HIGH COURT OF TRIPURA
AGARTALA

W.P. (C) No.972/2019

Shri Sanjoy Kumar Paul

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

Connected with
W.P. (C) No.973/2019

Shri Adhip Acharya

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.974/2019

Shri Debajit Chakraborty

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.975/2019

Shri Achalmani Biswas

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.976/2019

Shri Dasarath Reang

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.977/2019

Shri Arjun Shil

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.978/2019

Shri Nirmal Chandra Saha

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.979/2019

Shri Sudhansu Pal

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.980/2019

Shri Santi Ranjan Debbarma

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.981/2019

Shri Sudin Chandra De

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.982/2019

Shri Pradip Lodh

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.983/2019

Shri Alok Saha

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.984/2019

Shri Swapan Choudhury

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.985/2019

Smt. Chanchala Sarkar (Das)

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.986/2019

Smt. Sabita Das

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.987/2019

Shri Jagabandhu Paul

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.988/2019

Shri Pramod Lal Das

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

HIGH COURT OF TRIPURA
सत्यमेव जयते

W.P. (C) No.989/2019

Smt. Shipra Malakar

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.990/2019

Smt. Madhuri Debbarma

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.991/2019

Shri Tapan Debnath

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.992/2019

Shri Sajal Kanti Nath

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.993/2019

Smt. Mamun Singha Roy

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.994/2019

Smt. Rita Sil Das

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.995/2019

Shri Benu Kumar Debbarma

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.996/2019

Sri Rahim Debbarma

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.997/2019

Shri Gopal Debnath

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.998/2019

Shri Madan Deb

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.999/2019

Shri Pranab Majumder

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.1000/2019

Sri Subrata Sarkar

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

HIGH COURT OF TRIPURA
सत्यमेव जयते

W.P. (C) No.1001/2019

Shri Debasish Sengupta

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.1002/2019

Smt. Sudipa Nath

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.1003/2019

Smt. Suchitra Deb

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.1004/2019

Shri Sashi Mohan Debbarma

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

W.P. (C) No.1005/2019

Smt. Geeta Rangkhawl

.....Petitioner(s)

Versus

Union of India and others

.....Respondent(s)

For Petitioner(s) : Mr. P.K. Pal, Advocate.
Mr. Saugat Datta, Advocate.

For Respondent(s) : Mr. Debalay Bhattacharjee, GA.
Mr. Biswanath Majumder, CGC.

HIGH COURT OF TRIPURA
सत्यमेव जयते

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI

Date of hearing and judgment : 28.02.2020.

Whether fit for reporting : Yes.

JUDGMENT & ORDER(ORAL)

These petitions arise in common background and would be disposed of by this common judgment. For convenience, facts may be noted from W.P. (C) No.972 of 2019. Petitioner had entered the service of Tripura Scheduled Castes and Scheduled Tribes Co-operative Development Corporation Limited, a Government constituted Corporation as UDC in the year 1991. As per the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter to be referred to as 'the said Act') in due course of time he became the member of the provident fund. Over a period time he and his employer went on making statutory contributions to the said fund. He is due to retire on superannuation in the year 2024. He has challenged a communication dated 17.06.2019 issued by the Regional Provident Fund Commissioner, Employees' Provident Fund Organization under which his request for granting pension under the Employees' Pension Scheme framed under the said Act on the basis of his actual salary came to be rejected.

2. He had made a representation to the Provident Fund Commissioner on 12.06.2019. He contended that he used to make contribution to the provident fund @ 12% on the maximum ceiling of pay of Rs.15,000/- per month but with effect from 01.10.2018 he has been allowed to contribute @ 12% on his actual salary i.e.

basic pay + dearness allowance. He, therefore, made following request:

> "In view of the above, being a similarly situated person as that of petitioners in the cases before the Hon'ble Kerala High Court as well as in Delhi High Court and, above all, in the case of Civil Appeal No.10013 – 10014 (R.C Gupta Vrs. The Regional Provident Fund Commissioner & Ors.) in the Hon'ble Apex Court judgment rendered on 04-10-2016, **my client, a member of the EPF is entitled to the benefits of EPS-1995 and for the purpose you the notice-receiver No.2 within a period of 15 (fifteen) days issue necessary orders/notification/circular *so that my client is ensured to get the enhanced rate of pension under the EPS Scheme @8.33% of the actual salary (last drawn) at the time of retirement from service (on 01-07-2024)***, otherwise, my client would have no other alternative but to seek redress approaching the appropriate Court of law and in that case, you, the notice receivers shall jointly and severally liable for costs of litigations."

