(2013) 11 MAD CK 0212

Madras High Court (Madurai Bench)

Case No: W.A. (MD) No''s. 477 of 2011 and 570 to 572 of 2012 in Writ Petition (MD) No''s. 14002 of 2010 and 1331, 832 of 2012 and 5513 of 2011 and M.P. (MD) No''s. 1, 1 and 1 of 2012

P. Theetha Pillai	APPELLANT
Vs	
The Director, Gandhigram Institute of Rural Health and Family Welfare Trust	RESPONDENT

Date of Decision: Nov. 4, 2013

Citation: (2013) 5 LLN 683

Hon'ble Judges: S. Vaidyanathan, J; M. Jaichandren, J

Bench: Division Bench

Advocate: K. Vellaiswamy, W.A. MD No. 477 of 2011 and M. Mariappan in W.A. MD Nos. 570 to 572/2012, for the Appellant; K. Vellaiswamy, Advocate for R1 in W.A. (MD) No. 570 of 2012 and Sole Respondent in W.A. (MD) Nos. 571 to 572 of 2012, M. Mariappan, Advocate in W.A. (MD) No. 477 of 2011 and RR2 and 3 in W.A. (MD) No. 570 of 2012, for the Respondent

Judgement

S. Vaidyanathan, J.

The aforesaid Writ Appeals have been filed against the common Order passed by the learned Single Judge allowing the Writ Petitions in W.P. (MD) Nos. 1331 of 2012, 832 of 2012 & 5513 of 2011. For the sake of convenience, the Respondents namely F. Nirmal Kumar David, S. Gopal and P. Theetha Pillai are referred to Workmen and Gandhigram Institute of Rural Health and Family Welfare Trust, is referred to as the Management. Since the issue involved in all the cases, is one and the same, the Writ Appeals are taken up together for hearing and disposed of by this common judgment.

2. The undisputed facts are that the three Workmen were Class-IV Employees of the Management. As the age of retirement of Class-IV Employee was 60 fixed by the Government, the Management had fixed the age of retirement as 60, as the existing

service Rules of the Board is as follows:

There was a proposed amendment to restrict the age to 58 years to all the Employees including Class-IV Employees. It is also not in dispute that the Fundamental Rules were made applicable to the Management and the Workmen and in terms of Fundamental Rules 56, the age of the retirement for Class-IV Employee was 60 years. For the sake of convenience, Clause 16 of the Service Rules, 2003 pertaining to the age of retirement of Employees, Clause 19 of Service Rules, 2003 pertaining to the application of Fundamental Rules, etc. and Section 56(1)(a) of the Fundamental Rules are extracted below:

Clause 16 of the Service Rules:

Every employee shall retire on attaining the age of 58 (fifty eight) years or as fixed by the Government of Tamil Nadu from time to time.

Clause 19 of the Service Rules:

The provisions of Fundamental Rules, Manual of Special Pay and Allowances, Tamil Nadu Leave Rules as amended from time to time in so far as they may be applicable and except to the extent expressly provided in these rules shall mutatis mutandis apply to the staff members of the Institute in the matter of their pay, allowances, travelling allowance, leave, leave salary and other conditions of service. The powers assigned to the Government or other authorities in the said rules shall be exercisable by the Institute or any other authority of the Institute to who the Board of Trustees may delegate its powers.

Section 56(1)(a) of the Fundamental Rules:

Retirement on Superannuation.--(a) Every Government Servant in (1) the superior service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. He shall not be retained in service after that age except with the sanction of the Government on public ground, which must be recorded in writing but he shall not be retained after the age of sixty years except in very special circumstances:

Provided that this Clause shall not apply to Government Servants, who are treated as in superior service for the purpose of these Rules but as in the Tamil Nadu Basic Service for the purpose of pension. Such Government Servants as well as basic servants shall retire on attaining the age of sixty years.

3. Prior to 04.01.2003, as per the Service Rules, the age of retirement of the employees was 58 years or as fixed by the Government of Tamil Nadu from time to time. With effect from 01.04.2006, there was an amendment to the Rules and the age of the retirement was fixed at 58 years.

