(2000) 03 CAL CK 0006

Calcutta High Court

Case No: M.A.T. No''s. 3076, 3077, 3107 and 3035 of 1999

The Registrar General of Births, Deaths and Marriage, W.B. and Others		APPELLANT
	Vs	
W.B. Non-Official Marriage Officers Asscn. and Others and Shaktipada Sengupta and Shyam Sundar Gupta State of West Bengal and Another Vs Nitya Ranjan Guha		RESPONDENT

Date of Decision: March 10, 2000

Acts Referred:

- Special Marriage Act, 1954 - Section 50

Citation: 104 CWN 973

Hon'ble Judges: Ashok Kumar Mathur, C.J; Satyabrata Sinha, J

Bench: Division Bench

Advocate: Debasish Kar Gupta, Monotosh Chakraborty, Somnath Dey, Amal Baran Chatterjee and Nemai Chandra Betal, for the Appellant; A. Rahaman, S.P. Majumdar and Rabindra Narayan Das, Sadananda Sharma and Saktipada Sengupta, for the Respondent

Judgement

Ashok Kumar Mathur, C.J.
All those four appeals have been filed by the State arising out of the main judgment delivered by the learned Single Judge in the case of W. P. No. 30127 (W) of 1997. Therefore, all these four appeals are disposed of by the common order. For convenient disposal of all these four appeals the facts given in the M.A.T. No. 3035 are taken into consideration.

2. This appeal is directed against the judgment given by the learned Single Judge in the writ petition No. 30127 (W) of 1997 whereby the learned Single judge allowed the writ petition and directed that the impugned notification cannot stand in the

way of the petitioner and it will not affect his right lo continue in service under the original Rules till at the end of the age of retirement at 65 years under the original Rules.

3. The petitioner was appointed as a Non-Official Marriage Officer under the Special Marriage Act, 1954 (hereinafter referred to as the Act) and the West Bengal Special Marriage Rules, 1969 (hereinafter referred to as the Rules) by the State of West Bengal under Notification No. 124-Regn. dated 7th April, 1995 and 159-Regn. Dated 14th; July, 1995. The Non-Official Marriage Officer is defined under sub-clause (1) of Clause (c) Of Rule 2 of the said Rules. According to the unamended Rule 24(21 (c) a Non-Official Marriage Officer shall not ordinarily be appointed who is less than 40 years of age and more than 65 years of age. According to the unamended Rule, the writ petitioner would have retired from his post on attaining the age of 65 years in accordance with the Rule 30 read with Rule 24(2)(c) of the said Rules. The State appellant meanwhile amended the. Rules by the Notification No. .JE/MR/24 dated 22nd January, 1997 whereby Clause (c) of Rule 24(2) of the said Rules was amended by providing that a Non-Official Marriage Officer shall not be less than 25 years and more than 60 years of age. It was also provided that the upper age limit shall not apply to a Non-Official Marriage Officer who may have attained the age of 60 years i.e. he will be allowed to continue in service" till he reaches at the age of 65 years. Rule 30 of the said Rules was also amended by Notification No. JE/MR/155 dated 7th July, 1997 whereby a Non-Official Marriage Officer is to retire from the post on attaining the age of 60 years. However, the upper age limit shall not apply to Non-Official Marriage Officer who have already attained the age of 60 years The grievance of the petitioner was that a valuable right to continue to function as Non Official Marriage Officer till he attains the age of 65 years cannot be taken away and he cannot be made to retire at the age of 60 years. It was also contended that the respondent has illegally, arbitrarily amended the Rules and applied it retrospectively retiring the petitioner on attaining the age of 60 years. However, the validity of amended Rules was not challenged.

