

(2015) 02 BOM CK 0188
In the Bombay High Court
Case No : Writ Petition No. 1996/2000

Vinayak

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 26-02-2015

Acts Referred:

Constitution of India, 1950 — Article 141

Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961 — Section 248

Citation : (2015) 2 ABR 753 : (2015) 4 MhLj 936

Hon'ble Judges : P.R. Bora, J.;A.B. Chaudhari, J.

Bench : Division Bench

Advocate : P.B. Patil, for the Appellant; N.P. Hiwase, A.G.P, Advocates for the Respondent

Final Decision : Dismissed

Judgement

A.B. Chaudhari, J.—By the present petition, the petitioner claims declaration that his age of retirement or superannuation be declared as 60 years, with all consequential benefits.

FACTS:

2. The date of birth of the petitioner is 28.06.1940. He was appointed as Assistant Teacher by appointment order dated 05.08.1963/16.08.1963 by Chief Executive Officer, Buldana. He worked in Government High School, Khamgaon till 28.02.1999. He used to teach standards 5th to 10th as Special Teacher (Craft Teacher). Vidarbha region was the part and parcel of Madhya Pradesh and after reorganization, it became the part of the Maharashtra State. Reorganization having taken place w.e.f. 01.05.1960, the Madhya Pradesh Secondary Education Act, 1951 (hereinafter referred to as the "MP Act") was applicable in the Vidarbha region and continued to apply till 01.01.1966. The teachers serving in the secondary schools as well as middle schools in the Vidarbha region, therefore, were governed by the earlier service conditions and in particular Regulation-7 of Chapter 10 of the MP Act providing for age of superannuation as 60 years. A

person appointed to undergo probation in the term of one year would be deemed permanent upon completion of period of total two years. The petitioner, therefore, became entitled to be confirmed on 16.08.1965 since he completed two years from his initial appointment on 16.08.1963. The petitioner was obviously governed by the aforesaid provisions of the MP Act, 1951 all the more so because the Act continued to apply till 01.01.1966. The petitioner was, therefore, entitled to the said beneficial provision in the matter of age of his superannuation namely; 60 years and not 58 years. However, the petitioner was made to retire at the age of 58 years only. Despite the fact that he made representation on 01.10.1997 (Annexure C), he was denied the benefit of the Supreme Court Judgment in the case of M.G. Pandke and others Vs. Municipal Council, Hinganghat, Dist. Wardha and others, and pleaded that his age of retirement cannot be curtailed. However, he was made to retire at the age of 58 years on 30.06.1998. Hence, this writ petition.

ARGUMENTS:

3. Mr. P.B. Patil, learned counsel for the petitioner, vehemently submitted that the petitioner was admittedly governed by the provisions of the MP Act. Even on the date of his appointment namely; 05.08.1963/16.08.1963 the MP Act continued to apply till 01.01.1966. He was, therefore, clearly entitled to the benefit of Regulation-7 of Chapter 12 of the MP Act providing for the age of superannuation as 60 years. The petitioner having been continued in service for a period of two years after his initial appointment from 16.08.1963, obviously became deemed permanent and, therefore, no dispute could be raised about his permanency in service. In the case of M.G. Pandke and ors.(supra) the apex Court held that those who were governed by the provisions of the MP Act, were entitled to the age of superannuation, in which age of superannuation was 60 years and not 58 years. Mr. Patil, learned counsel for the petitioner, then contended that not only that, the State of Maharashtra issued a Government Resolution after judgment of the Supreme Court, on 27.10.1994 (Annexure "B") obeying the Supreme Court judgment by directing accordingly to fix the age of retirement of the teachers like the petitioner at 60 years. The petitioner, therefore, ought to have been given the age of retirement at 60 years and not 58 years. Continuing his submissions, Mr. Patil, further submitted that the State of Maharashtra issued another Government Resolution dated 02.02.1999 (Annexure G) and in particular its clause (4) by which, contradictory and illegal direction has been issued in respect of the teachers working under the Zilla Parishads that their retirement age would be 58 years and not 60 years. The said resolution is clearly contrary to the Supreme Court judgment as well as earlier Government Resolutions and, therefore, there is a prayer in the petition, prayer clause (c) for quashing the said Government Resolution dated 02.02.1999 which may be accepted. Finally, Mr. Patil, relied on an order dated 04.03.2005 passed by Division Bench of this Court in Civil Application No. 1243/2005 in Writ Petition No. 2002/1994 and contended that the Division Bench of this Court has also held accordingly and in view of the said order also, the petitioner is entitled to the consequential benefits

of his retirement as 60 years. In support of his contentions, Mr. Patil, learned counsel for the petitioner, cited decision in Laxmikant Gangadhar Ancharwadkar Vs. State of Maharashtra and Others, and submitted that insofar as Zilla Parishad teachers are concerned, paragraph 21 (3) of the said judgment was clarified by the Division Bench judgment of this court in Writ Petition No. 2002/1994 by its order dated 04.03.2005.

