

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on : July 21, 2015*
Judgment Delivered on : July 24, 2015

+ **LPA 666/2006**

DELHI TRANSPORT CORPORATIONAppellant

Represented by: Ms.Avnish Ahlawat, Advocate
with Mr.Nitesh Kumar Singh,
Advocate

versus

KANWAR SINGHRespondent

Represented by: Mr.Anil Mittal, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. The respondent was employed as a Driver by the Delhi Transport Corporation on June 14, 1978 and while driving a bus on December 07, 1991 was involved in an accident. He was suspended on December 21, 1991. Departmental proceedings were initiated against him. For the accident in question an FIR was registered and after investigation a charge-sheet was filed. Pursuant to a voluntary retirement scheme notified in the year 1995, respondent's request to be voluntarily retired from service was accepted and with effect from April 30, 1995 he stood voluntarily retired. Being a Member of a Contributory Provident Fund Scheme, respondent received the amount lying to his credit in his account under the Contributory Provident Fund Scheme; and needless to state this

included the management's share credited in the account each month along with the amount deducted towards respondent's contribution. After seven years the respondent filed a writ petition on December 01, 2005 pleading that on November 27, 1992 DTC had introduced a pension scheme membership whereof was opted by the respondent and thus he should be paid the pension.

2. Vide impugned order dated December 01, 2005 the writ petition had been allowed directing DTC to pay to the respondent the admissible pension. The respondent has been directed to refund the employer's contribution towards the Provident Fund Account which he had received.

3. In granting relief to the respondent the learned Single Judge has held that in view of the decision of this Court reported as 2005 (VII) AD 466 Satyavir Singh Vs. DTC the respondent was entitled to the relief prayed for.

4. The issue of entitlement of employees of DTC who opted for voluntary retirement under different voluntary retirement schemes notified by DTC have been resulting in conflicting opinions and the primary cause is an inapt handling of a few writ petitions which were not properly defended by the counsel appointed by DTC. The result was that in some cases claims by retired employees of DTC succeeded and in some relief was denied.

5. In the decision reported as 2010 (172) DLT 668 DTC Vs. Madhu Bhushan Anand, a Division Bench of this Court went into the issue in light of various decisions, for and against DTC. A finding of fact was returned with respect to the pension scheme notified on November 27, 1992; of it being a non-starter. The Division Bench considered the voluntary retirements schemes notified in the year 1993 and the year 1994 and highlighted that both schemes specifically excluded entitlement

of those who sought voluntary retirement to join any pension scheme. The Division Bench noted that the pension scheme which was put into place by DTC was the date when the Central Government provided the necessary funds and the scheme came into effect on October 31, 1995 and thus only those who were in service and retire after November 01, 1995 would be entitled to pension.

6. In LPA No.708/2002 R.D.Gupta & Ors. Vs. DTC & Anr. the Full Bench perceived a manifest and irreconcilable conflict in the decisions rendered in LPA No.1262/2007 dated 5th October, 2007, Delhi Transport Corporation vs. Kishan Lal Sehgal & Ors. and 2010 (172) DLT 668 DTC vs. Madhu Bhushan Anand, and framed the following question to be answered by a Larger Bench:-

“What is the effect of receipt of payment including higher ex-gratia amount and employer’s share of provident fund to employees who had applied and opted for voluntary retirement under the VRS 1993, though the said employees were entitled to pension as per officer order No.16 dated 27th November, 1992?”

7. The reference was answered by the Full Bench on September 20, 2011 and the view taken by the Division Bench in Madhu Bhushan Anand’s case was found to be correct.

8. In answering the reference the Full Bench noted the origin of how the issue of payment of pension to employees of DTC arose and noted that the employees of DTC who were governed by the Contributory Provident Fund Scheme preferred a writ petition under Article 32 of the Constitution before the Supreme Court seeking a direction against the DTC for introduction of the pension scheme. In pursuance of the assurance given by the DTC before the Supreme Court, the Office Order No.16 dated 27th November, 1992 was issued, which reads as under:

*“DELHI TRANSPORT CORPORATION
(A Government of India Undertaking)
I.P.Estate, New Delhi*

*No.Adm-I-S(4)/92
27.11.92*

Dated

OFFICE ORDER NO.16

Sub : Introduction of Pension Scheme for the employees of the DTC as applicable to the Central Govt. Employees.