4. Before we enter into the controversy involved in the matter, it may be relevant to mention that Section 50 of Special Marriage Act, 1954 empowers the Central Government as well as the State Government to frame Rules for earning out the purpose of the Act. In pursuance of the aforesaid Act. the State Government framed the Rules known as West Bengal Special Marriage Rules, 1969. Rule 2(c) defines Marriage Officers which reads as under:

2. Definitions : In these Rules, unless there is anything repugnant in the subject or context

(c) Marriage Officer include

(i) an ex-officio Marriage Officer, that is to say, a Marriage Officer appointed from amongst the Officers of the State Government, and

(ii) a Non-Official Marriage Officer, that is to say, a Marriage Officer appointed from persons other than the Officer of the State Government.""

5. Rule 24 unamended which deals with the process of appointment of Non-Judicial Marriage Officers reads as under:

24. Procedure for appointment of Non-Official Marriage Officers:

(1) The appointment of Non-Official Marriage Officers under the Act shall be made by the State Government on an application made in this behalf to the Secretary. Judicial Department, Government of West Bengal, by a person giving particulars of the following points :

(a) his present age;

(b) his educational qualification;

(c) his profession or service:

(d) the address of his residence:

(e) the building or premises in which the office of the Marriage Officer should be situated if he is so appealed

(f) the area for which he wants to be appointed as Marriage Officer;

(g) The number of Marriage Officers already appointed for that area:

(h) whether the number of Marriage Officers already appointed in that area is insufficient for the requirements thereof (the statement should be supported by grounds);

(i) the school or college in which he has read and how he has been employed since leaving the school or college;

(j) any other special qualifications or activities he wishes to mention;

and the application shall be countersigned by at least ten respectable inhabitants of the local area, for which the applicant wants to be appointed as a Marriage Officer, stating that he is fit and proper person to be appointed as a Marriage Officer for that area.

(2) A person to be appointed as a Non-Official Marriage Officer shall fulfil the following conditions :

(a) he must be an Indian citizen domiciled in the State of West Bengal:

(b) he shall be normally resident in the local area for which he is appointed;

(c) he shall not ordinarily be less than 40 years and more than 65 years of age;

(d) he must have passed the Higher Secondary or its equivalent examination;

(e) he shall be a person of integrity and good moral character.

(3) Before appointment, an inquiry shall be made through the Chief Presidency Magistrate in Calcutta and the District Magistrate in the districts regarding an applicant''s antecedents and his suitability for appointment as a Marriage Officer.

6. Rule 24(2)(c) was amended by notification dated 22nd January, 1997 published in the Calcutta Gazette (Extraordinary) on 24th January, 1997 for our purpose reads:

(c) he shall not be less than 25 years and more than 60 years of age.

provided that the upper age limit shall not apply to a Non-Official Marriage Officer who may have attained the age of 60 years before the coming into force of this clause. Such Non-Official Marriage Officer shall continue till he attains the age of 65 years unless. he retires or is removed in accordance with the provisions of the Act and these Rules.

7. As per the amended provision any person to be appointed as Non-Official Marriage Officer shall not be less than 25 years and not more than 60 years of age. Earlier, according to the unamended Rules as quoted above a Non-Official Marriage Officer could net have been appointed who was less than 40 years and not more than 60 years of age.

8. Rule 30 unamended dealt with age of superannuation which reads as under:

30. Retirement: A Non-Official Marriage Officer shall ordinarily retire from his post on the attainment of 65 years of ages. A notice of retirement shall be given by the District Registrar or the Registrar General of Births. Deaths and Marriages, West Bengal, six months ahead of the date of retirement in each case, but non-service of any such notice shall not entitle a Marriage Officer to continue lo hold the post alter his attainment of 65 years of age.

9. This Rule was amended by the Notification dated 7th July, 1997. The amended provision reads:

30. Retirement : A Non-Official Marriage Officer shall retire from his post on the attainment of 60 years of age. A notice of retirement shall be given by the District Registrar or the Registrar General of Births, Death and Marriages. West Bengal, six months ahead of the date of retirement in each case, but non-service of any such notice shall not entitle a Non official Marriage Officer to continue to hold the post after his attainment of 60 years of age:

Provided that the upper age-limit shall not apply to a Non-Official Marriage Officer who may have attained the age of 60 years before the coming into force of Clause (c) of sub-rule (2) of Rule 24 of the said Rules. Such Non-Official Marriage Officer shall continue till he attains the age of 65 years unless he retires or is removed in accordance with the provisions of the Act and these Rules.