4. Per contra, Mr. Wankhede, learned counsel for the respondent no.3, supported the impugned action about the age of retirement of the petitioner.

CONSIDERATION:

5. The question involved in the present writ petition is of considerable importance. The question relates to the teachers who were appointed by the Zilla Parishads in the State of Maharashtra and claimed to be governed by the MP Act, at least till the said Act continued to apply i.e. till 01.01.1966. It is true that in the case of M.G. Pendke and ors. (supra) by judgment dated 09.09.1992, the apex Court held that the employees governed by the provisions of the MP Act and who were confirmed prior to 31.12.1965 would get retirement/superannuation at the age of 60 years and not 58 years. It is also true that pursuant to the said Supreme Court decision, the State of Maharashtra issued resolution dated 27.10.1994. The relevant paragraph of the Government Resolution dated 27.10.1994 reads thus:

"Government Resolution :

Taking into consideration the above rulings, the Govt. is now pleased to issue orders, that those (Teachers/H.Ms.) who have come to Z. P. from the ex-Janpad Sabhas of Vidarbha Region (Nagpur and Amravati Division) Middle Schools and who were confirmed prior to 31-12-1963 will be 60 years and further that such teachers/H.Ms. will be retired on the last date of the academic years of the year in which they attain the age of 60 years."

6. Reading of the above resolution shows that those who have come to Zilla Parishads from Ex-Janpad Sabhas from Vidarbha Region (Nagpur and Amravati Division) would get the age of superannuation as 60 years. In the instant case, the petitioner was, for the first time, appointed as teacher by Zilla Parishad, Buldana by appointment order dated 05.08.1963/16.08.1963. Reading of the order itself shows that the petitioner was appointed by the Chief Executive Officer, Zilla Parishad, Buldana and not by Janpad Sabha, which existed prior to coming into existence of Zilla Parishads in the State of Maharashtra. Thus, the above decision of the Government dated 27.10.1994 insofar as the petitioner is concerned, has no relevance.

7. The next Government Resolution dated 02.02.1999 was issued by the State of Maharashtra. By the said Government Resolution, the age of retirement of the Government employee so also Zilla Parishad employee was reiterated as 58 years and in clause (4) of the said Government Resolution, translation of which is

extracted below, it is clearly stated that the Government in exercise of its power under section 248 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 had ordered that the age of superannuation of Zilla Parishad would be 58 years and not 60 years.

"4. In view of powers under Section 248 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (Act No. V of year 1962) and all other powers, Government orders that the aforementioned resolution shall also be applicable to those employees of the Zilla Parishads whose age of superannuation had been increased from 58 years to 60 years."

8. We, thus, clearly find that the petitioner was at the threshold appointed as employee of the Zilla Parishad and was never an employee under the Janpad Sabha. In this background, the submission made by Mr. Patil, will have to be tested.

9. The Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 came into force w.e.f. 01.05.1962. The Maharashtra Zilla Parishads District Services Rules, 1968 were framed in the year 1968 but they were given effect from 01.05.1962 in tandem with the date of coming into force of the Act. The applicability of these Rules thus was made from the date of commencement of the Act i.e. 01.05.1962 which is not under challenge in the present petition. Even if a challenge were to be made, the same would not have been of any merit because after formation of the Zilla Parishads and the State of Maharashtra and after coming into effect of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, w.e.f. 01.05.1962, the Rules framed would follow the course i.e. the Act and, therefore, in order to streamline the provisions of the Act and the Rules, no fault could be found out with the retroactive effect given to the conditions of service rules. Besides that, as earlier held by us, the petitioner was never an employee of Janpad Sabha (Janpad Sabha existed in Vidarbha Region before formation of the Zilla Parishads) and, therefore, he was a Zilla Parishad servant governed by the provisions of the Act and the rules. The Maharashtra Zilla Parishad District Services (Recruitment) Rules, 1967 applies to the persons like the petitioner falling under the Appendix IV, in particular in item no. 4. He thus falls in the category of District Technical Service (Class III) Educational) Assistant Teachers. We quote item no. 4 as under:

As per the provisions of Rule 5 (2) of the Maharashtra Zilla Parishads District Services Rules, 1968, the age of retirement is 58 years. The petitioner being an employee, falling in the category of Item No. 4 of Appendix IV as above, is obviously the Zilla Parishad servant. Rule 5 (1) (2) reads thus:

"5. Retirement.-(1) Except as provided in sub-rule (2) the provisions of Maharashtra Civil Services Rules in relation to compulsory retirement and matters connected therewith shall mutatis mutandis apply in relation to compulsory retirement and matters connected therewith of Parishad employees as they apply in relation to matters of the services of the State Government.

