

(2017) 03 AHC CK 0120

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 44835 of 2013

Usha Bunkar

APPELLANT

Vs

General officer, Commanding

RESPONDENT

Date of Decision : 01-03-2017

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 3 ADJ 730 : (2017) 4 ALLJ 43 : (2017) 121 ALR 635

Hon'ble Judges : Vivek Kumar Birla, J.

Bench : Single Bench

Advocate : Ankit Gaur, G. Gaur, R.C. Singh, Advocates, for the Petitioner;
Prashant Mathur, SC, Shakti Dhar Dubey, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Vivek Kumar Birla, J.—; Heard Sri R.C. Singh and Sri Ankit Gaur, learned counsel for the petitioner as well as Sri Shakti Dhar Dubey, learned counsel appearing for the respondents.

2. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties present petition is being decided at this stage itself.

3. Present petition has been filed for quashing of the notice of retirement dated 8.8.2013 by which the petitioner was intimated that she would be superannuating from service of the Cantonment Board on 31.8.2013 on attaining age of 60 years. A further prayer seeking direction in the nature of mandamus commanding the respondents not to interfere in peaceful working of the petitioner till the end of the academic session i.e. 30.6.2016 has also been made.

4. Facts of the case in brief are that the petitioner was appointed as Assistant Teacher in Balika Junior High School, Meerpur Cantt., Kanpur Nagar (hereinafter referred to as the institution) run by the Cantonment Board. She was appointed vide letter dated 30.7.1993 and joined on the aforesaid post on 5.8.1993. The

date of birth of the petitioner is 8.8.1953 as per high school certificate and as such claim is that the petitioner would be attaining age of superannuation on 8.8.2015 and has a right to continue till the end of academic session i.e. 30.6.2016. The institution is admittedly an institution recognised by the Basic Shiksha Parishad and to this effect a certificate of recognition was given by the Basic Shiksha Parishad, Kanpur vide letter dated 29.4.2000. It was further pointed out that the holidays as applicable in the institution made by Basic Shiksha Parishad are applicable in the institution, in support whereof notice of leave dated 28.7.2006 and 17.3.2007 have been placed on record. A copy of the pay slip has also been annexed to indicate that the petitioner is also receiving her regular salary as payable to the Teachers working with the Statement Government. Since vide letter dated 2.6.2009 the Basic Shiksha Parishad, U.P. had enhanced the age of Teachers working in Primary Schools from 60 years to 62 years and that the Teacher, who are due to retire in the middle of the session, will be permitted to continue till the end of academic session, therefore, the impugned notice of retirement is liable to be terminated and is liable to be quashed and the petitioner is entitled to continue upto the age of 62 years.

5. Learned counsel for the petitioner has relied various judgments of Hon''ble Apex Court as well as of this Court. He has relied on judgments in the cases of Triloki Nath Saxena v. Rookee's High School, Bareilly and others 1997 AWC (Supp.) 422; Brahma Dayal Mehta v. Senior Personnel Executive, Indian Drugs 1990 (2) AWC 1121; Shilendra Kumar Srivastava and another v. District Inspector of Schools, Chandauli and others 2013(2) ESC 1016; Shyam Lal and another v. State of U.P. and others 2011 (3) ADJ 640; and State of U.P. v. Dayanand Chakrawarty and others (2013) 7 SCC 595.

6. A counter affidavit has been filed disputing the claim of the petitioner and per contra, Sri Dubey submitted that the letter of appointment clearly indicates that services of the petitioner will be governed under the Cantonment Fund Servants Rules, 1937 (hereinafter referred to as the CFS Rules) and therefore the provisions of Basic Shiksha Parishad Adhiniyam and the rules framed thereunder are applicable. Specific attention was drawn to paragraphs 3, 10, 14, 19 and 20 of the counter affidavit to assert that the CFS Rules are applicable to the present case and Rule 22 of the CFS Rules, which provides for 58 years (now 60 years as per directions issued by the Central Government in the year 1988) the retirement notice was correctly issued and therefore, the provisions of Basic Shiksha Parishad Adhiniyam and Rules framed thereunder are not applicable in the present case, where the service conditions are governed by the provisions of CFS Rules. It was next submitted that in any case the General Law i.e. Basic Shiksha Parishad Adhiniyam will not apply as the service conditions are governed by Special Act i.e. the Cantonment Act and the Rules framed thereunder i.e. Cantonment Act 1924 and the CFS Rules framed under Section 280 of the Cantonment Act 1924 and therefore, they being the Special Rules framed under the Special Act would prevail over the General Rules and that the Cantonment Act being the pre-Constitution of India Act shall prevail in the present case.

