Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 26752 of 2022

Asoke Kumar Sen
Vs.
Union of India & Ors.

For the petitioner	:	Mr. Debabrata Saha Roy Mr. Indranath Mitra Mr. Subhankar Das
For Union of India	:	Mr. Rajesh Kumar Shah
For the Provident Fund Authorities	:	Mr. Anil Kumar Gupta
For the respondent Nos. 5, 8 and 9	:	Mr. Arnab Ray
Heard on	:	20.12.2022 & 31.01.2023
Judgment on	:	31.01.2023

Raja Basu Chowdhury, J:

1. The present writ application has been filed, inter alia, praying for a direction upon the Regional Provident Commissioner, Kolkata, to release the monthly pension of the petitioner. The present writ application is contested by the Provident Fund Authorities and is supported by the respondent nos.5, 8 and 9. The affidavit-in-opposition filed on behalf of the Provident Fund Authorities and

the respondent nos. 5, 8 and 9 in court today are taken on record.

2. The petitioner had joined as a Junior Assistant – I, in the West Bengal State Co-operative Agriculture and Rural Development Bank Ltd., being the respondent no. 5 herein in the year 1977. He retired on 31st January, 2017. The petitioner was enjoying pensionable service and is covered by the Employees Pension Scheme, 1995 (hereinafter referred to as the 'said Scheme').

3. Mr. Mitra learned advocate appearing in support of the aforesaid writ application submits that in the year 2011, the respondent no. 5 had issued a notification dated 26th April, 2011, thereby offering its employees an opportunity to exercise option, in terms of paragraph 11 (3) proviso of the said Scheme. It is submitted that while the petitioner was in employment, the petitioner having come across the above notification, had exercised his option in terms of paragraph 11(3) proviso of the said Scheme and thereby had agreed to pay @ 8.33 per cent as contributions on his salary exceeding Rs.6500/-. Mr. Mitra, learned advocate, submits that both the respondent no.5 and the Provident Fund authorities acted on the basis of the aforesaid option and started realising the additional Provident Fund contributions from the petitioner, for the same to be remitted to the pension fund. It is the petitioner's case that notwithstanding realising additional Provident Fund contributions from both the petitioner and other

similarly placed persons in the employment of the respondent no.5, since the Provident Fund authorities were not disbursing higher pension by acting in terms of paragraph 11 (3) proviso of the said Scheme, a representation was made by the respondent no. 5 to the Office of the Regional Provident Fund Commissioner, requesting them to look into the matter and to release higher pension to the employees of respondent no.5 who had since been superannuated. By letter dated 26th April 2013, the Provident Fund Authorities rejected the claim for disbursal of higher pension.

4. Mr. Mitra submits that since such prayer was rejected, a writ application was filed before this Court by West Bengal State Co-operative Agriculture and Rural Development Bank Employees' Association which was registered as W.P. 2381 (W) of 2014. By an order dated 20th March 2014, this Hon'ble Court, while setting aside the rejection dated 26th April 2013, directed the Provident Fund Commissioner to settle the pensionary benefits of the employees of the respondent no.5, subject to such employees fulfilling all other requirements.

5. In the interregnum, however, the said Scheme was amended and paragraph 11 (4) of the said Scheme was inserted with effect from 1st September 2014, thereby permitting the employees who had been contributing on the salary exceeding Rs.6500/- per month, to exercise fresh option jointly with the employer, for

contributing on the salary exceeding Rs.15000/- per month, subject to the employees contributing @ 1.16 per cent on the salary exceeding Rs.15000/- as an additional contribution from and out of the contributions payable by the employees for each month under the provisions of the Act or rules made thereunder.

6. Mr. Mitra, submits that the petitioner had consequent upon introduction of paragraph 11(4) of the said Scheme had duly exercised his option in terms of paragraph 11(4) of the said Scheme and the same was also acknowledged by the provident fund authorities.

