HONOURABLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION No.8673 of 2012

Date : 12-10-2018

Between:

A Sadasiva Rao S/o Mallaiah Executive Director AAM E 73249 APSRTC R/o H No 1234 Flat No 503 Maruthi Homes Maruthi Nagar

Petitioner

And

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

Respondents

The Court made the following:

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ORAL ORDER:

Petitioner joined the service as Officer under Trainee on 17.2.1978, earned promotions as Assistant Traffic Manager, Senior Scale Officer, Head of the Department and as Executive Director. He retired from service on attaining the age of superannuation while working as Executive Director. Petitioner claims that he submitted application for higher contribution under the Employees Pension Scheme, 1995 as per actual salary over and above the basic contribution on the salary @ .6500/- per month and in spite of several representations and reminders, the Provident Fund authority has not authenticated the request of the petitioner for enrolment in arbitrary and discriminatory manner.

2. Petitioner earlier filed W P No. 32702 of 2011 praying to declare the action of the respondents in not considering his representations made on various dates between 28.6.2008 to 17.1.2009 for remittance of 8.33 % of employer contribution to the P.F. Authority as per actual salary drawn by him with effect from 16.11.1995 under Employees Pension Scheme, 1995 as unjust and discriminatory. In the representation dated 17.1.2009, petitioner stated that he made application for higher option for pension scheme in the year 2004 along with his colleagues and though option of others was accepted, in spite of his representations, he is not informed of the status of the option exercised by him. The said writ petition was disposed of by order dated 15.12.2011 directing the Regional Provident Fund Commissioner and Assistant Provident Fund Commissioner of EPFO/respondents 1 and 2 therein to consider and dispose of the representation dated 17.1.2009 and to pass orders within a period of six weeks.

3. After the orders of this Court also, petitioner made further representations and caused legal notice. Consequence to the orders of this Court and representations made, the EPFO vide their proceedings dated 28.2.2012, impugned in the writ petition, informed the petitioner that he did not exercise option from the date of salary exceeding the statutory limit, nor submitted any application and therefore, the present application for option cannot be considered.

4. Heard learned counsel for petitioner, learned standing counsel for APSRTC and learned standing counsel for E.P.F.Organisation Sri Y Ravindra.

5. According to learned counsel for petitioner, petitioner has exercised option in the prescribed form on 28.2.2004, for contribution to pension scheme @ 8.33 % based on actual salary drawn by him over and above .6500/-, therefore petitioner has complied with the statutory requirement of exercising option and petitioner is entitled to higher pension. He would submit that there is no cut off date prescribed in the scheme and whenever an employee exercises higher contribution, it relates back to the date of enhancement of salary over and above .6500/- and based on the said contribution, on retirement from service, person is entitled to higher pension. Therefore, rejection of application on the ground that within the time prescribed in the scheme, option was not exercised is erroneous. According to learned counsel for petitioner, as held by Supreme Court in **R.C.Gupta Vs. Regional Provident Fund Commissioner, Employees Provident Fund Organisation & others**[1]**,** the cut off date principle has no application. He would further submit that the Division Bench of Kerala in W.A No. 568 of 2012 and batch decided on 5.3.2013 held that there is no cut off date prescribed in the pension scheme and employee can exercise option at any time during the course of his service. According to learned

[1] 2016 SCC Online SC 1639

counsel, the said decision of the Division Bench of Kerala High Court was upheld by Supreme Court and S.L.P. preferred by EPFO was dismissed. He therefore submitted that there is no cut off date and petitioner is entitled to higher pension based on option exercised by him.

5.1. He would submit that petitioner has deposited higher amount of contribution over and above the contribution of .6500/-; the said amount was lying for long time with the APSRTC Provident Fund Trust and as EPFO was non responsive on the issue of enrolment of the petitioner for higher pensionary contribution, the said amount was returned to the petitioner.

6. Per contra, according to learned standing counsel for EPFO Sri Y.Ravindra, as no option was exercised by the petitioner while he was in service for higher contribution as per actual salary drawn over and above the basic contribution on .6500/- and no contribution is credited to EPFO, petitioner is not entitled to claim higher pension and same is reiterated in the order rejecting the request of the petitioner.

