0HIGH COURT FOR THE STATE OF TELANGANA

THE HON'BLE THE ACTING CHIEF JUSTICE
RAGHVENDRA SINGH CHAUHAN

AND

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

W.P.No.44613 of 2018

Date: 12.06.2019

Between:

Union of India, Ministry of Rural Development,
Rep. by its Joint Secretary, Room No.249,
II Floor, Krishi Bhavan, New Delhi, and another

...Petitioners

and

Shyam Sunder Prasad Sharma,
Hyderabad, and another.

...Respondents

Counsel for the petitioners: Mrs. S. Nanda

Counsel for the respondent No.1: Mr. K. Sudhakar Reddy

The Court made the following:

ORDER: ***(per Hon'ble Sri Justice Raghvendra Singh Chauhan)***

The petitioners are aggrieved by the order, dated 27.08.2018, passed by the Central Administrative Tribunal, Hyderabad, in O.A.No.109 of 2015, whereby the learned Tribunal has directed the respondents i.e., the petitioners and the respondent No.2 herein, to give the benefit of Old Pension Scheme (GPF) to the applicant, the respondent No.1 herein.

Briefly, the facts of the case are that the respondent No.1-applicant was appointed on the post of Associate Professor in the National Institute of Rural Development (NIRD) on 14.12.2002. Although the said post was a permanent one, his appointment was a contractual one. His contractual appointment was subsequently extended till 13.08.2007. On 03.05.2007, he was appointed on the post of Professor. Again, although the said post was a permanent one, his appointment was a contractual one. Considering the fact that twenty persons, who were similarly placed as the applicant, had to be regularized, special rules were enacted for regularizing the service of such employees. Eventually, by order, dated 04.05.2012, the applicant's services were regularized. Thereafter, on 31.10.2014, he retired from the post of Professor. Since the applicant was covered by the Contributory Provident Fund Scheme, after his retirement, he was duly paid his amount under the said Scheme. However, subsequently, the applicant sought the benefit of the Old Pension Scheme. Since the same was denied, and as it was declared by the petitioners that, in fact he would be subjected to the New Pension Scheme, he had challenged the petitioners' action before the learned Tribunal.

By order dated 27.08.2018, as mentioned hereinabove, the Tribunal held that the New Pension Scheme is not applicable to the applicant. In fact, the applicant would be covered by the Old Pension Scheme. Therefore, the benefit of the Old Pension Scheme necessarily has to be given to him. Hence, this writ petition before this Court.

Mrs.S.Nanda, the learned counsel for the petitioners, submits that even in the regularization letter dated 31.01.2012, it was clearly stipulated that those persons, whose services are being regularized, would be covered by the New Pension Scheme. Therefore, the applicant could not have been given the benefit of the Old Pension Scheme.

Secondly, by Office Order No.466, dated 28.11.2013, the NIRD Service Bye-laws were amended. It was clearly stipulated in the amendment that the New Pension Scheme would be applicable to those employees who have been appointed on regular basis on or after 01.01.2004. It was further stipulated that '*the contract staff whose services were regularized after issue of an order on or after 01.01.2004 will also be governed by the New Pension Scheme, as per provisions contained in specific orders on regularization of their respective services*'. Therefore, according to the learned counsel, the learned Tribunal has erred in directing that the applicant is entitled to be covered by the Old Pension Scheme.

Thirdly, relying on the case of ***State of Punjab and others v. Dhanjit Singh Sandhu***[1], the learned counsel has pleaded that once the applicant had taken the benefit of the Contributory Pension Fund, he cannot be permitted to claim that he should be granted the benefit of the Old Pension Scheme. For, the applicant is blowing hot and cold simultaneously. After all, the benefit of the Contributory Provident Fund and the Old Pension Schemes cannot be given to him simultaneously.

Lastly, the learned counsel has placed reliance on the case of ***State of Gujarat v. PWD and Forest Employees Union and others*** (Civil Appeal Nos.1684-1686 of 2019 arising out of S.L.P. (C) No. 5028-5030 of 2019) decided by the Hon'ble Supreme Court on 15.02.2019, wherein the Hon'ble Supreme Court has opined that the benefit of the Old Pension Scheme has been scrapped by the Government and the Contributory Pension Fund Scheme or the New Pension Scheme has been introduced by it on 01.04.2005. Therefore, the New Pension Scheme would be applicable to the employee.

