

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

+ **RSA No.113/2014 and CM No.18836/2015**

% **28th July 2016**

DELHI TRANSPORT CORPORATION

..... Appellant

Through: Ms. Avnish Ahlawat,
Advocate

versus

SH. BALBIR SINGH

..... Respondent

Through: Mr. Pradeep Kadiyan, Mr.
Gautam Singh, Advocates

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit for setting aside the concurrent Judgments of the courts below; of the Trial Court dated 21.9.2013 and the First Appellate Court dated 4.1.2014; by which the courts below have decreed the suit of the respondent/plaintiff and directed the appellant/employer to grant pension to the respondent/plaintiff under the pension scheme and not treat the respondent/plaintiff as being covered under the Provident Fund Scheme.

2. The facts of the case are that the appellant/defendant on 23.11.1992 introduced a pension scheme vide an Office Order dated 27.11.1992 and as per para 9 of which scheme any employee of the appellant/employer who does not exercise the option in the prescribed period of 30 days would automatically be deemed to have exercised the option of the pension scheme benefits. Respondent/plaintiff did not exercise the option and therefore, he became the deemed pension optee. Respondent/plaintiff however thereafter wrote a Letter dated 4.4.1994, Ex.PW1/D1, whereby he requested that his option of deemed optee for the pension scheme be changed because he wanted to opt out of the pension scheme. This request of the respondent/plaintiff was accepted by the appellant/employer vide Letter Ex.PW1/D2 dated 12.4.1994. The courts below have however held that once the respondent/plaintiff was deemed to be a pension optee on account of not having exercised the option within 30 days, the subsequent Letter of the respondent/plaintiff dated 4.4.1994 would make no difference. In arriving at this conclusion the courts below have referred to the fact that in the salary slips (Ex.PW1/3 colly.) of the respondent/plaintiff issued by the appellant/employer the alphabet "S" is denoted indicating that employee has opted for the pension scheme whereas if the employee had to

continue under the Provident Fund Scheme then instead of alphabet “S” the alphabet “Z” would have been mentioned.

3. Learned counsel for the appellant/defendant has very vehemently argued that respondent/plaintiff is estopped from claiming that he continued under the pension scheme inasmuch as the respondent/plaintiff himself withdrew his option by means of his Letter dated 4.4.1994 Ex.PW1/D1 and which was accepted by the appellant/employer vide document dated 12.4.1994, Ex.PW1/D2. Learned counsel for the appellant/defendant also strongly relies upon the document Ex.PW1/D3 dated 29.4.1994 issued by its office showing that in fact the respondent/plaintiff was granted loan from the provident fund account and which would not have been in case the respondent/plaintiff was continued under the pension scheme, and since the respondent/plaintiff was not continued under the pension scheme in view of his own request Letter dated 4.4.1994. It is also argued that there remained no doubt with respect to the respondent/plaintiff not being a pension optee, inasmuch as, though when the suit was filed the respondent/plaintiff was in service, but during the pendency of the suit respondent/plaintiff retired and on retirement he took benefit of provident fund and related monetary benefits. Finally, it is argued on behalf of the

appellant that the courts below have overlooked the fact that an administrative mistake of mentioning the letter 'S' instead of letter 'Z' in the salary slips of the respondent/plaintiff would not make difference once in fact not only the respondent/plaintiff is found to have opted out of the pension scheme in view of his Letter dated 4.4.1994 but also that the salary slips which are filed by the respondent/plaintiff themselves show that in each of the salary slips in column no.41 there is deduction shown for provident fund and the fact of the matter is that in spite of the administrative/clerical mistake in writing the letter "S" instead of "Z", every month provident fund amount was regularly deducted from the salary of the respondent/plaintiff.

4. For disposal of this present second appeal, the following substantial question of law is framed:

"Whether the courts below have committed a grave illegality and perversity in giving importance to an administrative mistake of the appellant/employer using the alphabet "S" instead of "Z" although the respondent/plaintiff had himself opted out of the pension scheme vide his Letter dated 4.4.1994 and appellant/employer had acted accordingly by accepting the same vide its document dated 12.4.1994 with the fact that in every month's salary provident fund amount was deducted from the respondent's/plaintiff's salary and thus respondent/plaintiff is estopped from claiming that he has not opted out of the pension scheme?"

