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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

FMA 3807 of 2016

Gunadhar De
Vs.
The State of West Bengal and Ors.

Mr. Amal Baran Chatterjee, Sr. Advocate
Mr. Biswanath Samanta .... For the Appellant.

Mr. Pinaki Dhole
Mr. A. Prasad ... for the State.

Shortly the facts, in this appeal, are these:

The appellant was a teacher in a government-aided school from 1st January, 1965. On 1st January, 1986 he exercised his option pursuant to ROPA 1990 for a new scale of pay with effect from that date. On 19th September, 1990 he exercised the option of availing of a new revised enhanced scale of pay together with monthly pension on the condition that he had to retire after 31st January, 1999 on attaining sixty years of age.

Mr. Amal Baran Chatterjee, learned senior advocate appearing for the appellant submits that the scale of pay was enhanced and monthly pension provision was made applicable to the employee on the condition that he would retire at a particular age, forego the

S.D.

Contributory Provident Fund Scheme for pension and refund the government's contribution to it together with interest. This is for the simple reason that an employee could not be allowed to avail of the benefit of both the schemes at the same time.

On 31st January, 1999, the appellant retired from service on superannuation at the age of sixty years, effective from 1st February, 1999.

It is submitted before us that upto the time of retirement both the appellant and the government made contribution to the appellant's contributory provident fund. After retirement this fund was withdrawn by the appellant and refunded with interest to the government only on 19th July, 2013.

The government says that from 19th July, 2013 it would give pension to the appellant, whereas the appellant claims pension from the date of retirement.

Two Special Bench decisions of this court need to be examined and interpreted. The first is (In Re: District Inspector of Schools(SE), Kolkata & Anr. Vs. Abhijit Baidya & Ors.) reported in 2013(3) CLJ(Cal) 178. It appears in that case there was more or less a similar scheme where an option was given to the employee to switch over to the pension-cum-gratuity option only upon depositing the employer's share of contribution with interest and additional interest within a particular period.

The Special Bench opined that the employee would be entitled to the pension from the 'date refund is made'.

The other Special Bench judgement was in clarification of its ruling in Abhijit Baidya, wherein in paragraphs 54 and 55 the bench held as follows:

'54. Although this Bench is more than certain that there is no clerical error in paragraph 77 of the said order and the same has to be read in such manner that it agrees with the judgement, yet, quite a few learned Judges of this Court having accepted the interpretation given to paragraph 77 as an alternative to the clarification issued above, in the manner as follows:

77. If an employee exercises option, he shall be entitled to be paid Pension–cum-Gratuity in accordance with law upon refund being made.

55. This Bench to obviate future complications, issues this clarification too that if in terms of paragraph 77 of the said order an employee has opted for the pension-cum-Gratuity scheme within the time frame fixed in the notice dated June 13, 2014 and has also refunded the quantum of money that was notified to him/her, he/she shall be entitled to be paid pension from the date following the date of his/her retirement on superannuation in accordance with the provisions in the DCRB Rules.'

In our opinion, payment of pension depends on the terms and conditions of the scheme. If the option is offered to a retired employee, the terms and conditions could well be that he could only avail of the scheme upon refund of the government's contribution to the

Contributory Provident Fund withdrawn by him together with interest thereon. In that case he would get pension only on refund of the Contributory Provident Fund with interest. In another case availment of pension-cum-gratuity facility may not be conditional upon the employee's refund of the said contributory fund amount. In other words, the condition that pension-cum-gratuity would only be released, if the contributory provident fund amount was refunded may not be attached to the option. The employee would only be under an obligation to refund that amount with interest. In default the government would be entitled to recover that amount. In the case of Abhijit Baidya, it appears that the option could only be availed of on refund of the provident fund amount with interest. Therefore, the ruling that pension be paid from the date refund is made, followed by the clarification 'pension-cum-gratuity in accordance with law upon refund being made' is to be confined to the special facts of that case.

In this case, the appellant availed of the option in September, 1990. Nevertheless, the appellant and the government continued to make contribution to the contributory provident fund till his retirement. The fund was withdrawn by the appellant after his retirement.

We do not find that any condition was attached when the appellant's exercise of option for the monthly pension scheme was accepted by the government that the contributory provident fund amount had to be returned as a condition precedent to availing of monthly pension. The government could have stopped making contribution to the fund forthwith but it continued to do so.

At this stage, the government cannot combine the facility which it had already granted to the appellant in 1990 with its claim for return of the provident fund amount with interest so as to impose a condition at this point of time that the monthly pension was not payable unless the provident fund amount was returned. The government had the obligation to pay monthly pension in accordance with the option exercised by the appellant and accepted by it, from the date of retirement that is 1st February, 1999. It also had the concurrent right of recovery of the provident fund amount with interest calculated up to the date when the provident fund amount was refunded to the government by the appellant.

We rule and order that the appellant shall be entitled to monthly pension from 1st February, 1999. He is also entitled to recover the differential arrear amount of pension from the government. If anything is due on account of interest on the contributory provident fund, upto 19th July, 2013, the government would be entitled to calculate the same and recover it from the monthly pension payable to the appellant.

In the above facts and circumstances, the appellant will not be entitled to any interest on delayed payment of arrear pension and/or gratuity.

The arrear pension shall be released to the appellant by the government within six weeks of communication of this order.

The appeal (FMA 3807 of 2016) is disposed of.

(I.P. Mukerji, J.)

(Subhendu Samanta, J.)