07 **07.04.22**

Ct. No. 04

akd

WP.ST. 139 of 2019

Smt. Minakshi De & Ors.
Vs.
The State of West Bengal & Ors.

Mr. Pradip Kumar Tarafdar,
Mr. Indrajit Dasgupta,
Mr. Sourav Sengupta.
... for the petitioners.
Mr. Tapan Kumar Mukherjee,
Mr. Somnath Naskar.
... for the State.

The order dated 20th June, 2019 passed by the West Bengal Administrative Tribunal in OA 84 of 2018 is the subject matter of challenge in the instant writ petition.

The tribunal application was taken out by the applicants after the Modified Career Advancement Scheme was duly promulgated on 28th December, 2012 extending the benefit of movement to third higher scale of pay upon completion of 25 years of service as now available to the employees first appointed in pre-revised scale nos. 1 to 12 to the State Government employees first appointed in pre-revised scale nos. 13, 14 and 15. The said Memorandum further indicates that the said order would take effect from 1st December, 2012. It is apposite to quote the said Memorandum being Memo no. 10580-F(P), which runs thus:

"Memorandum

The question of improving the existing Career Advancement Scheme for the State Government employees first appointed in pre-revised scale nos. 13, 14 and 15 as introduced in Finance Department No. 3015-F dated 13.03.2001 has been under consideration of the Government for sometime past.

2. After careful consideration of the

matter, the Governor has been pleased to decide to extend the benefit of movement to third higher scale of pay after completion of twenty five years of service under MCAS as now available to the employees first appointed in pre-revised scale nos. 1 to 12 to the State Government employees first appointed ini pre-revised scale nos. 13, 14 and 15 under the same terms and conditions as in Finance Department No. referred above.

3. This order will take effect from 01.12.2012.

4. The Accountant General (A&E) West Bengal and Principal Accountant General, West Bengal may be informed accordingly.

Sd/- A. K. Das
OSD & E.O. Joint Secretary to the
Government of West Bengal
Finance Department"

In an earlier round of litigation when such entitlement was claimed, the direction was passed by the Tribunal to the competent authority to consider the representation made by the applicants and dispose of the same by recording proper reasons. By an order dated 23rd May, 2017 the Secretary, School Education Department, Law Branch of Government of West Bengal rejected the claim on the premise that the aforesaid Memorandum was issued by the Finance Department, Government of West Bengal on the basis of the recommendations made by the 5th Pay Commission, which was accepted by the Government of West Bengal in part, but the 6th Pay Commission has come in existence and, therefore, the claim of the applicants cannot be accepted. Another plea was taken that since the effective date of the said Memorandum has been indicated therein as 1st December, 2012, any employee who retired prior thereto is not entitled to the benefit thereunder.

The said order was further challenged by the applicants in OA 84 of 2018 before the said West Bengal Administrative Tribunal and the same is rejected by the impugned order.

Upon perusal of the impugned order what can be discerned therefrom is that the said Modified Career Advancement Scheme extending its benefit upon completion of 25 years of continuous and satisfactory service was effected from 1st December, 2012 and since the applicants retired prior thereto, they are not entitled to such benefits. It is further indicated that in every decision pertaining to the benefits to be extended to its employees the cut off dates are ordinarily fixed therein, which cannot be said to unreasonable, irrational and/or not based upon any justification for making it to operate or restricting to it to a class of persons.

Interestingly another point, which was raised before the Tribunal that the similarly circumstanced person, namely Aditya Hazra, had been extended the benefit of the said scheme upon completion of 25 years of his continuous and satisfactory service, who admittedly retired prior to 1st December, 2012. The Tribunal discarded such submission on the ground that the petitioner could not produce any document in support of such contention.

Such being the sum and substance of the findings/reasons given by the Tribunal, the point which arose in the instant writ petition, is whether the fixation of cut off date for extending the benefits to a particular class can be segregated for the purpose of achieving the object and on a seeming intelligible differentia. The other point pertains to a discriminatory act of the authorities in choosing one person and extending such benefit to him, whereas the similar and identical benefits are denied to the others, who stand on the same footing.

Learned Advocate for the petitioners submits that the findings of the Tribunal with regard to the act of discrimination are contrary to the record. According to him, the order dated 26th August, 2015 issued by the District Inspector of Schools (SE), Bankura was annexed to the tribunal applicaton and, in fact, was the integral part of the pleadings and, therefore, the finding that the petitioner could not produce any document in support thereof is ex facie irregular, infirm and cannot be sustained. It is further submitted that while promulgating the beneficial piece of incentives the classification by restricting the date is unconstitutional and clearly offends Article 14 of the Constitution of India.

