**THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 1331 OF 2017**

Amita Ajit Desai & Ors. .. Petitioners
Vs.
Union of India & Ors. .. Respondents

Mr.Ramesh Ramamurthy a/w. Mr. Saikumar Ramamurthy, Advocate for petitioners.

Mrs. Anjali N. Helekar a/w. Mr.A.R. Gole, Advocate for respondent Nos.1 to 3.

**CORAM : B.R. GAVAI &**
**N.J. JAMADAR, JJ.**

**DATE : 17TH JANUARY 2019**

**JUDGMENT : (B.R. GAVAI, J.)**

1. The learned counsel for the petitioners, on instructions, so far as petitioner No.3 is concerned, seeks liberty to withdraw the petition.

2 The petition stands disposed of as withdrawn so far as petitioner No.3 is concerned.

3 Rule. Rule is made returnable forthwith and, by consent, the petition is heard finally.

4 The petitioners have approached this Court seeking a declaration that they be treated as deemed to have come over to the Pension Scheme under the provision of Export Inspection Council Pension and General Provident Fund Rule, 1981 in view of the Circular dated 2nd July 1987 since

the petitioners are governed by the Central Civil Services (Pension) Rules, 1972 (hereinafter referred to as 'Pension Scheme') and not under the Contributory Pension Scheme (hereinafter referred to as 'CPF Scheme').

5 The petitioners were employed with the Export Inspection Agency, Mumbai, which is a statutory organization under the Export Inspection Council of India. The petitioners were earlier governed by the CPF Scheme, however, the Union of India issued a Notification dated 24th October 1981 thereby framing Export Inspection Council Pension and General Provident Fund Rules, 1981. Vide the said Rules, it is provided that the Pension Scheme, as amended from time to time, be extended to all the whole-time and regular employees of the Export Inspection Council. However, the proviso to the Rules provides that the employees who have entered into services prior to the date of issuance of the said Notification and who were governed by the CPF Scheme, would be given an option to continue to be governed by the said CPF scheme. The petitioners were required to exercise option in writing prior to 31st March 1982. It was further provided that the employees who do not exercise option, to opt for the CPF Scheme, would be governed by the Pension Scheme.

6 Another Circular was issued by respondent No.2 on 13th October 1983 vide which the date of option to be exercised was extended by 31st March 1983. It was provided that if no option is exercised by any of the

Officer/employees by 31st December 1983, such Officer/employee would be automatically governed by Pension Scheme. The petitioners had opted for 'CPF Scheme' in pursuance to the said Circular. An Office Memorandum came to be issued by the Government of India on 1st May 1987. The Office Memorandum provided that in pursuance to the Fourth Central Pay Commission, all the CPF beneficiaries in service on 1st January 1985 should be deemed to have come over to the Pension Scheme on the date unless they specifically opt out to continue under the CPF Scheme.

7 The Office Memorandum further provided that all CPF beneficiaries who were in service on 1st January 1986 and who were still in service on the date of issue of the Office Memorandum, will be deemed to have come over to the Pension Scheme. However, an option was given to the employees to continue under the CPF Scheme, if they so desire. They were required to exercise their option prior to 30th September 1987 in the 'Form of Option' enclosed to the said Office Memorandum. The said Office Memorandum further provided that if no option is received by the Head of Office by the given date, the employees will be deemed to have come over to the Pension Scheme in pursuance to the Office Memorandum dated 1st May 1987.

8 One of the petitioners retired in the year 2006, another retired in 2009 and the rest of the petitioners have retired from 2011 to 2015.

Undisputedly, the petitioners have also received the amount of CPF standing to their credit. After their retirement, the petitioners started correspondence with the respondent-Authority contending therein that they were governed by the Pension Scheme and, as such, benefit of the said Scheme should be granted to them. Since the representations of the petitioners were rejected, petitioners have approached this Court.

9 Shri Ramamurthy, learned counsel appearing on behalf of the petitioners submits that in view of the Office Memorandum dated 1st May 1987, a fresh option is required to be given if the employees desire to continue under the CPF Scheme. The counsel submits that a legal fiction was created by the said Office Memorandum that all such employees who do not specifically opt for CPF Scheme, will be deemed to have been governed by the Pension Scheme. The learned counsel, in support of this contention, relied on a judgment of the Apex Court in the case of ***Union of India & Anr. Vs. S.L. Verma & Ors.***[1]

10 Smt. Helekar, learned counsel appearing for the respondents, vehemently opposed the petition. The counsel submits that petitioners have exercised the option to continue under the CPF Scheme, withdrawn the employer's contribution and now it is stated that they are not governed by the CPF Scheme. This conduct itself disentitles the petitioners from the

1 (2006) 12 Supreme Court Cases 53

relief. It is submitted that the petitioners had opted for the CPF Scheme in pursuance to the Circular dated 31st March 1983. It is submitted that having opted for CPF Scheme as per Circular dated 31st March 1983, it will be deemed that the petitioners were desirous to continue under the CPF Scheme and not under the Pension Scheme. It can be noted from the conduct of the petitioners, in opting for the CPF Scheme, which shows that they were not interested in the Pension Scheme. The counsel further submits that the inordinate delay and latches in exercising the option dis-entitles the petitioners from seeking relief under Article 227 of the Constitution of India. Ms. Helekar The counsel relied on a judgment of the Apex Court in the case of ***Union of India & Ors. Vs. Tarsem Singh*** [2].