The introduction of Pension Scheme for the employees of the DTC has been sanctioned by the Central Government and conveyed by the M.O.S.T. vide letter No.RT-12019/21/88-TAG dated 23.11.92 as on the same pattern as for the Central Government employees subject to the following conditions:

- 1. The pension scheme would be operated by the LIC on behalf of DTC.*
- 2. The date of effect of pension scheme would be 3.8.81.*
- 3. All the existing employees including those retired w.e.f. 3.8.81 onwards would have the option to opt for the Pension Scheme or the Employees Contributory Provident Fund as at present, within 30 days from the date of issue of this O.O. for the implementation of the Pension Scheme as approved by the Government of India.*
- 4. The Pension Scheme would be compulsory for all the new employees joining DTC w.e.f. 23.11.92 the date of sanction of the scheme.*
- 5. The Pension Scheme would be operated by the LIC on behalf of DTC. The employees share in the EPF A/C of the DTC employees, who opt for pension scheme would be transferred to the LIC, for operating.*
- 6. The employees who have retired on or after 3rd August, 1981 and the existing employees, who have drawn the employer's share, under the E.P.F. Act, partly or wholly shall have to refund the same with interest in the event of their opting for the Pension Scheme. The total amount to be refunded by the retired*

employees/existing employees would be the amount that would have accrued, had they not withdrawn the employer's share.

7. Excess amount of gratuity, if already paid to ex-employees and which is not admissible under the Pension Scheme, will have to be refunded by them before any benefit under the Scheme, is granted to them.

8. A due and drawn statement would be prepared in respect of retired employees opting for Pension Scheme and the amount to be paid/refunded, would be worked out by the concerned unit, wherefrom the employee had retired from service.

9. If any of the employee of DTC, who does not exercise any option within the prescribed period of 30 days or quit service or dies without exercising an option or whose option is incomplete or conditional or ambiguous, he shall be deemed to have opted the Pension Scheme Benefits.

Application forms for exercising option would be available with the unit officers and all employees including retired employees wishing to exercise option, should do so with the unit of their present working/where from they retired, within a period of 30 days from the date of issue of this office order.

The unit officers, after receiving the option from the ex-employees, will take further necessary action for getting the necessary forms completed, which will be supplied to them by the LIC for pension etc. they will also ensure the recovery of E.P.F. and the Gratuity from the Ex-employees before forwarding their applications as mentioned above. The cases of all officers will be dealt with at Headquarters.

The option received from the existing employees for not opting Pension may be kept in their personal file and entry made in their Service Book.

*Sd/-
(L.C.Goyal)
DY. CHIEF GENERAL MANAGER (P)."
[Underlining is ours]*

9. The Full Bench noted that the scheme reflected, the pension scheme was to be operated by the Life Insurance Corporation on behalf of the DTC. The Full Bench noted that for some reasons the pension scheme could not be implemented because Life Insurance Corporation and DTC could not agree to the terms under which Life Insurance Corporation would pay pension. The Full Bench noted that discussions continued between the Union representing the employees of DTC and the management of DTC and that while the issue pertaining to the pension was pending and had not been concretized to a ripened scheme, the DTC introduced the Voluntary Retirement Scheme on 3rd March, 1993, and thereafter two more voluntary retirement schemes introduced in the year 1994 and 1995. The Full Bench noted the contents of the voluntary retirement schemes and highlighted that whereas the scheme notified in the year 1993 made a provision for pensionary benefits as per the office order dated November 27, 1992, but the one's notified in the year 1994 and 1995 expressly excluded the applicability of any pension. The Full Bench thereafter noted that the intra-court appeal in which the reference was made to it concerned the voluntary retirement scheme introduced in the year 1993 and not with the schemes introduced in the year 1994 and 1995 and thereafter proceeded to consider the stipulation in the scheme that pensionary benefits would be admissible in terms of the office order dated November 27, 1992. In paragraph 7 of its opinion, the Full Bench recorded relevant facts as under:-