5. Learned counsel for the appellant places great emphasis on the judgment of the Supreme Court in the case of ***DTC Retired Employees' Association and Others Vs. Delhi Transportation Corporation and Others, (2001) 6 SCC 61*** which holds that once a person who has opted out of the pension scheme, although such a person originally was deemed a pension optee by failing to exercise the option within 30 days, then in such a case such an employee cannot turn around to claim benefit of the pension scheme. Learned counsel for the appellant also argued that there were hundreds of similar cases of different employees of the appellant/employer who opted out of the pension scheme by giving letters and all judicial proceedings initiated by such persons who opted out of the pension scheme for seeking pension once again have been dismissed not only by the Supreme Court in the case of ***DTC Retired Employees' Association (supra)*** but also by judgments of this Court including the Division Bench judgment in bunch of cases with lead case being ***Delhi Transport Corporation Vs. Madhu Bhushan Anand, W.P.(C) No.14027/2009*** decided on 10.8.2010. It is also stated by counsel for the appellant/employer that challenge by employees to the Judgment of the Division Bench dated 10.8.2010 was dismissed by the Supreme Court. The relevant paras of the judgment of the Supreme

Court in the case of *DTC Retired Employees' Association (supra)* are paras 24 and 25 and the same read as under:

“24. Learned counsel for the petitioners in Writ Petition No. 499 of 2000 contended that the petitioner had initially opted for the Pension Scheme in 1992, but as they were apprehensive regarding DTC's ability to implement the Pension Scheme, they were compelled to opt out of the Pension Scheme. It is submitted that in 1995 only under the threat of contempt notice from this Court, DTC came forward to implement the Pension Scheme, but no fresh option was given to the employees. It is also argued that DTC had not communicated to all its employees that they were going to implement that Scheme. It is also submitted that pension is neither a bounty nor a charity. Therefore, all the retired employees should have been given the benefit of the Pension Scheme.

25. It is true that there was some delay in implementing the Scheme, but all the retired employees were given sufficient opportunity to exercise their option. In para 9 of the counter-affidavit filed on behalf of DTC it is stated that as far as the time to fill up pension option form is concerned, the letter dated 23-11-1992 conveyed by the Government of India, Ministry of Surface Transport, contained that DTC shall obtain option from its employees within 30 days from the date of issue of circular. However, DTC, in fact, extended the time twice, namely, firstly up to 15-1-1993 and, secondly up to 1-2-1993. Therefore, the retired employees had, in fact, more than one month's time to exercise their option. We do not think that sufficient time was not given to the employees to exercise their option for the Pension Scheme. Those employees who had received the benefit of Employer's Provident Fund Scheme failed to exercise their option and thus disentitled themselves from getting the pension benefit. The Pension Scheme was implemented on the basis of certain guidelines; it is not for the Court to interfere with the same. The Division Bench has rightly taken the view that those who had not exercised their option are not entitled to get pension. The appeals and the writ petition are without any merit and these are dismissed without, however, any order as to costs.” (underlining added)

6. A reading of the aforesaid paras of the judgment of the Supreme Court makes it clear that although an employee of the appellant was a deemed pension optee on account of failing to exercise option within 30 days of introduction of the pension scheme, however, if such employees subsequently take the route of withdrawing from the pension option by writing a letter which is accepted by the employer, then such employees cannot claim benefit of the pension scheme and are estopped from doing so. The facts of the present case show that though the respondent/plaintiff was a deemed pension optee as he did not exercise any option within 30 days, however, respondent/plaintiff vide his Letter dated 4.4.1994 prayed for change of his option to receive provident fund benefits instead of pension, and this Letter dated 4.4.1994 reads as under:

“Depot Manager
DTC Hari Nagar Depot-III
New Delhi

Sir,

With respect I say that I have not given in writing regarding pension. Hence I am entitled for pension. I do not want to get pension. Please cancel by pension. I will be obliged.

Thanking you.