On the other hand, the learned counsel for the respondent No.1-applicant has raised the following counter-arguments:

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[1] (2014) 15 SCC 144

Firstly, the regularization letter dated 31.01.2012 does not exist in isolation. It has necessarily to be read in consonance with the special rules, which were enacted, namely, the NIRD Rules, 2011 for Regular Appointment of the Academic Staff (Appointed on Contract Basis) (for short, 'the Rules of 2011'), and in consonance with the NIRD Service Bye-Laws. According to the learned counsel, the petitioners were well aware that there are certain employees, who were appointed on contractual basis, but against permanent posts. Therefore, in order to regularize their services, the Rules of 2011 were enacted. According to Rule 6 of the Rules of 2011, no pensionary benefits would be given other than as available under the New Pension Scheme of the Government of India as made applicable with effect from 01.01.2004. However, Rule 6 of the Rules of 2011 contains an exception wherein it is clearly stipulated that '*This will not affect employee who was initially appointed on a regular post and presently holding his/her higher academic post on contract basis and already subscribing to either "CPF or GPF cum Pension scheme" of the Institute from the date of their initial regular appointment. Their existing status will remain unchallenged.*' According to the learned counsel, when the applicant was appointed on contractual basis, he had opted for the Contributory Provident Fund. Since he was appointed in the year 2002, his appointment was prior to the coming into force of the New Pension Scheme on 01.01.2004. Therefore, clearly, his case falls within the exception clause of Rule 6 of the Rules of 2011.

Secondly, even according to the Service Bye-Laws, Bye-Law 52 deals with the applicability and eligibility of the Contributory Provident Scheme or the New Pension Scheme. Bye-Law 52 (4) clearly stipulates that on the date of regularization of appointment, two options would be available to the employee, *firstly*, the option of Pension-cum-Gratuity-cum-Family Pension Scheme, and *secondly,* the Contributory Provident Fund Scheme. According to this provision, the employee was required to give his option within three months of the regularization of his service. However, according to the second proviso, if the option were not given within the stipulated period of three months, it was deemed that he has opted for the Pension-cum-Gratuity-cum-Family Pension Scheme. In the present case, the applicant did not give any option after regularization of his service in 2012. Therefore, under Bye-Law 52, he is deemed to have opted for the Pension Scheme.

Lastly, since his regularization would relate back to his initial date of appointment in the present case i.e., 14.12.2002, and since his appointment relates to a period prior to the coming into force of the New Pension Scheme on 01.01.2004, obviously, he is entitled to be covered under the Old Pension Scheme.

In rejoinder, the learned counsel for the petitioners submits that even if it were held that the applicant was entitled to the benefit of the Old Pension Scheme for the sake of argument, even then, the applicant has already been paid the amount of the Contributory Provident Fund. Therefore, he cannot possibly take the benefit of the Old Pension Scheme. Thus, even in this scenario, the learned Tribunal is not justified in granting the benefit of the Old Pension Scheme to the applicant.

Heard the learned counsel for the parties, perused the impugned order, and considered the case laws cited at the Bar.

It is, indeed, trite to state that the regularization letter cannot be read in isolation. A bare perusal of the regularization letter dated 31.01.2012 clearly reveals that the letter itself states that '*the regularization will be done in accordance with the provisions contained in the said rules*'. The words 'said rules' obviously refer to the Rules of 2011.

Rule 6 of the Rules of 2011 is as under:

> *In the event of deemed appointment of the services of the academic staff appointed on contract basis, no pensionary benefits would be given other than as available under the New Pension Scheme of the Government of India as made applicable with effect from 1.1.2004. <u>This will not affect employee who was initially appointed on a regular post and presently holding his/her higher academic post on contract basis and already subscribing to either "CPF or GPF cum Pension Scheme" of the Institute from the date of their</u>*

> *initial regular appointment. Their existing status will remain unchanged. No arrears of pay and related allowances for the past service will be paid in case of deemed appointment. However, past service rendered by these academic staff appointed on contract basis may be taken into consideration for their future promotions, if any, as per norms/eligibility prescribed by the institute for other academic staff appointed on regular basis, for this purpose, as made applicable from time to time, with the approval of competent authority. The deemed appointment will have no impact on existing basic pay and allowances presently being drawn by these academic staff appointed on contract basis and they will continue to draw their existing pay and allowances as per norms.* (Emphasis added)

The said provision can be divided into two parts: the first part being that no pensionary benefits would be given other than the one available under the New Pension Scheme of the Government as made applicable with effect from 01.01.2014. But, most importantly, the second part carves out an exception: it clearly proclaims that the first part will not affect those employees, who were initially appointed on the regular post, and are presently holding his/her higher academic post on contract basis, and who have already subscribed to either "CPF or GPF cum Pension Scheme" from the date of their initial regular appointment. It further proclaims that their existing status will remain unchanged.

Admittedly, the applicant was appointed initially as an Associate Professor on contractual basis, and thereafter as Professor on contractual basis. Both the posts were regular posts. Therefore, the first part of the exception is clearly fulfilled that the employee was initially appointed on a regular post, and on the date of regularization, he was holding a higher post but on contractual basis. Moreover, while being appointed on a contractual basis, the applicant already opted for the Contributory Provident Fund. Therefore, the existing status of an employee, who has opted for the Contributory Provident Fund, would necessarily have to remain unchanged, according to Rule 6 of the Rules of 2011 itself. Furthermore, the regularization letter clearly states that after the regularization of the applicant, the Rules of 2011 will come to an end. Hence, the question is under what Rules the payment of pension or Contributory Provident Fund would be covered. Obviously, the payment of Pension, or Contributory Provident Fund, or both would have to be covered under the Service Bye-Laws.