“7. The present intra-Court appeal is concerned with the VRS 1993 and not with the VRSs 1994 and 1995 and, therefore, we shall restrict our advertence to the VRS 1993. As noticed, Clause 4(g) of the VRS 1993 had stipulated that the pensionary benefits as per the Office Order No.16 dated 27th November, 1992 would apply. There was a stipulation that all amounts due

to the Corporation would be adjusted against the payments under sub-clause (d) & (e) of the Clause 4 and the employee concerned should clear any outstanding dues/advances taken before the date of effect of voluntary retirement. If the said clause is appositely understood in the context of the Office Order dated 27th November, 1992 which we have reproduced hereinbefore, it would convey that the employees who had opted for VRS under the 1993 scheme would be entitled to pension benefits except in cases where an employee had specifically opted under the office order dated 27th November, 1992 to remain outside the pension scheme. However, another aspect which luminously arises to the forefront requiring consideration is that the said scheme became operational only in 1995. The appellants in the present appeal, as the factual matrix would reveal, were offered retirement with effect from 31st May, 1993. They were not paid any pensionary benefits as the pension scheme had not become operational till 1995 and was in an inchoate stage. The appellants were paid retiral benefits under the Contributory Provident Fund Scheme. It needs special emphasis to state that the retirement benefits included higher amount of gratuity, payment made ex-gratia and the employer's share of provident fund. Be it noted, even after 1995, the appellants were not extended the benefit of pension."

10. Relevant would it be to highlight that the Full Bench specifically noted that the pension scheme became operational only in the year 1995, and as noted by us hereinabove, in Madhu Bhushan Anand's case, the Division Bench noted that the pension scheme was notified on October 31, 1995. The Full Bench thereafter noted that as regards R.D.Gupta and others i.e. the appellants of the intra-court appeal in which the reference was made to the Full Bench had been propounding that as the appellants had opted for the pension scheme, they are entitled to pension. The Full Bench noted that the said contention had been pyramided on the bedrock of Clause 9 of the Order dated 27th November, 1992 read with Clause 4(g) of the VRS 1993. It had been canvassed that merely because they

had been paid the retiral benefits because the pension scheme had not become operational and could become effective in 1995 only, the same would not make an iota of difference. This is a factor in favour of the appellants. The Full Bench noted that the said submission was further edified and reinforced on the basis of the decision rendered in Kishan Lal Sehgal's case (supra).

11. To appreciate the controversy in totality, the Full Bench extracted paragraphs 4 to 8 of the decision in Kishan Lal Sehgal's case (supra) as under:-

“4. On 3rd March, 1993 the appellant notified a voluntary retirement scheme and the respondents No. 1 to 3 applied for under the said scheme. They were relieved from their duties on 31st May, 1993, 30th(sic) had already opted for pension scheme, they were entitled to pension on retirement and not covered by the Provident Fund Scheme. However as they were not paid pension, in April, 2005 the respondents filed the aforesaid writ petitions praying for grant of pension on which the aforesaid order was passed by the learned single judge.

5. The pension scheme was announced on 27th November, 1992, prior to the retirement of the respondents and they had opted for it. Though the respondents availed the voluntary retirement scheme in 1993 and received the employee's share of the provident fund in 1996, but later they approached the appellant for making pension scheme operational in their favour as they had opted for the said scheme and they were ready to return the money received by them along with interest. In the legal notice dated 15th February, 2005 issued by the respondents to the Chairman-cum-Managing Director of the appellant it was stated that the respondents had the apprehension that the appellant may not have implemented the pension scheme and therefore they had accepted the money.

6. On going through the records we find that the facts of this case are identical with the case DTC v. Vir Bhan decided by this Bench on 24th May, 2007. In the said clause also the employee had availed of the voluntary retirement scheme and

was allowed to retire on 31st May, 1993. He had also taken the(sic). In the said case we have held that though the employee had no opted for the pension scheme within the prescribed period of thirty days, but Clause-9 of the office Order dated 27th November, 1992 was applicable to the employee and the subsequent option exercised by the employee for getting provident fund and gratuity instead of pension scheme should not have been accepted by the DTC. We upheld the order of the learned Single judge in that case holding that the employee was entitled to pension.