Applicant
Sd/x x x
Balbir Singh
Conductor
B No 13072
T No 17018

PEC
May be forwarded to Mgr (Pension)
dated 4.4.94 Sd/x x 4.4.94
HND/94/439 4.4.94”

7. The aforesaid Letter dated 4.4.1994, Ex.PW1/D1 of the respondent/plaintiff was acted upon pursuant to the document dated 12.4.1994, Ex. PW1/D2, of the appellant/employer and in which list out of 305 persons who had opted out of the pension scheme the name of the respondent/plaintiff is found at serial no. 236. The fact that the respondent/plaintiff acted as per his fresh option to be not governed by the pension scheme but by the provident fund scheme also becomes clear from the document Ex. PW1/D3 dated 29.4.1994 which shows that respondent/plaintiff applied for and got a loan against his provident fund account. The document is dated 29.4.1994 and, which position obviously would not have been if the respondent/plaintiff was a pension optee, because, in the case that respondent/plaintiff was a pension optee he would not have been allowed loan against his provident fund account. This document dated 29.4.1994 reads as under:

“No.HND-I/Non-Ref./94/1812

Dated:29.4.94

Sh. Balbir Singh S/o Sh. Inder Singh, Conductor, B. No.13072 T.No.17918 of this Unit has been sanctioned a sum of Rs.40,000/- (Rupees Forty thousand only) by the Depot Manager as Non-refundable advance from his own contribution towards Provident Fund as well as employer's contribution in connection with the construction of his house situated at New Roshan Pura, Najafgarh, New Delhi in Lal Dora. In accordance with Clause 19-A(1) of the D.T.C. employees Provident Fund Trust Regulation 1978. The amount of advance sanctioned to him will be paid in two equal instalments each from H.Ors.

From his own contribution: Rs.21,000.00

From employer's share: Rs.19,000.00
Rs.40,000.00

Sh. Balbir Singh shall utilise the amount of advance only the purpose for which the same has been granted and shall give a certificate together with documentary proof testifying the utilisation of the amount of advance. The IIInd instalment of Rs.20,000/- will be paid after submission of the utilisation of amount of his first instalment.

If the Corporation is satisfied that the advance granted to him has not been utilised for the purpose for which it has been sanctioned of the conditions of advance have not been fulfilled wholly or partly or that the excess amount in not refundable the corporation shall forthwith take steps to recover the amount due with interest at the subscriber in such number of instalments as may be prescribed by the corporation.

1. The credit balance of share of employee as per pay slip for the month of March, 94 is Rs.25,004.09.
2. The credit balance of employer's share as per pay slip for the month of March, 94 is Rs.25,486.99.
3. The balance of C.P. Fund of refundable loan as per pay slip for the month of March, 94 is Rs.3900/-.
4. That the employee has not with drawn non-refundable advance under para 19A(1) of the C.P. Trust, Regulations-1978.
5. That the entries of this Non-refundable advance will be made in the S. Book at page no.12.
6. Sh. Balbir Singh filed the pension form for not obtaining the pension scheme.

This has the approval of Competent Authority.

Sd/-
Dy. Manager (T)

Dy. Manager (PF) Hqrs.

CC to : P. Concerned.

: PFC (Cond.)- alongwith the complete case file contg. 3N+10 Cr. for maling necessary entry in the S. Book at page No.12.”

8. Clearly the courts below have fallen into a grave error and caused grave miscarriage of justice, besides perversity existing in their judgments, because, the documents Ex. PW1/D1 to PW1/D3 leave no manner of doubt that respondent/plaintiff after becoming a deemed optee under the pension scheme himself voluntarily changed the option to the

provident fund scheme. Once the respondent/plaintiff has done so and in fact taken benefit of the same by getting a loan in the provident fund account as per Ex.PW1/D3, it therefore does not lie in the mouth of the respondent/plaintiff to claim that respondent/plaintiff should be given pension under the pension scheme. Whatever doubt remains is removed from the fact that respondent/plaintiff who retired during the pendency of these judicial proceedings received complete amount of his retirement benefits including towards provident fund and which the respondent/plaintiff would not have received, and in fact would have immediately returned if received, in case the respondent/plaintiff had been governed by the pension scheme and not by the provident fund scheme. It also bears note that a mere administrative mistake of writing the alphabet “S” instead of “Z” in the salary slips of respondent/plaintiff cannot have the effect of making the salary slips as under the pension scheme when the fact of the matter is that under the salary slips amount is shown to be deducted every month, month after month, towards the provident fund account.

9. Therefore, I hold that the substantial question of law has to be answered in favour of appellant/defendant and against respondent/ plaintiff and consequently the Judgments of the courts below dated 21.9.2013 and 4.1.2014 are liable to be and accordingly set aside by dismissing the suit

of the respondent/plaintiff. Accordingly this second appeal is allowed by dismissing the suit of the respondent/plaintiff, leaving the parties to bear their own costs.

JULY 28, 2016
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VALMIKI J. MEHTA, J