(2) The age of compulsory retirement of Parishad employee in District Technical Service (Class III) and District Service (Class III) shall be raised to 58 years with effect from the 11th day of February, 1953 subject to the following conditions namely....."

10. Next, we have no hesitation in declining to accept the contentions raised by counsel for the petitioner about the applicability of the MP Act to the case of the petitioner on the ground that the MP Act continued to apply till 01.01.1966. The petitioner is under a misconception that he was governed by the provisions of the MP Act since we have already found that he was a "Parishad servant" having been appointed as such on 05.08.1963/16.08.1963 and was never appointed by Janpad Sabha. We, therefore, hold that the petitioner was not governed by the provisions of the MP Act in order to claim the age of superannuation at 60 years.

11. The next aspect is about the clarification made by Division Bench of this Court by order dated 04.03.2005 in Civil Application No. 1243/2005 in Writ Petition No. 2002/1994. We quote the entire order, which reads thus:

"Heard.

Our attention is drawn to the fact that this Court in para 21 of its judgment dated 22nd December, 2004 has held that particular categories of teachers/employees are entitled to the benefit of Regulation 7 of Chapter 12 of the Madhya Pradesh Secondary Education Act, 1951 in order to clarify whether their age of retirement will be 58 or 60 years.

In that judgment, category (3) has been specified as under:

"The teachers who are teaching in a middle school or school run by the Zilla parishad or State Government will not be entitled to the benefits of regulation 7 as for the purpose of benefit of regulation 7 of the school must be a grant-in-aid school."

It is, therefore, pointed out to us that the words "or school" need to be deleted as it would bring within its compass all secondary schools run by the Zilla Parishad whose employees are otherwise entitled to continue in service till they attain the age of 60 years. This is by making a reference to Rule 82 (1) of the Secondary School Code, which provides for an Exception, which reads as under:

"The age of compulsory retirement of a permanent teacher or Headmaster in service in a recognised non-Government Secondary School in Vidarbha, on 31.12.1965, shall be 60 years."

The learned counsel, therefore, submits that the schools run by the Zilla Parishad stand on the same footing as private institutions having grant-in-aid schools.

We accept the proposition and clarify category (3) by deleting the words "or school" after the words "middle school". Category (3) in the original judgment be read accordingly. So also in the subsequent common judgment delivered by this Court in Writ Petitions No. 2008, 2603, 3383 and 3575 of 1993 on 25th January,

2005, in which this Court has followed the categories in the original judgment relying on the same parameter set out therein and reproduced all the categories including category (3), the said category (3) requires to be corrected accordingly."

12. The above order dated 04.03.2005 shows the discussion about Division Bench judgment of this Court in the case of Laxmikant Gangadhar Ancharwadkar (supra) and in particular paragraph 21 (3) thereof. We quote the relevant portion from paragraph 21.

"21. Save and except the aforesaid three contentions, no new contentions were raised before us and therefore, we are of the opinion that regulation 7 as interpreted by various judgments of the Apex Court as well as by the Division Bench of this Court and the further clarification as given in the present judgment, the following position in law emerges.

(1) All the teachers who are in service as on 31-12-1965 and have completed more than one year of service and are continued on 31-1-1965 are deemed to be confirmed teachers and would be entitled to the benefits of the said regulation.

(2) All the teachers who are teaching in Indian English Middle School (I.E.M.) secondary schools or Indian Middle School attached to the higher secondary school would be entitled to the benefits of the said regulation. It is further clarified that even if a teacher is teaching in standard 5th to 7th but the said school is part of the secondary school or attached to secondary school then such teacher will be entitled to the benefits of such regulation no.7.

(3) The teachers who are teaching in middle school or school run by the Zilla Parishad or State Government will not be entitled to the benefits of regulation 7 as for the purpose of benefit of regulation 7 the school must be a grant-in-aid school."

It is, thus, clear from paragraph 21 (3) above that the Division Bench had clarified that the teachers teaching in the schools run by the Zilla Parishad will not be entitled to the benefit of regulation 7 namely; for providing age of superannuation as 60 years. However, in order dated 04.03.2005, the other Division Bench in Civil Application No. 1243/2005 in Writ Petition No. 2002/1994, recorded a clarification and thereby clarified as above accepting the submission of the learned counsel for the teacher that the school run by the Zilla Parishad stands on the same footing as a private school having grant-in-aid and it is after accepting the said proposition, the Division Bench made the aforesaid clarificatory order. Mr. Patil, learned counsel for the petitioner, urged this Court to grant relief to the petitioner in the light of the said clarificatory order by which this Court accepted the proposition in relation to the Zilla Parishad teachers also.

