IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1251 OF 2012

Mrs. Veronica
Wife of Manoel Mascarenhas ..Petitioner
Versus
Our Lady of Dolours School and others ..Respondents

Mr. Rahul G. Walia for the Petitioner.
Mr. A. G. Kothari for the Respondent No.1.
Mr. Sagar Patil for the Respondent Nos.2 to 4 – MCGM.

CORAM : B. R. GAVAI &
SANDEEP K. SHINDE, JJ.
DATE : 9th OCTOBER, 2017

P.C.

1] Rule. Rule made returnable forthwith. Heard by consent.

2] The Petitioner has approached this Court for issuance of a Writ of Mandamus directing the Respondents to grant monthly pension to the Petitioner regularly and other retiral benefits with effect from the date of the retirement of the Petitioner alongwith arrears at the rate of 18% with compound interest.

3] The facts giving rise to the present Petition are as under :-

The Petitioner was working as a Assistant Teacher in the Respondent No.1 school which is duly approved as grant in aid school by the Respondent Nos.2 to 4. The Petitioner superannuated on 31st July 2000 after completing 39 years of service. The Petitioner submitted an application on 31st December 2001 in form I under the Rules of the Payment of Gratuity Act, 1972. Since there was no response, the Petitioner addressed several representations to the various authorities of the Municipal Corporation. The Petitioner therefore approached this Court by way of Writ Petition No.618 of 2007. In the said Petition, a statement was made on behalf of the Corporation that the proposal of the Petitioner along with 91 employees was pending before the Municipal Commissioner and the Municipal Commissioner would take a decision thereon. In that view of the matter, the Petition came to be disposed of by an order dated 21st June, 2007. However, subsequently a notice dated 14th January 2011 was served on the Petitioner that the Petitioner was not entitled to any pension or retirement dues. Hence, present Petition. It is the categorical assertion of the Petitioner as well as the Respondent No.1 that they have also offered to the Respondent-Corporation the contribution which the Petitioner and the other employees were liable to make towards the said pension shceme.

4] The learned counsel for the Petitioner submits that the Petitioner having given an option in pursuance to the Circular dated 31st October, 1997, could not have been denied the pensionary benefits. He therefore submits that the Petition is liable to be allowed.

5] The Respondents have contested the Petition by filing an affidavit of one Shaikh Abdul Basit, Administrative Officer in the office of Municipal Corporation. It is sought to be raised that the Petition involves disputed question of facts and as such cannot be entertained in its extraordinary jurisdiction of this Court. The another ground that is raised in the Petition is that the Respondent Corporation has issued Circular dated 7th October 1988 seeking options from the employees. It is submitted that since the employees of the Respondent No.1 school had not submitted the option, the Petitioner and the other employees of the Respondent No.1 school are not entitled to the pensionary benefit.

6] Mr. A. G. Kothari the learned counsel for the Respondent No.1 has submitted that the 1988 Circular was never received by the Respondent No.1 school and as such, there was no occasion for the employees of the Respondent No.1 school to give any option with regard to 1988 Circular. He categorically states that after 1997 Circular was received by Respondent No.1 all the employees duly submitted the option form of 1997. No doubt, that the counsel for the Corporation is submitting that there is dispute as to whether the Respondent No.1 had received Circular of 1988 inasmuch as it is assertion of the Corporation that it was not received. No doubt, normally this Court would not entertain a Petition which involves disputed questions of fact. However, the same is not hard and fast rule, but the rule of selft restraint. The Court is not precluded from even entertaining a Petition which involves disputed qustions of fact and law, if a case is made out. In any case, contention of the Respondent – Corporation that there are disputed questions of fact is totally without merit. The Corporation being a public body, is expected to argue on the basis of record available with it. The perusal of record would not show that there are disputed questions of fact.

