

HONOURABLE SRI JUSTICE P. NAVEEN RAO

W P Nos. 33804 of 2012 and 32028, 33091, 33094 of 2013

Date : 24.9.2018

WP 33804 of 2012

Between:

K Narasimha Rao

S/o Chinnaiah Rao 60 years Retd Attender E 326645 H No
9126 Loyapati Veedhi Nunna Vijayawada Rural Krishna
District

Petitioner

And

The Regional Provident Fund Commissioner
Employees Provident Fund Organization Barkatpura
Hyderabad 500 027 & others

Respondents

The Court made the following:



HONOURABLE SRI JUSTICE P. NAVEEN RAO

W P Nos. 33804 of 2012 and 32028, 33091, 33094 of 2013

COMMON ORDER:

Heard learned counsel for petitioners, learned standing counsel for APSRTC Sri P Durga Prasad and learned standing counsel for E.P.F.Organisation Sri T.Balaji and Sri Y Ravindra.

2. In all these writ petitions, petitioners were employees of A.P. State Road Transport Corporation (for short RTC) and retired from service on attaining the age of superannuation. Employees working in organizations like respondent corporation have to enroll with the Employees Provident Fund established under Employees Provident Funds and Miscellaneous Provisions Act, 1952 (for short the Act, 1952). However, Act, 1952 enables employer to seek exemption from the provisions of the Act, if the employer floats a scheme more beneficial to the employees than the fund established under the Act, 1952. RTC is exempted from the provisions of the Act and has created its own Provident Fund Trust. In the year 1995, the Government of India, floated 'The Employee's Pension Scheme, 1995' (for short scheme, 1995). This is in addition to Provident Fund. This pension scheme enables employees enrolled into the scheme to get monthly pension. Under the scheme, 1995 to the extent relevant for this case, it is appropriate to note that employee has to enroll into 1995 Pension scheme and employer has to remit 8.33% from 12 % employer contribution to the Employees Provident Fund Organization (for short EPFO). The scheme initially imposed ceiling of Rs.5000/- salary to determine 8.33% contribution to Pension scheme, later enhanced to Rs.6500/-. However, over and above the ceiling on compulsory contribution, it is open to the employee to contribute more under the scheme based on the actual salary drawn by

employee. However, paragraph 26.6 of the Provident Fund Scheme under Act, 1952 envisages that the employer and employee have to make a joint request to the EPFO. Officer not below the rank of Assistant Provident Fund Commissioner of EPFO is the nodal officer to whom such communication should be made expressing willingness to contribute more to pension scheme and on giving such consent if higher amount is contributed, the employee is entitled to receive higher monthly pension. The subject of controversy is on whether such willingness was informed to EPFO.

3. It is the common ground of petitioners as well as respondent corporation that they have consented to contribute higher amount of pension, than the minimum amount prescribed and such contribution at the rate of 8.33% on actual salary was credited every month to the EPFO. According to respondent corporation, as can be seen from paragraph 3 of the counter affidavit filed in W P No. 33804 of 2012, EPFO was informed about willingness of the employee to contribute higher pension amount and acceptance by employer. It has also referred to letter No. EPSI/547(1)/2012 dated 31.7.2007 where-under such consent and making of contribution was informed to EPFO.

4. It is not disputed by EPFO authorities that higher contribution at the rate of 8.33 % on actual salary was made by the employer to EPFO.

5. However, EPFO rejected the request of the petitioners in W.P. Nos. 32028, 33091 and 33094 of 2013 holding that prior consent of the competent authority as required by paragraph 26.6 was not obtained and therefore they are not entitled to claim higher pension. In W.P. No. 33804 of 2012, petitioner challenges order No. GR/GNT/00036307 of

21.9.2011 of second respondent to the extent of not sanctioning the higher pension. In other words, the only ground on which the claim to pay higher monthly pension is negated on alleged non compliance of paragraph 26.6.

6. According to learned counsel for petitioners, the issue is no more res-integra. The same issue has fallen for consideration before the Hon'ble Supreme Court in **R.C.Gupta Vs. Regional Provident Fund Commissioner, Employees Provident Fund Organisation & others**¹. Supreme Court was pleased to hold that cut off date is not stipulated by the scheme and employee can contribute higher amount at any point of time and refusal on the ground that before cut off date option was not exercised is not valid in law. Following the decision of the Supreme Court, EPFO has issued circular dated 23.3.2017 directing the Unit Heads to accept higher contributions.

7. However, according to learned standing counsel for EPFO on 31.5.2017 EPFO issued another circular. By this circular distinction between employer who is exempted from application of the scheme 1952 and employer who is not exempted is brought about. Learned standing counsel would therefore urge that the benefit of supreme Court judgment is extended only to the employees whose employer is not exempted under the PF Act. Learned standing counsel sought to clarify, by referring to this circular, that in case of non exempted organizations, contributions are received by the EPFO directly, whereas in the case of exempted employers, the contribution is received by the employer and later credited to EPFO.

¹ 2016 SCC Online SC 1639

8. As can be seen from the judgment of the Supreme Court, the request of the employee to contribute more as per the actual salary drawn by the employee was rejected by EPFO on the ground that cut off date imposed in the scheme of 1995 and after the cut-off date, no contribution can be made. Construing the provision in Clause 11(3) of Pension Scheme and paragraph 26.6 of scheme, 1952 the Supreme Court observed as under:

“8. Reading the proviso, we find that the reference to the date of commencement of the Scheme or the date on which the salary exceeds the ceiling limit are dates from which the option exercised are to be reckoned with for calculation of pensionable salary. The said dates are not cut-off dates to determine the eligibility of the employer-employee to indicate their option under the proviso to Clause 11(3) of the Pension Scheme. A somewhat similar view that has been taken by this Court in a matter coming from the Kerala High Court, wherein the Special Leave Petition (C) No. 7074 of 2014 filed by the Regional Provident Fund Commissioner was rejected by this Court by order dated 31.03.2016. A beneficial Scheme, ***in our considered view, ought not to be allowed to be defeated by reference to a cut-off date, particularly, in a situation where (as in the present case) the employer had deposited 12% of the actual salary and not 12% of the ceiling limit of Rs. 5,000/- or Rs. 6,500/- per month, as the case may be.***

....

