

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
(APPELLATE SIDE)**

**Present:
The Hon'ble Justice Rai Chattopadhyay**

WPA 7763 of 2017

With

CAN 1 of 2022

**Ajoy Kumar Rej & Ors.
Vs.
Union of India & Anr.**

For the Petitioners	: Ms. Reshmi Hossain, : Mr. M. Hossain, : Ms. M. Brahmachari, : Ms. M. Biswas.
For the Respondent nos. 1 to 3	: Mr. Kumar Joyti Tewari.
For the Respondent nos. 4 & 5	: Mr. Lakshmi Kumar Gupta, Ld. Senior Adv., : Mr. D. N. Ray, : Mr. Bhaskar Mukherjee, : Mr. Debdeeta Dutta.

Judgment on : 31/07/2024

Rai Chattopadhyay, J.

- 1) This writ petition is to challenge the inaction on the part of respondents No. 4 and 5/the Indian Institute of Management at Joka, Calcutta, to allow the writ petitioners the benefit of changeover to the Pension Scheme with effect from 1st May, 1987. The writ petitioners have prayed for a writ of mandamus

to be issued upon the said respondents treating the petitioners having been changed over to the Pension Scheme with effect from 1st May 1997; also that a writ of mandamus be issued commanding them to forbear from treating the petitioners as that the Contributory Provident Fund Scheme (in short CPF) members.

- 2) Let the factual background of the case be narrated in a nutshell.
- 3) A total of 58 petitioners have filed the present case. All of them have been employees of the respondents No. 4 and 5 and retired on various dates since after 2017. The Central Government Rules and the Central Civil Services (Pension) Rules 1972, govern the service conditions of the writ petitioners. In case of the petitioners, a revision in service conditions was affected pursuant to the 4th Central Pay Commission recommendations, with effect from 1st January, 1986, vide the notifications dated 19th September, 1986 and 14th March, 1987. In the process a further memorandum was issued on 14th April, 1987 to modify the provisions of the Central Civil Services (Pension) Rules, to incorporate appropriate provision in terms of the recommendation of the Pay Commission that all Contributory Provident Fund beneficiaries (CPF beneficiaries) in service on 1st January, 1986 should be deemed to have come over to the pension scheme on that date unless they specifically put out to continue under the CPF scheme. The amended rule as above was implemented by dint of an office memorandum dated 1st May, 1987.

- 4) An option was to be exercised by the employees declaring their desire to continue under the CPF scheme, if so, within 30th September, 1987 and in a prescribed form. The said memorandum has specified that all employees shall be continue to be treated under the Pension Scheme, unless they specifically seek to remain a member of the CPF scheme within the prescribed deadline.
- 5) Similar provision was made for the persons who were in service on 1st January, 1986 but have since retired and received the retirement benefit under the CPF scheme. It has been provided that those persons would also have an option to get their retirement benefit calculated under the Pension Scheme upon their refunding to the government the contribution of the government to the CPF and interest thereon at the time of settlement of CPF account and subject to exercise of such option latest by 30th September, 1987.
- 6) The writ petitioners have contended that since they decided to change over to the Pension Scheme, which was automatic unless an option to remain with the CPF scheme was exercised, they did not submit the option form before the said cut off date that is, 30th September, 1987. Thus, they say, that according to the amended Rules, they would have to be considered to have changed over to the Pension Scheme with effect from 1st January 1986. The respondent No. 5 issued a notification on 24th August, 1987 whereby it informed adoption of the modified Pension Rules as above and implementation thereof for the employees of the said Institution. The Board of Directors of the respondent Institution in its meeting dated 18th January, 1989, decided to extend the date of exercise of such option. Be that as

it may, the petitioners have stated that they have never exercised any option to remain members of the CPF scheme. As such in terms of the modified Rules, the respondent authorities should have to allow them benefits treating them to be the members of the Pension Scheme. The writ petitioners have challenged the alleged inaction on part of the respondent Institution in due compliance with the said amended Rules, in case of the writ petitioners. The petitioners have stated that several correspondences forwarded to the respondent authorities by the unions and by themselves, have gone in vain. Thus, allegedly the writ petitioners have been deprived of their lawful and legitimate claim. Hence this writ petition, to seek direction upon the respondent authorities to treat the petitioners to be members of the Pension Scheme and to grant them benefits commensurate to the same.

