Item - 49. 11-12-2023

sg Ct. 8

FMA 864 of 2022
CAN 1 of 2023

Pramila Behara
Versus
The State of West Bengal & Ors.

Mr. Subir Sanyal, Adv.
Mr. Saktipada Jana, Adv.
Mr. Sagnik Roy Choudhury, Adv.
…for the appellant
Mr. Shamim Ul Bari, Adv.
Ms. Nilanjana Dasgupta, Adv.
…for the State

1. Affidavit of service filed in Court today is taken on record.
2. By consent of the parties, the appeal and the application are taken up together and disposed of by this common order.
3. The appeal is arising out of an order passed by the learned Single Judge on 12th April, 2012 in a writ petition filed by the widow of a deceased primary school teacher claming benefit in terms of the Notification published by the School Education Department, Government of West Bengal on 13th June, 2014.
4. The writ petition was dismissed on the ground that the petitioner did not apply during the time specified by the Special Bench in ***APO No. 94 of 2009 (State of West Bengal and Ors. vs. Abhijit Baidya & Ors.)*** decided on 16th July, 2013 and in view thereof, at this stage, the petitioner cannot be allowed to exercise her option and the Court has no power to extend the time for filing option.

5. The petitioner is a widow of a deceased primary school teacher, who retired from service on 31st January, 2000 and breathed his last on 10th July, 2005 while he was in service. The husband of the petitioner exercised an option for switching over to pension-cum-gratuity in terms of ROPA 1990. As a result whereof, the age of superannuation of the husband of the writ petitioner got reduced from 65 years to 60 years.
6. After he died, the writ petitioner filed an application for family pension. The issue with regard to switching over from CPF to GPF was pending for long and it was ultimately decided by the Special Bench in ***Abhijit Baidya*** (supra) on 16th July, 2013. The State has raised an objection that unless the widow exercised an option for switching over from CPF to GPF and that too within the time limit provided by the Special Bench, the writ petitioner is not entitled to any relief. In view of the fact that the timeline had expired in the meantime, there is no legal enforceable right and in any event the writ petition is liable to be dismissed on the ground of delay and laches as she filed the writ petition only in the year 2019.
7. Mr. Subir Sanyal, learned Counsel appearing on behalf of the appellant/writ petitioner has referred to a decision of this Bench in ***MAT 146 of 2019 (The State of West Bengal & Ors. vs. Muktimoyee Pal (Dey) & Ors.***, decided on 26th July, 2023 to argue that similar points have been answered in favour of the writ petitioner. It is submitted that the said decision made it clear that once the

original employer has exercised option for switching over from CPF to GPF, his legal heirs and/or successors are not required to make any such application or exercise any such option as the decision of the employer to exercise such option is binding on his legal heirs entitled to receive such benefits. Mr. Sanyal has referred to two decisions of other coordinate Benches namely, (i) ***FMA 620 of 2018 (State of West Bengal & Ors. vs. Sefali Jana & Ors.)*** decided on 24th August, 2023 and (ii) ***MAT 2066 of 2014 (Renuka Khatua vs. State of West Bengal & Ors.)*** decided on 15th January, 2016 and submits that in ***Safeli Jana*** (supra), the entitlement of the widow to family pension on account of deceased husband/employee was upheld and in fact, the Government has implemented the said decisions.

8. The learned Counsel for the State in opposing the prayer has referred to the decision of a coordinate Bench in ***MAT 1559 of 2016 (The State of West Bengal & Ors. vs. Bithika Bagchi (Gupta))*** decided on 23rd August, 2017, in which the Hon'ble Division Bench considered whether relaxation can be given by a subsequent Bench in the terms and conditions laid down by the Special Bench followed by the judgement passed in MAT 1409 of 2016 and MAT 1877 of 2015 by providing a new condition of adjustment of amount already paid to the employee which is not opted within three months' time as notified in the order of switching over from CPF to GPF.

