

Amaresh Chandra BerA. Vs. the State and ors.

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Court : Kolkata Appellate

Decided On : Jan-13-2011

Judge : Amit Talukdar; Prabhat Kumar Dey, JJ.

Appeal No. : F.M.A. 566 OF 2010 with CAN 2013 OF 2010

Appellant : Amaresh Chandra BerA.

Respondent : The State and ors.

Advocate for Def. : Mr. Fazlul Haque Jr. G.A.; Mr. Gautam Banerjee, Advs

Advocate for Pet/Ap. : Mr. Biswaroop Bhattacharyya; Mr. Gautam Acharya, Advs

Judgement :

1. Initially, the appellant had opted on 26th June, 1990 for Contributory Provident Fund under the DCRB scheme. Subsequently, he revised such option on 16th January, 1992 and opted for the Government Provident Fund. This would be evident from the document available at page 28 of the paper book which is a communication by the Teacher-in-Charge addressed to the concerned District Inspector of School.

2. Since the position has fallen foul before the Authorities, he was posed to the fore of the Writ Court at the first instance. This saw an order passed by an Honble Single Judge on 22nd February, 2007 in connection with W.P. 11396 (W) of 1999 whereby the Honble Single Judge referred the entire issue for decision before the

Secretary, Education Department. It would be pertinent to note that there was a finding by the Honble Single Judge in paragraph 4 of His Lordships order which reads as under:-But it appears from annexure p-2, page-14 to the supplementary affidavit to the writ application that the petitioner had submitted those option forms on January 16, 1992 that is within time..

3. His Lordship by way of disposing of the application directed the respondent No. 2 (in the said writ petition) to reconsider the claim of the appellant in accordance with law treating the writ application along with the supplementary affidavit as his representation. The said application was disposed of without entering into the merits of the case as observed by His Lordship.

4. In terms of the direction passed by the Honble Single Judge on 22nd February, 2007 the matter came before the respondent No. 3 in the present appeal (who happened to be respondent No. 2 in the said writ petition) in the manner that we have noticed hereinabove. The respondent No. 3 on 5th December, 2007 (page 52 of the paper book) refused the prayer of the appellant and amongst other findings held:-

.In view of what has been stated hereinbefore, the revised option allegedly exercised by the petitioner on 16-1-1992 cannot be taken cognizance of. The option exercised by the petitioner on 26-10-1999 is not valid as it was submitted beyond the permissible period..

5. Furthermore respondent No. 3 came to the following findings:- It is a settled principle that if any pertinent point is missed out in the original writ application and if that point is relevant for the purpose of determination of the matter, then it can be submitted before a Court of law through a supplementary affidavit. But a supplementary affidavit cannot be used for contradicting the averments made in the original writ application. In the instant case, the petitioner has completely contradicted in the supplementary affidavit the averments made in the original writ application. The statements made by the petitioner in the supplementary affidavit are, therefore, not acceptable.

6. This saw the second trip for the appellant before this Court in W.P. 18357 (W) of 2008. This time on 31st August, 2009 the writ petition was dismissed primarily on the following aspects:- No right can be created on the basis of a mistake nor could the District Inspector of Schools create any right in favour of the writ petitioner by acting illegally. Admittedly, the petitioner exercised an option on 26th October, 1994.

and that

the genuineness of which is gravely in doubt for reasons already discussed that is the alleged option on 16th January, 1992.

7. After we have seen the background facts as appearing from the records, we would now advert to the submissions made at the Bar.

8. Sri Bhattacharyya, learned Advocate for the appellant argued the matter extensively and placed before us all relevant orders of the earlier Writ Courts including the finding of the respondent No. 3 in terms of the Court of the first instance including the annexure and the position prevalent.

9. Sri Bhattacharyya submitted that the appellant superannuated from the post of an assistant teacher on 30th September, 1992 and he had initially exercised option by way of switching over from his previous choice from 16th January, 1992 within the time specified by the Government. Sri Bhattacharyya has referred to a Memo of 16th December, 1991 issued by the Joint Secretary for this purpose (page 25 of the paper book). According to Sri Bhattacharyya the appellant acted within the perimeters of the rules but since his initial petition was lost, he made a further application as would be evident from page 28 of the paper book.

10. Thereafter Sri Bhattacharyya put great stress on the finding of the respondent No. 3 which was a fall out of the order passed by the Court of first instance. According to Sri Bhattacharyya, the crux of the matter was essentially missed by respondent No. 3 with regard to the cut off date as also the date on which such choice was exercised at first which was very much within the time limit prescribed by the Government.

11. Thereafter Sri Bhattacharyya invited our attention to that part of the finding where the respondent No. 3 has noted on the veracity of the supplementary affidavit and he was of the view that it is in terms of the order passed by the Honble Single Judge of the first instance it was incumbent upon the respondent No. 3 to have considered the supplementary affidavit in its true perspective. Lastly he wrapped up his submission on the score that the finding returned by the respondent No. 3 was contrary to the order of the Honble Writ Court of the first instance.