- 7) Ms. Reshmi Hossain has appeared to represent the writ petitioners. She has very candidly and lucidly put forth that the memorandum dated 14th April, 1987 has provided for exercise of option by the concerned employee only in case he desires to remain a member of the CPF scheme, as earlier. She says that as the petitioners decided to switch over to the Pension Scheme, they were not required to submit any option in terms of the said memorandum. She says further that such shifting should have been automatic after promulgation of the new amended Rules unless the employee would have expressed his willingness to be retained with the CPF scheme. She indicates that inspite of the petitioners having undertaken an appropriate step by not exercising any option to remain with the CPF scheme, the authorities have acted illegally in not allowing them the benefits under the Pension Scheme, with effect from the stipulated date.

She says further that thus the respondent Institution has acted illegally and arbitrarily by depriving the writ petitioners of the legitimate dues. That the respondent authorities acted illegally in violation of the aforesaid memorandum and without any jurisdiction by refusing to treat the petitioners, within the purview of the Pension Scheme. Thus the object of socio economic welfare measure to be advanced to a citizen as enshrined in Part-IV of the Constitution of India was jeopardised by dint of the alleged unlawful act of the said respondents, she says. That the respondents have failed to exercise the duties vested in it by law and such inaction is illegal and arbitrary on their part and is liable to be set aside by dint of an order of this Court.

- 8) She has stated further that the pecuniary and other benefits under the Pension Scheme is the property within the meaning of Article 300 A of the Constitution of India. That, by dint of the alleged act, the respondents have deprived the petitioners of such property right guaranteed to them under the Constitution of India.
- 9) Ms. Hossain has referred to a judgment of the Supreme Court, reported in **2022 SCC Online SC 594 [University of Delhi vs. Shashi Kiran &Ors]** and strongly relies on the same by contending that the decision of the Court and the ratio thereof, applies to the case of the present writ petitioners too. She has indicated that there the Supreme Court has dealt with three batches of appeals, arising from the judgments of Delhi High Court. An identical issue, as is involved in the present case, has been dealt with by the Supreme Court there. In **R. N. Virmani** and **N. K. Bakshi** batches of case, where the petitioners did not

exercise any option at all to remain with the CPF Scheme, the Court has upheld the High Court's decision that in absence of any option being exercised by them to remain with CPF Scheme, they would be deemed to have switched over to the Pension cum GPF Scheme, under the said modified pension Rules. That such deeming provision would automatically come into operation, in absence of exercise of any option by the employee, contrary to the same.

- 10) In ***Shashi Kiran*** batch of cases, the majority of the employees barring the appellants/writ petitioners there, who had earlier exercised the option to remain in the CPF Scheme, were allowed to reverse switchover, at a later point of time to the Pension Scheme. The Supreme Court considered the same to be discriminatory as against the appellants/petitioners there and that the differential treatment of the appellants was not founded on any rationale or justifiable reason. The Court had thereafter directed for recouping the contribution under CPF with 8% simple interest, for the appellants in order to treat them under the Pension Scheme. The following observation of the Supreme Court in the said judgment has been strongly relied on behalf of the instant petitioners: ***“Going by the intent of the notification, those who were to opt for CPF, were an exception and the general rule was that everybody after 01.01.1986 would normally be covered by GPF.”*** Ms. Hossain would say that the present petitioners having been the employees of an educational institution, the decision of the Supreme Court passed with respect to the other educational institution/universities would squarely apply in their case too. She insists that a similar order in terms of the order of the Supreme Court as above may be passed in this writ petition.

