Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 8600 of 2019
Sankar Prasad Mukherjee & Ors.
Vs.
West Bengal State Minor Irrigation Corporation Ltd. & Ors.
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WPA 11967 of 2019
Nitya Gopal Mondal & Ors.
Vs.
West Bengal State Minor Irrigation Corporation Ltd. & Ors.

For the petitioners	:	Mr. Asoke Kumar Banerjee Mr. Surajit Sen Mr. Tapas Singha Roy
For the P.F. Authorities	:	Mr. S.C. Prasad
For the WBSME	:	Ms. Sonal Sinha Ms. Ankita Dey
Heard on	:	22.02.2023 & 27.02.2023.
Judgment on	:	27.02.2023.

Raja Basu Chowdhury, J:

1. Since both the aforesaid writ applications raise common questions, hearing of the aforesaid writ applications are taken up together. The writ application being WPA No. 8600 of 2019 has been filed, *inter alia*, challenging two several orders dated 7th

February, 2019 and 25th February, 2019, while the writ application being WPA 11967 of 2019 has been filed, *inter alia,* for a direction upon the respondent no.1 to remit the sum representing 8.33 per cent of the employers contribution on the petitioners' salary exceeding Rs. 6500/- to the pension fund. Both the matters relate to claim for higher pension.

2. The petitioners say that most of the petitioners are the retired employees of the respondent no.1. It is the petitioners' case that in order to claim benefit of the judgment delivered by the Hon'ble Supreme Court in the case of ***R.C. Gupta & Ors. v. Regional Provident Fund Commissioner, Employees Provident Fund Organization & Ors.***, reported in **(2018) 14 SCC 809,** the petitioners had made a representation before the Regional Provident Fund Commissioner.

3. Subsequently, a writ application, being WP 24947 (W) of 2018, was filed before this Hon'ble Court. It is in connection with such application that this Hon'ble Court by an order dated 7th January 2019, was, *inter alia,* pleased to direct the Regional Provident Fund Commissioner to take a reasoned decision on the representation of the petitioners in accordance with law, having regard to the judgment dated 4th October, 2017, delivered in the case of ***R.C. Gupta*** (supra) as well as other relevant circulars issued by the Employees Provident Fund Authority.

4. By communication in writing dated 7th February 2019, the Employees Provident Fund Authority rejected the petitioners' representation, *inter alia*, on the ground that as per their records, the employer's share was restricted at the rate of 12% on the ceiling, i.e., Rs. 5000-6500, and not on the actual salary of the employees. By a further communication in writing dated 25th February 2019 the Provident Fund Authority further clarified that in terms of the judgment delivered in the case of ***R.C. Gupta*** (supra) the petitioners are not entitled to higher pension since their employers had contributed upto the wage ceiling and not on the actual salary. Challenging the aforesaid two orders the writ application being WPA 8600 of 2019 has been filed. In the other writ application the petitioners have sought for specific direction upon the respondent nos. 1 to 3 to make remittance of the sum representing 8.33 per cent of the contribution of the employers on their salary exceeding Rs. 6500/- to the pension fund.

5. Mr. Banerjee, learned senior advocate representing the petitioners by drawing attention of this Court to a supplementary affidavit filed on 22nd February, 2023, submits that all the writ petitioners in both the writ applications had exercised their option in terms of proviso to paragraph 11(3) of the Employees Pension Scheme 1995 (for short "said Scheme"). It is submitted that since filing of the writ application before this Hon'ble Court, the Hon'ble Supreme Court by a detailed judgment delivered in

the case of ***The Employees Provident Fund Organization & Anr. v. Sunil Kumar B. & Ors.***, reported in **2022 Online SC 1521,** after taking into consideration relevant provisions of paragraphs 11(3) and 11(4) of the said Scheme, had extended the time for exercise of option.

6. He says that the petitioners have since, exercised their option in terms of proviso to paragraph 11(3) of the said Scheme and such fact would corroborate from the copies of the option forms which are annexed to the supplementary affidavits affirmed on 22nd February, 2023. He says that the petitioners are ready and willing to comply with the other directions issued by the Hon'ble Supreme Court and the terms of the said Scheme, insofar as deposit of additional contribution is concerned. He says unless the respondents are directed to process the option forms exercised by the petitioners and release higher pension in favour of the petitioners by revising the pension payment orders, the petitioners shall suffer irreparable loss, injury, and prejudice.

7. Mr. Prasad learned advocate representing the Provident Fund Authorities submits that the aforesaid writ applications have been filed by and on behalf of the retired employees and most of them have retired prior to 1st September, 2014, without exercising option in terms of proviso to paragraph 11(3) of the said Scheme. As such, the petitioners are not entitled to the benefit of the judgment delivered by the Hon'ble Supreme Court

in the case of the ***Employees Provident Fund Organization & Anr.*** (supra). He says that only those employees/petitioners, who were in service as on 1st September, 2014, are eligible to exercise their options jointly with the respondent no.1, provided they are ready and willing to contribute at the rate of 1.16% on the salary exceeding Rs.6500/Rs.15,000/- as an additional contribution from and out of the contributions payable by the employees for each month under the provisions of the Act or the rules made thereunder.

