

(2009) 11 CAL CK 0035

Calcutta High Court

Case No: M.A.T. No. 1409 of 2006 Arising out of W.P. No. 7157 (W) of 2004

Amiya Pada
Chatterjee and Others

APPELLANT

Vs

State Of West Bengal
and Others

RESPONDENT

Date of Decision: Nov. 30, 2009

Citation: (2010) 1 CALLT 635 : (2010) 124 FLR 977

Hon'ble Judges: Md. Abdul Ghani, J; Kalyan Jyoti Sengupta, J

Bench: Division Bench

Advocate: Rameswar Bhattacharjee, for the Appellant; Bhaskar Mitra and Dibyendu Sengupta, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.

The Appellants before us having been unsuccessful in getting relief in their above writ petition have preferred instant appeal against the judgment and order of the learned Single Judge dated 1st March, 2008. By the said impugned judgment and order the learned Trial Judge disposed of several writ petitions having found identical and similar points were being agitated, and the aforesaid writ petition was one of them. The fact constituting the grievance of the appellants before the learned Trial Judge is as follows:

2. The appellants and each of them were initially appointed by the State of West Bengal and were subsequently absorbed in Durgapur Projects Limited in terms of the then conditions of service which the petitioners had with the Government of West Bengal. After they were absorbed in Durgapur Projects Limited being the respondent No. 6 it did not extend the benefit as was admissible to them in violation of the conditions of service. According to them under the terms and conditions of service they were entitled to get all the benefits as was and still is available to the State Government employees. It is further case of appellants that at the time of absorption they duly exercised their option and respondent No. 6 had accepted the

same and thereby and thereunder it had agreed to grant all the benefits arising out of the terms and conditions for the Government employees. At the time of their respective dates of retirement they were not paid their due pensions and the amount of Gratuity. The grievance of non-payment of due Gratuity has been elaborated in the supplementary affidavits filed in support of the writ petition. They had accepted the said amount of Provident Fund which includes their own shares as well as that was contributed by the respondent No. 6. After receiving the said amount they found that the State of West Bengal has extended the benefit of pension to the employees of other State Government undertaking. The said pension scheme has been formulated by the Government in the said undertaking for retired employee who received contributory Provident Fund. On return of Provident Fund amount with interest they could opt for pension. They made several representations for extending such scheme to this undertaking so that the appellants may get benefit of pension.

3. From the statement and averment made in the petition it appears that the appellants have highlighted two grievances. Firstly they were erstwhile employees of the Government as such their conditions of service which includes payment of pension cannot be changed and/or varied by the respondent No. 6 after absorption. Secondly they have been paid less amount of gratuity. The grievance against the Government of West Bengal is that the Government has failed to make provision for pension scheme for the employees like appellants and though the employees who were similarly circumstanced and placed likewise the appellants have been given pensionary benefits in the other State Government undertaking.

4. The case of the respondent No. 6 is briefly stated hereunder. In the affidavit affirmed by one Tarun Kumar Sen Sharma on behalf of the respondent No. 6 has stated that appellants (writ petitioners) and each of them were all temporary Government employees under the Durgapur Industries Board. After on Durgapur Projects Limited being incorporated they exercised their option for continuing their services in newly incorporated body. Accordingly in terms of the notification on and from 1961 they became employees of the Durgapur Projects Limited. The respondent No. 6 being a Government Company framed and published standing orders providing terms and conditions of service of its employees and also prescribing financial and terminal benefits which will be granted to the employees of the Durgapur Projects Limited on their retirements. Those terms and conditions were acted upon by all the persons concerned as the present appellants without demur or objection had accepted the same. As a matter of fact they became direct employees of the respondent No. 6 unlike the permanent Government staff whose terms and conditions of service with Government prior to absorption had to be accepted by the respondent No. 6. Rules were framed by the respondent No. 6 regulating payment of Gratuity to its regular employees from 1963. Obviously on commencement of Gratuity Act, 1972 necessary amendment to the State Rules was made as under the Act minimum and maximum amounts of Gratuity have been

prescribed and with the Amendment of the said Act, minimum and maximum amount of Gratuity were also revised. The respondent No. 6 also issued necessary amendment orders and the retired employees were paid different amount of Gratuity, as was permissible on the date of retirement under terms and conditions of the Gratuity Act, 1972. The appellants and each of them having accepted the amount of gratuity and Provident Fund without any demur and objection had acted upon the said terms and conditions of service. After having accepted the same now they have come long after their retirement with the illegal and unreasonable prayer for payment of pension. It is also stated that similar grievance was raised by a group of retired employees in writ petitions being 16589 (W) of 1998 and 8982 (W) of 2004. The writ petition filed in 1998 was dismissed however in the second writ petition of 2004 an order was passed by the Hon'ble Trial Judge directing the Managing Director of respondent No. 6 to take reasoned decisions dealing with this problem after giving an opportunity of hearing to the writ Petitioners. In pursuance of such decision reasoned order was passed by the Managing Director of respondent No. 6. By the reasoned order the claim and contentions were not allowed as such the same has been challenged by filing a writ petition being WP No. 2262 (W) of 2005 which is still pending in this Court. Therefore, the grievance of the appellants which is identical and similar to that of those group of retired employees are not required to be adjudicated any more as those points are hit by the principle of res judicata and analogous thereto.