7. The petitioner says that in the mean time, an appeal was carried from the order dated 20th March 2014. The order passed by the learned Single Judge was set aside by the Hon'ble Division Bench of this Court by an order dated 4th April 2016, *inter alia,* by observing as follows:-

> *"In order to ascertain this, material to be produced by the employee and the employer cannot be decided in the lis initiated at the instance of the association, particularly when conflicting documents coming forth before this Court and also in the light of not submitting proper format for claim of such benefit giving details as indicated in the requisite format under the statute and procedure.*
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> *In the light of above practical difficulty we are of the opinion there cannot be uniform direction to consider all the members of the association for higher pension benefit. Each*

case has to be decided depending upon establishment of contribution as indicated in the amended paragraph 11 of the Scheme.

...

We reserve liberty to be (Sic; read: *the*) *members of the respondents/ writ petitioners to approach the appellant Authority in terms of proper requisite application and also place on record requisite information as required in paragraph 11 of the amended Scheme and the same shall be considered by the Provident Fund Commissioner in accordance with the procedure contemplated after giving opportunity of hearing to the employees and the employer.*

8. Mr. Mitra submits that since the petitioner had already exercised his option in terms of paragraph 11(4) of the said Scheme consequent upon paragraph 11 (4) being inserted by notification dated 22nd August 2014, the petitioner did not make further application in terms of the liberty reserved by the Hon'ble Division Bench of this Court. He says that the aforesaid option exercised by the petitioner under paragraph 11(4) of the said Scheme was duly acted upon by the respondent no.4. By referring to the communication dated 19th February, 2021, issued by the Provident Fund Authorities addressed to the respondent no.5, a copy whereof was marked to the petitioner, which is annexed to the affidavit of respondent no.5, it is submitted that the Provident Fund Authorities taking note of the option exercised by the petitioner in terms of the paragraph

11(4) of the said Scheme, had called upon the petitioner to deposit the sum of Rs1,48,460/- on the basis of the calculation made by them towards differential payment, to be made by the petitioner for the period from November, 1995, December, 1995, March 1997, November 1997, June 2000 and March 2011 and September, 2014 to January 2015. The aforesaid communication also recorded that the aforesaid sum, not only included the contributions payable by the petitioner on actual salary exceeding to Rs.15,000/- @ 1.16 per cent with effect from September, 2014 to January, 2015, in terms of paragraph 11(4) proviso of the said Scheme, but also applicable interest, for the petitioner to be entitled to higher pension. It is submitted that the petitioner, while acting in terms of the aforesaid letter had duly deposited a sum of Rs1,48,460/- with the Provident Fund Authorities. The petitioner says that the respondent no.4 while acting on the basis of the deposits made by the petitioner, had also issued a Pension Payment Order (PPO) bearing no. (WBPRB00027099) and had thereby determined Rs.8419/- as monthly pension payable to the petitioner. The petitioner states that subsequently the aforesaid PPO was revised by another PPO bearing no. (WBPRB00027454), thereby revising the petitioner's pension amount to Rs.8235/-. By drawing attention of this Court to page 62 of the writ application, it is submitted that the respondent no.4 had also simultaneously called the petitioner to refund a sum of Rs.14505/- on account of excess pensionary benefits, disbursed in favour of the petitioner in respect of previous PPO no. WB/PRB/27099. The petitioner had duly deposited the same, whereupon the PPO no. WB/PRB/00027454, was issued.

9. The petitioner says that unfortunately since June 2022, the respondents all on a sudden stopped disbursing pension in favour of the petitioner without any rhyme or reason. This prompted the petitioner to make representation. Despite such representation, no steps have been taken by the respondents and hence, the present writ application has been filed.

10. By referring to page 15 of the affidavit-in-opposition filed by the respondent, Provident Fund Authorities, it is submitted that the respondent authorities for the first time in their opposition have disclosed that the PPO, which has been revised had been further revised thereby refixing petitioner's pension from Rs.8235/- to Rs. 2160/- per month by issuing PPO dated 23rd November, 2022. The aforesaid revision is illegal. No cogent reason for such revision has also been disclosed in the affidavit filed by the Provident fund authorities. This Hon'ble Court may be pleased to direct the Provident Fund authorities to release and disburse higher pension in favour of the petitioner, by revising the aforesaid Pension Payment Order dated 23rd Novemver, 2022.