3. This request of the petitioner was rejected by the Regional Provident Fund Commissioner by impugned communication dated 17.06.2019, which reads as under:

> "Sir,
>
> With reference to your notices bearing reference nos. SD/L-Notice/01/19 and SD/L-Notice/ /19, all dated 12th June, 2019 received by our office on 14th June, 2019 on behalf of your 34 clients as mentioned in the enclosed ANNEXURE-A, this is to inform you that,
>
> i) Pension Fund set up under Section 6A(2) of the EPF & MP Act'52 is to be financed by transferring 8.33% of the contributions made by the **employers** only.

ii) Section 6 of the EPF & MP Act'52 has stipulated that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section, thus any contribution in excess of the statutory limit cannot be insisted upon.

iii) Employees can contribute exceeding the prescribed limit, provided he is allowed to contribute under para 26(6) of the EPF Scheme'52 under certain terms and conditions.

iv) The employers of your clients namely **'Tripura SC, ST Co-op. Development Corpn. Ltd.'** bearing EPF Code No. **NE/AGT/2202** and **'Tripura OBC Co-op. Development Corpn. Ltd.'** bearing EPF Code No. **NE/AGT/8208**, never contributed beyond the statutory limit prescribed from time to time. So there is no possibility to divert Provident Fund Contribution to Pension Fund Contribution from Employer's Share of contribution.

v) Thus there is no scope to treat the Pensionable Salary of your clients more than the statutory limit as contributed by their employers from time to time, presently Rs.15,000/-.

vi) Some of your clients have contributed their own share of contribution on actual salary as mentioned in ANNEXURE-A, but their employers' contribution are always limited to the prescribed cap which will be treated as their **pensionable salary** debarring them from pension on actual salary, as EPFO never received pension fund contribution upon actual wages.

Ratio of different cases cited by you in your notice(s) are applicable to those cases where the employers have contributed their share of contribution upon actual wages without any cap of

the prescribed ceiling, and have no nexus in respect of your clients as their employers never contributed their share of contribution beyond the prescribed cap.

You are, therefore, requested to advise your clients accordingly."

4. Thereupon he has filed this petition. Facts of the connected petitions being substantially similar they are not separately recorded. Based on these facts, learned counsel for the petitioners submitted that the issues involved in these petitions are squarely covered by the judgment of Division Bench of Kerala High Court in case of ***P. Sasikumar and others vs. Union of India and others, W.P. (C) No.13120 of 2015*** dated 12.10.2018, which judgment was carried in appeal to the Supreme Court but the SLP, came to be dismissed by an order dated 01.04.2019. Counsel submitted that in view of contribution by the employees at the higher rate of 12% on the actual salary ignoring the limit of Rs.15,000/- per month, the petitioners should be granted pension from the Employees' Pension Fund on the basis of their actual salary. He submitted that the Provident Fund Commissioner committed a serious error in rejecting such request of the petitioners. He placed heavy reliance on the decision of Kerala High Court in case of ***P. Sasikumar (supra)***.

5. On the other hand, learned counsel for the Provident Fund Organization opposed the petitions. In addition to the impugned communication, he also placed reliance on the contents of an affidavit dated 26.02.2020 filed by one Sri Subir Sanyal, Regional

Provident Fund Commissioner. He submitted that in the present case, the employer had never agreed to make contribution in excess of the statutory limit. The Employees' Pension Scheme comprises of a portion of the employer's contribution and has nothing to do with the employees' contribution. The decision of Kerala High Court would apply only where employee and employer both agree to make contribution beyond the statutory limits. In the present case, the employer never showed such willingness. Mere contribution by the employee in excess of the limit would not entitle the employee to seek higher pension.