- 11) The respondents No. 4 and 5 are the principal contesting respondents in this writ petition. The said respondents have mainly contended that the petitioner's case is barred by the principles of estoppel, waiver and acquiesce. The respondents have stated that GPF-cum-Pension-cum-Gratuity scheme has been introduced by the same by dint of a notification dated 26th July, 1985, with effect from 1st July, 1985. In terms of the said notification, the existing employees of the institution were given an option to remain under the earlier scheme of Contributory Provident Fund. The existing employees of the institution were asked to exercise their options initially within a period of 30 days from the date of the said notification, which was subsequently extended. The decision of the authorities was categorically informed by dint of the said notification that option once exercised, would be final.
- 12) The said respondents have stated that most of the writ petitioners had exercised their option within the extended period of time and thus elected to continue to be governed under the CPF scheme. The time limit for submission of the option form was further extended by the respondents till 6 months period from the date of the notification issued by the Government of India, as per the recommendation of the 4th Central Pay Commission. The respondents have stated that the writ petitioners have consciously chosen to remain with the CPF scheme by duly furnishing their respective option forms, within the extended period of time. Thus, the petitioners having opted consciously to remain with the CPF scheme, were subsequently not entitled to switch the scheme, in terms of the said government notification, that was adopted by the respondent

institution *mutatis mutandis*. Later on, at the time of retirement, each of the petitioners have been granted retiral benefits under the CPF scheme as per their exercise of choice, which have received without protest.

13) Therefore, they say, firstly that the petitioners shall be barred by the principles of estoppel, to claim any further benefit under the notification dated 1st May, 1987. Respondents would further say that the writ petition is unreasonably belated and is nothing but a calculative manipulation to extract undue benefits by the said retirees, even after receipt of all their retirement benefits, duly as per the applicable Rules.

14) The said respondents in their affidavit though have taken a point of maintainability of the writ petition, the same has not been pressed at the time of argument of the case. Maintainability of the writ petition is challenged on the ground that the management and finance of the respondent institution is independent of any government control. Therefore, the decision of the Court, meant for the purpose of the Government run colleges and universities, would not be attracted in case of the present respondents. Similarly, not being an instrumentality of the government, the respondent Institution would not be amenable to the writ jurisdiction of this Court. However, at the same breath the respondents have stated about adopting the notification of the Government of India dated 1st May, 1987 *mutatis mutandis*, to be applicable to its employees. Specific office order has also been issued by the same to implement those provisions in case of its own employees. Therefore, the grounds challenging the maintainability of the writ petition does not appear to be well founded and convincing

that only for the reason the Institution is run by its own funds and management, it would not be amenable to the jurisdiction of this Court. The respondent institution having been discharging the function of imparting education to the pupil, is working within the domain of discharge of public function. It has adopted and made itself to implement and follow a policy of the Government of India by dint of the said notification dated 1st May, 1987 to its employees. Therefore, any dispute with regard to the process of implementation thereof, would be amenable to the power of judicial review of this Court, as to the same.

- 15) Be that as it may, the respondents would say that once having exercised the option to remain with the CPF scheme and having accepted the retirement benefits being granted in terms of the said option exercised by the writ petitioners consciously, it is now too late in a day, for the petitioners to successfully maintain a writ petition before this Court, challenging their coverage under the CPF scheme. That the writ petitioners have exercised their options back in the year 1987. According to the Rules, such option once exercised, was irrevocable unless and until that would have been done under a new policy of the employer of reverse switch over.
- 16) Mr. Gupta, Ld. Senior Advocate has appeared for the said respondents. He says that the notification dated 1st May, 1987 has been adopted by the respondent Institution *mutatis mutandis* to make the same applicable in case of the employees and retired employees of the said Institution. Extract of the minutes of the 95th meeting of the Board of Governors, held on 2nd July, 1987, has been relied on by Mr. Gupta Ld. Senior

Advocate, in this regard. The agenda and the decision when as follows:

“Agenda Item No. 4 (a) : Permission to exercise fresh option for coming under GPF-cum-Pension-cum-Gratuity Scheme.

The Board approved the proposal that employees of the Institute may once again be allowed to exercise their option whether they would like to continue under the CPF Scheme. Such an option may be exercised within a period of 6 months from the date of the notification to be issued in this regard as per recommendation of the Fourth Pay Commission as accepted by the GOI. If no option is exercised within the said period the employees will automatically be brought on to the pension scheme.”

- 17) Mr. Gupta, Ld. Senior Advocate has thereafter relied on an exhaustive list containing the individual dates on which the respective writ petitioners have submitted the option forms respectively, in terms of the said resolution, to express their desire to continue with the Contributory Provident Fund scheme. According to Mr. Gupta, Ld. Senior Advocate, after submission of such option forms, the writ petitioners would not be eligible to be treated under the Pension Scheme but only under the CPF scheme. He says that submission of such option form was a conscious and voluntary decision of the writ petitioners from which they are debarred under the law, to retract at a subsequent point of time. That, once having exercised the option of remaining with the CPF scheme, the writ petitioners would not be eligible to reverse their choice, particularly after settlement of the entire retirement benefits under the said scheme. Mr. Gupta, Ld. Senior Advocate

suggests that the present case is a misconceived one and liable to be dismissed.

