 'automatically' entitled to the benefits under the relevant ROPA Rules. They have also submitted that such an Order of the learned Single Judge, if allowed to stand, would open floodgates.

25. We are not at all impressed with the arguments of the learned Counsel appearing for the Appellants. We have carefully perused the Judgments of the learned Single Judge and we are of the opinion that the learned Judge was correct when he came to the conclusion that, in the facts of these cases, the Petitioners having exercised their options under the relevant ROPA Rules, they were entitled to the benefits thereunder upon refund of the employers' contribution together with interest at the rate prescribed by the Government. We say so because the Petitioners were all in service when the relevant ROPA Rules of 1990 came into force enabling persons like the Petitioners to act in terms of either Para 17 of the ROPA Rules of 1990 or Para 5/6 of the ROPA Rules of 1998. We have noticed that in all these cases, the Petitioners/Respondents filled up and exercised their options in the manner prescribed under the relevant ROPA Rules and therefore, even if they had not acted in terms of the earlier Memorandums, they would still be deemed to have become entitled to the benefits as envisaged under the relevant ROPA Rules under which they applied respectively.

26. The ROPA Rules of 1990 was published on the basis of Memorandum dated 7th March, 1990 under Memo No. 33-Edn (B). Under Para-5 of these Rules, and as is evident from the said Para-5 quoted above, it is clearly laid down that a teacher or non-teaching employee who had not reached the age of superannuation, as prescribed in Para 17 on the day of issuance of the said ROPA Rules of 1990 (i.e. 07.03.1990), and who had not attained the age of superannuation as prescribed in Para 17 thereof, could, within 90 days from the date of the issuance of the said Order (i.e. 07.03.1990), come over to the revised scale of pay together with the terms and conditions as may be revised and determined by the Government and on coming over to the revised scale of pay, such teacher shall retire on attaining the age of superannuation as prescribed in Para 17 (i.e. 60 Years).

Therefore, the learned Single Judge, was right in holding that the Petitioners became 'automatically entitled' to get the benefits under the relevant ROPA Rules.

For the sake of convenience, both Paras 17 of the ROPA Rules of 1990 as well as Para 5 of the ROPA Rules 1998 are reproduced below.

Paras 17 of the ROPA Rules of 1990 reads as follows:

17. Age of Superannuation and related issues.- (1) Subject to the provisions of para 5, the age of superannuation of all categories of teaching and non-teaching employees who elect to come over to revised scales of pay shall be fixed at 60 years, as per recommendation of the 3rd Pay Commission.

(2) The teaching and non-teaching employees of an aided/sponsored educational institution or organisation who will opt for the revised scales of pay shall be allowed to enjoy pensionary benefits including dearness relief at par with State Government employees. Maximum amount to gratuity shall be raised from Rs. 36,000/- to Rs. 60,000/-. Orders in this respect will follow.

Para 5 of the ROPA Rules 1998 reads as follows:

5. Option- (1) the Option under the proviso to para 4 shall be exercised within 90 days from the date of issue of this order.

(2) A teacher or a non-teaching employee of a Government Aided/Sponsored educational institution who was in service on the 31st December, 1985 may, at his discretion, retain his existing scale of pay and existing terms and conditions of service:

Provided that such a teacher or a non-teaching employee who has not attained the age of superannuation, as prescribed in para 17, on the date of issue of this order and who will not attain the age of superannuation, as prescribed in para 17, within 90 days from the date of issue of this order may come over to the revised scale of pay together with the revised terms and conditions of service as may be determined by the Government, with effect from such date as he may choose in terms of the proviso to para 4, by exercising option in this regard in the appropriate form within 90 days from the date of issue of this order. On coming over to the revised scale of pay, such a teacher or a non-teaching employee shall retire on attaining the age of superannuation as prescribed in para 17:

Provided also that a teacher or a non-teaching employee who even after attaining the age of superannuation as prescribed in para 17, continued or is continuing in service on the basis of Government Order No. 81-Edn. (B) dated the 31st March, 1986 or a teaching or a non-teaching employee who will attain the age of superannuation, as prescribed in para 17, within 90 days from the date of issue of this order may come over to the revised scale of pay together with the revised terms and conditions of service as may be determined by the

Government, with effect from such date as he may choose in terms of the proviso to para 4, by exercising option in this regard in the appropriate form within 90 days from the date of issue of this order if and only if he has already retired or agrees to retire on the date on which he exercises such option or as the case may be, on the date on which he will attain the age of superannuation, as prescribed in para 17.