6. Kerala High Court in the said judgment in case of ***P. Sasikumar (supra)*** has considered various aspects concerning the claim of the employee for seeking pension from the Employees' Pension Scheme ignoring the previous limits of Rs.6,500/- per month, which was revised to Rs.15,000/- per month towards pensionable salary. In this context, certain amendments made by the Central Government in the Provident Fund Scheme and Pension Scheme, were challenged. The High Court noted that Section 6A of the Act permits transfer of a portion of the employer's contribution made under Section 6 to constitute the pension fund. The said provision does not empower the Central Government or any other authority to demand and recover further amounts from either the employees or the employers. In this context, the Court noticed the provisions contained in sub-clause (6) of para-26 of the Employees' Provident Fund Scheme, which provides as under:

(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 fifteen thousand 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."

7. In this context, it is observed that –

"27. It is clear from the Scheme of things discernible from an examination of the above provisions that, the legislative intention has been to constitute a Pension Fund utilizing 8 1/3% of the employer's contribution made under Section 6 of the EPF Act. Sub paragraph 6 of paragraph 26 of the EPF Scheme gives an option to the employee to remit contributions at the rate of 12% of the actual salary drawn by him, provided a joint request is made by the employer and the employee for such purpose. Thereupon, the employer's contribution would also be 12% of the actual salary drawn. Since Section 6 has limited the employer's contribution to 10% or 12% of the salary of the employee and has specifically stipulated that "the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this Section", any contribution in excess of the statutory limit cannot be insisted upon. A joint request to be voluntarily made by the employer and the employee offering to pay contributions on the basis of the actual salary drawn by

the employee was the only solution. Therefore, the option that was required to be exercised jointly by the employer and the employee under paragraph 26(6) of the EPF Scheme was to tide over the above situation."

8. In the context of the Pension Scheme and the limits of maximum pensionable salary, it was further observed as under:

"(i) Paragraph 11 of the Pension Scheme limits the maximum pensionable salary to Rs.15,000/- per month. Prior to the amendment, though the maximum pensionable salary was only Rs.6,500/- per month, the proviso to the said paragraph permitted an employee to be paid pension on the basis of the actual salary drawn by him provided, contribution was remitted by him on the basis of the actual salary drawn by him preceded by a joint request made for such purpose jointly with his employer. The said proviso has been omitted by the amendment thereby capping the maximum pensionable salary at Rs.15,000/-. The Scheme has been amended further by a subsequent notification, the Employee's Pension (Fifth Amendment) Scheme, 2016 to provide that the pensionable salary for the existing members who prefer a fresh option, shall be based on the higher salary.

(ii) Paragraph 11(4) of the Pension Scheme has been amended to confer an option on the existing members as on 1.9.2014 to submit a fresh option jointly with their employer to continue to contribute on salary exceeding Rs.15,000/- per month. Upon such option, the employee would have to make a further contribution at the rate of 1.16% on the salary exceeding Rs.15,000/-, additionally. Such fresh option would have to be exercised within a period of six months from 1.9.2014. A power to condone the omission to exercise fresh option within the said period

> of six months by a further period of six months is conferred on the Regional Provident Fund Commissioner. If no such option is made, the contribution already made in excess of the wage ceiling limit would be diverted to the Provident Fund Account, along with interest."

9. In this context, the Kerala High Court considered the validity of the Employees' Pension (Amendment) Scheme, 2014 brought into force by Notification dated 22.08.2014. By such Notification, sub-clause (3) of Paragraph 11 of the Employees' Pension Scheme was amended. This sub-clause (3) provides that the maximum pensionable salary shall be limited to Rs.15,000/- per month. Prior to the amendment this sub-clause (3) contained a proviso, which read as under:

> "Provided that if at the option of the employer and employee, contribution paid on salary exceeding rupees six thousand and five hundred/Rs.6,500/- per month from the date of commencement of this Scheme or from the date salary exceeds rupees six thousand and five hundred/Rs.6,500/- whichever is later, and 8.33 per cent share of the employers therof is remitted into the Pension Fund, pensionable salary shall be based on such higher salary."

