
(2010) 11 AHC CK 0307

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No's. 43208 and 43209 of 2009

Suresh Chandra Sharma

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 16-11-2010

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2011) 1 ADJ 169 : (2011) 2 AWC 2096

Hon'ble Judges : Yatindra Singh, J;Arun Tandon, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Arun Tandon, J.—Learned Single Judge vide order dated 20.8.2009 has referred the following questions of law, to a Larger Bench of this Court, in view of the doubts expressed qua the legal position as stated by another learned Single Judge in his judgment dated 30.1.2009, passed in the case of Roop Chandra v. State of U.P. and Ors. Writ Petition No. 52720 of 2007.

(a) Whether the Government Order dated 19th April, 2006, as explained by the Government Order dated 23rd November, 2007, is valid and being prospective in nature will have no application to the employees who retired prior to the date of issuance of the Government Order.

(b) Whether an employee, who had opted for retiring at the age of 60 years, like the Petitioner, without availing the benefit of gratuity, can now be permitted to turn around and claim gratuity after his retirement in view of the Government Order dated 19th April, 2006.

2. Under order of the Hon'ble The Chief Justice dated 4.9.2009 this Bench has been constituted for answering the reference so made.

3. Before advertng to the legal issues involved, it would be worthwhile to refer to the facts, giving rise to the proceedings, in short.

4. Petitioner of Writ Petition No. 43208 of 2008 was employed as Head Clerk, in Bhagirathi Arya Kanya Inter College, Lalkurti, District Meerut. After attaining the age of 60 years, he retired from service on 31.8.2005. Similarly, Petitioner of Writ Petition No. 43209 of 2009 was employed as Head Clerk in Sri Mahaveer Shiksha Sadan Inter College, Jain Nagar, District Meerut and retired from service on 31.7.2005 after attaining the age of 60 years. In accordance with the terms and conditions applicable at the time of their retirement, Petitioners were sanctioned post retiral benefits, which did not include gratuity.

5. At the relevant time a Class-III employee had the option to seek retirement at the age of 58 years with pensionary benefits including payment of gratuity or to retire at the age of 60 years with pensionary benefits without gratuity. It is admitted on record that the Petitioner did not opt for retiring at the age of 58 years. Petitioner in fact retired at the age of 60 years. He has been paid is retiral dues, which did not include gratuity in terms of the provisions application and there is no dispute in that regard.

6. The State Government by means of Government Order dated 19th April, 2006 took a decision to withdraw the facility of option which was earlier provided to the employees qua retirement at the age of 58 years with the gratuity, or for retiring at the age of 60 years without gratuity. It is now provided that all Class-III employees shall retire at the age of 60 years with the benefit of gratuity. The position whereof has further been clarified vide Government Order dated 23.11.2007, providing that the said benefit shall be available only to the Class-III employees who retire on or after 19.4.2006.

7. On the strength of the Government Order so issued, the Petitioner, set up a claim for payment of gratuity, as has been provided to the employees retiring subsequent to April, 2006 and in support thereof he placed reliance upon the judgment of the learned Single Judge in the case of Roop Chandra v. State of U.P. and Ors., passed in Writ Petition No. 52720 of 2007 decided on 30th January, 2009. In the said case the Single Judge has held that the benefit of the Government Order dated 19th April, 2006 cannot be denied to the employees who retired prior to 19.4.2006 and a mandamus has been issued directing the State Respondents to grant the benefit of the Government Order dated 19.4.2006 to the employees like the Petitioner also w.e.f. 19.4.2006.

8. The Single Judge has placed reliance upon the judgments in the cases of Shanti Devi (Smt) v. State of U.P. 2001(4) ESC 1589, Smt. Akhtari Begum v. Director of Education, Rajmuni Devi v. District Inspector of Schools, Ghazipur and Ors. 2002(1) ESC 136 , D.S. Nakara and Others Vs. Union of India (UOI), Dhanraj and Ors. v. State of Jammu and Kashmir and Ors. 1998(2)UPLBEC 1589 and Mohan Lal Sharma and etc. v. State of Rajsthan and Anr. 2004 (3) ESC 1690. /t has been held that the clause, which restricts the application of the said Government Order to the employees who retire after 19.4.2006, was arbitrary. The learned Single Judge with reference to the judgment of the Hon"ble Supreme Court in the case of Dhan Raj and Ors. v. State of Jammu and Kashmir

1998(2) UPLBEC 1525, held that pension is part and parcel of the constitutional goal of setting up a socialist State which secures to a person serving with the State after retirement, of his livelihood. To deny such a right to such a person, without any sound reasoning, would be against the spirit of the Constitution.