- 18)** Mr. Gupta, Ld. Senior Advocate has submitted that an executive order which has provided for certain rules and regulations for grant of pensionary benefits to the employees qua his employer, though is in the nature of non-statutory regulations, the employees as well as the employer shall be governed by the terms and conditions encapsulated in such non-statutory regulations. He has further submitted that the CPF and pension are conceptually different. The CPF is a simple mechanism where an employee is paid the total amount contributed by him along with equal share thereof made by the employer, ordinarily at the time of his retirement. Contrarily, the pension is a retirement benefit partaking of the character of regular payment of a person in consideration of the past services rendered by him. Therefore according to Mr. Gupta, Ld Senior Advocate, the writ petitioners are obliged and duty bound to comply with the mandatory conditions and requirements under the notification dated 1st May, 1987. According to the said respondents petitioner's action deviating from the conditions in the said notification shall render the same as illegal and invalid. It is more so when the petitioners have availed the retiral benefits arising out of CPF, without any protest. On this, Mr. Gupta has relied on a decision of the Supreme Court reported in **(2011) 11 SCC 702 [Pepsu Road Transport Corporation, Patiala vs Mangal Singh &Ors]**.

- 19)** According to the petitioners, their right for being automatically treated under the Pension Scheme is generated from the notification dated 1st May, 1987, which has provided for the

changeover from Contributory Provident Fund to Pension Scheme and also from the decision of the Board of Governors held in the meeting dated 2nd July, 1987, to adopt such change over for the employees of the Institution. The specific contention of the writ petitioners is that since they have not used any option to remain with the CPF Scheme, they should be automatically converted to the Pension Scheme, pursuant to the deeming provision made thereunder. It is necessary to look in to the relevant clauses of the said notification, which are as follows :

“3.1. All CPF beneficiaries, who were in service on 1st January, 1986, and who are still in service on the date of issue of these orders (viz. 1st May, 1987) will be deemed to have come over to the Pension Scheme.

3.2. The employees of the category mentioned above will, however, have an option to continue under the CPF Scheme, if they so desire. The option will have to be exercised and conveyed to the concerned Head of Office by 30-9-1987, in the form enclosed if the employees wish to continue under the CPF Scheme. If no option is received by the Head of Office by the above date the employees will be deemed to have come over to the Pension Scheme.”

- 20) Clause 3.1 is the deeming provision whereas Clause 3.2 is the exception brought out therefrom. Clause 3.1 says that all CPF beneficiaries who were in service on 1st January, 1986 and continuing, which includes the present petitioners too, will be deemed to have come over to the Pension Scheme, from the effective date.

- 21) An opportunity to use a contrary option has been provided in Clause 3.2, that is, the desirous employee would convey to the Head of Office, in prescribed form, his option to continue under the CPF Scheme. A specific provision is made that if no option is received by the Head of Office, on or before the cut off date, the deeming provision in Clause 3.1 shall automatically be effective to change over such an employee, who has not used an option, to be covered under the Pension Scheme, from under the CPF Scheme. Clause 1 of the said notification may also be noted, which has provided changeover of the employees to the Pension Scheme, unless they specifically opt out to continue under the CPF Scheme. Therefore, inclusivism is the basic feature of the policy whereas exclusion therefrom had to be opted for, by the concerned employee. In this case there is no dispute to the fact that the respondent Institution has adopted the notification dated 1st May, 1987, to be applied *mutatis mutandis*, to its employees.
- 22) It is necessary to look in as to how far the provisions of the said notification is binding on the employees as well as the employer, though in this case there is no serious challenge as to the binding effect of the said notification dated 1st May, 1987. It is well settled that even in case of a non-statutory regulation specifically provided for grant of pensionary benefits to the employees, the same shall be governed by the terms and conditions as envisaged in such non-statutory regulation. In the case of ***Pepsu Road Transport (supra)***, the Supreme Court has discussed about the applicability and binding effect of the statutory regulation as the subordinate/delegated legislation and the non-statutory regulations also. The relevant portion thereof may be quoted, as herein below:

“32. Even in the case of non-statutory regulations, specifically providing for the grant of pensionary benefits to the employee qua his employer shall be governed by the terms and conditions encapsulated in such non-statutory regulations. In Union of India v. P.K. Dutta [1995 Supp (2) SCC 29 : 1995 SCC (L&S) 760 : (1995) 29 ATC 654] , this Court held: (SCC p. 32, para 7)

“7. It is true that the Pension Regulations are non-statutory in character. But as held by this Court in Hari Chand Pahwa v. Union of India [1995 Supp (1) SCC 221 : 1995 SCC (L&S) 433 : (1995) 29 ATC 220] , the pensionary benefits are provided for and are payable only under those Regulations and can, therefore, be withheld or forfeited under and as provided by those very Regulations. The following [observations] from the said judgment makes the position clear:

‘We do not agree even with the second contention advanced by the learned counsel. The provisions of Regulation 16(a) are clear. Even if it is assumed that the Pension Regulations have no statutory force, we fail to understand how the provisions of the said Regulations are contrary to the statutory provisions under the Act or the Rules. The pension has been provided under these Regulations. It is not disputed by the learned counsel that the pension was granted to the [Corporation] under the said Regulations. The Regulations which provided for the grant of pension can also provide for taking it away on justifiable grounds.’

(emphasis supplied)”

23) The discussion as above shall lead to the obvious finding that the petitioners and the respondent Institution as well, shall be governed by the terms and conditions as encapsulated in the said notification dated 1st May, 1987.

24) The question relates to the exercise of option, if any, by the present petitioners in order to opt out and be excluded from the deeming provision of being included in the Pension Scheme, as

envisaged in the said notification. According to the writ petitioners, after adoption by the respondent Institution of the said notification dated 1st May, 1987, they have never opted to remain with the existing CPF scheme. It is their specific case that having not opted to remain with the CPF scheme, the authorities should have treated them to be governed under the Pension Scheme and not the CPF scheme any further. According to the writ petitioners, such changeover should have been a matter of course and automatic, they having not submitted any contra option. Thus, respondent's action to treat them under the CPF Scheme, while granting pensionary benefits, have been challenged by the petitioners.

- 25) However, a contrary fact is found from the supplementary affidavit submitted on behalf of the respondents. The respondents have provided there a comprehensive list incorporating petitioner's names and the dates on which they have submitted the option forms pursuant to the resolution of the Board of Governors, dated 2nd July, 1987. There by the writ petitioners have exercised a contra option to remain with the CPF scheme in exclusion of the deeming provision of being covered under the Pension Scheme, as provided in the said notification dated 5th May, 1987. All the writ petitioners have exercised such option in the year 1987 itself, on various dates.
- 26) The petitioner's reply to the same, in their affidavit-in-reply, are twofold. Firstly, that the Supreme Court in the judgment of ***University of Delhi (supra)*** has settled the law that irrespective of submission of option form or not, by the employee, or belated submission of that, the benefit of Pension Scheme is to be advanced to all the concerned employees. That the ratio thereof

is binding in the present case also. Secondly, the petitioners have doubted the genuineness of the option forms as relied on by the respondent, in its supplementary affidavit.

27) It is necessary to find out if the verdict in **University of Delhi case (supra)** is a judgment "*in rem*" or a judgement "*in personam*" by understanding the distinction between them. Historically the term judgement "*in rem*" was used in Roman law in connection with *actio* but not in connection with "*jus actio in personam*". The effect of "*actio in rem*" was to conclude against all mankind, but the effect of "*actio in personam*" was to conclude with regard to the individual only. After the Roman forms of procedure had passed away, the term "*in rem*" survived to express the effect of an action "*in rem*" and gradually, it came to import "*generally*".