10. According to the unamended provisions an incumbent is ordinarily to retire from his post on attaining the age of 65 years. According to the amended provision Non-Official Marriage Officers shall retire from his post on attaining the age of 60 years but a proviso was added to safeguard the interest of the Non-Official Marriage Officers who had already crossed the age of 60 years. Such Non-Official Marriage Officer shall continue till he attains the age of 65 years unless he retires or is removed in accordance with the provisions of the Act and the Rules. Therefore, the effect of amendment is that earlier the minimum age prescribed for the Non-Official Marriage Officer was 40 years and the maximum 65 years and the retirement was at the age of 65 years but by virtue of the amendment, the effect is that minimum age has been fixed as 25 years of age and maximum age at 60 years and a proviso was added for persons who have crossed the age of 60 years that they may be allowed to continue upto (35 years of age. Therefore, under both these provisos under Rule 24(2)(c) and Rule 30 a candidate who has crossed the age of 60 years has been allowed to continue upto 65 years. This has been challenged on the ground of Articles 14 and 16 that it is discriminatory and its retrospective operation will deny the right which have been conferred on the incumbent to continue upto 5 years.

11. In this background, the learned Single Judge after considering the matter came to the conclusion that both provisos are discriminatory and classifying two age groups of superannuation is not rational. The learned Single Judge also held that both provisos are prospective and it cannot be applied retrospectively, denying benefits which have already accrued to persons to continue upto 65 years. In this connection, the learned Judge relied on the decision of the Apex Court in B. Prabhakar Rao vs. State of Andhra Pradesh. AIR 1986 SC 210. The learned Single Judge allowed the writ petition and held the notification cannot stand in the way of the petitioner and shall not affect the rights of the petitioner with regard to his age of retirement under the original Rules i.e. 65 years. Accordingly, he allowed the writ petition. Hence, the present appeal was preferred by the Registrar General of Births, Deaths & Marriage. West Bengal.

12. Learned Counsel for the State-appellant submitted that the State is competent to frame Rules unilaterally as the appointment in the present case is not based on the contract, but it is a status. Since it is a service under the State, therefore, the State is competent to amend the Rules unilaterally and lay down the service conditions. If was also contended by learned Counsel that State can frame Rules prospectively as well as retrospectively. Therefore, the Government framed the Rules u/s 50 of the Act and laid down the service condition for the Non-Official Marriage Officers. In this connection, the learned Counsel invited out attention to the decision of the Apex Court in Roshan Lal Tandon & Ors. vs. Union of India. AIR 1967 SC 1889. It was observed by Their Lordships as:

The legal position of a Government servant is more of one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties

imposed by the public law and not by mere agreement by the parties.""

13. In this connection our attention was also invited to the decision in the case of K. Nagraj & Ors. vs. State of Andiva Pradesh AIR 1985 SC 551. In this case, the age of the retirement of the Government servants was reduced from 58 to 55 years and this was challenged it was held that the State is competent to frame Rules prospectively and retrospectively and can change the service condition also. It was observed :

The service Rules can be as much amended, as they can be made, under the proviso to Article 309 and the power to amend these Rules carries with it the power to amend them retrospectively. The power conferred by the proviso to Article 309 is of a legislative character and is to be distinguished from an ordinary Rule making power. The Rules and amendments made under the proviso to Article 309 can be altered or repealed by the legislature but until that is done, the exercise of the power cannot be challenged as lacking authority.