5. Mr. Rameswar Bhattacharjee the learned Counsel appearing for the Appellants. while highlighting the fact contends that the Appellants were appointed as Government analysis and it will appear from the appointment letters issued by the Government of West Bengal, Development Department, but they were placed at Durgapur Industries Board. By virtue of Clause 7 of the Notification at page 45 of the supplementary paper book the Appellants being temporary employees, were absorbed in the Durgapur Project Limited on option being exercised under the same terms and conditions as they were appointed. The terms and conditions may however, be modified by the Government in future that would not be in no way less advantageous than those to which the Appellants were entitled to immediately before incorporation of the Company. Therefore, according to him terminal benefit on retirement as admissible to the State Government employee will also be made available and payable automatically to the Appellant. Similarly enhanced amount of gratuity should have been paid. Unfortunately the company in breach of the aforesaid terms of absorption did not pay the amount of Gratuity to the Appellants from 1st December, 1995 till November, 1997, although enhanced gratuity amount is being paid. He has drawn our attention to an order of the learned Single Judge of this Court and passed in Case No. 10156 (W) of 1987 and submits that one of the employees who is similarly placed got the pensionary benefit. His Lordship also considered the notification dated 8th August, 1961 and while interpreting His Lordship was pleased to grant benefit to the absorbed employees. He further

submits that the judgment of Justice Subhro Kamal Mukherjee was passed taking into consideration of the judgment and order of Justice Mitra. His Lordship also provided on the basis of other materials and not on those which are placed in this matter. Therefore, the said judgment is not a binding precedent. Naturally the judgment of the Appeal Court following the judgment of Justice Mukherjee cannot be a precedent in the present matter as points urged in this matter stand on different footing from the matter referred above. He also urges that there has been a gross discrimination while refusing the relief to the appellants herein and granting relief to the employee who obtained order of this Court.

6. Mr. Bhaskar Mitra learned Counsel appearing for the respondent No. 6 while placing the facts as narrated by his client submits that there was no warrant for interference with the judgment and order of the learned Trial Judge as the writ petition has been rightly rejected. Admittedly the appellants at the time of absorption were temporary employees and it would appear from Clause 7 of the Notification dated 3rd August, 1961 the terms and conditions of the temporary employees of the Durgapur Industries Board immediately prior to 3rd August, 1961 could be modified by Director Durgapur Projects Limited provided the modified terms and conditions were not less advantageous to the existing terms and conditions. Under the law on the date of absorption of the temporary employees here appellants also became permanent employee of the respondent No. 6. Thereafter the standing order was prepared and the same was also certified and accepted by the authority concerned. The said standing order containing new terms and conditions which are not at all inconsistent with or less advantageous to the previous terms and conditions, was acted upon and accepted by everyone including appellants. The appellants were granted promotion under the terms and conditions of the standing order. The family pension scheme was introduced by respondent No. 6 in 1971 under the Provident Fund Act, 1962 none of the appellants exercised option in favour of family pension scheme. Accordingly the appellants became entitled to and accepted Contributory Provident Fund on their retirement. After accepting all these retirement benefits the appellants and each of them are estopped after severance of employer-employee relationship. As far as the grievance of the appellants about payment of less amount of Gratuity is concerned such claim is baseless and without any foundation. The appellants and each of them were paid their amount of Gratuity as was available under the law viz. the Gratuity Act as well the Rules framed thereunder. At the time of respective dates of retirement maximum amount of Gratuity as admissible under the law was less and therefore the company had no option but to pay whatever is available. Since maximum amount of Gratuity was enhanced subsequently by amendment of Gratuity Act, 1971 the employees who retired after 1995-1997 got the higher amount of Gratuity and this amendment of increasing the maximum amount of Gratuity cannot be given any retrospective effect.

7. He further contends that the judgment and order Justice N.K. Mitra cannot be a binding precedent as it was not a case of temporary employee.

