THE HON'BLE SRI JUSTICE P.NAVEEN RAO

<u>WRIT PETITION No.10795 OF 2010</u>

<u>DATED : 28.11.2017</u>

Between :

D.V.Anjaneyulu S/o.Late D.Subba Rao,
Aged about 62 yrs, Occu : Retired Private Service,
R/o.H.No.11-14-356/2, Siri Nagar Colony,
Near L.B.Nagar, Hyderabad

.. Petitioner

And

The Regional Provident Fund Commissioner,
Employees Provident Fund Organization,
Salt Lake City, Kolkatta, West Bengal & another.

.. Respondents

This court made the following :

THE HON'BLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION No.10795 OF 2010

ORDER:

Petitioner was employed by Bata India Limited (BATA). He attained the age of superannuation of 60 years on 05.02.2007. In this writ petition, petitioner seeks to call for the records pertaining to the order bearing No.R.EX.Pen.III/WB/5224/80 dated 30.11.2009 issued by the 1st respondent including the monthly returns submitted by 2nd respondent and to quash the same.

2. Heard learned counsel for the petitioner and learned Standing counsel for Employees Provident Fund Organization and learned counsel representing the 2nd respondent-BATA.

3. Learned counsel for the petitioner submits that Employees' Pension Scheme, 1995 (for short 'the Scheme 1995') is a welfare scheme and all the employees working in private establishments like the 2nd respondent-BATA are entitled to the benefits of the Scheme 1995. According to learned counsel there is no requirement for any employee exercising option who come under the scheme and benefits of scheme have to be automatically extended to all the employees like the petitioner. However, erroneously the benefits of the Scheme, 1995 are not extended to the petitioner and he is not paid the pension. Petitioner earlier filed W.P.No.12879 of 2009 and in pursuant to the direction of this Court, the E.P.F. authorities examined the claim of the petitioner and by order dated 30.11.2009, the request of the petitioner to grant pension under the E.P.F. Scheme, 1995 is rejected without

following the statutory requirements and the object of the scheme, which is assailed in this writ petition.

4. According to learned counsel, the employer has illegally not included the name of petitioner in E.P.F. Scheme. In fact petitioner also gave option, but the said option is not forwarded and name of the petitioner is not included due to lapse on the part of employer and now petitioner cannot be blamed. Learned counsel for the petitioner by extensively referring to various paragraphs of the Scheme, 1995 would submit that as per the Scheme 1995, it is mandatory for the employer to file monthly returns in Form-I, disclosing the status of the employees including exempted employees. If those details are furnished, the truth would come out. If the 2nd respondent employer is filing the monthly returns as per Form-I, and if the details of the petitioner are not reflected in Form-I statement, it would mean that the employer had acted deliberately against the petitioner's claim to deprive him the benefits of the Scheme, 1995. Learned counsel therefore, submits that the record of Form-I declaration filed by the employer be called and according to him, such declaration is mandatory as per paragraph Nos.39 and 39 (A) of the Scheme, 1995.

5. Learned Standing counsel, representing the E.P.F.Organization submits that the petitioner joined service in the year 1969; he was not a member of Family Pension Scheme, 1971 (for short 'the 1971 Scheme'). He was governed by the Statutory Provident Fund created by the employer. As he was not a member of 1971 scheme, unless he exercises option as required by the Pension Scheme, 1995, the benefits of the Scheme, 1995 are not applicable. On verification of the records, the Organization has

noticed that no option was exercised by the petitioner and therefore, he is not entitled to the pension under the Scheme, 1995.

6. According to learned counsel representing the 2nd respondent-BATA, the 2nd respondent after securing exemption under Section 17 of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (for short 'the Act'), 2nd respondent created employees statutory provident fund trust for the employees. Petitioner was governed by said Fund. Petitioner never exercised option to come over to Scheme, 1995. Petitioner has in fact withdrawn his entire provident fund amount as per the fund created by BATA and at no point of time, he has protested for not extending the benefit of the Scheme, 1995. He would further submit that the claim now made is only an after thought.

7. The fact that petitioner was not member of 1971 Scheme is not disputed. Petitioner also does not dispute the fact that separate fund was created by employer and petitioner was member of the fund and all the benefits of the fund were drawn by him, on his retirement.

8. On a review of the existing benefits available to the employees working in private sector and in exercise of power under Section 6 (A) of the Act, the Government notified Employees Pension Scheme, 1995. To appreciate the contention of the petitioner that he automatically comes under the benefits of the Scheme, 1995, it is necessary to consider the scope of Paragraphs 6 and 7 of the Scheme, 1995 :

6. Membership of the Employees' Pension Scheme – Subject to sub-paragraph (3) of paragraph 1, this Scheme shall apply to every employee, -

(a) who on or after the 16th November, 1995 becomes a member of the Employees' Provident Fund Scheme, 1952, or of the provident funds of the factories and other establishments exempted by the appropriate Government under section 17 of the Act, or in whose case exemption has been granted under paragraph 27 or 27A of the Employees' Provident Fund Scheme, 1952 [and whose pay on such date is less than or equal to fifteen thousand rupees], from the date of such membership;

(b) who has been a member of the ceased Employees' Family Pension Scheme, 1971 before the commencement of this Scheme from 16th November, 1995;

(c) who ceased to be a member of the Employees' Family Pension Scheme, 1971, between 1st April, 1993, and 15th November, 1995 and opts to exercise his option under paragraph 7;

(d) who has been a member of the Employees' Provident Fund or of provident funds of factories and other establishments exempted by the appropriate Government under Section 17 of the Act or in whose case exemption has been granted under paragraph 27 or 27A of the Employees' Provident Fund Scheme, 1952, on 15th November 1995 but not being a member of the ceased Employees' Family Pension Scheme, 1971, opts to exercise his option under paragraph 7.]