4. The case of the Workmen was that as they were Class-IV Employees and they ought to have continued up to the age of 60 years and they are entitled to wages for

two years (58 to 60) as the Management has not complied with Section 9-A of the Industrial Disputes Act, 1947 and that the wages is a property within the meaning of the Act, under Article 300-A of the Constitution of India, cannot be deprived except in accordance with the law.

5. Even though the Management had addressed the argument before the learned Single Judge about the maintainability of the Writ Petition as Writ would not lie against the private Management, the Management did not argue the said point before the Bench. The Management admitted that they are getting grant in aid from the Government, and that the employees are not entitled to get pension. According to them, this Court, by Order dated 29.10.2010 dismissed the Writ Petition in W.P. (MD) No. 14002 of 2010 filed by one of the Workmen concerned in this Writ Appeal questioning the impugned list, retiring employees at the age of 58 years and consequently, did not allow the Employee to continue in service upto the age of 60 years, and hence, these Employees are not entitled to get any relief, as two other employees in this Writ Appeal are also similarly placed like the other Workman. The Management contended that once Rule is amended, it is retrospective in nature and that there was no mala fide intention on the part of the Management. The Management also further contended that there is no violation of Fourth Schedule to the Industrial Disputes Act, 1947 as the said Schedule did not deal with the age of retirement.

6. It is the case of the Management that the age of the retirement will not come under the alteration of the condition of service and there is no need to issue notice u/s 9-A of the Act. It is also pointed out that upto 2003, the age of the retirement was 58 years and after 2003 till 2006, the age of the retirement was 60 years and thereafter the amendment to the service Rules on 12.04.2006, the age of the retirement was 58 years with effect from 01.04.2006. Hence, the Employees cannot have any grievance and they are not entitled to get any relief.

7. The Management relied upon the judgment of the Honourable Supreme Court in the matter of Harmohinder Singh Vs. Kharga Canteen, Ambala Cantt., , wherein it is held that the pre-conditions namely (i) there must be a change in the conditions of service; (ii) the change must be such that it adversely affects the Workmen; and (iii) the change must be in respect of any matter provided in the Fourth Schedule to the Act, will not be applicable to the facts of the case. The Management also relied upon the decision of the Honourable Supreme Court in the matter of T.P. George and Others Vs. State of Kerala and Others, and contended that it is a policy decision of the Management and the Court cannot decide about the retirement age and prescribe the age limit for retirement.

8. Heard the contentions of the learned Counsel for the Workmen and the Management.

9. It is not in dispute that the Workmen concerned are Class-IV Employees and they were governed by the old Service Rules which prescribed the age limit of 58 years or as fixed by the Government of Tamil Nadu from time to time. The Fundamental Rules, extracted supra, would make it very clear that all the basic servants were to retire on attaining the age of 60 years. There was a legislative intention to give benefits to the basic servants and it cannot be taken away by the Management in an arbitrary and capricious manner to retire at the age of 58 years, more particularly, it is an admitted fact that they are not entitled to get pension.

10. The contentions of the Management that there is no violation of the provisions of the Industrial Disputes Act, cannot be correct as they have violated Clauses 8 & 9 of the Fourth Schedule of the Industrial Disputes Act, and Section 9-A and which are extracted below:

Section 9-A and the extract of the Fourth Schedule to The Tamil Nadu Industrial Disputes Act:

Section 9-A. Notice of change.--No employer, who proposes to effect any change in the conditions of service applicable to any Workman in respect of any matter, specified in the Fourth Schedule, shall effect such change--

(a) without giving to the Workman likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or

(b) within twenty-one days of giving such notice:

Provided that no Notice shall be required for effecting any such change--

(a) where the change is effected in pursuance of any [settlement or award;] or

(b) where the Workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules or the Indian Railway

Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply.

Fourth Schedule to The Tamil Nadu Industrial Disputes Act:

8. Withdrawal of any customary concession or privilege or change in usage.

9. Introduction of new Rules of discipline, or alteration of existing Rules, except in so far as they are provided in Standing Orders.