14. Our attention was also drawn to the decision of Apex Court in case of N. Lakshmana Rao & Ors. vs. State of Karnataka reported in AIR 1975 SC 1646. This was a case under Karnataka State Civil Sen-ices (Age of Compulsory Retirement) Rules, 1974. Under Rule 2, the age of compulsory retirement of six categories u/s 2(4) of the Government servant was fixed at 55 years with effect from 1.4.74. This was challenged on the ground of Articles 14 and 16. Their Lordship held that under the provision of Article 309. the service condition can be laid down by the State Government without any limitation. The Government is competent to frame the Rules under the provision to Article 309 of Constitution prospectively and retrospectively. It was held:

The proviso to Article 309 contemplates that Rules regulating conditions of service may be made under an enactment Just as it is open to the appropriate legislature to provide Rules to be framed for regulating recruitment and conditions of service under Article 309. it is equally open to the legislation to provide that in certain conditions the Governor acting under the proviso may make appropriate Rules. The power under the Main part.

15. The contention of the learned Counsel for the appellants was that since the State Government can frame the Rules prospectively and retrospectively, therefore, they have framed the Rules in exercise of the powers u/s 50 of the Act and has laid down that for appointment to the post of the Non-Official Marriage Officer, the minimum age shall be 25 years and the age of superannuation will be 60 years. However, a proviso was added with a view to protect the interest of candidates who have already crossed the age of 60 years and they have been allowed to continue upto 65 years as it was there in the original Rules. But the candidates who have not crossed the age of 60 years they have been allowed to retire on attaining the age of superannuation at 60 years. Therefore, there are two ages of superannuation one

for the persons who have not attained the age of 60 years and another for the persons who have already crossed the age of 60 years. For those who have crossed the age of 60 years at the time when the Rules came into force, for that the State Government has added a proviso that they may be allowed to continue upto 65 years but the incumbents who have not attained the age of 60 years, they will be retiring on attaining the age of 60 years. Therefore, the question is whether this kind of classification made by the State Government is permissible or not add is it violative of Articles 14 and 16 of the Constitution of India. It is true that the status of the Non-Official Marriage Officer is not a contractual appointment but it is an appointment under the Rules and therefore these Non-Official Marriage Officers enjoy a status. The State Government is competent to lay down the Rules unilaterally. The State Government can also lay down the Rules prospectively and retrospectively. In the present case. the State Government has formed two classes one for candidates who are yet to complete 60 years and candidates who have already crossed the age of 60 years. It is permissible for the State Government to unilaterally fix the age of superannuation for all the class of people. But State Government has created two classes one who has attained the age of 60 years and one who is likely to attain the age of 60 years. The purpose for classifying the person in two classes is that normally the age of superannuation for all incumbents shall be 60 years but persons who have already crossed the age of 60 years they may continue upto 65 years of age as was provided in the old Rules because it would cause hardship to them. The classification is very clear and the nexus or object is also very clear. In order to ameliorate the hardship which is likely to be caused to persons who have crossed the age of 60 years they created a separate class as distinct from the class of persons who have not crossed the age of 60 years. Therefore, the State Government with the clear purpose in the mind that those candidates on the date when Rules have come into force have already crossed 60 years they have been allowed to continue upto the age of 65 years. The distinction which has been made by the State Government with reference to the classes is very clear and categorical. But the question is that the candidates who are yet to cross the age of 60 years have been allowed to retire on attaining the age of 60 years whether the denial of benefit to this class of persons is valid or not. Since the validity of the rules have not been challenged before us we have to interpret the Rules as it stands and a clear reading of the newly added Rule 2(c) as well as Rule 30 makes it clear that two classes have been framed by the State and the two classes of persons have been separately dealt with i.e., the candidates who have crossed 60 years and candidates who are yet to cross the age of 60 years. This distinction of the basis of the age is clear and cannot be said that this distinction is arbitrary or discriminatory. The intention of the State Government is clear that the candidates who have not attained the age of 60 years shall retire on attaining the age of 60 years and those who have already crossed the age of 60 years they may be allowed to continue upto 65 years. Therefore, there are two classes and there is no similarity between the two classes though initially they were governed by the old rule where the age of