10. We do not see how exercise of option under paragraph 26 of the Provident Fund Scheme can be construed to estop the employees from exercising a similar option under paragraph 11(3). If both the employer and the employee opt for deposit against the actual salary and not the ceiling amount, exercise of option under paragraph 26 of the Provident Scheme is inevitable. Exercise of the option under paragraph 26(6) is a necessary precursor to the exercise of option under Clause 11(3). Exercise of such option, therefore, would not foreclose the exercise of a further option under Clause 11(3) of the Pension Scheme unless the circumstances warranting such foreclosure are clearly indicated.

11. The above apart in a situation where the deposit of the employer's share at 12% has been on the actual salary and not the ceiling amount, we do not see how the Provident Fund Commissioner could have been aggrieved to file the L.P.A. before the Division Bench of the High Court. All that the Provident Fund Commissioner is required to do in the case is an adjustment of accounts which in turn would have benefitted some of the employees. At best what the Provident Commissioner could do and which we permit him to do under the present order is to seek a return of all such amounts that the concerned employees may have taken or withdrawn from their Provident Fund Account before granting them the benefit of the proviso to Clause 11(3) of the Pension Scheme. Once such a return is made in whichever cases

such return is due, consequential benefits in terms of this order will be granted to the said employees.

(emphasis supplied)

9. Hon'ble Supreme Court observed that there is no cut off date imposed under paragraph 11 (3) of the Pension Scheme and employee can exercise option to contribute more at any time.

10. It is not in dispute that the employer was crediting amount at the rate of 8.33 % on actual salary of employees. According to EPFO the compulsory contribution of 8.33 % of Rs. 6500/- towards EPFO would come to approximately Rs. 500/-, whereas, more than Rs.500/- was deposited by the respondent corporation. This was never objected to nor questioned by EPFO. Having received the higher contribution, it is not open to EPFO to take hyper technical plea that there was non compliance of paragraph 26.6, to deny higher pensionary benefits to petitioners. Even assuming that there was no such communication from the employer about the willingness of the employee to contribute more, the fact that higher contribution was made and accepted by EPFO would be sufficient to hold that there is compliance of paragraph 26.6. A bare reading of paragraph 26.6 would make it clear that it does not impose any restriction on contribution but it only seeks to streamline the higher contribution and therefore require the employer and employee to inform the Assistant Provident Fund Commissioner or higher authority the willingness of the employee to contribute more.

11. At this stage, learned standing counsel sought to contend that as the respondent employer is exempted from the Provident Fund Act, 1952 and it is maintaining separate Provident Fund, EPFO had no means to ascertain how the contribution was made in the absence of

compliance of paragraph 26.6 of the scheme. The said contention is stated to be rejected.

12. On plain reading of relevant paragraphs of the EPF Scheme 1952 and Pension Scheme 1995, I am of the considered opinion that no distinction can be drawn between exempted category employer and non exempted category employer for application of Pension Scheme 1995. Admittedly no exemption is granted to RTC from the 1995 pension scheme and its employees are enrolled and contributions are made under 1995 scheme. Further, it is categorical assertion of the respondent RTC that the entire information including higher contributions made based on the actual salary drawn by the petitioners was already furnished to the EPFO. It is not disputed that 8.33% of actual salary was being credited to EPFO all along. As noted above, it was not objected by EPFO. Thus, it is not open to EPFO to raise plea of non compliance of paragraph 26.6 at this distance of time and to deprive higher monthly pension drawable by the petitioners.

13. Pension Scheme 1995 is formulated by Government of India to enable employees working in the establishments where monthly pension system is not in vogue unlike in Government of India or State Government service and it enables the employees after termination of their service to draw some kind of monthly pension. It is a social welfare scheme to enable post retirement sustenance. Monthly pension is determined based on the amount accrued to the account of employee at the time of termination of service. It is not in dispute that the petitioners herein have made higher contribution than the ceiling limit imposed and amount is accrued to the account of EPFO. Thus, petitioners are entitled to draw higher pension based on the higher contribution made by them

than the minimum amount required. Even assuming that there was no compliance of paragraph 26.6 the employees cannot be deprived of their higher pension on this hyper technical ground.

14. Thus, the orders impugned in W P Nos. 32028, 33091 and 33094 of 2013 rejecting the request of the petitioners for higher pension and order in W.P. 33804 of 2012, to the extent of not sanctioning the higher pension to petitioner therein are set aside. The Employees Provident Fund Organisation is directed to work out the amount of pension payable to petitioners based on the actual contribution made by them over and above ceiling of Rs.6500/- prescribed. The entire exercise shall be undertaken and completed and arrears and monthly pension shall be drawn and paid to petitioners within three months from the date of receipt of copy of this order.

15. Accordingly, the writ petitions are allowed. No costs. Miscellaneous petitions, if any pending, are closed.

DATE: 25-09-2018
TVK

P NAVEEN RAO,J

HONOURABLE SRI JUSTICE P. NAVEEN RAO



W P Nos. 33804 of 2012 and 32028, 33091, 33094 of 2013

Date : 24.9.2018