7] Apart from that we find that the stand taken by the Corporation itself is not justifiable. It will be relevant to refer to sub clause (v) of clause 5 of the Circular dated 31st October, 1997, which reads thus :-

> "(v) The full time approved and confirmed teaching and non-teaching staff who was in service in the Private Primary Aided School in Greater Mumbai as on 31st March 1979 and retired/superannuated or will retire/ superannuate subsequently will have an option to come under this scheme. Likewise, the full time approved and confirmed teaching and non-teaching staff who were in service on 31st March 1979 and died without exercising such option, their family will also have an option to come under this scheme. The option will have to be exercised in writing in the proforma prescribed by the Municipal Commissioner within a period of six months from the date

> of approval of this scheme by Corporation. However, the Municipal Commissioner may extend this period for further 6 months in deserving cases. Option once exercised will be final. He option should be forwarded through Head of the School to Education Department of the Municipal Corporation of Greater Mumbai within three months from the last date of exercising option. The option so exercised will be registered only on receipt of Management's contribution for entire qualifying service and interest thereon as indicated below :"

It could be seen from the said Circular that the said 1997 Circular has been issued in supersession of all Circulars. The said Circular specifically provides that such members of the teaching and non-teaching staff whoever were in the service on 31st March, 1979 in the Private Primary Aided School and have retired/superannuated or will retire/superannuate subsequently will have an option to come under this scheme. Not only that but even the legal representatives of such of the employees who were on the service on 31st March 1979 are died are also entitled to take benefit of the said scheme. The option was required to be submitted within a period of six months which could have been extended by the Commissioner for further six months. It is not in dispute that the Petitioner and other employees of the Respondent No.1 school who were entitled to take part in the said scheme, have submitted their option form within the prescribed period. It is further to be noted that learned counsel for the Petitioner as well as Respondent - Mangement have categorically stated that Petitioner and other employees had specifically offered to deposit their contribution in accordance with 1997 Circular, but was not accepted by the Corporation.

8] One another factor that needs to be noted that the 1997 scheme nowhere states that unless employee has given an option under 1988 scheme, he would not be entitled to the benefits of 1997 scheme. In that view of the matter stand of the Respondent No.1 - Corporation in denying the eligibility dues of the Petitioner in our view is not justifiable.

9] It will further be relevant to refer to the following observations of their Lordships in the Apex Court in ***Dakshin Haryana Bijli Vitran Nigam and others Vs. Bachan Singh***[1] in almost similar facts.

> "8. It was pleaded by the respondent that he had no knowledge about the aforesaid instructions issued by the appellants nor were the same got noted from his and as such, he could not exercise his option for grant of pensionary benefits within the prescribed time-limit. The respondent submitted that immediately after acquiring the knowledge of the circular he exercised his option for being governed under the pension scheme on 20-12-1994. The respondent submitted that he was ready to deposit the requisite amount received by him under the EPF Scheme. The appellants did not give any response and after the retirement of the respondent calculated his pension and other retiral benefits with effect from the date of his regularisation i.e. 14-10-1981.
>
> 9. The respondent issued reminders dated 2-9-2002 and 16-4-2003, but did not receive any response from the

1 **(2009) 14 SCC 793.**

appellants. Ultimately, the respondent issued a legal notice to the appellants on 10-11-2003 calling upon the appellants to consider his pension case in the light of the instructions issued in the circulars of the appellants dated 6-8-1993 and 9-8-1994. Since no response was received by the respondent, therefore he was compelled to file a writ petition before the Punjab and Haryana High Court.

10. The appellants' main plank of argument was that the said circulars were issued twice inviting options from the desirous employees for being governed under the pension scheme. Even the said circulars were also put on the notice board and copies thereof were endorsed to the Secretary, Workers' Union, but the respondent failed to exercise his option within the time prescribed and, therefore, his case for counting work-charged services towards pensionary benefits has rightly not been considered by the appellants.

11. It was submitted by the respondent before the High Court that he was always desirous and willing to opt for the pension scheme by counting the work-charged service and he was prepared to refund the amount of employer's share with interest under the EPF Scheme.