superannuation was 65 years but by amendment of the Rules and incorporation of the provisions under Rule 24(2)(c) two classes has been made which are distinct and separate on the basis of age and both the class of persons have been separately dealt with. It is not correct to say that both the class of persons are similarly situated. In this connection reference may be made to the decision of the Apex Court in State of West Bengal vs. Manatosh Roy 1999(2) SCC 71. arising from this State. The question in this case was with regard to fixation of cut off date for revised pension on the recommendation of the Pay Commission. The question was whether the retired Government employees can seek pension prior to the cut off date under the pension Rules. The contention was negatived by their Lordships and held that persons who had retired on a particular date and are not covered by the recommendation of the Pay Commission they cannot be given the benefit of the revised pension. It was observed that a particular cut off date can be fixed by the appropriate Government and the persons who are eligible as per the Rules they can get the pensionary benefits and if the persons who are not eligible to the benefits with regard to the cut off date no relief for such persons can be given. It was observed by the Hon''ble Supreme Court as under:

In matters of revising the pensionary benefits and even in respect of revision of scales of pay, a cut off date on some rational or reasonable basis has to be fixed for extending the benefits. The new provisions for payment of pension introduced by the amendment of 1987 were only consequential to the restructuring of the pay scale of the members of the service. Therefore, the respondent cannot claim benefit of higher pay scale having retired from service long before the introduction of such pay scales.

16. As per the decision in State of West Bengal vs. Manatosh Roy (supra), it is clear that the two classes can be formed, that is those persons who retired on and after 1.1.86 and those who retired prior to that. Therefore, the benefit was only made applicable to persons who have retired on or after 1.1.86 and no pensionary benefit was made available to the persons who have retired prior to this date. The learned Counsel for the appellants submitted that in view of this decision of the Apex Court a distinction which has been made by the Government with reference to the age appears to be rational, reasonable and it cannot be said that it suffers from any illegality. The learned Counsel for the appellants submits that there is no question of retrospectivity involved in the matter once the Rules have come into force then persons who are covered these Rules will be entitled to the benefits and those who are not covered by these will not be entitled to the benefits. As mentioned above the two classes has been created with reference to the age i.e. those who have crossed the age of 60 years and those who are yet to cross 60 years. Therefore, applying the ratio laid down by the Apex Court, the persons who are not covered by the provisions of Rules will not be entitled to any benefit.

17. As against the above, the learned Counsel for the respondents relied on the judgment in the case of B. Probhakar Rao vs. State of Andhra Pradesh (supra), where the age of superannuation of the employee of the Andhra Pradesh was reduced from 58 to 55 years. Subsequently, the State Government realized that a serious injustice has been done by reducing the age of retirement from 58 to 55 years. Therefore, they tried to redress the grievances of their employees and again enhanced the age of superannuation from 55 to 58 years by A. P. Public Employment (Regulation of Age of Superannuation) Act by substituting 58 years as the date of superannuation. The question arose whether those employees who have retired under the old Rules on attaining the age of 55 years are entitled to the benefits of the enhanced age of 58 years or not as the benefit of subsequent enactment enhancing the age of retirement to 58 years had come into force. Their Lordships held that in Section 4(1) of the A. P. Public Employment (Regulation of Age of Superannuation) Act. the naughty word "not" be omitted. Their Lordships laid down the provisions in order to give benefit to those class of persons. This was a case of peculiar nature and of its own kind. In this case where the age of superannuation was reduced from 58 to 55 years and it was sought to be restored back in that context. Their Lordships said that the provisions cannot be read retrospectively unless they are so intended. But in the present case, the Rules have been made prospectively only and when the Rules have come into force reducing the age for certain class of persons who have not crossed the age of 60 years to be retired on attaining the age of 60 years cannot be said that the Rules are being sought to be applied, with retrospective effect. At the time when the appointment was made a particular age limit was prescribed and subsequently the age of superannuation was reduced and two classes were formed those who have crossed 60 years and those who are yet to cross 60 years. On coming into force of these Rules any incumbent who attains the age of 60 years shall be retired and who have already crossed that age will continue upto 65 years of age. Therefore. Rules are not given retrospective effect as is held by the learned Judge with reference to decision of Apex Court (supra). The present case, in our opinion, is distinguishable from that of the case of B. Prabhakar Rao vs. State of Andhra Pradesh (supra).