7. 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.

8. Paragraph 26.6 of EPFO Scheme made under E.P.F. Act, 1952 reads as under:

> **"**26. Classes of employees entitled and required to join the fund
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> ....
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> (6) Notwithstanding anything contained in this paragraph, an officer not below the rank of an Assistant Provident Fund Commissioner may, **on the joint request in writing,** of any employee of a factory or other establishment to which this Scheme applies and his employer, enroll such employee as a member or allow him to contribute more than [3][six thousand five hundred rupees] of his pay per month if he is already a member of the fund and thereupon such employee shall be entitled to the benefits and shall be subject to the conditions of the fund, provided that the employer gives an undertaking in writing that he shall pay the administrative charges payable and shall comply with all statutory provisions in respect of such employee]."

9. To enroll for higher pension claim with higher contribution based on actual salary, the employee and employer have to submit a joint application consenting for enrolment for higher contribution on the

actual salary drawn over and above .6500/ per month. If such request is accepted by the competent authority of EPFO and employer contributes higher amount @ 8.33 % as per actual salary drawn over and above the salary of .6500/- drawn by the employee, on retirement the employee is entitled to proportionate higher pension. Thus, basic requirement is consent by the employee and employer for higher contribution. According to the learned counsel for petitioner, petitioner has exercised his option on 28.2.2004, therefore he has fulfilled the basic requirement of consent. No material is placed on record to show that petitioner has exercised that option. Further, as per paragraph 26 (6) of the pension scheme extracted above, there should be a joint application by the employee and employer for higher contribution and such application must be submitted to the EPFO. Thereafter, the employer should start remitting the amount @ 8.33 % of the salary over and above .6500/- per month to the EPFO. In all the subsequent representations of the petitioner, petitioner sought to highlight that he submitted an option form on 28.2.2004 and that his option form is not acted upon.

10. In the counter affidavit filed on behalf of APSRTC Provident Fund Trust, it is categorically asserted that no option form from the petitioner was received, as stated by him. It is also asserted that as early as on 25.9.1996 general circular was issued directing the Unit Officers to inform all the employees and take options from them. Accordingly the Trust has received 9000 applications exercising options for higher contribution and all those applications were processed. When the Court has specifically directed the learned counsel for petitioner to show proof of submission of option, more so, when the APSRTC Provident Fund Trust is denying submission of such application, he could not show any evidence of submitting such option. Further, there was no joint request made to EPFO and EPFO has not received joint request as required by Paragraph 26.6. Further, in the several

representations submitted by the petitioner, except harping that his application form is not acted upon, he has not chosen to submit option form through his employer even at a later point of time. Thus, till the petitioner retired from service, he has not exercised his option to make higher contribution. It is pertinent to note that petitioner reached to the level of Executive Director and retired from service in that capacity. He has to blame himself.

11. Though one of the reasons for rejection was on the ground that petitioner did not submit option within time such reason is not valid in view of the law laid down in **R.C.Gupta** and the view taken by Kerala High Court W.A No. 568 of 2012 and batch (referred to above) which was affirmed by the Supreme Court. However, the matter does not rest there. The APSRTC PF Trust, which was managing the Provident Fund of all the employees of the respondent APSRTC and which was processing the claims for contribution under EPF Act, 1995 including claims for higher contribution, categorically denies exercise of option by the petitioner. No material is placed on record to show that such option was exercised by the petitioner. Further, belatedly, if petitioner deposited some amount with the APSRTC PF Trust, it would not amount to statutory compliance. As noted above, there was no option exercised as per paragraph 26.6 of Employees Pension Scheme. Thus, the claim of the petitioner that he should be granted higher pension as if he had already exercised option, merits no consideration.

12. The writ petition deserves no consideration and accordingly dismissed. Miscellaneous petitions, if any pending, are closed.

P NAVEEN RAO,J

DATE: 12-10-2018
TVK

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