

(2016) 06 CAL CK 0013

In the Calcutta High Court

Case No : R.V.W. No. 68 of 2016 with CAN No. 2663 of 2016 and CAN No. 2667 of 2016 arising out of M.A.T. No. 1598 of 2015

State of West Bengal

APPELLANT

Vs

Smt. Jharna Bhattacharya

RESPONDENT

Date of Decision : 28-06-2016

Acts Referred:

Citation : (2016) 4 CalHCN 515

Hon'ble Judges : Girish Chandra Gupta and Asha Arora, JJ.

Bench : Division Bench

Advocate : Mr. L.K. Gupta, Additional Advocate-General and Ms. Chaitali Bhattacharya, Advocate, for the Applicant; Mr. Subir Sanyal, Mr. Saktipada Jana, Mr. Subhrangsu Panda and Ms. Ujani Pal (Samanta), Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Girish Chandra Gupta, J.—After hearing learned advocates for both the parties and the case stated in the section 5 application, we have condoned the delay in filing the review application and have taken up the review application for hearing. Accordingly, CAN No.2663 of 2016 is allowed.

2. The application for review has been filed by the State of West Bengal. The order sought to be reviewed was passed on December 9, 2015 in MAT No.1598 of 2015. It was an appeal preferred by the State which was disposed of after hearing the learned advocates appearing for both sides.

3. The operative part of the order dated December 9, 2015 in MAT No.1598 of 2015 sought to be reviewed is as follows :-

"In the case before us the teacher concerned died on 15th October, 2005. It is not in dispute that he had opted for revised pay under ROPA 1999. It is also not in dispute that by virtue of his opting for revised pay under ROPA 1999 he automatically became entitled to pensionary benefit."

4. Mr. Gupta, learned Additional Advocate-General appearing in support of the review application, submitted that the learned advocate, who appeared for the State at the hearing of the appeal, was under a misapprehension as regards the meaning and purport of the judgment of the larger Bench of this court in the case of District Inspector of Schools (SE), Kolkata v. Abhijit Baidya reported in 2013(3) CHN (Cal) 711. That was a judgment by which a large number of appeals were disposed of.

The following questions of law were formulated for decision :-

"Considering various issues involved in the matters, we framed the following questions for our determination :

i) Whether a person who has opted for revised pay scale under ROPA, 1990 becomes entitled to pension by virtue of operation of para 17 of ROPA 1990?

ii) Whether an incumbent who has exercised an option under ROPA 1990 can still be conditioned to the rider of option to be exercised under W. Ben. Recognised Non-Government Educational Institution Employees DCRB Scheme, 1981, particularly in view of the amendment effected in paragraph 17(2) vide G.O. 226-SE(B)/1M-102/98, dated 16th May, 2007 and whether the amendment made in paragraph 17(2) can be said to be valid law; that too with retrospective effect?

iii) Whether para 13 of Revision of Pay and Allowance Rules 1998, as amended by Notification dated 13th July, 1999 relating to the employees of W. Ben. Recognised Non-Government Aided Institutions can be said to be valid in law?

iv) Whether after amending the para 13 of ROPA 1998 on 13.07.1999 and para 17 of ROPA 1990 in 2007, it was necessary to give fresh opportunity to employees to revise option under W. Ben. Recognised Non-Government Education institution Employees (Death-cum-Retirement Benefit) Scheme, 1981?

v) Whether the time-limit fixed under the DCRB Scheme, 1981 to submit option can be extended in suitable cases?"

The aforesaid questions were answered in the said judgment as follows :-

"1) An employee who has opted for revised pay scale under ROPA, 1990 becomes entitled to pension and gratuity by virtue of operation of para 17 of ROPA 1990. It was not necessary for him to exercise fresh option as per Memo dated 16th December, 1991, which was applicable to employees who had not opted for ROPA 1990. Benefit of Pension-cum-Gratuity was conferred due to acceptance of reduced for age of superannuation of 60 years under para 17(1) of ROPA 1990 and his right for Pension-cum-Gratuity so accrued could not have been taken away retrospectively by substitution of the provisions of para 17 in 2007 or by substitution of para 13 of ROPA 1998 in 1999.

2) Once option has been exercised under ROPA 1990, a person cannot be subjected to the rider of the option exercised under the DCRB Scheme, 1981 as the invitation of the option under the said Scheme was with respect to the

employees who elected to continue in service till the age of 65 years and to have the benefit of the old scheme. For such employees, opportunity was given to submit fresh options as per Memo dated 16th December, 1991. The amendment made in para 17(2) of ROPA 1990 on May 16, 2007 cannot be said to be valid piece of law as such provisions cannot be substituted with retrospective effect to take away the rights already accrued to an employee. So as to validate provisions of para 17(2) of ROPA 1990, as substituted, it was necessary to invite option for switching over to Pension-cum-Gratuity from CPF-cum-Gratuity when the substitution of para 17(2) of ROPA 1990 was made on 16th May, 2007 with retrospective effect.

3) Para 13 of the ROPA 1998 as amended on 13th July, 1999 cannot be said to be valid in the eye of law as it has the effect of taking away benefit conferred by para 17(2) of ROPA 1990, as the ROPA 1998 was made applicable to the employees who had opted for ROPA 1990 and the benefit conferred could not have been taken away by substitution of provisions contained in para 13 of ROPA 1998. It was clearly arbitrary and an unreasonable exercise of power and to treat it as valid and legal, it was necessary to invite fresh option under the DCRB Scheme, 1981 for switching over to Pension-cum-Gratuity as the provisions had been amended drastically which could not operate to the prejudice of the employees in whose favour right to claim Pension-cum-Gratuity had accrued. The substituted provisions of para 13 of ROPA 1998 fail to qualify Wednesbury principles of reasonableness. The action was in utter violation of fair play and justice.