11. *Per contra*, Mr. Gupta, learned advocate appearing for the Provident Fund authorities submits that the petitioner did not exercise his option in terms of paragraph 11 (3) of the said Scheme. By referring to the notification dated 26th April 2011, which is at page 25 of the writ application, it is submitted that the said notification is contrary to paragraph 11(3) of the said Scheme and no option on the basis thereof could be exercised by the petitioner. By referring to the order passed by the Hon'ble Division Bench of this Court dated 4th April 2016, it is submitted that despite the Division Bench reserving liberty to the employees of the respondent no.5, to approach the Provident Authorities with requisite application, the petitioner had not approached them and as such is not entitled to get higher pension. By referring to sub paragraph (e), (f), (g) and (h) of paragraph 5 of the affidavit filed by the Provident Fund authorities, he submits that since the provisions of paragraph 11(3) proviso and paragraph 11(4) of the said Scheme had not been complied with by the petitioner as well as the respondent no.5 and the since no option form was submitted by the petitioner prior to 1st September, 2014, the petitioner is not eligible for higher pension beyond the wage ceiling limit. It is still further submitted, that the pension payment order directing disbursal of higher pension was withdrawn, since the matter was pending before the Hon'ble Supreme Court. He says the

issue has now been resolved and in this context relies on the Judgment delivered by the Hon'ble Supreme Court on 4th November, 2022 in the case of ***The Employees Provident Fund Organization & Anr. ETC*** *versus* **Sunil Kumar B. & Ors. ETC**[1]**.**

12. He further submits that the respondent no.4, being a subordinate authority of the Government of India, is awaiting instructions from the Government of India, in form of issuance of guidelines, for implementing the judgment passed by the Hon'ble Supreme Court in the case of ***The Employees Provident Fund Organization & Anr. ETC*** (supra). He submits, once the guidelines by the Government of India are issued, the question of making payment of higher pension to the petitioner shall be taken into consideration.

13. Mr. Ray learned advocate appearing for respondent nos. 5, 8 and 9 submits that the respondent no. 5 had jointly, with the petitioner, exercised the options under paragraph 11(3) proviso as also under paragraph 11(4) of the said scheme, and had duly forwarded the documents to the respondent no.4. He submits that all option forms were duly acted upon by the provident fund authorities. The Provident Fund authorities are bound to adhere to their communication dated 19th February, 2021 and having

[1] *2022 SCC Online SC 1521*

realised additional contribution from the petitioner, cannot deny higher pension to the petitioner.

14. I have heard the learned advocates appearing for the respective parties and have considered the materials on record. I find admittedly the writ petitioner was in employment with the respondent no. 5 and the petitioner was enjoying a pensionable service. I find from the affidavit filed by the respondent nos. 5, 8 and 9 that the option form exercised by the petitioner on 29th April 2011, has been annexed to such affidavit. The said option was obviously exercised in terms of paragraph 11 (3) proviso of the said Scheme. I also find that the Provident Fund Authorities by their communication dated 19th February, 2021 had called upon the petitioner to make payment of a sum of Rs1,48,460/- towards differential payment for the period November, 1995 to March, 1997, November 1997 and June 2000 to March 2011 and September, 2014 to October, 2018. From the aforesaid communication it would be further apparent that the aforesaid differential sum of Rs1,48,460/-, also included the employees contribution payable by the petitioner, on actual salary exceeding Rs.15,000/- @ 1.16 per cent with effect from September, 2014 to February, 2021. It is, therefore, apparent that the petitioner had not only exercised his option jointly with the respondent no.5 but the respondent no.4 had also realised the additional contribution from the petitioner @ 1.16 per cent

on the salary exceeding Rs.15,000/- as an additional contribution payable by the petitioner for each month under the provisions of the Act.