9. Similarly, reference has been made to the judgment of the Hon"ble Supreme Court in the case of Mohan Lal v. State of Rajasthan 2004(3) ESC 790 wherein denial of pensionary benefit to those who retired prior to 1.10.1987 and granting such benefit to those who retired after 1.10.1987 has been held to be discriminatory.

10. It may be recorded stated that in the judgment of the learned Single Judge heavy reliance has been placed upon the judgment of the Supreme Court in the case of D.S. Nakara and Others Vs. Union of India (UOI), However, it has been held that such benefit would only become available from the date of notification.

11. In the reference order the other Single Judge had expressed doubts upon the legal proposition as laid down in the aforesaid judgment. It has been observed that the Government Order dated 19th April, 2006 was prospective in nature and will not apply to a person who had retired prior to the said date. The retiral benefits have to be determined in accordance with the retiral scheme, which was applicable on the date a particular employee retires.

12. In order to have a broader view in the matter, this Court required the Standing Counsel to produce the relevant Government Orders which regulate the payment of retiral benefits to the employees of aided and recognized Intermediate Colleges.

13. A supplementary counter-affidavit has been filed on behalf of the State authorities. Government Orders dated 6.10.1990, 17.2.1999 as well as Gratuity Niyamawali Rajagya dated 29.8.1981 have been brought on record. It has further been stated that the Government Order issued on 19th April, 2006 and 23rd November, 2007 have not been given retrospective effect and since the Petitioner had retired at the age of 60 years prior to 19.4.2006, he was and is being paid his retiral dues in accordance with the option exercised by him, which contained a specific stipulation that he will not be entitled to the payment of gratuity. Petitioner cannot be permitted to turn around now and claim payment of gratuity in terms of the subsequent Government Order dated 19th April, 2006 and 23rd November, 2007.

14. We have heard learned Counsel for the parties and have gone through the records of the writ petition.

15. The age of retirement of Class-III employees was 60 years. The State Government vide Government Order dated 23rd November, 1994, considering the demand of the employees of aided and recognized institutions for payment of gratuity, resolved that like in the case of teachers of recognized institutions, if a ministerial employee of Intermediate Colleges opts for retiring at the age of 58

years, then he would be entitled for payment of gratuity alongwith other retiral dues as per the new scheme. For the purpose the employee had to submit an option form. A condition was imposed that such option form must be submitted within 90 days of the issuance of the Government Order, failing which it shall be presumed that the employee concerned is not willing to opt for the facility so made available. Earlier Government Orders issued on the subject are not necessary to be referred. Reference may also be made to the Government Order dated 17.2.1999 which provided an opportunity to change the option, if any, earlier , exercised.

16. The employees, who did not opt for retiring at the age of 58 years, continued till the age of 60 years and were entitled for determination of pension and other retiral benefits accordingly, except gratuity.

17. It is not in dispute that the Petitioner at the relevant time did not opt for retiring at the age of 58 years. As a consequence thereto he continued in service up to 60 years and retired thereafter During his service period, after he had attained the age of 58 years, he was granted annual increment and other monetary benefits as applicable. It is further not in dispute that the pension of the Petitioner has also been determined after taking into consideration the last pay drawn and the period of service rendered between the age of 58 years to 60 years. The Petitioner accepted the benefits so conferred upon him with open eyes without protest.

18. It is not in dispute that under Government Order dated 19th April, 2006, the provision for retiring at the age of 58 years has been withdrawn and all ministerial staff of recognized Intermediate Colleges are to retire at the age of 60 years. Under the said Government Order dated 19th April, 2006, as clarified under Government Order dated 23.11.2007, the employees retiring on or after 19.4.2006 are to be provided gratuity alongwith other retiral benefits. These Government Orders are prospective in nature and have no application qua the employees who had retired prior to 19.4.2006.