18. Therefore, in view of above discussion we are of the opinion that these two separate classes have been dealt with separately and there is no question of implementing the proviso respective qua petitioner. The proviso has come with prospective effect amending the earlier provision and the same has been given prospective effect. The view taken by the learned Single Judge does not appear to be correct, hence, we set aside the orders under appeals and dismiss all the writ petitions filed by the petitioners. All the State appeals are allowed. No order as to costs.

Our attention was drawn to M. A. T. No. 3077 of 1999. In that case it is alleged the incumbent has already crossed the age of 60 years with reference to the cut off date and therefore he is entitled to continue upto 65 years of age. If it is so, the

authorities may ascertain and if he is entitled to continue beyond 60 years with reference to the amended provisions of law then he may be allowed to continue upto 65 years.

Sinha, J. : Although I agree with the judgment of the Hon''ble Chief Justice, I would like to add a few words.

21. The question which emerges for consideration in these appeals is whether prescribing two different retirement age, one at 60 years and the other at 65 years, is discriminatory and thus hit by Article 14 of the Constitution of India. Article 14 although forbids class legislation but does not forbid reasonable classification.

22. Those who had already crossed the age of 60 years from a separate class by themselves and such classification in my view is reasonable.

23. In Life Insurance Corporation of India vs. S. S. Srivastava & Ors. reported in AIR 1987 SC 1527, the Apex Court after holding that age of superannuation at 58 is valid, proceeded to consider as to whether different age of superannuation is permissible in law. The question was answered in the affirmative. The said decision was followed by the Supreme Court in B. S. Yadav & Anr. vs. The Chief Manager, Central Bank of India & Ors. reported in AIR 1987 SC 1706. wherein different ages were prescribed in relation to the employees who were appointed prior to nationalization and those were appointed thereafter. It was held :

"We have given detailed reasons in our judgement in the Life Insurance Corporation of India vs. S. S. Srivastava (Civil Appeal Nos. 1076-1077 of 1987) decided on 5.5.1987: (Reported in AIR 1987 SC 1527) justifying the existence of a Rule fixing different ages of retirement to different classes of employees of the Life insurance Corporation of India in the circumstances existing there. The circumstances prevailing in this case are almost the same. Those reasons are equality applicable lo the present case too. In Govindarajulu vs. Management of the Union Bank of India, Writ petition No. 5486 of 1980 decided on 21.11.1986. the High Court of Madras has rejected the contention similar to those which are raised before us. In that case a regulation framed by the Union Bank of India which was similar lo the one in this case was upheld. That decision has been approved by us in the Life Insurance Corporation of India vs. S. S. Srivastava (supra). In Dr. Nikhil Bhnsan Chandra us. Union of India, 1983 Lab IC (NOC) 109 (Cal). similar questions framed by the United Commercial Bank which was also nationalized under the Act came up for consideration before the High Court of Calcutta. The High Court rejected theory of discrimination put forward on the basis that fixing 60 years as age of retirement for those who were recruited prior to July 19, 1969 and 58 years of age who joined after that date lacked an intelligible differentia. The Calcutta High Court pointed out that the terms and conditions of the service of the employees of the Banks which were taken over under the Act had been protected by the Act and it was not possible to hold that there had been any hostile discrimination against the petitioner in that

case."

Similar view has also been taken by a learned Single Judge of this Court in Sri Ramopada Sinha vs. Union of India reported in 1996(2) CHS 65.

Later on-Prayer for stay of operation of the order is rejected.

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Satyabrata Sinha, J.