7. *We may also refer to the judgment of a Division Bench of this Court in DTC v. Baijnath Bhargava and others – LPA No. 33/1998 decided on 16th March, 200 wherein on the question of entitlement to ex gratia amount, the Court recorded the statement of the counsel for the DTC that DTC had decided to not to contest the said issue as it had already started paying pension to all eligible employees having 20 years of service even when they had not refunded the ex gratia amount taken at the time of the voluntary retirement scheme. The learned Single judge has also referred to the same in the impugned judgment in the present case.*

8. *In view of the delay by the respondents No. 1 to 3 in approaching the Court, learned Single judge has directed that pension shall be payable to them w.e.f. 1st April, 2005 only and the respondents have been directed to also refund the employer's share/contribution to CPF received with interest at the rates as applicable"*

[Emphasis added]

12. The Full Bench thereafter noted reliance made by learned counsel for DTC on the decision of the Division Bench in Madhu Bhushan Anand's case (supra) and thereafter extracted paragraphs 35 and 36 of the decision in Madhu Bhushan Anand's case as under:-

"35. The claim of the respondents in category 1 and category 2 may be taken up together for the reason whether they exercised a positive option to be brought under the pension

scheme or having exercised no option whatsoever and hence as deemed optees being brought under the pension scheme, their status would be the same as entitled to be brought under the pension scheme under the notification dated 27.11.1992. Since all these respondents applied for being voluntarily retired when the scheme notified on 3.3.1993 was extended from time to time in the year 1993, they certainly would be entitled to pension for the reason clause 4(g) of the scheme notified on 3.3.1993 clearly stated that such persons would be entitled to pensionary benefits. But, there are certain further facts which need to be noted qua them. The case of the Corporation is that having opted under the pension scheme or deemed to have opted under the pension scheme, the said respondents specifically opted out from the pension scheme and by the time they retired under the Voluntary Retirement Scheme, the pension scheme had not been formally brought into effect (as noted above it was formally brought into effect for the retirees who retired post 1.11.1995), they filed applications specifically stating that they intend to opt out of the pension scheme and be retained as members under the Contributory Provident Fund Scheme and thus on accepting their offers to be voluntarily retired the Corporation paid over to them not only their share in the Contributory Provident Fund Account but even the management's share, which they accepted without demur and hence could not rake up the issue after 12 to 15 years i.e. when they filed either writ petitions in this Court which were transferred to the Central Administrative Tribunal or filed Original Applications before the Central Administrative Tribunal.

36. Qua these respondents, it may be noted that the respondent of W.P.(C) No.14027/2009 submitted a letter dated 2.3.1995 specifically stating that he does not want to opt for the pension scheme and desires his dues to be paid as per his CPF Account. The respondent of W.P.(C) No.565/2010 likewise submitted a letter on 12.7.1995. The respondent of W.P.(C) No.598/2010 likewise submitted a letter in the year 1994 and reaffirmed the said fact in the letter dated 5.11.1998. The respondent of W.P.(C) No.754/2010 likewise submitted a letter on 20.4.1995. The respondent of W.P.(C) No.1902/2010 likewise submitted a letter on 14.7.1995. The 3 respondents of W.P.(C) No.2274/2010 likewise submitted letters on 11.3.1994,

15.3.1994 and 9.6.1995 respectively. The respondent of W.P.(C) No.3919/2010 likewise submitted a letter on 22.7.1996. The respondent of W.P.(C) No.423/2010 likewise submitted a letter on 5.10.1994. The respondent of W.P.(C) No.756/2010 likewise submitted a letter on 15.3.1994 as claimed by the DTC but denied by said respondent. We note that DTC has produced said letter and additionally has relied upon a list prepared on 12.4.1994 where the name of said respondent is at serial No.113 and notes his opting out for pension. The respondent of W.P.(C) No.832/2010 likewise submitted a letter on 5.9.1995. The respondent of W.P.(C) No.752/2010 likewise submitted a letter on 7.12.1993. The respondent of W.P.(C) No.401/2010 also opted out of the pension scheme, though the date when he did so is not on record.”