19. The Hon''ble Supreme Court in the case of Krishena Kumar and Others Vs. Union of India and others, after taking into consideration the judgment in the case of D.S. Nakara (supra), in Para 30 has held as follows:

But in Nakara it was never required to be decided that all the retirees formed a class and no further classification was permissible.

20. In paragraph 31 of the same judgment it has been held that the rights of an employee crystallize on the date of retirement qua receipt of the retiral benefits. Paragraph 31 reads as follows:

31. The next argument of the Petitioners is that the option given to the P.F. employees to switch over to the pension scheme with effect from a specified cut-off date is bad as violative of Article 14 of the Constitution for the same reasons for which in Nakara the notification were read down. We have extracted the 12th

option letter. This argument is fallacious in view of the fact that while in case of pension retirees who are alive the Government has a continuing obligation and if one is affected by dearness the others may also be similarly affected. In case of P.F. retirees each one's rights having finally crystallised on the date of retirement and receipt of P.F. benefits and there being no continuing obligation thereafter they could not be treated at par with the living pensioners. How the corpus after retirement of a P.F. retiree was affected or benefited by prices and interest rise was not kept any track of by the Railways. It appears in each of the cases of option the specified date bore a definite nexus to the objects sought to be achieved by giving of the option. Option once exercised was told to have been final. Options were exercisable vice versa. It is clarified by Mr. Kapil Sibal that the specified date has been fixed in relation to the reason for giving the option and only the employees who retired after the specified date and before and after the date of notification were made eligible. This submission appears to have been substantiated by what has been stated by the successive Pay Commission. It would also appear that corresponding concomitant benefits were also granted to the Provident Fund holders. There was, therefore, no discrimination and the question of striking down or reading down Cl. 3.1 of the 12th option does not arise.

21. In paragraph 32 it has been held that the employees had the option for switching over from one Pension Scheme to the other P.F. Scheme and vice versa, which was not availed of. In paragraph 35 it was recorded that Pension Scheme and P.F. Scheme are structurally different. Thereafter the Hon'ble Supreme Court of India proceeded to hold that there is no discrimination practiced in respect of monetary benefits paid to the employees who opted for two different schemes of retirement and Article 14 will have no application.

22. This Court finds that the reasoning of the aforesaid judgment of the Supreme Court of India applies with full force in the facts of the case. The Petitioner had availed the benefits flowing from his continuance till the age of 60 years and, having availed the said benefits, he cannot now be permitted to turn around and contend that the benefit of gratuity, which have been made applicable to the employees who opted for retiring at the age of 58 years at the relevant time, should also be provided to the Petitioner. Such a plea would amount to conferment of extra benefit upon the persons like the Petitioner, who have availed the option of continuing till the age of 60 years vis-a-vis a similarly situated employee, who opted for retirement at the age of 58 years with gratuity. Such plea, if accepted, would in fact lead to a situation where an arbitrary and discriminatory situation would result qua an employee who was asked to retire at the age of 58 years for availing the benefit of gratuity. The Petitioner had opted for retirement at the age of 60 years with open eyes being fully aware that he would not be entitled for gratuity after retirement.

23. We may also take note of the judgment of the Hon'ble Supreme Court in the case of In the Matter of: Hari Ram Gupta (D) Thr. L.R. Kasturi Devi Vs. The State

of Uttar Pradesh, wherein it has been held that the retiral benefits under the rules enforced subsequent to the date of retirement of the employee cannot be claimed nor the rules can be said to be discriminatory on the plea that they have been made applicable to those employees only who retire after the date of enforcement of the rules.

24. Similarly, reference may also be had to the judgment of the Hon'ble Supreme Court in the case of V. Kasturi Vs. Managing Director, State Bank of India, Bombay and Another, wherein in paragraphs 21 and 22 it has been held as follows:

21. If the person retiring is eligible for pension at the time of his retirement and if he survives till the time by subsequent amendment of the relevant pension scheme, he would become eligible to get enhanced pension or would become eligible to get more pension as per the new formula of computation of pension subsequently brought into force, he would be entitled to get the benefit of the amended pension provision from the date of such order as he would be a member of the very same class of pensioners when the additional benefit is being conferred on all of them. In such a situation the additional benefit available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to the date on which the aforesaid additional benefit was conferred on all the members of the same class of pensioners who had survived by the time the scheme granting additional benefit to these pensioners came into force. The line of decisions tracing their roots to the ratio of D.S. Nakara and Others Vs. Union of India (UOI), (supra) would cover this category of cases.