7. Learned counsel for the respondents has placed reliance on judgments rendered in the cases of *Devi Prasad Khare v. Cantonment Board, Jhansi and others* 1992 ALJ 964; *Taramati Nandkishore Sharma v. Cantonment Board Laws (MPH)* 1994 (9) 53; *Krishi Upaj Mandi Samiti, Narsinghpur v. Shiv Shakti Khansari Udyog and others* (2012) 9 SCC 368; *Rahela Universal Limited v. NRC Limited and others* (2012) 4 SCC 148; and *Offshore Holdings Private Limited v. Bangalore Development Authority and others* (2011) 3 SCC 139 in support of his arguments.

8. I have considered the rival submissions and have perused the record.

9. Undisputedly, the petitioner was appointed vide letter dated 30.7.1993, which clearly provides that her services will be governed under the CFS Rules. However, it is also not in dispute that recognition was given to the Institution subsequently by the District Basic Education Officer, Kanpur to the institution in question vide letter dated 29.4.2000, which is Annexure-4 to the writ petition. The aforesaid recognition clearly provides that the Management shall comply with the directions issued from time to time by the authority concerned under the Basic Shiksha Parishad Adhiniyam and the Rules framed thereunder. It further provided that the same pay scale etc. shall be given to the teaching and non-teaching staff to the institution as payable to the employees of Basic Shiksha Parishad. It is also not in dispute that the holidays of the institution are also governed by the instructions of the Basic Shiksha Parishad and the petitioner is getting pay as applicable to the teaching staff of the Basic Shiksha Parishad. Admittedly, recognition of the institution is still in existence.

10. It is pertinent to note that the appointment of the petitioner is of the year 1993 when the institution was not recognised by the Basic Shiksha Parishad, however, while taking recognition in the year 2000 the institution has consented to the conditions imposed by the Basic Shiksha Parishad and therefore, unless proved otherwise, for which the burden lies heavily on the respondents, all such directions, instructions and amendments in service conditions as applicable in the case of Basic Shiksh Parishad or its aided school shall apply in the present case also. It is also not in dispute that the age of retirement has been enhanced from 60 years to 62 years by the Statement Government in case of Basic Shiksha Parishad schools and the recognised aided schools. It is not in dispute that the recognition of the institution is continuing in the present case.

11. Though large number of cases have been referred by learned counsel for both the parties, however, in so far as the case of *Triloki Nath Saxena (supra)* is concerned, the same directly relates to an institution maintained by the Cantonment Board but recognised under the provisions of the Intermediate Education Act, 1921 and the dispute was also regarding the age of retirement, which at the time of decision of the aforesaid case was 58 years as per CFS Rules and 60 years as per the Intermediate Education Act. After going through the provisions of 16-G and 16-H it was clearly held that the petitioner was eligible and entitled to continue till the age of 60 years being the age of superannuation,

namely, till 31 July as provided under Regulation 21, Chapter III of the Regulations framed under the Intermediate Education Act, 1921. Undisputedly, this age of 60 years is now 62 years.

12. In the case of Brahma Dayal Mehta (supra) the Hon'ble Division Bench of this Court after having extensively gone through the provisions of Section 16-G and Section 16-H of the Intermediate Education Act, 1921 and the definition of local authority held that the school run by the Indian Drugs and Pharmaceutical Limited (IDPL) will not be considered to be maintained by the Central Government for the purpose of Section 16-H, therefore the petitioner was found to be entitled to continue till the age of 60 years in place of 58 years as applicable at that point of time.

13. In the case of Shailendra Kumar Srivastava (supra) the institution was run by the Nagar Palika known as Nagar Palika Inter College, Mughalsarai, Chandauli, which was a recognised institution under the provisions of U.P. Intermediate Education Act, 1921 after interpreting the provisions of U.P. Municipalities Act with reference to Section 16-H of the Intermediate Education Act it was held that the provisions of U.P. Intermediate Education Act and the regulations framed thereunder would prevail and simply because the appointing authority of the institution established by Nagar Palika Parishad is the Chairman/Executive Officer, the provisions of Intermediate Education Act or the Payment of Salary Act, 1971 would not apply.

14. In the case of Shyam Lal (supra), wherein the institution was run by Municipal Board, Etah similar view has been taken by this Court after interpreting the Municipalities Act and the provisions of the Intermediate Education Act, 1921.