13. It is true that the above clarificatory order dated 04.03.2005 is an order made by Division Bench of this Court and in normal course upon disagreement, a reference could be recommended to the Hon"ble Chief Justice. However, upon

careful perusal of the said clarificatory order and the entire matter carefully, we find it to be per incuriam for which we record the following reasons:

Per incuriam:

In the first place, the Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961 and the Conduct Rules cited supra, in particular Rule 5 (2), provides for age of retirement of Zilla Parishad servant; whether is a teacher working in any school or employee of the Zilla Parishad; is 58 years and not 60 years. Secondly, the MP Act which continued to apply till 01.01.1966 could not be applied in respect of the Zilla Parishad servants because though the rules were framed in the year 1968, the same were given retrospective effect from 01.05.1962 i.e. from the date of commencement of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961. The Government Resolutions dated 27.10.1994 and 31.10.1998 clearly stated that the age of retirement of Zilla Parishad employees including teachers serving in any school in Zilla Parishad would be 58 years and not 60 years. However, if a Zilla Parishad teacher was appointed by Janpad Sabha, his age of retirement would be 60 years. The judgment of Supreme Court in the case of M.G. Pendke and ors. (supra) was in respect of the Municipal Teachers in respect of whom the age of retirement was sought to be brought down to 58 years by amending the bye laws when those teaches were governed by the provisions of the MP Act (Regulation-7). However, in the case of Zilla Parishad servants, that is not the case since the MP Act would not apply for the reasons given by us above and secondly the age of superannuation of Zilla Parishad servant is prescribed as 58 years and not 60 years w.e.f. 01.05.1962. All the above provisions were not brought to the notice of the court when the said clarificatory order dated 04.03.2005 was made nor any arguments were advanced or question was decided by said order.

We are, therefore, of the view that the said clarificatory order dated 04.03.2005 passed by the Division Bench of this Court, was recorded in ignorance of the terms of the statute or law and the rules having statutory force, as discussed by us above.

Our view that the said clarificatory order is per incuriam is also fortified by the judgment of the apex Court in M.P. Rural Road Development Authority and Another Vs. L.G. Chaudhary Engineers and Cont., , wherein the principle of per incuriam has been explained by the apex Court, in paragraphs 28 to 34 of judgment, which we quote hereunder:

"28. The principle of per incuriam has been very succinctly formulated by the Court of Appeal in 18 Young vs. Bristol Aeroplane Company, Limited. Lord Greene, Master of Rolls formulated the principles on the basis of which a decision can be said to have been rendered "per incuriam". The principles are: (KB p. 729)

"Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in

ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam."

29. The decision in *Young* was subsequently approved by the House of Lords in *Young vs. Bristol Aeroplane Company, Limited* at page 169 of the report. Lord Viscount Simon in the House of Lords expressed His Lordship's agreement with the views expressed by the Lord Greene, the Master of Rolls in the Court of Appeal on the principle of per incuriam (see the speech of Lord Viscount Simon in *Bristol Aeroplane Co. Ltd. case*, AC at p. 169 of the Report).

30. Those principles have been followed by the Constitution Bench of this Court in *The Bengal Immunity Company Limited vs. The State of Bihar* (See the discussion in SCR at pp. 622 and 623 of the report)

31. The same principle has been reiterated by Lord Evershed, Master of Rolls, in *Morelle Ltd. vs. Wakeling* QB 3 at p. 406. The principle has been stated as followed:

"...As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some 20 inconsistent statutory provision or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong....."

32. In the case of *State of U.P. vs. Synthetics and Chemicals Ltd.*, this Court held (SCC p. 162, para 40) the doctrine of "per incuriam" in practice means "per ignoratum" and noted that English Courts have developed this principle in relaxation of the rule of stare decisis and referred to the decision in the case of *Bristol Aeroplane Co. Ltd.* (supra). The learned Judges also made it clear that the same principle has been approved and adopted by this Court while interpreting Article 141 of the Constitution (see *Synthetics and Chemicals Ltd. case*, SCC para 41).

33. In *MCA v. Gurnam Kaur*, a three-Judge Bench of this Court explained this principle of per incuriam very elaborately in paragraph 11 at page 110 of the report and in explaining the principle of per incuriam the learned Judges held:

"11.....A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute....."

34. In paragraph 12 the learned Judges observed as follows:(*Gurnam Kaur case*, SCC p. 111)

"12.....One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be

reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."

14. To sum up, we find no merit in the present writ petition. Hence, we make the following order.

ORDER

(i) Writ Petition No. 1996/2000 is dismissed.

(ii) We hold that the petitioner, being the appointee of Zilla Parishad, Buldana and not of Janpad Sabha, was governed by the provisions of the Maharashtra Zilla Parishads District Service Rules, 1968 about retirement/superannuation and consequently was rightly superannuated at the age of 58 years and not 60 years.

Rule discharged. No order as to costs.