8. Ms. Sonal Sinha learned advocate representing the respondent no.1 in both the writ applications submits that none of the petitioners who were ex-employees of the respondent no.1, or who have come forward, either directly or through their legal representative/s in the aforesaid writ applications, had exercised option in terms of proviso to paragraph 11(3) of the said Scheme prior to 1st September, 2014. She says that several petitioners have retired prior to 1st September, 2014 and, as such, the option forms, copies whereof have been annexed to the supplementary affidavit affirmed by the petitioners on 22nd February, 2023, cannot be taken, to be a valid exercise of option, in terms of the judgment delivered by the Hon'ble Supreme Court. She, however, on instructions, confirms that only those petitioners, whose names are appearing at page no.20 of the supplementary affidavit affirmed on behalf of the petitioners on 6th February,

2023, in WPA 8600 of 2019 and those petitioners, whose name are appearing at page no. 16 of the supplementary affidavit affirmed on behalf of the petitioners on 6th February, 2023, in WPA no. 11967 of 2019, were in service as on 1st September, 2014. According to her, only the aforesaid petitioners are eligible to exercise option.

9. Having heard the learned advocates appearing for the respective parties and having regard to the submissions made by Ms. Sinha, learned advocate representing the respondent no.1 I find that thirty-four number of ex-employees of the respondent no.1, whose names are appearing at page no. 20 of the supplementary affidavit affirmed on 6th February, 2023 and filed in WPA 8600 of 2019 and a total number of 22 employees of the respondent no.1, whose names are appearing at page no. 16 of the supplementary affidavit affirmed on 6th February, 2023 and filed in WPA 11967 of 2019, were in service as on 1st September, 2014.

10. Based on the disclosure made by the parties it also appears that the aforesaid ex-employees were drawing salary in excess of Rs.6500/Rs.15,000/-per month. I, however, find that the respondent no.1 in its affidavit has categorically stated that none of the petitioners/ex-employees of the respondent no.1 had exercised option in terms of proviso to paragraph 11(3) of the said Scheme. It would also appear from the orders impugned in the writ application being WPA 8600 of 2019 that the Provident Fund

Authority had also confirmed that they did not receive the employers' contribution exceeding the ceiling limit or on actual salary exceeding Rs. 5000/Rs.6500/-.

11. I find that all such ex-employees/petitioners have, however, subsequently in the year 2022, have purported to exercise option in terms of proviso to paragraph 11(3) of the said Scheme. Such fact would corroborate from the option forms annexed to the supplementary affidavit affirmed by the petitioners on 22nd February, 2023 in both the writ applications. I, however, find that the Hon'ble Supreme Court in the case of ***Employees Provident Fund Organization & Anr.*** (supra) in paragraph 46 thereof has been, *inter alia*, pleased to direct as under.

> *"**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.

(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.

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

12. As would appear from the above, only those employees of the respondent no.1 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 provision of the 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 the joint options covering pre-amended paragraph 11(3) as also amended paragraph 11(4) of the Scheme. In the present case none of the ex-employees of the respondent no.1 had exercised their option in terms of paragraph 11(3) of the said Scheme (pre-amendment). As per paragraph 2(ix) of the said Scheme a member, ceases to be a member of the pension fund from the date of attaining 58 years of age or from the date of vesting admissible benefits under the said scheme whichever is earlier. It would also appear from the aforesaid judgment that the Hon'ble Supreme Court had made it clear that the employees who had retired prior to 1st September, 2014, without exercising any option under paragraph 11(3) of the pre-amendment scheme and have already exited from the membership thereof will not be entitled to the benefit of the judgment.

13. In view of the aforesaid, only those employees of the respondent no.1, who were in service as on 1st September, 2014, and were members of the said scheme shall be entitled to exercise the option which shall cover (pre-amended previous scheme) paragraph 11(3) as also paragraph 11(4) of the said Scheme. The aforesaid option should be exercised jointly with the respondent no.1.

14. Mr. Prasad has, however, submitted that the Provident Fund Authority in compliance of the directions passed by the

Hon'ble Supreme Court has already issued departmental instructions dated 20th February, 2023 setting out the modalities for exercise of joint option by the ex-employees, who continued to be members of the scheme as on the cut-off date.

15. In such circumstances, I direct both the respondent no.1 as also the eligible ex employees of the respondent no.1 being the thirty-four number of petitioners/ex-employees of the respondent no.1, whose names are appearing at page no. 20 of the supplementary affidavit affirmed on 6th February, 2023 and filed in WPA 8600 of 2019 and 22 numbers of petitioners/ex-employees of the respondent no.1, whose names are appearing at page no. 16 of the supplementary affidavit affirmed on 6th February, 2023 and filed in WPA 11967 of 2019, to act in terms of the liberty afforded by the Hon'ble Supreme Court in the case of ***Employees Provident Fund Organization and Anr.*** (supra), and jointly exercise option in terms of paragraph 11(3) and 11(4) of the said Scheme, in the manner as directed by the Hon'ble Supreme Court, within the time specified and in accordance with the departmental instruction dated 20th February, 2023 issued by the Provident Fund Authorities.

16. In the light of the aforesaid, the respondent no.5 is directed to accept the joint option forms, from the eligible petitioners indicated above and the respondent no.1 and to re-compute the pensionary benefits payable to the petitioners and to complete

the entire process within a period of two months from the date of furnishing of joint option forms both by the eligible petitioners as indicated above and the respondent no.1.

17. Court fees paid are found to be sufficient.

18. With the aforesaid observations and/or directions, the writ applications being WPA 8600 of 2019 and WPA 11967 of 2019 are accordingly disposed of.

19. There shall, however, no order as to costs.

20. Urgent Photostat copy of this order, if applied for, be delivered to the learned advocates for the parties, upon compliance of all formalities.

(Raja Basu Chowdhury, J.)

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