10. By the said amendment, this proviso was deleted. The Kerala High Court by the said judgment set aside the Notification and thereby annulled the amendment. In other words, the action of deleting the proviso to sub-clause (3) noted above was disapproved. It was further directed that all proceedings issued by the Provident Fund authorities on the basis of the said amendment would also be set aside.

11. Reference may also be made to a decision of Division Bench of Delhi High Court in case of ***Bharatiya Khadya Nigam Karamchari Sangh and another vs. Union of India and others*** dated 22.05.2019 cited by the counsel for the petitioners in which referring to and relying upon the decision of Kerala High Court in case of ***P. Sasikumar (supra),*** the Court held that the revised limit for pensionary benefits under the Employees' Pension Scheme would also be applicable to the employees of exempted organization.

12. In my opinion, the decision of the Kerala High Court in case of ***P. Sasikumar (supra)*** does not cover the case of the petitioners. The central issue in the said case was the validity of the amendment in sub-clause (3) of para-11 of the Employees' Pension Scheme by virtue of which the proviso was deleted. This proviso provided that if at the option of the employer and employee contribution paid on the salary exceeding Rs.6,500/- (which was later revised to Rs.15,000/-) and 8.33% share of the employers thereof is remitted into the pension scheme, pensionable salary shall be based on such higher salary. For applicability of this proviso, it was thus essential that not only the employee but the employer also must agree to make higher contribution than the statutory limit on the basis of actual salary. When this is done, a portion of such contribution which is diverted to the pension fund would automatically go up and this is the logic for lifting the ceiling for payment of pension on Rs.15,000/- to pension on the basis of actual salary. In other words, only if the

employer agrees to deposit the contribution of provident fund calculated not on the basis of ceiling of Rs.15,000/- per month but on the basis of actual salary i.e. basic pay + dearness allowance, that the benefit of enhanced pension as per the reintroduced proviso to sub-clause (3) of para-11 of the Pension Scheme as per decision of Kerala High Court in case of ***P. Sasikumar (supra)*** would apply. When the employer makes such higher contribution, proportionately higher amount will flow into the pension fund. When the employer does not agree to carry such additional burden, the employee on his own cannot contribute higher amount towards the Provident Fund Scheme and claim the benefit of the Pension Scheme on the basis of his actual salary. No part of this contribution made by the employee is diverted to the Pension Fund. Delhi High Court in case of ***Bharatiya Khadya Nigam Karamchari Sangh (supra)*** was dealing with a limited question of applicability of linking pension with actual salary to employees of exempted organizations.

13. Paragraph-3 of the Employees' Provident Fund Scheme envisages establishment of a Pension Fund. As per sub-clause (1) of para-3, from and out of the contributions payable by the employer in each month under Section 6 of the said Act or under the rules, a part of contribution representing 8.33% of the employees' pay shall be remitted by the employer to the Employees' Provident Fund every month. Sub-clause (2) of para-3 of the said Scheme provides that the Central Government shall also contribute at the rate of 1.16% of the pay of the members of the Employees' Pension Scheme and credit the contribution to the

Employees' Pension Fund. Proviso to sub-clause (2) provides that where the pay of the member exceeds Rs.15,000/- (substituted for Rs.6,500/- with effect from 01.09.2014) per month the contribution payable by the employer and the Central Government be limited to the amount payable on his pay of Rs.15,000/- only.

14. Thus, a part of the contribution of the employer representing 8.33% of the employees pay would be diverted to the Employees' Provident Fund and as per the proviso to sub-clause (2) of para-3, in case the pay of the member exceeds Rs.15,000/- per month, the contribution of the employer would be limited to the amount payable on his pay of Rs.15,000/- only.

