Item-149.   26-07-2023

sg   Ct. 8

MAT 146 of 2019

The State of West Bengal & Ors.
Versus
Muktimoyee Pal (Dey) & Ors.

Mr. Pinaki Dhole, Adv.
Mr. Avishek Prasad, Adv.
…for the appellants

Mr. L.K. Gupta, Sr. Adv.
Mr. Arjun Roy Mukherjee, Adv.
Ms. Saheli Mukherjee, Adv.
…for the writ petitioner

1. The appeal is arising out of an order dated 21st December, 2018 passed in a writ petition in which the petitioner had prayed, inter alia, for a direction upon the respondent authorities to convert the option of her pensionary benefit from contributory provident fund to pension including family pension and to prepare her service book accordingly.
2. The facts not in dispute are:
   (i) The petitioner was appointed as an Assistant Teacher on 18th November, 1980 at Khalna Rai Radhagobindo Institution, District Howrah. She opted for contributory provident fund cum gratuity scheme on 15th July, 1985 in terms of the G.O. No. 136-Edn(B) dated 15th May, 1985.
   (ii) There was a revision of pay and allowances (ROPA) by the Government. On 18th May 1990 the petitioner exercised her option to come within the purview of G.O. No. 33-Edn(B) dated 7th March, 1990.

Accordingly her salary was revised and fixed as per ROPA 1990. On 21st November, 2005 the petitioner made a representation before the respondent authorities requesting the authorities for conversion of her option for pensionary benefit from contributory provident fund cum gratuity to pension including family pension cum gratuity. The petitioner also gave an undertaking to refund the Government's share of contributory provident fund with interest accrued thereon as and when directed by the authorities upon conversion of her option. As the respondent authorities did not take any steps for conversion of the option made by the petitioner she filed the instant writ petition praying for necessary relief. During the pendency of the writ petition the petitioner retired from service on 31st May, 2012.

3. The moot question that came up for consideration in the writ petition was, once the petitioner has exercised her option in terms of the G.O. No. 33-Edn(B) dated 7th March, 1990 (ROPA 1990) will it be necessary for her to exercise fresh option for conversion of her pensionary benefit option from contributory provident fund cum gratuity to pension including family pension cum gratuity. This issue is accordingly, *res integra* in view of the judgment of the Full Bench in the matter of ***District Inspector of Schools vs. Abhijit Baidya*** reported in ***2013(3) CHN (Cal) 711***. The questions framed and answers thereto by the Full Bench are mentioned below:

“Q.1) Whether a person who has opted for revised pay scale under ROPA, 1990 becomes entitled to pension by virtue of operation of para 17 of ROPA, 1990?

Ans.1) An employee who has opted for revised pay scale under ROPA, 1990 becomes entitled to pension and gratuity by virtue of operation of para 17 of ROPA 1990. It was not necessary for him to exercise fresh option as per Memo dated 16th December, 1991, which was applicable to employees who had not opted for ROPA 1990. Benefit of Pension-cum-Gratuity was conferred due to acceptance of reduced age of superannuation of 60 years under para 17(1) of ROPA 1990 and his right for Pension-cum-Gratuity so accrued could not have been taken away retrospectively by substitution of the provisions of para 17 in 2007 or by substitution of para 13 of ROPA 1998 in 1999.

Q.2) Whether an incumbent who has exercised an option under ROPA, 1990 can still be conditioned to the rider of option to be exercised under West Bengal Recognised Non-Government Educational Institution Employees DCRB Scheme, 1981, particularly in view of the amendment effected in paragraph 17(2) vide G.O. 226-SE(B)/1M-102/98, dated 16th May, 2007 and whether the amendment made in paragraph 17(2) can be said to be valid law; that too with retrospective effect?

Ans.2) Once option has been exercised under ROPA 1990, a person cannot be subjected to the rider of the option exercised under the DCRB Scheme, 1981 as the invitation of the option under the said Scheme was with respect to the employees who elected to continue in service till the age of 65 years and to have the benefit of the old scheme. For such employees, opportunity was given to submit fresh options as per Memo dated 16th December, 1991.

The amendment made in para 17(2) of ROPA 1990 on May, 2007 cannot be said to be valid piece of law as such provisions cannot be substituted with retrospective effect to take away the rights already accrued to an employee. So as to validate provisions of para 17(2) of ROPA 1990, as substituted, it was necessary to invite option for switching over to Pension-cum-Gratuity from CPF-cum-Gratuity when the substitution of para 17(2) of ROPA 1990 was made on 16th May, 2007 with retrospective effect.