Bye-Law 52 (4) of the Service Bye-Laws stipulates that once the appointment is made on a regular basis, the employee shall have two options, *firstly*, to opt for the Pension Scheme, and *secondly,* to opt for the Contributory Provident Fund.

For our purpose, the second proviso is the most important provision, which is as under:

> *"Provided further that if a person does not communicate his option in the manner aforesaid, he shall be deemed to have elected the Pension-cum-*

Gratuity-cum-Family Pension Scheme and the General Provident Fund Scheme.

Where a person elects or is deemed to have elected the Pension-cum-Gratuity-cum-Family Pension Scheme and the General Provident Fund Scheme, he shall forego the Institute's contribution to his Contributory Provident Fund account together with interest thereon, which shall be paid back to the Institute, and shall thereupon be entitled to count towards pension the service rendered by him prior to his appointment on a regular basis to the extent permissible under the Pension-cum-Gratuity-cum-Family Pension Rules of the Institute, and the accumulated balance of his subscriptions in the Fund together with interest thereon standing to his credit shall be transferred to his General Provident Fund Account."

According to the second proviso of Bye-Law 52 (4), in case an option was not exercised by the employee, then he is deemed to have opted for the Pension Scheme. Admittedly, in the present case, the applicant did not submit any option after his services were regularized. Therefore, under the first part of the said proviso, he is deemed to have opted for the Pension Scheme.

The quixotic issue still remains as to whether the applicant would be entitled to both the Contributory Provident Fund Scheme and the benefit of the Old Pension Scheme. But the said issue stands resolved in the light of the second proviso to Bye-Law 52 (4). For, the second proviso clearly stipulates that in case an employee is deemed to have opted for the Pension Scheme, then the contribution made by the employer, along with the interest thereupon, has to be returned back to the employer and the contribution made by the employee along with the interest thereupon has to be deposited in the General Provident Fund Account. Moreover, the employer needs to calculate the years of service rendered by the employee and to calculate the pension thereupon. Therefore, as the applicant is deemed to have opted for the Pension Scheme, he is required to refund the contributory amount paid by the employer along with the interest thereupon, as the contribution made by him and the interest thereupon has already been received by him. Therefore, that part of the amount need not be touched by the employer. But nonetheless the applicant is still entitled to receive the pension under the Old Pension Scheme. For, the New Pension Scheme had not come into effect on the date of his initial appointment in 2002.

Keeping in mind the mechanism prescribed by Bye-Law 52(4), this Court directs the petitioners to calculate the amount contributed by the employer to the Contributory Provident Fund and the interest thereupon. Once the said amount is duly calculated by the petitioners, the applicant is directed to refund the said amount to the petitioners. Thereafter, the petitioners are directed to calculate the years of service rendered by the applicant, and to calculate the pension payable to the applicant under the Old Pension Scheme. This exercise shall be carried out by the petitioners and by the applicant within a period of three months from the date of receiving the certified copy of this order.

Although the learned counsel for the applicant has relied on the case of ***Dhanjit Singh Sandhu*** **(supra)**, the ratio of the said case is not applicable to the present case. For, it is not a case where the applicant has derived any benefit. In fact, when the applicant had sought for the payment of his Contributory Provident Fund amount, it was the petitioners, who were duty bound to have pointed out to him that he was covered by Bye-Law 52(4) of the Bye-Laws. Hence, the amount kept in his Contributory Provident Fund Account cannot be given to him. It is the duty of the petitioners to deduct the contribution made by them, and to deposit the contribution made by the applicant to the General Provident Fund Account, and to follow the procedure prescribed by Bye-Law 52 (4) of the Bye-Laws. Therefore, for the fault of the petitioners themselves, they cannot claim that the applicant has derived any benefit. Even in case the applicant has derived any benefit, as stated above, the applicant has already been directed by this Court to return the contribution made by the employer along with the interest thereupon.

Even the case of ***PWD and Forest Employees Union*** (supra) does not rush to the rescue of the petitioners for the simple reason that in the present case, the Contributory

Provident Fund Scheme has not been scrapped while bringing into existence the new Pension Scheme.

Bye-Law 52(4) of the Bye-Laws establishes that while the New Pension Scheme is applicable, the Contributory Provident Fund Scheme continues to be in existence. Therefore, the reliance placed on the case of ***PWD and Forest Employees Union*** (supra) is highly misplaced.

For the reasons stated above, this Writ Petition stands disposed of in terms of the directions issued by this Court hereinabove. There shall be no order as to costs.

As a sequel, miscellaneous petitions, pending if any, stand dismissed as infructuous.

(RAGHVENDRA SINGH CHAUHAN, ACJ)

(Dr. SHAMEEM AKTHER, J)

Date: 12.06.2019
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