Category II:

22. However, if an employee at the time of his retirement is not eligible for earning pension and stands outside the class of pensioners, if subsequently by amendment of relevant pension Rules any beneficial umbrella of pension scheme is extended to cover a new class of pensioners and when such a subsequent scheme comes into force the erstwhile non-pensioner might have survived, then only if such extension of pension scheme to erstwhile non-pensioners is expressly made retrospective by the authorities promulgating such scheme; the erstwhile non-pensioner who has retired prior to the advent of such extended pension scheme can claim benefit of such a new extended pension scheme. If such new scheme is prospective only, old retirees non-pensioners cannot get the benefit of such a scheme even if they survive such new scheme. They will remain outside its sweep. The decisions of this Court covering such second category of cases are; Commander Head Quarter, Calcutta and others Vs. Capt. Biplabendra Chanda, and Government of Tamil Nadu and another Vs. K. Jayaraman, to which we have made a reference earlier. If the claimant for pension benefits satisfactorily brings his case within the first category of cases he would be entitled to get the additional benefits of pension computation even if he might have retired prior to enforcement of such additional beneficial provisions. But if on the other hand the case of a retired employee falls in the second category, the

fact that he retired prior to the relevant date of coming into operation of the new scheme, would disentitle him from getting such a new benefit.

25. From the judgments of the Apex Court referred to above the legal principle which follow according to us can be summarized as ;

(a) rights of an employee for pension and other retiral dues crystallize in accordance with the scheme as is applicable on the date of retirement, (b) If at the time of retirement an employee has an option to opt for one of the two retiral benefits scheme applicable, which are structurally different, he cannot at a subsequent point of time claim that he should be provided benefits which are available under other scheme, nor plea of discrimination under Article 14 can be pleaded for the purpose, (c) Statutory rules framed for granting retiral benefits to particular categories of employees from a particular date cannot be said to be arbitrary or violative of Article 14 qua the employees who had retired prior to the date on which rules were enforced, (d) If an employee is under the umbrella of a pension scheme, then any additional benefits provided to the employee within the umbrella with reference to a particular date, the employee outside the cut of date is also entitled to the additional benefits, (e) If the employee was not within the umbrella of the pension scheme, as was applicable on the date of retirement, any additional benefits provided to the person within the said umbrella or new category of persons being brought within the umbrella of pensionary benefits will not entitle an employee, who had retired earlier to claim additional benefits.

26. In the facts of the case we find that on the date of retirement the Petitioner had the choice of opting for any one of two of the differently structured pensionary schemes i.e. (a) retirement at the age of 60 years with pension (without gratuity) and (b) retirement at the age of 58 years with pension and gratuity. Petitioner opted for the second scheme, which was entirely differently structured.

27. Judged in the aforesaid legal background, we find that the Petitioner's case falls within the second category as per in paragraph 22 of the said judgment of the Apex Court in the case of V. Kasturi (supra), inasmuch as on the date of retirement the Petitioner was not within the category of persons entitled for gratuity.

28. Any subsequent scheme providing for retirement at the age of 60 years with the payment of retiral dues including gratuity, which is prospective in nature and has specifically been directed to apply to the case of employees, who retire after the date of enforcement of the scheme, cannot be made applicable qua the earlier retiree with the intervention of the Writ Court.

29. For the reasons recorded above, our answer to the question referred are as follows:

(a) That the Government Order dated 19th April, 2006, as clarified under Government Order dated 23rd November, 2007, is prospective in nature. It will

not apply to the employees, who had retired prior to the issuance of the said Government Order.

(b) if the employee had opted for retiring at the age of 60 years with specific stipulation that he will not claim to gratuity, his right stands crystallized accordingly on the date of retirement and he cannot be permitted to turn around and claim gratuity in view of the subsequent Government Order dated 19th April, 2006, which is prospective in nature.

30. It was agreed by the counsel for the parties that since no other issue is involved in these petitions, both the petitions may be finally decided in terms of the answers to the questions referred.

31. In view of the aforesaid, it is held that the Petitioners are not entitled to claim benefit of the Government Order dated 19th April, 2006. Both the writ petitions are dismissed.