In other words, it is submitted that the classification within the class though permissible but must pass on the muster of intelligble differentia based on reasonability and rationality to achieve the object. To buttress the aforesaid submission reliance has been placed on a Constitutional Bench decision of the Supreme Court rendered in case of *D.S. Nakara & Ors. vs. Union of India* reported in (1983) 1 SCC 305 and *All Manipur Pensioners Association by its Secretary vs. State of Manipur & Ors.* reported in 2019 SCC Online SC 845.

Mr. Mukherjee, learned Advocate appearing for the respondents was invited to address the Court on the second issue, i.e. the issue pertaining to discrimination having shown by an authority while extending the benefits under the Modified Career Advancement Scheme to a person, who admittedly attained superannuation prior to the cut-off date.

It is arduously submitted by Mr. Mukherjee that the mistake does not accrue any right and such mistake cannot offend Article 14 of the Constitution, as the same cannot be said to be a discriminatory act. In support of his contention reliance has been placed upon a judgment of the Supreme Court in case of *State of Orissa & Anr. vs. Mamata Mohanty* reported in (2011) 3 SCC 436.

Mr. Mukherjee further submits that by reserving a cut-off date does not ipso facto make a classification within the class as the same is within the realm of administrative decision or in other words the policy decision of the State and, therefore, the invocation of power of judicial review should not be readily exercised.

We have already indicated the broad point hereinabove. Indubitably the applicants attained superannuation prior to 1st December, 2012. The Memorandum dated 28th December, 2012 extended the benefits of movement to third higher scale of pay upon completion of 25 years of service under the Modified Career Advancement Scheme. However, the said Memorandum was to take effect from 1st December, 2012.

Naturally the first point which arises in this context is whether there was any rationality in dividing a class, i.e. the employees who retired prior to 1st December, 2012 and those who retired after 1st December, 2012.

Article 14 of the Constitution forbids the class division. It augments the class legislation as the persons forming homogeneous group are to be treated equally and cannot be discriminated amongst themselves. However the division of class is not absolutely forbidden under Article 14 of the Constitution. The classification within the class is permissible provided it must pass twin tests, firstly that the classification must be founded on intelligible differentia distinguishing the persons forming homogeneous group from the other of the same group and secondly such differentia must pass the test of rational relation to the objects sought to be achieved and not mere casual connection between the basis of the classification and the object of the statute under consideration.

Apart from the same another facet of Article 14 is to eschew the arbitrariness in any form and may not be relatable with the doctrine of classification. Though Article 14 forbids discrimination within the class but when a classification is made upon fulfilling the aforesaid twin conditions, such classification is considered to be in consonance with or in tune with the constitutional ethos behind the incorporation of Article 14.

The Tribunal ought to have started its journey when the question was raised on classification within the class as to whether the aforesaid conditions have been fulfilled. The Tribunal surreptitiously jumped to the conclusion that in every order or the Memorandum extending the benefits must have cut-off date and if the executive fiat after taking into consideration various factors have decided to extend such benefit from a particular date, it does not offend Article 14 of the Constitution of India. Such observation of the Tribunal is contrary to the authoritative judgment of the Supreme Court in case of *D. S. Nakara (supra)* wherein an identical question was posed when the pensionary benefits were extended to a class by fixing a date of coming into operation and the Apex Court on the conspectus of the same held whether the division which classified the employees retired prior to the said cut-off date and after the same without any rational principle offends Article 14 of the Constitution in these words:

"42. If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits from a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision, and would such classification be founded on some rational principle? The classification has to be based, as is well settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. We have set out the objects underlying the payment of pension. If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalisation was considered necessary for augmenting social security in old age to government servants then those who, retired earlier cannot be worst off than those who retire later. Therefore, this division which classified pensioners into two clases is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket, the average emolument was the same and both had put in equal number of years of service. How does a fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension? One retiring a day earlier will have to be

subject to ceiling of Rs.8100 p.a. and average emolument to be worked out on 36 months' salary while the other will have a ceiling of Rs.12,000 p.a. and average emolument will be computed on the basis of last 10 months' average. The artificial division stares into face and is unrelated to any principle and whatever principle, if there be any, has absolutely no nexus to the objects sought to be achieved by liberalising the pension scheme. In fact this arbitrary division has not only no nexus to the liberalised pension scheme but is is counter-productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Article 14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the matter of commutation of pension. A 48 hours' difference in matter of retirement would have a traumatic effect. Division is thus both arbitrary and unprincipled. Therefore, the classification does not stand the test of Article 14."

