

THE HON'BLE SRI JUSTICE DILIP B. BHOSALE

AND

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

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WRIT APPEAL No.582 of 2007

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JUDGMENT: (Per Hon'ble Sri Justice A.Ramalingeswara Rao)

This Writ Appeal is directed against the order of the learned single Judge in W.P.No.35571 of 1997 dated 14.03.2007.

The first respondent herein filed the Writ Petition seeking a declaration that she is entitled for the family pension since November, 1977, together with interest. Her husband was working as Store Assistant in the second respondent's office and while working in the said post, he died on 11.11.1977. During the period of his service from 1972 to 1977 deductions were made towards Family Pension Fund and Employees Provident Fund separately under Account No.AP 3262/980 and the same was being sent to the appellant herein. After his death, though the amount was paid under Employees Provident Fund, no family pension was granted to her. She submitted a representation to the employer, the second respondent herein, on 04.08.1988 duly enclosing family pension form seeking grant of family pension. The second respondent herein in turn forwarded the same to the appellant on 12.08.1988. But, the same was returned to her stating that her husband did not opt for family pension. When she sought clarification from the second respondent, the second respondent, vide his letter dated 09.11.1990 addressed to the appellant, stated that with regard to exercise of option by her husband, no record was available. But, recoveries were already made from the salary of her husband from 1971 to 1977 under the family pension fund scheme and the same was remitted to the appellant.

A counter affidavit was filed on behalf of the appellant stating that the husband of the first respondent was a member of the Provident Fund under Employees'

Provident Funds and Miscellaneous Provisions Act, 1952, with Account No.AP/3262/444 with effect from 01.01.1970. The Family Pension Scheme was introduced from 01.03.1971. But, the deceased employee did not opt for the same, and hence, all the contributions received by the appellant were credited to the Provident Fund Account. The amounts lying to the credit of the Provident Fund and the Deposit Linked Insurance benefit was given to the first respondent in 1981 itself. The deductions made from the salary of the husband of the first respondent from 01.04.1972 were erroneously done by the second respondent herein, and the said amount was also returned to the first respondent as per the request made by the second respondent herein through his letter dated 10.05.1981. The second respondent herein also allotted a second account number consequent to the regularization of services of the husband of the first respondent erroneously, and the second respondent should not have deducted the family pension contributions. The counter affidavit also stated that the Writ Petition was filed after 17 years.

The learned single Judge, after considering the rival submissions, allowed the Writ Petition by directing the respondents therein to treat that the husband of the first respondent herein had exercised his option for family pension and the first respondent was entitled for the family pension, subject to the condition that she deposits the entire amount, which was paid to her along with interest as decided by the Authority.

Learned Counsel for the appellant contended that in the absence of an option exercised by the husband of the first respondent herein, learned single Judge should not have directed the appellant to treat that the deceased employee had exercised his option and to pay the family pension to the first respondent. He relied on the order of this Court in **Noorunnisa Begum v. Regional Provident Fund Commissioner**, the Division Bench judgment of the High Court of Bombay in **Smita v. Regional Provident Fund Commissioner** and another judgment of the learned single Judge of this Court in **Smt.Sugavarapu Rajyalakshmi v. Employees Provident Fund Organization** following the Division Bench judgment of the High Court of Bombay.

Learned Counsel for the first respondent, on the other hand, by relying on the decision of the learned single Judge of the High Court of Madras in **P.Sadasivampillai v. Regional Commissioner** submitted that it is the statutory duty enjoined on the employer to get the option form and the employer becomes statutorily bound to see that all the members exercise their option to become a member of the Employees' Family Pension Scheme, 1971, and hence, the order of the learned single Judge is proper in the circumstances of the case.

We have carefully perused the provisions of the Employees' Family Pension Scheme, 1971, more particularly, paragraph 4 thereof. It gives an option to the members of the Employees' Provident Fund to join the family pension scheme and there is no record available to show that the husband of the first respondent exercised such option to come within the Family Pension Scheme, 1971. Though separate contributions were recovered from the salary of the deceased towards Provident Fund and Family Pension Fund, the entire amount was paid to the first respondent way back in 1981. Though the employer was recommending her case for consideration of the scheme, treating that her husband had exercised the option, the appellant, being the statutory authority, in the absence of an option, declined to pay the family pension. In the absence of evidence exercising option to come under the Family Pension Scheme, we cannot hold that the husband of the first respondent had exercised the option. We cannot extend the benefit of the provisions on the basis of circumstantial evidence in the absence of a specific option exercised by the deceased as per the provisions of the Scheme. The facts in **Noorunnisa Begum's** case (supra) are identical to the facts in the present case. Though it is the duty of the employer to collect the option from the employees, if the employee does not exercise the option, we cannot say that the employee has exercised the option and the benefit of the provisions should be extended to his surviving wife.

In view of the above, the order of the learned single Judge is erroneous and the same is set aside. The Writ Appeal is, accordingly, allowed. The miscellaneous

petitions pending, if any, shall stand closed. There shall be no order as to costs.

(DILIP B. BHOSALE, J)

(A.RAMALINGESWARA RAO, J)

16.04.2015

vs

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