Q.3) Whether para 13 of Revision of Pay & Allowance Rules 1998, as amended by Notification dated 13th July, 1999 relating to the employees of W. Ben. Recognised Non-Government Aided Institutions can be said to be valid in law?

Ans.3) Para 13 of the ROPA 1998 as amended on 13th July, 1999 cannot be said to be valid in the eye of law as it has the effect of taking away benefit conferred by para 17(2) of ROPA 1990, as the ROPA 1998 was made applicable to the employees who had opted for ROPA 1990 and the benefit conferred could not have been taken away by substitution of provisions contained in para 13 of ROPA 1998. It was clearly arbitrary and an unreasonable exercise of power and to treat it as valid and legal, it was necessary to invite fresh option under the DCRB Scheme, 1981 for switching over to Pension-cum-Gratuity as the provisions had been amended drastically which could not operate to the prejudice of the employees in whose favour right to claim Pension-cum-Gratuity had accrued. The substituted provisions of para 13 of ROPA 1998 fail to qualify Wednesbury principles of reasonableness. The action was in utter violation of fair play and justice.

Q.4) Whether after amending the para 13 of ROPA 1998 on 13.07.1999 and para 17 of ROPA 1990 in 2007, it was necessary to give fresh opportunity to employees to revise option under West Bengal Recognised Non-Government Education Institution Employees (Death-cum-Retirement Benefit) Scheme, 1981?

Ans.4) In our opinion, after substitution of para 13 of ROPA 1998 on 13th July, 1999 and para 17 of ROPA 1990 on 16th May, 2007, in order to save the provisions from the vice of arbitrariness, it was necessary to give an opportunity to the employees to submit fresh option under DCRB Scheme, 1981. As the option exercised earlier in terms of the DCRB Scheme, 1981 was made applicable, it was necessary to give fresh opportunity to exercise an option for switching over to Pension-cum-Gratuity and the State could not have acted to the detriment of the employees opting for ROPA 1990 who chose the rider of reduced age of superannuation i.e. 60 years under para 17(1) of ROPA 1990.

Q.5) Whether the time-limit fixed under the DCRB Scheme, 1981 to submit option can be extended in suitable cases?"

Ans.5) In our opinion, as there was drastic change of provisions of para 17(2) of ROPA 1990 made by way of substitution in 2007, and ROPA 1998 also interfered with the rights conferred upon the employees under para 17(2) of ROPA 1990, all the employees who opted for ROPA 1990 ought to be given fresh opportunity to submit the pension option to switch over to Pension-cum-*Gratuity*.

4. It is an admitted position that the writ petitioner had already exercised her option for revised pay scale under ROPA 1990. In view thereof, it was not necessary for her to exercise fresh option all over again. She had given an undertaking to forego five years of her service career by consenting to the terms and conditions of ROPA 1990. The benefits accrued in terms of ROPA 1990 cannot be taken away as has been held by the Full Bench in the aforesaid decision. The petitioner has also given an undertaking to refund the Government's share of contributory provident fund with interest accrued thereon as and when directed by the authorities upon conversion of her option.

5. Before Justice Amrita Sinha, the learned Advocate

representing the writ petitioner had relied upon an unreported judgement dated 28th June, 2016 passed by a Division Bench of this Court in ***R.V.W. No. 68 of 2016*** arising out of ***MAT 598 of 2015 (The State of West Bengal & Ors. vs. Smt. Jharna Bandopadhyay & Ors.)*** in which the court held:

> *"in the ROPA 1990 and subsequently by the ROPA 1998 it was stipulated that the teachers who opt to accept revised scale of pay shall automatically become entitled to the pension and gratuity benefits. This benefit of pension and gratuity was in consideration of the concerned teacher agreeing to have the age of superannuation reduced from 65 to 60 years. To put it differently, a teacher who agreed to retire at the age of 60 only he was given the benefit of the pension and gratuity.*
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> *The Court further held that the teachers who already attained the age of 60 years prior to the order of the larger Bench the question for any further exercise by them cannot arise. In the instant case the petitioner retired on 31st May, 2012 and the judgment of the Full Bench was delivered on 16th July, 2013."*

6. Mr. Pinaki Dhole, learned Counsel appearing on behalf of the appellants has submitted that notwithstanding the judgment of the Special Bench, there is a requirement to exercise a fresh option in stipulated time and the writ petitioner having not exercised the said option within the stipulated time is not entitled to such benefits.