12. The respondent further submitted that immediately after he learnt about the circulars, he exercised his option for pension scheme and in fact he has been consistently requesting the appellants to consider his case for grant of pension but the grievance of the respondent has not been redressed. The respondent was compelled to approach the Punjab and Haryana High Court.

13. The Division Bench of the Punjab and Haryana High Court, after hearing the learned counsel for the parties at length, came to the definite conclusion that the appellants had failed to produce any record showing that the instructions dated 6-8-1993 and 9-8-1994 were actually got noted in writing from the respondent. The High Court further observed that in the absence of any such material, it can well be inferred that the respondent had no knowledge about the options called by the appellants vide Circulars

> dated 6-8-1993 and 9-8-1994. The High Court also observed that it would be unreasonable to deny pensionary benefits to the respondent despite the said circulars issued by the appellants.
>
> 14. The High Court allowed the writ petition filed by the respondent and directed the appellants to permit the respondent to exercise his option in accordance with the Circulars dated 6-8-1993 and 9-8-1994 within a period of one month from the date of receipt of a certified copy of the order and thereafter give him the consequential benefits subject to his fulfilling the conditions of eligibility for being governed under the pension scheme. The appellants aggrieved by the said judgment of the Punjab and Haryana High Court have approached this Court.
>
> 15. The appellants submitted that the respondent did not comply with the instructions dated 6-8-1993 and 9-8-1994 within the prescribed period and as such was not entitled for benefits in terms of these circulars.
>
> 16. The High Court in its impugned judgment had categorically observed that the appellants had failed to produce any record showing that the instructions dated 6-8-1993 and 9-8-1994 were actually got noted in writing from the respondent. The appellants had also failed to produce such material from which it can be inferred that the respondent had any knowledge about the options called by the appellants vide instructions dated 6-8-1993 and 9-8-1994. The High Court also observed that in this view of the matter it would be unreasonable to deny pensionary benefits to the respondent and the similarly placed respondents."

10] It could thus be seen that like in the present case, in the aforesaid case before Their Lordships also, the employee therein had failed to produce any material from which it can be inferred that the employees had the knowledge about the circular under which the options were sought for. The Apex Court thereafter considered the legal position as enunciated in its earlier judgments and observed thus in paragraph 28.

> "28. In view of the law as has been articulated in a large number of cases where this Court has observed that any discriminatory action on the part of the Government would be liable to be struck down. Hence, in this case, it would be totally unreasonable and irrational to deny the respondent the pensionary benefits under the scheme particularly when the appellants have failed to produce any record showing that the instructions dated 6-8-1993 and 9-8-1994 were actually got noted in writing by the respondent. In the absence of any such material it can well be inferred that the respondent had no knowledge about the options called by the appellants."

We are therefore of the considered view that the Respondent-Corporation is totally unjustified in denying benefits of 1997 scheme to the Petitioner is totally unjustifiable.

11] In that view of the matter, Rule is made absolute by holding that the Petitioner is entitled to the pensionary benefits under the circular dated 31st October 1997.

> **I]** The Respondent shall regularly pay monthly pension to the Petitioner from the month of November 2016. All the arrears of the Petitioner to which the Petitioner is entitled from the date of superannuation would be

paid to the Petition within a period of three months from today.

II] However, the Respondent-Corporation would be entitled to adjust the amount of contribution which the Petitioner was entitled to make towards the said scheme from the arrears that the Petitioner would be entitled to get in accordance with the aforesaid order.

III] We are not inclined to award any interest in favour of the Petitioner inasmuch as contribution which the Petitioner was required to make towards the said scheme could not have been deposited may be not on the count of the fault of the Petitioner. However, in order to adjust equities, we find that the aforesaid order would serve the said purpose.

[SANDEEP K. SHINDE, J.] **[B. R. GAVAI, J.]**