15. It is very much pertinent to note that the law laid down by Hon'ble Apex Court in the case of Dayanand Chakrawarty (supra), wherein also the dispute regarding the age of retirement was under consideration. In this case Local Self-Government Engineering Department (LSGED) was transferred to U.P. Jal Nigam. In paragraph 36 of the aforesaid judgment it was observed that even if it is treated that both the General Regulation 4 of the 2005 Regulations and Special Regulation 31 of the 1978 Regulations co-exist, one which is advantageous i.e. Regulation 31 shall be applicable to the members of the same service.

16. In the present case also the petitioner was appointed in the year 1993 when only CFS Rules were applicable, however with the taking of the recognition in the year 2002 with the condition that the Basic Shiksha Parishad Adhiniyam and the Rules framed thereunder shall prevail and the salary as payable to the employees of the Parishad shall be payable to such employees of the institution, having been followed by the institution, it cannot be said that the age as provided for the teaching staff of the Basic Shiksha Parishad which is a recognised institution and will not prevail in the present case.

17. In so far as the law as relied on by the learned counsel for the respondents is concerned, suffice to notice that Devi Prasad Khare (supra) is on Rule 22 (1) of

the CFS Rules and was dealing with the discretion of the commanding officer to extend service to the age of 60 years. The issue involved in the present case was not involved on the aforesaid case, which was decided in the year 1992, whereas in the present case the appointment is of the year 1993 and recognition by the educational authority is of the year 2000 and the dispute was not considered in the light of the provisions of the Act and the rules framed thereunder is thus, clearly distinguishable.

18. In so far as the judgment in the case of Taramati Nandkishore Sharma (supra) is concerned, the same is a judgment of Madhya Pradesh High Court rendered by Hon''ble Single Judge decided in the year 1994, whereas the consistent view has been taken by this Court including the Hon''ble Division Bench of this Court as well as ratio of judgment of Hon''ble Apex Court in the case of Dayanand Chakrawarty (supra), where it has been held that a provision, which is more beneficial to the employees should be interpreted in their favour and therefore, with due respect I am not inclined to subscribe the view taken by Hon''ble Single Judge of Madhya Pradesh High Court.

19. In so far as the other rulings regarding applicability of Special Law as against General Law is concerned, as to which law is prevail as relied on by the learned counsel for the respondent in the cases of Offshore Holdings Private Limited (supra); Rahela Universal Limited (supra); and Kirishi Upaj Mandi Samiti (supra) are concerned, the same are as to whether the Special Law would apply or General Law would prevail, in view of the law settled by this Court and as held by Hon''ble Apex Court in Dayanand Chakrawarty (supra) that a provision, which is more beneficial to the employees should be interpreted in their favour, I am not inclined to go into that issue. Moreso, when the Board has accepted recognition which was granted with the condition, at the cost of repetition it is noted, that the Management shall comply with the directions issued from time to time by the authority concerned under the Basic Shiksha Parishad Adhiniyam and the Rules framed thereunder. It further provided that the same pay scale etc. shall be given to the teaching and non-teaching staff to the institution as payable to the employees of Basic Shiksha Parishad. It is also not in dispute that the holidays of the institution are also governed by the instructions of the Basic Shiksha Parishad and the petitioner is getting pay as applicable to the teaching staff of the Basic Shiksha Parishad. Admittedly, recognition of the institution is still in existence.

20. This Court has taken a consistent view in case where such institutions are maintained by the Corporations or local bodies owned by the State Government but recognised under the educational laws would govern by the provisions of the educational laws and rules or regulations framed thereunder insofar as age retirement of employees is concerned.

21. A reference may be made in this regard to few more judgments rendered by this Court in the cases of Chandrika Prasad Gupta v. State Electricity Board (2000) 38 ALR 411 (SJ); Satyawarti Verma v. U.P.S.E.B. (1998) 78 FLR 504 (All);

and Anees Kumar Hajela v. State of U.P. and others (2013) 1 All 588, taking similar views.

22. In such view of the matter, notice of retirement retiring the petitioner at the age of 60 years as per CFS Rules is not sustainable in the eyes of law and is hereby quashed. In so far as the payment of arrears of salary is concerned, in the light of observations of Hon''ble Apex Court in paragraph 49.1 in the case of Dayanand Chakrawarty (supra), which provides that the employees including the respondents, who moved before a court of law, irrespective of the fact whether interim order was passed in their favour or not, shall be entitled for full salary, it is hereby provided that the petitioner, even if no interim order was passed, but since she has approached this Court before the date of retirement, she would be entitled to entire arrears of salary up to the age of superannuation i.e. 62 years till the end of academic session as applicable under the provisions of the educational laws.

23. With the aforesaid observations, present writ petition stands allowed. No order as to costs.