8. Mr. Joydeep Kar appearing for the State while highlighting the argument of Mr. Mitra contends that the Durgapur Project Limited is a separate entity and has got nothing to do with the State Government though the State Government is having financial control. The State Government has no obligation to pay to the employees of the company. The decision taken by the Government in respect of other companies cannot be cited as instance of discrimination as each and every company has got its separate policy and Government has to take the separate decision. After incorporation of the respondent No. 6 consequent upon absorption the appellants cease to be employee of the Government of West Bengal. Therefore the State Government has nothing to do with this matter.

9. After hearing the contention of the learned Counsels and considering the written notes of argument we feel the point which has fallen for consideration of this Court is whether the learned Trial Judge has rightly dismissed the claim of the appellants for payment of Gratuity at an enhanced rate and further bringing them within the pension scheme after their retirement. The learned Trial Judge has found on fact the appellants/writ petitioners were temporary employee prior to their absorption in respondent No. 6 Company and in terms of the absorption scheme they opted to be absorbed as regular employee of the respondent No. 6 as such they were to be governed by the terms and conditions formulated in the Standing Order which were from time to time amended and/or modified. It was further findings of the learned Trial Judge they and each of them enjoyed such terms and conditions and benefits which were not less advantageous to those which they were enjoying as a temporary Government employee. It was also found by the learned Trial Judge that the appellants and each of them on Pension Scheme being introduced in 1971 by the respondent No. 6 did not opt for being covered by the Pension Scheme rather chose to accept the Contributory Provident Fund. As such on acceptance of the Contributory Provident Fund they are not entitled to get any further benefit. As far as their claim of Gratuity at enhanced rate is concerned it was observed by the learned Trial Judge the Gratuity amount was paid in accordance with the norms adopted adhering to the provision of the law which was in vogue at the time of the respective dates of retirement.

10. From the argument advanced and also the grounds in the Memorandum of appeal we notice that there has been no challenge against the findings of the learned Trial Judge that they were temporary employees and were absorbed as a regular employee of the respondent No. 6, nor there was any challenge that they opted for Contributory Provident Fund.

11. In view of the aforesaid situation we now examine whether in the context of the argument advanced before us the said findings of the learned Trial Judge should be upset recording our different finding. We are unable to accept the contention of Mr.

Rameswar Bhattacharjee that the appellants/writ petitioners were not a temporary employee on the date of absorption and they were to be extended all the benefits as available to the permanent State Government employee. In the notice dated 8th August, 1961 after the said Company was incorporated and the employees working in the Durgapur Industries Board being absorbed, two different terms and conditions were incorporated: One for permanent Government employee and another for temporary employees. Clause (2) of the Regulation of the permanent employee which is as follows:

"2. Employees appointed on permanent basis for the Durgapur Project of the Government will automatically become employees of the said Company on its incorporation under their present terms and conditions."

12. For the temporary employees following terms being Clauses 6 and 7 were incorporated:

"6. All the temporary employees at present employed in the Durgapur Project of the Government in the Durgapur Industries Board, will become employees of the said Company on its incorporation unless any employee is unwilling to accept employment under the said company, specifically in writing within a period of 15 days from the date of issue of this notice".

"7. All temporary employees, at present employed in Durgapur Project, who are willing to continue their services under the Company will continue under the same terms and conditions as at present. The terms and conditions may, however, be modified by the said Company in future but these will not in any way be less advantageous than those to which the employees were entitled to immediately before incorporation of the Company".

13. Upon plain reading of the terms of absorption of both the categories of employees it will appear that in case of permanent employee no option is required to be exercised and they are treated to be employee on permanent basis automatically under the terms and conditions then prevailing, meaning thereby in case of permanent employee all the benefits which were available to the Government employee were automatically accepted by both the employee and the Company, and there was no scope for change of their terms and conditions at all. However, in case of temporary employees who had chosen to be absorbed would be treated to be employee on and from the date of absorption on option being exercised and not otherwise and the terms and conditions relating to their salaries and other things were to remain the same without any change, modification and/or variation. Subsequently, however, the same not being disadvantageous to the terms and conditions then operating, would be liable to be changed.

14. It is an admitted position the appellants/writ petitioners and each of them exercised their option. Mr. Rameswar Bhattacharjee learned Advocate has drawn our attention to the respective dates of appointment. He says that the petitioners

and each of them were permanent employee. We are unable to accept as we do not find any letters of appointment having been annexed. Rather we find from the averment of the affidavit in opposition of the respondent No. 6 that they were temporary employee at the time of incorporation of respondent No. 6 and they exercised their option being absorbed in the said Company such facts were not denied and disputed in the affidavit in reply hence we hold rejecting the contention of Mr. Bhattacharjee that the appellants/writ petitioners were temporary employee at the time of incorporation of the respondent No. 6 and also absorption. Naturally aforesaid terms and conditions for the temporary employee will govern. It is also stated in the affidavit-in-opposition which were not denied and disputed in the affidavit in reply that on their absorption standing order was framed stipulating terms and conditions changing and/or varying those which were at the time of absorption, without creating any disadvantage to the employees.