9. In our respectful reading of the said judgment which does

not deal with the issue whether a widow would be required to exercise a fresh option after her husband has already exercised option prior to his death on the basis thereof, was enjoying the benefit of pension and gratuity. This issue has been succinctly considered in ***RVW 68 of 2016 (The State of West Bengal & Ors. vs. Smt. Jharna Bhattacharya & Ors.)*** decided on 28th June, 2016 by the Division Bench presided over by Justice Girish Chandra Gupta, former Chief Justice of this Court. For better understanding and convenience the relevant portion of the said judgment is stated as under:

"Mr Gupta, learned Additional Advocate-General appearing in support of the review application, submitted that the learned advocate, who appeared for the State at the hearing of the appeal, was under a misapprehension as regards the meaning and purport of the judgment of the larger Bench of this court in the case of District Inspector of Schools (SE), Kolkata -vs- Abhijit Baidya reported in 2013(3) CHN (Cal) 711. That was a judgment by which a large number of appeals were disposed of.

The following questions of law were formulated for decision:-

"Considering various issues involved in the matters, we framed the following questions for our determination:

i) 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?

ii) Whether an incumbent who has exercised an option under ROPA 1990 can still be conditioned to the rider of option to be exercised under W. Ben. 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?

iii) 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. Recognized Non-Government Aided Institutions can be said to be valid in law?

iv) 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 W. Ben. Recognized Non-Government Education institution Employees (Death-cum-Retirement Benefit) Scheme, 1981?

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

The aforesaid questions were answered in the said judgment as follows:-

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 for 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.

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 16, 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.

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.

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.*

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 pa para 17(2) of ROPA 1990, all the employees who opted for ROPA 1990 ought to be given fresh opportunity to submit the option to switch over to Pension-cum-Gratuity."

Mr Gupta further submitted that in answering question no.4 the larger Bench was of the opinion that the State should have given an opportunity to the teacher concerned to exercise an option for switching over to pension-cum- gratuity. He also submitted that based on the aforesaid opinion of the larger Bench the State has given such opportunity and those who exercised their option the benefit of pension-cum-gratuity has been extended to them. The writ petitioner before us did not exercise option. Therefore, she was not entitled to the benefit of pension and gratuity. He submitted that this point was inadvertently not raised by the learned advocate appearing for the State when the appeal was heard by a Bench to which one of us was a party (Gupta, J).

We have not been impressed by the submission advanced by Mr Gupta. The questions no.1, 2 and 3 were *answered by the larger Bench against the State. In view of the answer to questions no.1, 2 and 3 the view taken by the learned trial court in WP No.25441 (W) of 2014 dated January 30, 2015 appears to be quite justified, which is as follows:-*

"Husband of the petitioner was a primary teacher under Paschim Medinipur District Primary School Council. Though he did not opt to come under the D.C.R.B. Scheme, 1981, but he opted for revised pay scale under ROPA, 1990 and became entitled to get the pension and gratuity as per para 17 of ROPA 1990. He died on 15th October, 2005 while in service."

In the appeal the Division Bench concurring with the learned trial court held as follows:

"In the case before us the teacher concerned died on 15th October, 2005. It is not in dispute that he had opted for revised pay under ROPA 1999. It is also not in dispute that by virtue of his opting for revised pay under ROPA 1999 he automatically became entitled to pensionary benefit. But it is common ground that he did not refund the fund contributed by the State. In fact the money on account of the Contributory Provident Fund continues to be held by the estate of the deceased teacher.

In that view of the matter and in tune with the Special Bench order, quoted above, the District Inspector of Schools (PE), Paschim Medinipur, being the appellant no.3, is directed to communicate the amount of money on account of contributory provident fund together with interest at the rate specified in the notification dated 13th June, 2014 which is 8.7% per annum and additional interest at the rate of 3.3% per annum, i.e. to say interest is payable at the rate of 12% per annum. Such calculation shall be submitted to the writ petitioner within two weeks from date without any further request.

It will be open to the writ petition to deposit the amount within three weeks from the date of receipt of such demand. In the event she does that, the authorities shall start paying family pension from the date of refund within six weeks from the date. The order under challenge is set aside."

The aforesaid view expressed both by the learned trial court and the Division Bench is in consonance with the answer to the questions no.1, 2 and 3 given by the larger

Bench which we have quoted above.

Now comes the question as to whether any separate or any other interpretation is possible, in view of the answer given by the larger Bench to the fourth question. The questions and the answers have already been quoted by us which we need not repeat. Before examining the point one has to keep at the back of his mind that by 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. Admittedly, the husband of the petitioner had agreed to retire at the age of 60. Therefore, the consideration for the benefit of gratuity and pension was duly paid by him. Can it be said any longer that the pension and gratuity is payable only upon exercise of any further option? The detriment which he was to suffer for the purpose of getting the pension and gratuity had already been suffered by him by agreeing to retire at the age of 60. The entitlement thereafter could not have depended upon any further exercise of option.