12. He has also submitted that the order under appeal cannot be sustained in view of the fact that the very essence of the question which was correctly decided earlier before the Court of first instance was referred for a factual decision before the respondent No. 3, was not taken note of and simply on the ground that the option exercised being disbelievable, the prayer was refused.

13. Sri Haque, learned Junior Government Advocate for the State has opposed the submissions of Sri Bhattacharyya. He has placed before us the Division Bench decision of this Court in the case of State of West Bengal vs. Madan Mohon Ghosh reported in 2005(1) Calcutta Law Journal, Calcutta 151.

14. According to Sri Haque, learned Junior Government Advocate in view of the said Division Bench decision the cut off date that is 90 days from the date of option as stipulated in paragraph 2 at page 25 of the paper book has to be strictly adhered to and no relaxation can be made under any circumstance. Relying on the said decision of the Division Bench in the case of State of West Bengal vs. Madan Mohon Ghosh (supra) Sri Haque was of the opinion that this Court should dismiss the appeal on that very score.

15. He took us through the contents of the communication by the Joint Secretary at page 25 of the paper book and submitted that once it is made clear that the appellant did not submit the option within the extended period, he could not revise his claim any further. In reply, Sri Bhattacharyya claimed that the matter is to be routed through the Head Master of the School. Sri Haque submitted that it was intra-school communication and unless the District Inspector had received the same, no action could have been taken. Seeing no merit in the appeal, he had

prayed for dismissing it.

16. After we have heard the submissions made at the Bar and have considered the materials in the light of the Division Bench decision relied upon by Sri Haque, we would proceed to consider the prayer made in the appeal which is directed against the finding made by the Honble Single Judge on 31st August, 2009 (page 64 of the paper book).

17. Even though in this intra-Court appeal the order which has been assailed relates to 31st August, 2009, the genuineness of the entire issue needs to be traced even anterior to the position before the court of first instance on 22nd February, 2007. As we have already adumbrated before us the sequence of events since the superannuation of the appellant till such time he had moved the appeal we need not repeat the same but simply keep abreast of certain important dates and events which would be necessary for the purpose of proper disposal of this appeal.

18. Although there has been a bundle of events surrounding the entire issue, we are of the opinion that the scope for reconsideration can be narrowed down to a very thin conspectus as the issue involved is whether such option (page 24 of the paper book) has been exercised on 16th January, 1992 or if not at all when? Since the finding of the Honble Single Judge of the first instance (in page 37 of the paper book), in our opinion, carries a long way, the relevant finding of that we have quoted hereinabove. The supplementary affidavit was accepted by the Honble Single Judge of the first instance and the exercise of option on 16th January, 1992 was quoted by His Lordship.

19. Let us understand this situation in the light of the objection raised by Sri Haque, learned Counsel for the State.

20. Fact of such option has been sanctified by virtue of a judicial order which has not been assailed in any forum. Therefore, we take it as it had reached its finality. Once we have gained control over the situation we would again come back to the position where the supplementary affidavit has been spoken of by a judicial forum where the date of exercise of option has been incorporated. Again at the cost of

repetition, we must say that the said order reached its finality as it was not sat in appeal.

21. As such the finding of the respondent No. 3 that the contents of supplementary affidavit are not acceptable and the same cannot construct the averments made in the writ application is not appreciable. Once the Court has accepted the value of the supplementary affidavit and directed the respondent concerned to act on it, it was open for him either to accept or to refuse the same, but not to comment on the acceptability of the same which indirectly impinges on the findings of the Court. This is one aspect of the matter.

22. The other fact remains that in a judicial forum, which again at the cost of repetition we must keep in mind has attained its finality in the absence of the same being challenged elsewhere, the fact of exercise of option was recorded as 16th January, 1992. From the very own findings of the respondent No. 3 we would quote again for the purpose of proper appreciation:-

In view of what has been stated hereinbefore, the revised option allegedly exercised by the petitioner on 16-1-1992 cannot be taken cognizance of.

The option exercised by the petitioner on 26.10.1994 is not valid as it was submitted beyond the permissible period.

23. His act is contrary to the finding returned by him. In the event, we for a moment, referred to the communication of the School Authorities to the District Inspector (page 28) which shows that the option was exercised on 16th January, 1992, but the Authorities had lost the papers, this document, in our opinion, is unimpeachable piece of document which has not been controverted in any fashion.

24. Taking a wholesome appreciation of the entire issue before us, we are constrained to say that the fact in issue which subsisted for consideration did not receive its forensic appreciation in the manner which it was required. As such we are of the opinion that the order under appeal is required to be set aside as also the findings of the respondent No. 3.

25. Accordingly, we allow the appeal and direct the respondent No. 4 to act on the option exercised by the appellant on the above-stated date and take a decision as expeditiously as possible since the appellant is a geriatric person. While disposing of the appeal, we have noted the objection of Sri Haque in the light of the aforesaid Division Bench decision in the case of State of West Bengal vs. Madan Mohon Ghosh (supra) which would be quite distinguishable in the facts of this case. In our opinion, in view of the particular fact situation of the present case, the order is being passed without setting it as a precedent. In view of the above, the application being CAN 2013 of 2010 stands disposed of.

26. Xerox certified copy of the order, if applied for, be given to the parties at an early date.

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