7. We plainly reject the said submission as the law is clear on this point as settled by the Full Bench in ***Abhijit Baidya*** (supra). The argument that in the supplementary affidavit filed by the writ petitioner she had disclosed that she had retired on 31st May, 2012 and as there was no order from the Court for conversion of contributory provident fund to pension cum gratuity in her favour and she had to accept the

CPF retiral benefits to meet up her medical expenses for her survival cannot be accepted. She was in no way responsible for the delay in disposal of the writ petition or failure to process her application for option. Moreover, in the meantime, the Special Bench had decided the said issue with regard to exercise of option of an employee who have retired prior to the decision of the Full Bench. Moreover, it is a specific case of the petitioner that she had already exercised option on 18th May, 1990 for revised pay scale under ROPA 1990. According to the decision of the Full Bench, the petitioner is not required to exercise option.

8. Mr. Dhole has referred to an unreported judgment dated 23rd August, 2017 passed by a Division Bench of this Court in ***MAT 1559 of 2016 [The State of West Bengal & Ors. vs. Bithika Bagchi (Gupta)]*** to argue that since the petitioners have availed all benefits of the contributory provident fund scheme therefore, the petitioner cannot be permitted to come or to switch over to general provident fund scheme without compliance of all the terms and conditions laid down by the Apex Court and in the Notification dated 30th June, 2014 published in the Kolkata Gazette.

9. In Bithika Bagchi (supra), the learned Single Judge directed the writ petitioner to make an application before the District Inspector of Schools, Purulia within one week from the date of consideration of the prayer and to adjust government share along with interest, which was due and payable from her monthly pension and issue Pension Payment Order in favour of the writ petitioner. The writ petitioner filed an application

on 8th September, 2014 for switching over from CPF to GPF without complying with the conditional refund of the amount as notified in Kolkata Gazette pursuant to the judgment of the Special Bench. In the instant case, there was no requirement for the petitioner to make any application for switching over as he had already exercised her option and the delay in processing the said application by the State authorities cannot act to the detriment of the writ petitioner. The Notification referred to in *Bithika Bagchi* (supra) would not be applicable insofar as the writ petitioner is concerned as she had already exercised her option and in the writ petition she had already given an undertaking to refund the employer's share of provident fund along with interest.

10. In view of such categorical statement, there was no requirement for the writ petitioner again to furnish any undertaking. Moreover, in terms of sub para 2 of para 17 of ROPA 1990, a teaching and non-teaching employee of an aided/sponsored educational institution or organization who will opt for the revised scale of pay shall be allowed to enjoy pensionary benefits including dearness allowance relief at pat with State Government employees. Admittedly, the writ petitioner had exercised her option for revised scale of pay on 18th May, 1990.

11. We are thus, in agreement with the view expressed by the learned Single Judge that the time limit that had been fixed in the case of *Bithika Bagchi (Gupta)* (supra) was in respect of the employees who had not exercised her option earlier to switch over to pension cum gratuity. In view of the admitted

fact that the petitioner had exercised her option her case comes within the purview of ROPA 1990, any notification issued subsequent to the decision of the Full Court would not be applicable in her case.

12. The respondent authorities are directed to calculate the employer's share of Contributory Provident Fund with interest and additional interest which the petitioner is required to refund for availing the benefit of pension cum gratuity scheme and intimate the same to the petitioner within a period of eight weeks from date. The petitioner shall deposit the specified amount of the employer's share of CPF with interest and additional interest to the Government Treasury through the concerned District Inspector of Schools within ten days from the date of receipt of the statement of refund. The concerned District Inspector of Schools shall send the pension papers of the petitioner to the Office of the Director of Pension, Provident Fund and Group Insurance, West Bengal after verifying the same and shall issue pension payment order in favour of the petitioner within two months thereof.

13. In computing the interest, the appropriate authority shall take into consideration the clause 3(iv) of the Notification dated 13th June, 2014 which has prescribed the rate of interest to be paid towards refund of the employer's share of contributory provident fund upto the date of exercise of option.

14. The judgment under appeal is affirmed with the modification indicated above. The appeal stands dismissed. However, there shall be no order as to costs.

15. MAT 146 of 2019 is, accordingly, disposed of.
16. Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Uday Kumar, J.) **(Soumen Sen, J.)**