The submission of Mr Gupta cannot, in any event, be accepted, because if the intention of the larger Bench was that a further option pursuant to the order was required to give the benefit of the pension and gratuity, then the question arises who are the teachers who could exercise the option? Answer is that it is only those teachers who could exercise the option who are yet to attain the age of 60. Those who already attained the age of 60 prior to the order of the larger Bench have already retired. The question of any further exercise of option by *them cannot arise. Therefore, the submission of Mr Gupta leads to absurd results.*

A person who has already retired at the age of 60 hoping that he shall get pension and gratuity, can he now be said that he cannot get the benefit because he did not exercise the option? The State took the benefit of the early retirement of the teacher and now is seeking to deny the benefit of pension and gratuity. The husband of the writ petitioner died in 2005 long before the judgment of the larger Bench. Therefore, the question of denying the pension and gratuity to the widow does not arise."

10. In fact, the Director, Pension, Provident Fund and Group Insurance, Government of West Bengal has accepted the said judgment in deciding a representation of a widow namely, Putul Mondal in WP 614(W) of 2016 in a reasoned order dated 19th August, 2021. The decision of the Director in the said matter is reproduced below:

> *"Hence In terms of the "ratio" laid down in review application bearing RVW no. 68 of 2016 and In consonance with the order dated 16.07.2013 passed by the Special Bench of the Hon'ble High Court, Calcutta in connection with APO No.94 of 2009, I am of the view that the petitioner is entitled to get family pension In terms of G. O. No.749-SE (L) dated 13.06.2014 I.e. from the date refund is made.*
>
> *Therefore the concerned District Inspector of Schools is directed to Inform the writ petitioner to refund the actual amount of the employer's share of contribution along with interest to be calculated by the concerned District Inspector of Schools within two weeks from the receipt of this order.*
>
> *The Writ Petitioner is directed to refund the employer's share of contributory Provident Fund along with Interest as calculated by the concerned District Inspector of Schools within two weeks thereafter. After completion of all these formalities, District Inspector of Schools concerned is directed to prepare family pension case of the petitioner and the same shall be sent to the office of the DPPG within*

> *fifteen (15) working days thereafter for issuance of PPO in favour of the petitioner.*
>
> *Thus the matter is disposed of.*
>
> *This order is issued in compilance with the order dated 13.04.2017 passed by the Hon'ble High Court, Calcutta in connection with the W.P.No.614 (W) of 2016."*

11. We have also independently considered the matter in ***Muktimoyee Pal (Dey)*** (supra) in paragraph 7. It appears that before the learned Single Judge, the aforesaid decisions have not been placed and hence, the learned Single Judge did not have the benefit to consider the said decisions in deciding the matter. The ground for delay is also not relevant as an application was filed by the petitioner for family pension in the year 2006 and the State is unable to offer any explanation for not considering this application and giving benefit to the petitioner even after the Special bench decision.
12. This is a valuable right as that has accrued in favour of the petitioner of which he cannot be denied. As observed earlier, the husband of the petitioner had already agreed to reduce the age of superannuation and thereby had suffered financially. The widow cannot be made to suffer by reason of the long interpretation of the relevant provisions of the scheme or the judgement of the Special Bench. In fact, as observed earlier, the authorities concerned had already accepted in principle that the widow will not be required to exercise any fresh option. Had the teacher being alive when the Special Bench delivered the judgement, question of exercising option would become

relevant. In the instant case, there was no scope to switch over option of the teacher concerned as he was dead on the date of the judgement. Furthermore, the husband of the petitioner exercised option under ROPA 1998 and 1990. In view thereof, the judgement is set aside.

13. 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.

14. In computing the interest, the appropriate authority shall take into consideration the clause 3(iv) of the Notification dated 13 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.

15. The family pension shall be payable the respondents from

the date of actual superannuation and/or the death of the concerned teacher as the case may be. Let arrears of pension be paid to the writ petitioners respondents, within a period of three months of issuance of the Pension Payment Order.

16. With the aforesaid observations, the appeal and the application are disposed of.

17. 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.)**