Form No. J(2)

IN THE HIGH COURT AT CALCUTTA

CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Raja Basu Chowdhury

WPA 11525 of 2017

Kartick Chandra Kapas
Vs.
Union of India & Ors.

For the petitioner	:	Mr. Achyut Basu, Ms. Punam Basu Mr. Srikumar Chakraborty Ms. Pritha Biswas
For the Union of India	:	Mr. S.C. Prasad
For the PF authorities	:	Mr. Anil Kumar Gupta
For the Respondent No. 7	:	Mr. Soumya Majumder
Heard on	:	24.02.2023
Judgment on	:	24.02.2023

Raja Basu Chowdhury, J:

1. The present writ application has been filed, inter alia, praying for a direction upon the respondent nos. 3 and 7 to collect pension contribution, towards the Employees' Pension Scheme, on the basis on actual salary drawn by the

petitioner in terms of proviso to paragraph 11. 3 of the Employees' Pension Scheme, 1995 (hereinafter the "said Scheme").

2. Mr. Basu, learned advocate representing the petitioner submits that although the petitioner had challenged the notification dated 22nd August, 2014 whereby paragraph 11.3 of the said Scheme had been amended and paragraph 11.4 had been inserted in the said Scheme and although the validity of the challenge to paragraph 11.4 traveled upto the Hon'ble Supreme Court, yet the Hon'ble Supreme Court by a judgment delivered in the case of ***Employees Provident Fund Organization & Anr. v. Sunil Kumar B. and Ors.***, reported in **2022 SCC OnLine SC 1521** was, *inter alia*, pleased to uphold the validity of the notification dated 22nd August, 2014.

3. He says that the petitioner had joined the services of the respondent no. 7 sometimes on 1st June 1976. The petitioner had since retired in the year 2009. He says that subsequent to his retirement, the Provident Fund authorities had prepared a Pension Payment Order on 31st March, 2006 and the petitioner is drawing monthly pension.

4. He says that the petitioner cannot be deprived of the benefits of higher pension especially when the Hon'ble Supreme Court has approved the view taken in the case of ***R. C. Gupta & Ors. v. Regional Provident Fund Commissioner, Employees' Provident Fund Organization & Ors.***, reported in **(2018) 14 SCC 809** and has held there is no time limit for exercise of option under paragraph 11.3 of the said Scheme. It is submitted that since the Hon'ble Supreme Court has also extended the time for exercising option, in terms of paragraphs 11.3 and 11.4 of the said Scheme,

the petitioner should also be given an opportunity to exercise the said option.

5. Mr. Majumder, learned advocate for the respondent no. 7 submits that the Hon'ble Supreme Court in the case of ***Employees Provident Fund Organization and Another (supra),*** by approving the view taken in the case of ***R.C. Gupta (supra)***, in paragraph 43 thereof has been pleased to observe that there was no cut of date contemplated prior to the 2014 amendment, limiting the entitlement of enhanced pension coverage.
6. Mr. Majumder submits that since the Hon'ble Supreme Court has now opened a window for such employees who are otherwise entitled to exercise option under the pre-amended scheme of 2014, in terms of paragraph 11.3 of the said Scheme the petitioner should also be given an opportunity.
7. Mr. Gupta, learned advocate appearing for the Provident Fund authorities on the other hand submits that the petitioner having retired prior to the cut of date, in terms of the directions passed by the Hon'ble Supreme Court is not entitled to the benefits of the said Scheme. He says that the petitioner had reached the age of 58 years prior to 1st September, 2014 and as such, is otherwise not entitled to exercise any option in terms of the liberty afforded by the Hon'ble Supreme Court in the case of ***R.C. Gupta (supra)***. He further submits that the petitioner having not exercised the option in terms of paragraph 11.3 of the said Scheme and having retired prior to 1st September, 2014, is otherwise not entitled to exercise option under paragraph 11.3 of the said Scheme.
8. Having heard the learned advocates appearing for the respective parties and having considered the materials on record, I find that the Hon'ble Supreme

Court in the case of ***Employees Provident Fund Organization & Anr. (supra)*** in paragraph 46 thereof, has been pleased to observe as follows:-