13. Analyzing the decision of the Division Bench in Madhu Bhushan Anand’s case (supra) and noting that pertaining to the employees who were granted voluntary retirement under 1993 VRS but not paid pension benefits and who were covered by Clause 9 of the Office Order dated 27th November, 1992 or had opted for the pension scheme despite that they had not been paid pensionary benefits but only paid higher ex-gratia amount and the employer’s share of provident fund, the Full Bench noted that the Division Bench expressed the view that they were not entitled to pension by ascribing the following reasons:

“30. Pertaining to the remaining 18 writ petitions, we may divide the same into 3 further categories which emerge from the facts noted by us in para 6 and 8 above. The said 18 writ petitions are divided: Category 1- Respondents of W.P.(C) Nos.14027/2009, 401/2010, 565/2010, 598/2010, 754/2010, 1902/2010, 2274/2010 and 3919/2010 who specifically opted for the pension schemes when they submitted their offer for being voluntarily retired as per the terms and conditions notified in the VRS Scheme notified on 3.3.1993 which was made applicable by reference to the subsequent schemes notified in the year 1993. Category 2- Respondents of W.P.(C) Nos.423/2010, 756/2010, 832/2010, 752/2010, 793/2010, 1384/2010, 1386/2010 and 2051/2010 who having not

submitted any options have to be treated as deemed optees for the pension scheme when they submitted their offer for being voluntarily retired as per the terms and conditions notified in the VRS Scheme notified on 3.3.1993 which was made applicable by reference to the subsequent schemes notified in the year 1993. Category 3- Respondents of W.P.(C) No.4906/2010 and the writ petitioner of W.P.(C) No.4689/2010 who specifically opted to be retained in the Contributory Provident Fund Scheme.

31. We take category 3 first. Surprisingly, one claimant being the respondent of W.P.(C) No.4906/2010 has succeeded before the Tribunal and the other i.e. the petitioner of W.P.(C) No.4689/2010 has lost, notwithstanding their cases being identical.”

[Emphasis added]

14. The Full Bench noted that a contention was propounded before the Division Bench to the effect that those who had opted under the VRS 1993 was due to compulsion and coercion as it was uncertain when the pension scheme would come into effect. The Division Bench, repelling the said contention, stating as follows:

“43. The compulsion alleged by them is the uncertainty of pension being released. As noted hereinabove the pension scheme notified on 27.11.1992 could not take off because LIC did not fund the scheme as envisaged and later on the Central Government agreed to fund the scheme on 31.10.1995 and indisputably those who retired after 1.11.1995 were paid pension. Thus, the compulsion resulting as the consequence of the uncertainty of pension being released, which may have been uncertain when the said respondents opted out to receive pension and reverted to receive benefit under CPF, came to an end on 1.11.1995. The silence of these respondents for periods ranging from 12 to 15 years when they took recourse to legal action is clearly indicative of there being no compulsion. The silence of these respondents speaks for itself. It is apparent that with the passage of time these respondents became clever by a dozen and thought why not take the benefit of a few who

likewise went to Court and obtained relief, by pulling wool over the eyes of the Court by pleading that their act of subsequently opting out of the pension scheme was meaningless because the contract stood concluded, a submission which was accepted by the Courts without considering the further issue of contract being novated.

44. In our opinion these respondents have no claim whatsoever to receive pension. They novated the contract by volition when they subsequently opted out of the pension scheme and DTC accepted the same and paid to them even the management's share in the CPF account. Their claims are hit by delay, laches and limitation. They are not entitled to plead that right to receive pension is a continuous cause of action, for the reason, in law either pension can be received or benefit under the CPF account. If the management forces down the gullet of an employee payment under the CPF Scheme and the employee desires pension he has to approach the Court or the Tribunal within a maximum period of 3 years being the limitation prescribed to file a suit.