The same principle has been reiterated in *All Manipur Pensioners Association by its Secretary (supra)* in the following:

"8. Even otherwise on merits also, we are of the firm opinion that there is no valid justification to create two classes, viz., one who retired pre-1996 and another who retired post-1996, for the purpose of grant of revised pension, in our view, such a classification has no nexus with the object and purpose of grant of benefit of revised pension. All the pensioners form a one class who are entitled to pension as per the

pension rules. Article 14 of the Constitution of India ensures to all equality before law and equal protection of laws. At this juncture it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. It is true that Article 16 of the Constitution of India permits a valid classification. However, a very classification must be based on a just objective. The result to be achieved by the just objective presupposes the choice of some for differential consideration/treatment over others. A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective and secondly, the choice of differentiating one set of persons from another must have reasonable nexus to the objective sought to be achieved. The test for a valid classification may be summarised as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. Therefore, whenever a cut-off date (as in the present controversy) is fixed to categorise one set of pensioners for favourable consideration over others, the twin test for valid classification or valid discrimination therefore must necessarily be satisfied. In the present case, the classification in question has no reasonable nexus to the objective sought to be achieved while revising the pension. As observed hereinabove, the object and purpose for revising the pension is due to the increase in the cost of living. All the pensioners form a single class and therefore such discriminatory and violative of Article 14 of the Constitution of India. The State cannot arbitrarily pick and choose from

> *amongst similarly situated persons, a cut-off date for extension of benefits especially pensionary benefits. There has to be a classification founded on some rational principle when similarly situated class is differentiated for grant of any benefit."*

What can be deduced from the above Reports is that though the valid classification is a valid discrimination, yet such classification must be based upon just objective and the result to be achieved on differentia consideration or the treatment over the others. If the classification between the pre-1.12.2012 retirees and post-1.12.2012 retirees does not appear to have any rationality nor the object sought to be achieved by putting such cut-off date, which appears to be so, such Memorandum cannot withstand on the anvil of Article 14 of the Constitution.

By virtue of the said Memorandum which is, in effect, the beneficial document cannot create any distinction amongst the retirees by putting a cut-off date, as the object is to extend the benefits under the Modified Career Advancement Scheme by providing a third higher scale of pay upon completion of 25 years of service. The action of differentiating of one set of persons to another without any reasonable nexus to the object sought to be achieved cannot be allowed to sustain or withstand on the legal parameters.

We do not find any reasonable classification amongst those persons by creating a different class within the homogeneous class, i.e. post-1.12.2012 retirees and pre-1.12.2012 retirees. The said Memorandum in our opinion does not satisfy the twin conditions required for its existence in the Constitutional provision and, therefore, the decision of the Government restricting the benefit under the said Memorandum dated 28th December, 2012 to the post retirees cannot be sustained.

The applicants are, therefore, entitled to the benefits under the said Memorandum.

So far as the point of discrimination is concerned, there is no quarrel to the proposition that the mistake or the order of the Court which appears to be contrary to the statute or the law cannot be allowed to be perpetuated for all time to come. The mistake does not accrue or confer any right nor the Court should encourage such mistake to perpetuate eternally solely on the ground of discrimination. The mistake is a relative term - whether it was intentional or bona fide. There is nothing coming out from the pleading that after realization of the mistake or the mistake is being made patent, any action has been taken by the authority to rectify the same.

The decision in case of *Mamata Mohanty (supra)* and the law laid down therein cannot be doubted, but such decision has to apply in the perspective of given facts. It is too late in a day to say that the mistake has been done when there is no attempt for its rectification. Furthermore the Tribunal has shirked its responsibility in deciding the point of discrimination solely on the ground that there is no corroborative evidence in support thereof.

Our attention is drawn to the Office Memorandum dated 26th August, 2015 issued by the District Inspector of Schools (SE), Bankura indicating that the benefit was extended to Aditya Hazra who stands on the same footing that of the applicants having superannuated on 31st March, 2012, i.e. prior to 1st December, 2012 taking note of the continuous service of 25 years. If such benefit is extended to a pre-retiree, it is an apparent case of discrimination when the authority have denied such benefit to the applicants herein.

Since the discrimination is patent on record, the findings of the Tribunal that no document in support of the same was produced by the applicants, is perverse and as such cannot be sustained.

On both the counts, we find that the applicants are entitled to the benefit as claimed in the tribunal application.

The order impugned is thus set aside. As a consequence the order dated 23rd May, 2017 passed by the Secretary, Government of West Bengal, Department of School Education stands set aside.

The respondents are directed to extend the benefit of Modified Career Advancement Scheme to the applicants in the same manner as has been given to Aditya Hazra.

The writ petition is thus disposed of.

There will be no order as to costs.

(Harish Tandon, J.)

(Rabindranath Samanta, J.)