4) In our opinion, after substitution of para 13 of ROPA 1998 on 13th July, 1999 and para 17 of ROPA 1990 on 16th May, 2007, in order to save the provisions from the vice of arbitrariness, it was necessary to give an opportunity to the employees to submit fresh option under DCRB Scheme, 1981. As the option exercised earlier in terms of the DCRB Scheme, 1981 was made applicable, it was necessary to give fresh opportunity to exercise an option for switching over to Pension-cum-Gratuity and the State could not have acted to the detriment of the employees opting for ROPA 1990 who chose the rider of reduced age of superannuation i.e. 60 years under para 17(1) of ROPA 1990.

5) In our opinion, as there was drastic change of provisions of para 17(2) of ROPA 1990 made by way of substitution in 2007, and ROPA 1998 also interfered with the rights conferred upon the employees under para 17(2) of ROPA 1990, all the employees who opted for ROPA 1990 ought to be given fresh opportunity to submit the option to switch over to Pension-cum-Gratuity."

5. Mr Gupta further submitted that in answering question no.4 the larger Bench was of the opinion that the State should have given an opportunity to the teacher concerned to exercise an option for switching over to pension-cum-gratuity. He also submitted that based on the aforesaid opinion of the larger Bench the State has given such opportunity and those who exercised their option the benefit of pension-cum-gratuity has been extended to them. The writ

petitioner before us did not exercise option. Therefore, she was not entitled to the benefit of pension and gratuity. He submitted that this point was inadvertently not raised by the learned advocate appearing for the State when the appeal was heard by a Bench to which one of us was a party (Gupta, J).

6. We have not been impressed by the submission advanced by Mr Gupta. The questions no.1, 2 and 3 were answered by the larger Bench against the State. In view of the answer to questions no.1, 2 and 3 the view taken by the learned trial court in WP No.25441(W) of 2014 dated January 30, 2015 appears to be quite justified, which is as follows:-

"Husband of the petitioner was a primary teacher under Paschim Medinipur District Primary School Council. Though he did not opt to come under the D.C.R.B. Scheme, 1981, but he opted for revised pay scale under ROPA, 1990 and became entitled to get the pension and gratuity as per para 17 of ROPA 1990. He died on 15th October, 2005 while in service."

7. In the appeal the Division Bench concurring with the learned trial court held as follows:

"In the case before us the teacher concerned died on 15th October, 2005. It is not in dispute that he had opted for revised pay under ROPA 1999. It is also not in dispute that by virtue of his opting for revised pay under ROPA 1999 he automatically became entitled to pensionary benefit. But it is common ground that he did not refund the fund contributed by the State. In fact the money on account of the Contributory Provident Fund continues to be held by the estate of the deceased teacher.

In that view of the matter and in tune with the Special Bench order, quoted above, the District Inspector of Schools (PE), Paschim Medinipur, being the appellant no.3, is directed to communicate the amount of money on account of contributory provident fund together with interest at the rate specified in the notification dated 13th June, 2014 which is 8.7% per annum and additional interest at the rate of 3.3% per annum, i.e. to say interest is payable at the rate of 12% per annum. Such calculation shall be submitted to the writ petitioner within two weeks from date without any further request.

It will be open to the writ petitioner to deposit the amount within three weeks from the date of receipt of such demand. In the event she does that, the authorities shall start paying family pension from the date of refund within six weeks from the date. The order under challenge is set aside."

8. The aforesaid view expressed both by the learned trial court and the Division Bench is in consonance with the answer to the questions no.1, 2 and 3 given by the larger Bench which we have quoted above.

9. Now comes the question as to whether any separate or any other interpretation is possible, in view of the answer given by the larger Bench to the fourth question. The questions and the answers have already been quoted by us

which we need not repeat. Before examining the point one has to keep at the back of his mind that by the ROPA 1990 and subsequently by the ROPA 1998 it was stipulated that the teachers who opt to accept revised scale of pay shall automatically become entitled to the pension and gratuity benefits. This benefit of pension and gratuity was in consideration of the concerned teacher agreeing to have the age of superannuation reduced from 65 to 60 years. To put it differently, a teacher who agreed to retire at the age of 60 only he was given the benefit of the pension and gratuity. Admittedly, the husband of the petitioner had agreed to retire at the age of 60. Therefore, the consideration for the benefit of gratuity and pension was duly paid by him. Can it be said any longer that the pension and gratuity is payable only upon exercise of any further option? The detriment which he was to suffer for the purpose of getting the pension and gratuity had already been suffered by him by agreeing to retire at the age of 60. The entitlement thereafter could not have depended upon any further exercise of option.

10. The submission of Mr Gupta cannot, in any event, be accepted, because if the intention of the larger Bench was that a further option pursuant to the order was required to give the benefit of the pension and gratuity, then the question arises who are the teachers who could exercise the option? Answer is that it is only those teachers who could exercise the option who are yet to attain the age of 60. Those who already attained the age of 60 prior to the order of the larger Bench have already retired. The question of any further exercise of option by them cannot arise. Therefore, the submission of Mr Gupta leads to absurd results.

11. A person who has already retired at the age of 60 hoping that he shall get pension and gratuity, can he now be said that he cannot get the benefit because he did not exercise the option? The State took the benefit of the early retirement of the teacher and now is seeking to deny the benefit of pension and gratuity. The husband of the writ petitioner died in 2005 long before the judgment of the larger Bench. Therefore, the question of denying the pension and gratuity to the widow does not arise.

12. For the aforesaid reasons, the review application fails and is dismissed. The stay application - CAN No.2667 filed by the State - is also dismissed. Parties shall, however, bear their own costs.

13. Certified photostat copy of this judgment, if applied for, shall be given to the parties.