15. Para-11 of the Employees' Pension Scheme, 1995 pertains to determination of pensionable salary. Sub-clause (1) of para-11 provides the manner in which such pensionable salary shall be calculated. Sub-clause (3) of para-11 provides that the maximum pensionable salary shall be limited to Rs.15,000/- per month (which was revised from Rs.6,500/- w.e.f. 01.09.2014). This sub-clause (3), as noted, contained a proviso provided that if at the option of the employer and employee, the contribution paid on salary exceeding Rs.6,500/- per month from the date of commencement of the Scheme or from the date salary exceeds Rs.6,500/- whichever is later, and 8.33% share of the employer is remitted into the Pension Fund, pensionable salary shall be based on such higher salary. This proviso was deleted with effect from 01.09.2014 when the ceiling of Rs.6,500/- for contribution of the employer under sub-clause (2) of para-3 and the maximum

pensionable salary as per sub-clause(3) of para-11 was revised to Rs.15,000/- from Rs.6,500/- per month. The Kerala High Court in the decision in case of ***P. Sasikumar (supra)*** annulled such amendment and thereby reintroduced the said proviso. However, the lifting of the ceiling of Rs.15,000/- of pensionable salary would happen only if the conditions contained in the said proviso are satisfied namely, both the employer and employee make contribution on the salary exceeding Rs.15,000/- per month. It is only in such circumstances that the 8.33% of the share of the employer which is to be remitted into the Pension Fund would be worked out on the actual salary of the employee instead of being limited to Rs.15,000/- per month. In the present case, the employer has not made any such higher contribution.

16. Yet another aspect which may require examination is whether the employer and employee can mutually agree and contribute their shares on the basis of actual salary at any point of time and the employee can then claim pension not on the basis of ceiling of Rs.15,000/- per month but on the basis of actual salary or would the applicability of the proviso require that such higher contribution should have been made from the date of commencement of the Scheme or from the date salary exceeds Rs.6,500/- per month which are is later. This question, however, need not be threshed out in this petition and can be left open to be decided in appropriate case since such a question has not been argued at length before me and in any case, as correctly pointed out by the Provident Fund Commissioner in case of these

petitioners the basic requirement of the applicability of proviso to sub-clause (3) of para-11 of the Scheme are not satisfied.

17. This is what has been the stand of the Provident Fund Commissioner in the impugned communication dated 17.06.2019. He pointed out that the employee can contribute under para-26 (6) of the EPF Scheme exceeding the prescribed limit. However, ceiling of Rs.15,000/- prescribed as a pensionable salary under the Pension Scheme cannot be lifted since the employer's contribution is always limited to the said ceiling and it would be in relation to such ceiling that the employee's pensionable salary would be considered. This aspect has been elaborated in the affidavit-in-reply filed by the said authority as under:

> "g) There had a provision up to 31.08.2014 in proviso of paragraph No.11(3) of the Employees' Pension Scheme, 1995, of tendering option to contribute in the Pension fune exceeding the prescribed limit of pay, in such a case pensionable salary could be treated as the actual wages upon which contribution has been received. That proviso has been omitted vide notification No.GSR/609 (E), w.e.f. 01.09.2014. Moreover, that proviso is not at all applicable here as the employers never contributed beyond the prescribed ceiling of pay.
>
> 11. That, in reply to the averments made in Paragraph No.9 of the writ petition under reply, I submit that joint declaration of 52 employees received by this office on 09.08.2018 was option for contribution on actual salary by the employees only, which was option under Para No.26(6) of the Employees' Provident Funds Scheme, 1952, not under Para No.11(3) of the Employees' Pension Scheme, 1995, as

employers never had any contribution over and above the prescribed ceiling."

18. Learned counsel for the petitioners, however, vehemently contended that under the Act and the Schemes framed thereunder the Provident Fund Commissioner has the power to recover the unpaid contribution by the employer. The question of recovering unpaid contribution does not arise in the present case. It is not the case of the petitioners that the employer has not deposited the contribution of provident fund as per the statutory prescribed rates. If the employer does not show willingness to raise such limit for which there is no legal obligation, surely the Provident Fund Commissioner cannot enforce the same through recovery powers.

19. In the result, petitions are dismissed.

Pending application(s), if any, stands disposed of.

(AKIL KURESHI), CJ

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