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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT/65/2022
In
WPO/86/2019
IA No.GA/2/2022

THE STATE OF WEST BENGAL & ORS.
Vs
SRI BHAGWAN SINGH & ORS.

BEFORE :

THE HON'BLE JUSTICE HARISH TANDON
And
THE HON'BLE JUSTICE RABINDRANATH SAMANTA
Date : 26th April, 2022

Appearance:
Mr. Amitava Chaudhuri, Adv.
Mr. Moniruzzaman, Adv.
Mr. N. Roy, Adv.
...for the appellants.

Mr. Sakti Pada Jana, Adv.
Mr. Sunbhajyoti Das, Adv.
...for the respondents.

The Court : The respondent was appointed as Darwan on a sanctioned post and contributed his entire life till the attainment of superannuation for protection of the educational institution and the safety and security of the students therein. He was paid a paltry sum of Rs.12,000/- as Death-cum-Retiring Gratuity under Rule 41 of the West Bengal Non-Government College Teacher's Death-Cum-Retirement Benefit Scheme, 1973 (in short, DCRB Scheme). It is the sordid state of affairs as evident from the findings made in the impugned order that the college authorities forwarded all necessary documents and papers three years after the attainment of superannuation and the retiral and terminal benefits admissible to him was paid belatedly.

Inevitably, the petitioner was allowed to opt for the pensionary benefit as available on the date of his joining the said post and, in fact, in 1983 after a gap of four years, he chose for Contributory Provident Fund (CPF). The State Government promulgated the revision of pay and allowances under ROPA 1990 and extended its operation to all non-teaching employees of aided non-government colleges to take effect from 1st January, 1985.

Paragraph 17 of the scheme pertains to the teaching and non-teaching employees of aided/sponsored educational institution to opt for revised scales of pay with an object to get the pensionary benefits including the Dearness Allowance at par with the State Government employees. It is evident that the pay was revised in accordance with ROPA 1990 and ROPA 1998. The slew of litigations came to be filed before this Court raising an issue whether the time limit fixed under the Death-cum-Retirement benefit, 1981 (which was subsequently promulgated) can be extended beyond the period provided therein depending upon the mitigating circumstances. There were divergent views and ultimately the matter was referred to a Full Bench in case of **District Inspector of Schools (SE), Kolkata –vs- Abhijit Baidya** reported in **2013(3) CHN (CAL) 711**.

The Full Bench held that the Government must invite a fresh option under DCRB Scheme for switching over to pension-cum-gratuity as well as under the amended provisions in order to avoid the vice of arbitrariness and ultimately directed the Government to give such opportunity to these employees for submission of the fresh option under the said scheme.

The interesting point is raised by the learned Counsel appearing for the State that the moment the orders or the scheme having notified, the notice is presumed to all and sundry who comes under the periphery thereof and, therefore, it is not obligatory on the part of the Government to approach each and every employee making them aware that he is required to opt for the scheme or may opt for changing the scheme. Such point, in our view, is not tenable for two reasons. Firstly, there are no documents produced before this Court in support of the aforesaid contentions. Secondly, there is a categorical observation of the Full bench in the **Abhijit Baidya** (supra) that neither ROPA 1990 nor ROPA 1998 were published in the official Gazette. The same Bench further held that the aforesaid schemes ought to have been published in its original form along with all subsequent amendments.

Another point is taken relying upon an order dated 30th August, 2001 issued by the Assistant Secretary, Higher Education Department, Government of West Bengal, whereby and whereunder, the time for changing the option was extended with clear stipulation that if the employees do not opt within that extended time, no further change of option can be entertained. The preceding paragraph of the letter provides for circulation of the said order amongst the Non-government affiliated College including the erstwhile Sponsored Colleges for necessary action.

According to the learned Counsel for the appellant, once such order is passed, it implies the knowledge thereof and, therefore, the respondent cannot contend that he was not aware of any such provisions pertaining to change of options. In addition to the same, it is submitted that if the college has committed error, the Government cannot be held responsible therefor and no right can be accrued in favour of the employee, which is prejudicial to the interest of the Government.

The aforesaid argument appears to have been advanced before the Single Bench and the Single Bench found that unless there is a conscious communication in terms of the ratio laid down by a Full Court in **Abhijit Baidya** (supra), such stand is neither tenable, nor appreciable. The Court shall not forget the hard realities and miseries of the persons employed as a Darwan in an educational institution for not only to protect the dignity and the reputation, but above all, safety and the security of the girl students of the said institution. It is more onerous, respectable and a responsible duty which such person discharges throughout his service career and, therefore, it is not improbable that he may not be aware of all the nitty gritty of the various orders or the circulars issued by the Government. It is the collective responsibility of the college as well as the Government officials to see the best interests of his employees and the beneficial or the benevolent piece of the schemes must be made aware to them with clarification that it would benefit him in future. There is no communication forthcoming either from the college authorities or from the Government that the respondent was made aware or at least alive of such orders or the schemes having framed by the Government during the span of his service career. Interestingly, the college deducted the amount on his GPF account for a pretty long time spanning over two years and, thereafter, retracted from the same. The Single Bench held that once the action of the college authorities are patent and evident from their conduct, it would raise a presumption in favour of him that he, in fact, exercised the option.