45. That apart, if it was the case of the respondents that they were compelled to opt out of pension scheme on account of the uncertainty in the implementation of the pension scheme, they ought to have sought a declaration that their act of opting out of the pension scheme be declared null and void, being out of compulsion and for said prayer they ought to have made the requisite pleadings entitling them for such a declaration. Needless to state an act out of compulsion is a voidable act and not a void act. The respondents have admittedly not done so. It is only in the rejoinder filed by them to the reply to their respective OA that a bald plea has been set forth that they acted out of compulsion when they opted out of the pension scheme.
[Emphasis added]

15. The Full Bench thereafter noted that the decision rendered in Madhu Bhushan Anand's case (supra) and other connected matters were assailed in SLP(C) No.31241/2010 by one of the employees and on

December 03, 2010, while refusing to grant leave to appeal the Supreme Court passed the following order:

“No ground is made out for our interference with the impugned judgment. The special leave petitions are dismissed.”

16. Thereafter, in paragraphs 14 to 18, the Full Bench answered the reference with reasons, and we reproduce the said paragraphs 14 to 18 of the decision by the Full Bench. They read as under:-

*“14. The question that emanates for consideration is when an employee receives payments including higher ex-gratia amount and the employer’s share of provident fund and had applied and opted for a voluntary retirement under VRS 1993, whether he would be entitled to get pension as per the Office Order dated 27th November, 1992, when he had “opted” for pension specifically or by default. As has been held in the case of **Kishan Lal Sehgal and Ors.** (supra), the Division Bench had placed reliance on the decision in **DTC v. Vir Bhan** decided on 24th May, 2007 in LPA No.359/2007 wherein it had been held that the employee was entitled to pension. Thus, the decision rendered in **Kishan Lal Sehgal and Ors.** (supra) is based on **Vir Bhan** (supra). In the case of **Vir Bhan** (supra), the Division Bench referred to the Voluntary Retirement Scheme specially Clause 3 and Clause 9 and thereafter proceeded to state as follows:*

“3. The learned Single Judge held that clause 9 of the aforesaid pension scheme is applicable to the respondent. Therefore the respondent had opted for pension scheme when he retired on 31.5.93. Even the appellant vide letter dated 15.10.93 had informed the respondent that he would be paid in terms of the pension scheme. The respondent then submitted an application on 28.3.1994 for payment of provident fund and gratuity. The request was made after the respondent had already retired on 31.5.1993. Thus the same should not have been acted upon and was not available as the respondent was governed by the pension scheme. At a later stage the respondent again stated that he was not interested to have provident fund and should be paid

benefits under the pension scheme and consequent upon which the aforesaid writ petition was filed in 1994 itself which stood allowed by the learned Single Judge. Learned Single Judge also noticed that the respondent was paid only the employee share towards CPF in July, 1994 and the employer's share was released during the pendency of the petition."

15. In this regard, reference to the decision in LPA No.330/2002 decided on 17.4.2002, **DTC Retired Employees Association v. DTC**, is worth noting:

"It is not disputed that the members of the first petitioner association and second and third petitioners had exercised their option to withdraw from the pension scheme pursuant to the Circular of the Delhi Transport Corporation dated 10th February, 1994 and the same was accepted by the respondent. Once the members of the petitioner association and second and third petitioners opted for Contributory Fund Scheme, they have no right to switch back to the pension scheme, especially when the petitioners have availed of the benefits under the Contributory Provident Fund Scheme after opting out of the pension scheme."

[Emphasis supplied]

16. The aforesaid order was assailed before the Apex Court in SLP(C) No.16135/2002 and their Lordships declined to interfere and dismissed the special leave petition.

17. In **Delhi Transport Corporation v. Mool Chand**, (2009) 1 SCC 255, it has been held thus:

"It appears that there was a voluntary retirement scheme (for short "VRS") in Delhi Transport Corporation, hereinafter referred to as "the Corporation, in 1993 which contained a provision for pension. The respondent herein did not apply under that VRS scheme. Subsequently, the Corporation framed a new scheme dated 13.12.1995 in which it was specifically stated that

those employees who opt for VRS under the new scheme will not get pension. The respondent, admittedly, applied under this scheme.