28) The judgements "*in rem*" signified as judgements which are good against all mankind and judgements "*in personam*" signified the judgements which are good only against the individuals who are parties to them and their privies. The point adjudicated upon in a judgement "*in rem*" is always as to the status of the "*res*" and is conclusive against the world as to that status, whereas in a judgement "*in personam*", the point whatever it may be, which is adjudicated upon, not being as to the status of the "*res*" is conclusive only between the parties or privies. Reference can be made to the cases - **Firm of Radhakrishnan Vs. Gangabai, 1928 S 121** and **Ballantyne vs. Mackinson 1896 2 QB 455**.

29) Courts have held that, "*Judgement in rem*", operates on a thing or status rather than against the person and binds all persons to the extent of their interest in the thing, whether or not they

were parties to the proceedings. The judgement "*in rem*", as distinguished from judgement "*in personam*" is an adjudication of some particular thing or subject matter of controversy and having the binding effect on all persons having interests, whether or not joined as parties to the proceedings, in so far as their interests in the "*res*" are concerned. In determining whether a judgement is "*in rem*", the effect of the judgement is to be considered and it is tested by matters of substance, rather than by measure of any particular draft or form.

- 30) In the above legal backdrop, it is necessary to examine whether the judgement rendered in the case of ***University of Delhi (supra)*** by the Supreme Court is confined only the parties thereto or it binds all persons having interests in the "*res*", that is, the subject matter of controversy.
- 31) Three groups of writ petitioners approached the Supreme Court in that case. All were claiming benefit under the said notification dated 5th May, 1987. The Supreme Court has upheld decision of the High Court, with respect to two batches of cases there, that if no option was exercised by the concerned employee before the cut-off date, they would be deemed to have "come over" to GPF. It was only a positive option exercised by the employees to continue to be under CPF which could have departed from such deeming provision. Once exercised the option was final and as such there could be no switch over for those who have consciously opted to be under CPF. The Supreme Court has also upheld that any exercise of option after the dead-line or the cut-off would be inconsequential.

32) With respect to the other batch of cases, that is **Shashi Kiran** batch of cases, the High Court decided that once the conscious decision was taken and option was exercised to continue to be under CPF, there was no room for any come back situation. In that case, out of the entire body of employees of the University of a total of 3237 employees, 2469 of them were covered under the Pension Scheme, either by virtue of the deeming provision in the notification or by exercise of the reverse option. 768 were left to be under CPF. The University in its affidavit had affirmed 86 to be under CPF whereas the appellants before the Supreme Court were 75 of them. The Court itself has held that ***“We are, thus, concerned with 75 original petitioners in Shashi Kiran batch of cases”***.

33) Hence, there is no room left for any doubt or misinterpretation, that the judgment relied on by the petitioners has been with respect to a handful from amongst the total employees and would be binding only on those 75 petitioners there, in **Shashi Kiran** batch of cases, with which the petitioners claim parity in this case. As we understood what a judgment “*in rem*” and “*in personam*” are, as stated above, the judgment as relied on by the writ petitioners is “*in personam*” deciding the rights of the 75 writ petitioners/appellants there and not “*in rem*”, to be applicable to any other person interested in the “*res*”, that is the subject matter of dispute. The petitioner’s claim to be covered under the said judgment is therefore misconceived and not maintainable.

34) In this case the writ petitioners are found to have submitted their option to stick to CPF, back in the year 1987. It has been a conscious decision of them, irreversible since thereafter, as

per the terms and conditions of the said notification dated 5th May, 1987. The plea taken by them regarding veracity and genuineness of the documents in this regard does not appear to be well founded, in so far as the petitioners have after retirement accepted the retiral benefits as per the scheme which they have earlier opted for, that is CPF Scheme, that too without any protest or reserving their rights in the future. We may refer to Clause 3.6 of the said notification dated 5th May, 1987 in this regard that is, “**3.6 The option once exercised shall be final**”.

- 35) After submission of the option form to consciously opt to remain under the CPF Scheme, the petitioners are restrained to claim any switch over to the Pension Scheme, at any future point of time and thus, their prayer in this case is unsustainable.
- 36) The discussions as above lead the Court to the obvious conclusion that the present writ petition is devoid of merits and liable to be dismissed.
- 37) Therefore, writ petition No. WPA 7763 of 2017 is dismissed, connected application being CAN 1 of 2022 is disposed of.
- 38) Urgent Photostat certified copy of this judgment, if applied for, be given to its parties on usual undertaking.

(Rai Chattopadhyay, J.)