It is no doubt true that any presumption be it statutory or otherwise is rebuttable in nature and high degree of the onus is to be shouldered upon by a person against whom such presumption has been raised. There is no material forthcoming which may remotely suggest the rebuttal of such presumption.

The word 'probable' which is used in the impugned judgment has been projected by the learned Counsel appearing for the appellant to contend that the same cannot be considered to be a final in nature. According to him, the decision cannot be based upon a probability, but the cause must be decided on materials and a firm finding to be made thereupon in consonance with the provisions of law. The word 'probable' connotes raising of a presumption. In a civil proceeding, the same is construed as the preponderance of probability and/or possibility and we do not find any fetter in a legal jurisprudence to use the word 'probable' while arriving at the decision based on other mitigating circumstances justifying the same.

The judgment of the Apex Court as relied upon by the learned Counsel for the appellant in the case of **Rajasthan Rajya Vidyut Vitran Nigam Limited –vs- Dwarka Prasad Koolwal and Others** reported in **(2015) 12 SCC 51**, appears to us in tune with the ratio laid down in a Full Bench decision delivered in case of **Abhijit Baidya** (supra). It is relevant and apposite to quote the observations made in paragraphs 58, 59 and 60, which run thus:

> *"58. When the Pension Regulations and the GPF Scheme are read together, the necessary conclusion is that an employee must give his option for either continuing to be a member of the CPF Scheme or to switch over to the Pension and GPF Scheme. This option had to be exercised within a period of 90 days from the cut-off date, that is, 28-11-1988. But RSEB, in its wisdom, chose to extend the time for exercising the switch-over option over a period of 8 years by giving several opportunities to the employees through its notices. The right of an employee to switch over was, therefore, limited in time by the Pension and GPF Scheme. However, administrative orders issued by RSEB from time to time extended the period for exercising the option. No employee had any inherent right to either demand and extension of the period for exercising the switch-over option or claim a right to exercise the switch-over option at any time prior to his retirement, and no such right has been shown to us.*

59. But, the learned counsel for the respondents finally submitted that pension is not a charity or a bounty and an employee is entitled to earn his pension. There can be no doubt about this proposition but when two schemes are available to an employee, one being the CPF Scheme and the other being the Pension Scheme, it is for the employee to choose the scheme that he feels more comfortable with and appropriate for his purposes. No employee can switch over back and forth from one scheme to another as per his convenience. Once an employee has chosen to be a part of a particular scheme, he continues to remain a member of that scheme unless an option to switch over to another scheme is given to him.

60. Insofar as the present appeals are concerned, the respondents who are members of the CPF Scheme were given several opportunities of switching over to the Pension Scheme and the GPF Scheme under the Pension Regulations and the GPF Scheme respectively but they chose not to do so. The question whether under these circumstances pension is a bounty or a charity becomes completely irrelevant. The entitlement to pension was available to the respondents but they chose not to avail the entitlement for reasons personal to them. Having taken a decision in this regard the respondents cannot now raise an argument of pension not being a bounty and therefore requiring RSEB to give them another option to switch over to the Pension and GPF Scheme."

It is discernible from the aforesaid judgment that once the Government has decided that a particular scheme would lapse by efflux of time then after the expiration of the period, the employee is not expected to avail the benefit under the said scheme subsequently.

In paragraph 60 of the said report, the Apex Court observed that the respondents therein were given several opportunities of switching over to the pension scheme and from the GPF scheme, but they chose not to do so. The Apex Court was of the view that once all the employees have been made aware of the aforesaid scheme and the options were sought from them which is evident from the facts of the case and chose not to change the option, after the expiration of the period limited therein, such options are not available to such employees. The aforesaid decision does not run counter to the ratio laid down by the Full Court in **Abhijit Baidya** (supra). If the employees are made aware and, thereafter, chose not to change the option, there is no illegality and/or infirmity in disbursing the retiral benefit under the said scheme as one cannot approbate and/or reprobate at the same time.

Once the scheme for changing the option has been framed and an option is to be exercised by the employee, it connotes that both the earlier scheme and the subsequent scheme are in vogue simultaneously. Otherwise, it would frustrate the very object of inviting an option from the employees. Once discretion is left to the employee to choose under a particular scheme he intended to come and having chosen the one or not availing the subsequent scheme by changing the option, later on such an employee cannot contend that the subsequent scheme appears to be more beneficial. Such is not the case in the instant case as the respondent was never made aware of such provisions and right to choose an option and, therefore, we do not find that the ultimate decision of the trial Court warrants any interference.

With these observations, the appeal is dismissed.

There shall, however, be no order as to costs.

In view of the dismissal of the appeal, connected application being IA No.GA/2/2022 also stands dismissed.

(HARISH TANDON, J.)

(RABINDRANATH SAMANTA, J.)

s.pal