2. Since there was a specific provision in VRS scheme dated 13.12.1995, we fail to see how the High Court has held that the respondent will get pension in addition to VRS benefits. In view of above, we find that the impugned judgment of the High Court is erroneous and it is hereby set aside. The appeal is allowed accordingly. No order as to costs."

*18. From the aforesaid pronouncement of law in the field by various Division Benches, it is noticed that the decision rendered in **Kishan Lal Sehgal and Ors.** (supra) did not take note of the earlier decision rendered in **DTC Retired Employees Association** (supra). The said decision was rendered prior in point of time. It is well settled principle of law that earlier Division Bench decision is a binding precedent on the later Division Bench. As is evincible, the decisions rendered in **Kishan Lal Sehgal and Ors.** (supra) and **Vir Bhan** (supra) have laid emphasis on Clause 9 of the Office Order dated 27th November, 1992. The concept of 'deemed to have opted the pension scheme benefits' has been accepted on the foundation that the same is binding on the DTC. If the language of Clause 9 is appositely understood, it would convey that if an employee does not exercise any option or quits service or dies without exercising an option or whose option is incomplete or conditional or ambiguous, he shall be deemed to have opted the pension scheme benefits. It does not lay down that if an employee deliberately applies for getting the benefit under the Contributory Provident Fund scheme and avails the benefits, then it would come under the realm of opting out of the pension scheme. It is an affirmative act to opt for the Contributory Provident Fund Scheme and to avail other benefits attached to it. The said benefits are higher ex gratia amount and the employer's provident fund contribution. There is subtle distinction between deemed inclusion to be under the pension benefit scheme but it would be an anathema to hold that even if an employee has voluntarily opted out and availed the benefits still he can take a somersault and claim to be brought within*

*the pension scheme. As has been in the case of **Madhu Bhushan Anand** (supra) the same amounts to novation of contract of volition. To hold that who had applied and opted for the voluntary retirement under VRS 1993 and received all payments would still be entitled to pension regard being had to Clause 9 of the Office Order dated 27.11.1992 would result in placing a farfetched interpretation on Clause 9. In the case of **DTC Retired Employees Association** (supra) the Division Bench has clearly opined that such employees have no right to switch back to the pension scheme after they have opted out of the pension scheme. As we have indicated earlier, the decision in **Madhu Bhushan Anand** (supra) and **DTC Retired Employees Association** (supra) have not been interfered with by their Lordships of the Apex Court. In our considered opinion, Clause 9 of the scheme cannot be carried so far as to have an absurd impact on the scheme. Once the said benefits are availed of, the principle of opting out has to be made applicable. The concept of switch on and switch off has to be ostracized. When an employee accepts the benefits out of his own volition without any coercion, he cannot take a somersault and claim to have the benefits taking recourse to Clause 9 that he is deemed to be within the pension scheme. Thus analyzed, we are of the considered opinion that the decision in **Madhu Bhushan Anand** (supra) lays down the law correctly. The law laid down in **Kishan Lal Sehgal and Ors.** (supra) and **Vir Bhan** (supra) is not correct and, accordingly, the said decisions and the decisions on the said lines are overruled.”*

17. Thus, the respondent would not be entitled to any claim for pension and the reasons would be two. The binding precedentiary value of the decision of the Division Bench in Madhu Bhushan Anand's case which has been opined to be the correct enunciation of law by the Full Bench of this Court in R.D.Gupta's case or to put it differently the binding law declared by the Full Bench and additionally that having received the management's share under the Contributory Provident Fund Scheme when respondent voluntarily retired on April 30, 1995 he could not

maintain an action for payment of pension after seven years. Not only estoppel but even delay and laches would hit the claim.

18. The appeal is allowed.

19. Impugned judgment and order dated December 01, 2005 is set aside. The writ petition filed by the respondent is dismissed.

20. Parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

JULY 24, 2015

mamta