11 The controversy is no longer *res integra.* In the case of *Union of India & Anr. Vs. S.L. Verma & Ors.* , the Hon'ble Supreme Court had an occasion to consider the very same Office Memorandum. It will be helpful to refer to paragraph 7 of the said judgment of the Apex Court which reads as under :-

> *"7 The Central Government, in our opinion, proceeded on a basic mis-conception. By reason of the said Office Memorandum dated 1.5.1987 a legal fiction was created. Only when an employee consciously opted for to continue with the CPF Scheme, he would not become a member of the Pension Scheme. It is not disputed that the said respondents did not give their options by 30.9.1987. In that view of the matter respondent Nos. 1 to 13 in view of the legal fiction created, became members of the Pension Scheme. Once they became the member of the Pension Scheme, Regulation 16 of the Bureau of Indian Standards(Terms and Condition of Service of*

2 (2008) 8 Supreme Court Cases 648

> *Employees Regulation, 1988) had become ipso-facto applicable in their case also. It may be that they had made an option to continue with the CPF Scheme at a later stage but if by reason of the legal fiction created, they became members of the Pension Scheme, the question of their reverting to the CPF would not arise. The respondent No.14 has correctly arrived at a conclusion that an anomaly would be created and in fact the said purported option on the part of respondent No.1 to 13 was illegal when a request was made by respondent No.14 to the Union of India for grant of approval so that all those employees shall come within the purview of the Pension Scheme. In our opinion, the Ministry of Finance proceeded on a wrong premise that the Pension Scheme was not in existence and it was a new one. Two legal fictions, as noticed hereinbefore, were created, one by reason of the memorandum, and another by reason of the acceptance of the recommendations of the Fourth Central Pay Commission with effect from 1.1.1986. In terms of such legal fictions, it will bear repetition to state, the respondent nos.1 to 13 would be deemed to have switched over to the pension scheme, which a fortiori would mean that they no longer remained in the CPF scheme."*

12 On perusal of the aforesaid observations of the Hon'ble Apex Court, it is clearly revealed that by reason of the said Office Memorandum dated 1st May 1987, a legal fiction was created. It has been held that only when an employee consciously opted to continue with the CPF Scheme, he would not become a member of the Pension Scheme. It has been held that if no option is exercised by an employee, prior to the date specified in the Office Memorandum dated 1st May 1987, the employee shall be deemed to have automatically come over to the Pension Scheme.

13 We find that the aforesaid directions of the Hon'ble Apex Court would clearly cover the case of the petitioners. Undisputedly, none of the petitioner has opted for the CPF Scheme under the Office Memorandum

dated 1st May 1987. In that view of the matter, we find that in view of the Office Memorandum dated 1st May 1987, the petitioners would be deemed to be covered by the Pension Scheme.

14 Now the question that arises for consideration is with regard to the contribution of the employer towards the CPF Scheme. The learned Single Judge of Delhi High Court had an occasion to consider similar facts in Writ Petition (Civil) No. 1490 of 2006 along with companion matters. Vide judgment and order dated 30th April 2014, the learned Single Judge has held that the employer would be entitled to recoup their contribution under the CPF Scheme, if not already recouped, with simple interest at the rate of 8% p.a.

15 We find that in the case at hand, the same arrangement can be made to ensure equity. It will further be relevant to refer Clause 4.2 of the Office Memorandum, dated 1st May 1987. The said Clause in the Office Memorandum provides that the Government contribution to the CPF, together with interest thereon, credited to the CPF account of the employees who come over or are deemed to come over to the Pension Scheme, would be resumed by the Government. It further provides that the employees contribution together with interest thereon in the CPF account will be transferred to the GPF Account to be allotted to him on his coming over to the Pension Scheme.

16 Since the petitioners have already retired, there will be no question of employees contribution being transferred to the GPF Account. The only issue for consideration is with regard to employer's contribution to the CPF Scheme. Respondent No.2 can be directed to adjust the said amount along with interest @ 8% from the arrears that would be payable to the petitioners.

17 Hence, the rule is made absolute in the following terms :-

(i) It is held and declared that the petitioners would be entitled to be governed by the Central Civil Services (Pension) Scheme, 1972.

(ii) The petitioners would be paid Pension from the month of April- 2019.

(iii) The arrears of Pension shall be paid within a period of six months. However, the arrears will not carry any interest.

(iv) Respondent No.2 is entitled to recover the employer's contribution towards CPF along with simple interest @ 8% p.a. thereon, from the arrears of pension that would be payable to the respective petitioners.

**[ N.J. JAMADAR, J. ]** **[ B.R. GAVAI, J.]**