11. From the provisions of Section 9-A and the Clauses 8 & 9 of the Fourth Schedule, extracted supra, it is very clear that it is the mandatory duty cast upon the employer to issue a Notice u/s 9-A of the Act before any change is effected and if there is no

dispute or objections raised by the Workmen, the change can be effected after 21 days of such notice. If the change is effected pursuant to the any settlement or award, no notice is required. Similarly, if the Workmen are going to be affected by any change based on the Rules and Regulations notified by the Government in the Official Gazette, notice u/s 9-A is not required. Admittedly, the Management has reduced the age to 58 years when there is no amendment for retirement of age from 60 to 58 years. The Service Rules framed by the Management is not statutory in nature, even though it binds on the Management and Workmen and the said amendment of the Rules framed by the Management cannot take away the benefit conferred on the Workmen by the Management by violating the mandatory provisions of Section 9-A of the Industrial Disputes Act, 1947. Hence, the contention of the Management that the age of the retirement will not come under alteration of Service Conditions has to fail. When the Management has not complied with the mandatory provisions, the question of retrospective effect to the rules need not be gone into. Whether the Rules framed by the Management is retrospective or prospective cannot take away the benefit conferred on the employees under the Industrial Disputes Act, 1947. When the Management has extended the age of the retirement to 60 in 2003 and it continued for three years, it has become a service condition and it cannot be withdrawn unilaterally.

12. The contention of the Management that in view of the Order dated 29.11.2010 in W.P. (MD) No. 14002 of 2010, the learned Judge ought to have dismissed the Writ Petition which is subject to the Writ Appeal, is farfetched. In the Writ Petition filed by one employee namely P. Theetha Pillai, he has questioned by filing a Writ of Certiorarified Mandamus the list of the Management retiring the employees at the age of 58 years and then to continue up to the age of 60 years. The learned Judge dismissed the Writ Petition holding that as the Rules were not questioned, the Writ Petition was not maintainable. The learned Judge, while dismissing the Writ Petition, has observed that Fundamental Rules are applicable mutatis mutandis and pay the allowances and other conditions of the services and in that case Board has made a clarification that there shall be a uniform age of retirement. There was no challenge to the Rules in W.P. (MD) No. 14002 of 2010. In W.P. (MD) No. 14002 of 2010, the Employee has not questioned the Clause 16 of Service Rules, 2003, amended with effect from 1.4.2006 and thereby, retiring the age of employees at the age of 58.

13. Hence, the judgment in W.P. (MD) No. 14002 of 2010 will not be applicable as the Rules have not been questioned. In any event that decision is subject matter of W.A. (MD) No. 477 of 2011 now decided in this common judgment. The Management cannot quote the unreported judgment when the same is subject matter of Appeal now being heard and decided.

14. The Hon''ble Supreme Court in the matter of Hindustan Petroleum Corporation Ltd. and Another Vs. Dolly Das, has held that when the facts are not in dispute relegating the parties to alternative remedy is not required. As observed earlier, the

date of joining, the date of retirement age at 60, subsequently reduced to 58 years and applicability of Section 56(1)(a) of the Fundamental Rules, the status of the Employees as Class-IV Employees, there was no notice as contemplated u/s 9-A of the Industrial Disputes Act, 1947, the Management receiving grant-in-aid from the Government are all admitted facts.

15. In such a situation, relegating to an alternative remedy and direct them to go and approach the Industrial forum even though the Management is an Industry as per the Industrial Disputes Act, 1947, we feel that such an exercise need not be given to the Employees, as based on the admitted facts, the Employees will have to succeed. The Management unfortunately without acting as a model employer has driven them to the Court to get the two years wages when the money value got down. We, therefore, dismiss the Writ Appeals in W.A. (MD) Nos. 570 to 572 of 2012 as the Clause 16 of the Service Rules, 2003 has been held to be bad as in violation of Section 9-A of the Industrial Disputes Act, and in view of this, there is no adjudication required in W.A. (MD) No. 477 of 2011. It is a fit case for payment of costs. Since the Management is a Trust and hoping that henceforth the Management would be a model employer, we refrain from imposing costs. The Management is directed to pay the wages for two years with interest @ 6% per annum from the date of Writ Petition, and other consequential benefits including terminal benefits, if any, like Gratuity with statutory interest as per Payment of Gratuity Act, 1947, from the date of the money became due. Consequently, the connected Miscellaneous Petitions are also dismissed. No costs.