15. The learned Trial Judge found that each of the appellants accepted this changed terms and conditions without any dispute and demur. Under such circumstances we are unable to hold that after their retirement the terms and conditions in the standing order were not beneficial to them or arbitrary. We find indisputably in 1971 on Pension Scheme being introduced by the respondent No. 6 the appellants and each of them chose not to be covered by this Scheme rather remained to be covered under the Scheme of Contributory Provident Fund. For the reasons best known to them, perhaps at that time it was thought lump sum amount of contributory Provident Fund would be beneficial for them and not pension. Once such option being exercised appellants and each of them by their act and conduct rather promised not to claim or demand any other things other than the Contributory Provident Fund. Naturally the company had acted upon and done all the things pursuant to such written promise. Hence the appellants and each of them are estopped from resiling from their own stand. We fail to understand the argument of Mr. Bhattacharjee in this case how promissory estoppel as against the respondent No. 6 or for that matter Government would be applicable. Mr. Bhattacharya in support of the plea of promissory estoppel feebly wants to urge that when the Government had held out promise at the time of their appointment the pension should be made available to them irrespective of the fact of absorption and taking over by the respondent No. 6. Such plea is wholly absurd in the eye of law as on absorption being made and on option being exercised by each and every appellants/writ petitioners their relationship with the State Government ceased to exist so the plea of promissory estoppel is applicable so long there exists jural relationship between the promissory and promisee. In this case such a relationship has been put to an end by the promisee. themselves and established their own relationship with the third party, then promise held out by the former employee cannot be applied neither against the former party nor against the new party.

16. It is also contended by Mr. Bhattacharjee in support of the plea of coverage by pension Scheme, that other undertaking owned by the Government has introduced

post retirement pension Scheme on returning the contributory amount of Provident Fund with interest similar scheme ought to be framed for the appellant. We think as rightly observed by the learned Trial Judge that the State Government undertaking likewise respondent No. 6. is wholly owned Government company nonetheless its financial structure of the functional system is absolutely independent from the Government as the policy is adopted by the Board of Directors. Therefore, a policy in one Government undertaking cannot be thrust upon to another one. If it is attempted to be done it is not only arbitrary act but an absurd idea. We are unable to comprehend the plea of discrimination in this case. Judgment of the learned Judge namely Late Hon"ble Justice N.K. Mitra has been annexed. We do not find from it any discussion was made or anything has been decided. Relief granted by order of Court cannot be a binding precedent nor acceptable material in decision making process. The decision rendered on particular point of law or identical fact become a material for rendering subsequent judicial decision or some times it become the binding precedent. The said order of Justice Mitra cannot be treated to be a binding precedent nor an acceptable material in this case for writing a judgment in favour of the appellants.

17. Now coming to the question of less amount of Gratuity to the appellants/petitioners we find from the affidavit in opposition and also the stand taken by the appellants/writ petitioners in their affidavit in reply it appears to us that the appellants/writ petitioners were deprived of their due amount of Gratuity. It is stated by the respondent No. 6 in the affidavit that before the Gratuity Act, 1972 came into force, the Company of its own framed a rule for payment of Gratuity. The amount of Gratuity was increased after the said Act came into force for the employees who were governed by the Gratuity Act and the Gratuity amount used to be paid to those employees who retired after commencement of the said Act as per the provisions contained therein. There were employees who were not even entitled to be paid under the said Gratuity Act still they were paid on Rule being framed by the Company. Indeed for a long time there was no increase of the maximum ceiling limit in the Act nonetheless the respondent No. 6 increased the amount of Gratuity in the Rules for the employees who are not covered by the said Act and to maintain a parity such increased amount was also made available to those employees who are also covered by the said Act. Thereafter the maximum ceiling limit of the amount of Gratuity under the said Act was increased and the Company had also increased correspondingly the amount of Gratuity. The appellants/writ petitioners as we notice from the averment were paid their amount of Gratuity as it was admissible either under provision of the said Act or under the Rules framed it. Under such circumstances we do not find any scope to find fault in dealing with these appellants. Naturally we do not think that the learned Trial Judge in refusing the claim and contention of the appellants/writ petitioners had fallen in error, as such no interference is called for. We affirm the same while dismissing the appeal. There will be no order as to cost. However we desire that appropriate department of

Government will look into the issue sympathetically to evolve scheme.