> ***"46.*** *We accordingly hold and direct:—*
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> *(i) The provisions contained in the notification no. G.S.R. 609(E) dated 22nd August 2014 are legal and valid. So far as present members of the fund are concerned, we have read down certain provisions of the scheme as applicable in their cases and we shall give our findings and directions on these provisions in the subsequent sub-paragraphs.*
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> *(ii) Amendment to the pension scheme brought about by the notification no. G.S.R. 609(E) dated 22nd August 2014 shall apply to the employees of the exempted establishments in the same manner as the employees of the regular establishments. Transfer of funds from the exempted establishments shall be in the manner as we have already directed.*
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> *(iii) The employees who had exercised option under the proviso to paragraph 11(3) of the 1995 scheme and continued to be in service as on 1st September 2014, will be guided by the amended provisions of paragraph 11(4) of the pension scheme.*
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> *(iv) The members of the scheme, who did not exercise option, as contemplated in the proviso to paragraph 11(3) of the pension scheme (as it was before the 2014 Amendment) would be entitled to exercise option under paragraph 11(4) of the post amendment scheme. Their right to exercise option before 1st September 2014 stands*

crystalised in the judgment of this Court in the case of R.C. Gupta (supra). The scheme as it stood before 1st September 2014 did not provide for any cutoff date and thus those members shall be entitled to exercise option in terms of paragraph11(4) of the scheme, as it stands at present. Their exercise of option shall be in the nature of joint options covering pre-amended paragraph 11(3) as also the amended paragraph 11(4) of the pension scheme.

There was uncertainty as regards validity of the post amendment scheme, which was quashed by the aforesaid judgments of the three High Courts. Thus, all the employees who did not exercise option but were entitled to do so but could not due to the interpretation on cut-off date by the authorities, ought to be given a further chance to exercise their option. Time to exercise option under paragraph 11(4) of the scheme, under these circumstances, shall stand extended by a further period of four months. We are giving this direction in exercise of our jurisdiction under Article 142 of the Constitution of India.

Rest of the requirements as per the amended provision shall be complied with.

(v) The employees who had retired prior to 1st September 2014 without exercising any option under paragraph 11(3) of the pre-amendment scheme have already exited from the membership thereof. They would not be entitled to the benefit of this judgment.

(vi) The employees who have retired before 1st September 2014 upon exercising option under paragraph 11(3) of the 1995 scheme shall be covered by the provisions of the paragraph 11(3) of the pension scheme as it stood prior to the amendment of 2014.

(vii) The requirement of the members to contribute at the rate of 1.16 per cent of their salary to the extent such salary exceeds Rs. 15000/- per month as an additional contribution under the amended scheme is held to be ultra vires the provisions of the 1952 Act. But for the reasons already explained above, we suspend operation of this part of our order for a period of six months. We do so to enable the authorities to make adjustments in the scheme so that the additional contribution can be generated from some other legitimate source within the scope of the Act, which could include enhancing the rate of contribution of the employers. We are not speculating on what steps the authorities will take as it would be for the legislature or the framers of the scheme to make necessary amendment. For the aforesaid period of six months or till such time any amendment is made, whichever is earlier, the employees' contribution shall be as stop gap measure. The said sum shall be adjustable on the basis of alteration to the scheme that may be made.

(viii) We do not find any flaw in altering the basis for computation of pensionable salary.

(ix) We agree with the view taken by the Division Bench in the case of R.C. Gupta (supra) so far as interpretation

> *of the proviso to paragraph 11(3) (pre-amendment) pension scheme is concerned. The fund authorities shall implement the directives contained in the said judgment within a period of eight weeks, subject to our directions contained earlier in this paragraph.*
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> *(x) The Contempt Petition (C) Nos. 1917-1918 of 2018 and Contempt Petition (C) Nos. 619-620 of 2019 in Civil Appeal Nos. 10013-10014 of 2016 are disposed of in the above terms.*"

9. As it would appear from the above that the employees who had exercised option under the proviso to paragraph 11.3 of the said Scheme and continued to be in service as on 1st September 2014, will be guided by the amended provisions of paragraph 11.4 of the said Scheme. The members of the scheme, who did not exercise option, as contemplated in the proviso to paragraph 11.3 of the said Scheme (as it was before 2014 amendment) would be entitled to exercise option under paragraph 11.4 of the said Scheme. Their exercise of option shall be in the nature of joint options covering pre-amended paragraph 11.3 as also amended paragraph 11.4 of the said Scheme. In the present case, it does not appear that the petitioner had exercised any option in terms of proviso to paragraph 11.3 of the said Scheme prior to the cut of date as provided in the judgment delivered by the Hon'ble Supreme Court. The petitioner also did not continue to be a member of the said Scheme on or after 1st September, 2014.

10. In view thereof, I am unable to accede to the prayers made by the petitioner.

11. At this stage Mr. Basu, however, prays for leave to apply before the Provident Fund authorities in terms of the departmental instruction dated 20th February 2022 issued by the Provident Fund Authorities. Since the petitioner now chooses to independently apply before the provident fund authorities, it is for the provident fund authorities to consider his case. I express no opinion in that regard.

12. Accordingly, WPA 11525 of 2017 is disposed of.

13. There shall, however, be no order as to costs.

14. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)