Note: 1. The aforesaid option shall not be admissible to any employee appointed to a post on or after the 1st January, 1986 for the first time in service. Such an employee shall draw pay in the revised scale of pay of the post with effect from the date of his appointment.

Note: 2. The aforesaid option shall be applicable only in respect of the existing scale of the employee as on the 1st January, 1986. If the employee has got appointment to a higher scale of pay with effect from any date prior to the 1st January, 1990, he may exercise option to come over to the revised scale corresponding to his existing scale (as on the 1st January, 1986) from a date not later than the date with effect from which he got appointment to the higher scale.

Note: 3. The forms in which option shall be exercised have been set out in Annexures VIIIA, VIIIB and VIIC.

27. The learned Single Judge was therefore correct when he held that the Petitioners were entitled to get pensionary benefits including Dearness allowance at par with State Government employees.

28. The learned Single Judge, after considering all the aspects involved in the cases including the fact that other persons had been given the benefits of exercising their options, finally came to the conclusion, in Biswanath Koley's case and correctly so, that having opted under the ROPA Rules, it was not necessary for the Petitioner to exercise his option under the 1991 Memorandum referred to above as the same was applicable only to those teachers who had not opted under the ROPA Rules and for those who had opted to continue to serve up to 65 years of age. We uphold this view and make it applicable in the other two Appeals also.

29. The learned Counsel for the Appellants have referred to an unreported Judgment of this Court passed in MAT 1352 of 2004 (The State of West Bengal and Ors. v. Madan Mohan Ghosh and Ors.) in support of their contention that the Petitioners/Respondents having not availed of the opportunity even after the issuance of the Circular dated 16.12.1991, cannot be allowed to subsequently turn around and take benefit under ROPA Rules. We have no hesitation in rejecting the aforesaid contention for the reason that in each of these cases at hand, the Petitioners were in service on the day when the relevant ROPA Rules came into existence which did not take away the rights of anyone to exercise their options provided that such option was exercised within time and with an undertaking that the optics would refund the excess, if any drawn by him and would retire at the age of 60 years.

In the instant case, the learned Counsel appearing for the Petitioners/ Respondents has repeatedly asserted and has stated that each of the Petitioners, after exercising their options under relevant ROPA Rules, would retire on attaining the age of 60 years.

It is only the Petitioner of APO 452 of 2006 (Jagabandhu Ghose) who retired on 30.11.2005 but in his case also, the ROPA Rules of 1990 had been published on 07.03.1990 and he had also exercised his option within the prescribed time and before his retirement. According to Mr. S.S. Arefin, learned Counsel for the Petitioners/Respondents, the other two Petitioners are still in service.

30. For the foregoing reasons, we answer the questions framed at the outset by holding that notwithstanding the Petitioners not having opted under the Government Memorandums dated 15.05.1985 and 16.12.1991, they cannot be deprived of the benefits accruing to them under the relevant ROPA Rules, if they had chosen to exercise their options under those Rules.

31. For the aforementioned reasons we are of the view that no interference is called for with the Judgments under Appeal. We accordingly uphold the judgments of the learned Single Judge, allow the Writ Petitions and dismiss these Appeals but, in the facts and circumstances, there shall be no order as to costs.

Upon appropriate Application(s) being made, urgent Xeroxed Certified copy of this Order, may be given/issued expeditiously subject to usual terms and conditions.

S.S. Nijjar, C.J.

32. I agree.