7. Option for joining the Scheme –(1) Members referred to under the paragraph (c) of paragraph 6 who have died between 1st April, 1993 and 15th November, 1995, shall be deemed to have exercised the option of joining the Scheme on the date of his death.

(2) Members referred to in sub-paragraph (c) of paragraph 6 who are alive shall have the option to join the Scheme as per the provisions of paragraph 17 from the date of exit from the employment.

(3) Members referred to in sub-paragraph (d) of paragraph 6 shall have the option to join the Scheme as per the provisions of paragraph 17 from 16th November, 1995.]

9. Paragraph 6 deals with membership of the employees pension scheme. This scheme is automatically extended to all

employees joined in service on or after 16.11.1995 and who have become members of EPF scheme, 1952. Paragraph 6 (d) deals with employees who are governed by separate employees provident fund created by the employer after getting exemption under Section 17 of the Act and was not a member of Employees Family Pension Scheme 1971. Paragraph 7 deals with situation arising out of Paragraph 6. Such an employee can exercise option to come over to the Scheme, 1995 in accordance with Paragraph 7 of the Scheme, 1995. According to Paragraph 7 (3) of the Scheme, 1995, persons governed by Paragraph 6 are required to exercise option to join the scheme. It is thus clear, an employee working in BATA like the petitioner does not automatically become member of the Scheme, 1995, unless he exercises option.

10. Having regard to the statutory mandate, it is necessary for the petitioner to establish that he exercised option and therefore has become a member of the Scheme, 1995, in order to claim the benefits under the Scheme, 1995. It is the categorical assertion of the employer that petitioner did not exercise option. It is also the categorical assertion of EPF Organization that they did not receive any option form of the petitioner and therefore, he is not entitled to the Pension.

11. Having regard to the specific stand of the respondents, petitioner was asked to show the proof of exercising option. Learned counsel fairly submits that petitioner does not have proof of submission of option. However, he stated that petitioner had exercised option on 05.12.2001. According to him, on that day the enforcement officer conducted inspection of the records of the respondent-company and in that process, when he insisted that all

the employees should be enrolled, the employer has taken option form and accordingly, option was submitted by the petitioner. However, no proof is available with reference to the said assertion.

12. As no proof is available with the petitioner to show that option is exercised and the respondents categorically denied exercising of option, it cannot be said that petitioner has become a member of the Scheme, 1995.

13. Learned counsel for the petitioner sought to contend that the employer is required to submit monthly return in Form-I and that returns should contain the details of contributions made and the availability of other schemes and therefore, requests calling for the details from the respondent-EPF Organization. Heavy reliance is placed on Paragraph 39-A and Form-I appended to the Scheme.

14. Under Paragraph 39 of the Scheme, 1995 employer can seek exemption from application of the provisions of Scheme, 1995 to any establishment or class of establishments, if such establishment/establishments have introduced the scheme, with similar benefits or better benefits and on due consideration of the claim, the competent authority can grant exemption. In the event of exemption being granted under Paragraph 39, Paragraph 39 (A) requires submission of returns in Form-I by the employer. It is not the case of the petitioner that 2nd respondent was granted exemption under Paragraph 39. In fact the situation arising out of Paragraph 39 is not attracted to the case on hand. As noted above, to apply the benefits of Scheme, 1995, an employee, such as petitioner governed by Paragraph 6 (d), in terms of Paragraph 7 (3), he must exercise option but no such option was exercised by the petitioner. Therefore, Paragraph 39 has no application to the

facts of this case. Thus, whether particulars were furnished in Form-I or name of petitioner is reflected/not reflected has no significance to the case on hand as petitioner has not enrolled in the Scheme, 1995.

15. No doubt, the 1952 scheme and the Scheme, 1995 are welfare measures to provide succor to the employees working in private sector and in unorganized sector and therefore, requires a liberal construction and to the extent possible employee should be granted all the benefits of the schemes.

16. However, to apply the provisions of Scheme, 1995, pre-condition imposed in the scheme, as noted above, is that the employee must exercise option. The petitioner has not crossed this hurdle and as there is no proof on record to show that petitioner has exercised option, the benefits of the scheme, 1995 cannot be extended on mere asking. Therefore, I do not see any merit in the contentions urged.

17. The decision communicated to the petitioner impugned in this writ petition cannot be said as made in arbitrary exercise of power or without application of mind and nor can be called a perverse decision, warranting interference by this Court.

18. Accordingly, the Writ Petition is dismissed. It is needless to observe that what is considered in this writ petition is only with reference to application of benefits of Pension Scheme, 1995 and if the petitioner is entitled to the benefits under any other scheme or fund, it is always open to him to receive and this order does not come in the way of making claim for those amounts. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

P.NAVEEN RAO,J

28th November 2017
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