15. In the affidavit-in-opposition, the respondent no.4 has only attempted to make out a case that by reasons of non-compliance of the provisions of paragraph 11(3) and paragraph 11(4) proviso of the said Scheme, and the order passed by the Division Bench of this Hon'ble Court, the petitioner is not entitled to higher pension. The aforesaid stand taken by the respondents is illegal to say the least. From the document dated 19th February, 2021, it would be apparent that the respondent no.4 acted on the basis of not only paragraph 11(3) proviso but paragraph 11(4) of the said Scheme and had realised additional contribution from the petitioner in terms of the paragraph 11(4) of the said Scheme, including the shortfall and interest. Having thus, realised the same, it does not lie in the mouth of the respondent no.4 to deny the petitioner the benefit of higher pension which the petitioner is otherwise entitled in law. I find from the judgment delivered in the case of ***The Employees Provident Fund Organization & Anr. ETC*** (supra), the Hon'ble Supreme Court has extended the time to exercise option under paragraph 11(4) of the said scheme by a further period of four months.

16. It would be evident from the documents on record that the petitioner, along with his employer, the respondent no. 5, had

jointly exercised the option under paragraph 11(4) of the said Scheme and the respondent no.4 while acting on the basis thereof had realized additional contribution payable by the petitioner along with interest in terms of paragraph 11(4) of the said Scheme. In such circumstances, as to whether the petitioner had exercised such option, strictly in terms of paragraph 11(3) and 11(4) of the said Scheme or whether the same was forwarded immediately to the respondent no.4, loses much of its significance. The respondent no.4 having called upon the petitioner to deposit the additional contribution in terms of paragraph 11(4) of the said scheme cannot turn around and claim that petitioner having not approached them with requisite application, in terms of the liberty reserved by the Hon'ble Division Bench is not entitled to claim higher pension. I find that no proper explanation is forthcoming as to why the petitioner's pension has been revised from Rs.8235/- to Rs.2160/-. The issue before the Supreme Court having been resolved, there cannot be any impediment in disbursing higher pension in favour of the petitioner, neither can the petitioner be called upon to wait, for the Government of India to take steps in the matter.

17. Although the petitioner had asserted that the petitioner had deposited contributions as was directed to be paid by the Employees' Provident Fund Organization and had deposited a

sum of Rs.1,48,460/-, and that no additional contribution is payable, yet without going into such controversy, it would be prudent to direct the respondent no. 4 to ascertain whether the petitioner had contributed @ 1.16 per cent on the salary exceeding Rs.15000/- as an additional contribution from and out of the contributions payable by the petitioner for each month in terms of paragraph 11 (4) of the said Scheme and in the event of shortfall, to realise the same from the petitioner along with interest.

18. I find that the Hon'ble Supreme Court despite declaring the requirement of members to contribute @ 1.16 per cent on the salary to the extent of salary exceeding Rs.15000/- as an additional contribution under the said Scheme to be ultra vires, has suspended the operation of such order for a period of 6 months, so as to enable the authorities to make adjustments in the Scheme so that additional contribution can be generated. As such as and when adjustments are made, it only natural that the petitioner would also get benefit thereof.

19. In the light of the aforesaid, the respondent no. 4 is directed to re-compute the pensionary benefits payable to the petitioner, by treating the option exercised by the petitioner under paragraph 11 (4) of the said Scheme, as valid and release appropriate monthly pension in favour of the petitioner at higher

rate along with all arrears, as may be found due by issuing revised Pension Payment Order.

20. In the event the respondent no.4 proposes to re-fix the pension payable to the petitioner less than Rs.8235/-, appropriate reasons must accompany such PPO to justify such revision in accordance with paragraph 11(4) of the scheme. It is made clear that the PPO revision should strictly be made in terms of paragraph 11(4) of the said Scheme and based on observations made herein.

21. The entire exercise must be completed within a period of 2 (two) months from the date of communication of this order. The directions are peremptory.

22. With the above directions and observations, the writ application being WPA 26752 of 2022 is disposed of.

23. There shall be no order as to costs.

24. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis upon completion of requisite formalities.

(Raja Basu Chowdhury, J.)

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