

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

**WPA 7664 of 2020
With
CAN 1 of 2020**

Bhairab Prasad Chatterjee & Ors.
Vs.
Union of India & Ors.

For the petitioner : Mr. Achyut Basu
Mr. Kartik Chandra Kapas
Ms. Punam Basu

For the Provident : Mr. Shiv Chandra Prasad
Fund Authorities

Heard on : 28th February, 2023.

Judgment on : 28th February, 2023.

Raja Basu Chowdhury, J:

1. The present writ application has been filed, inter alia, challenging a notification dated 22nd August, 2014 and a circular dated 31st May, 2017, issued by the respondent nos. 1 and 3 respectively.
2. The petitioners are the retired employees of the respondent nos. 6 and 7 and were members of the Employees' Pension Scheme 1995 (hereinafter referred to as the "said Scheme"). It is also the petitioners' case that they had exercised their options as

provided in paragraph 26(6) of the Employees Provident Fund Scheme 1952. Subsequently when the Notification dated 22nd August, 2014 was issued, *inter alia*, challenging the same the aforesaid writ application was filed.

3. Mr. Basu learned advocate representing the petitioners submits that although this application was filed challenging the Notification dated 22nd August, 2014, yet during the pendency of the aforesaid proceeding, the issue as regards the validity and legality of the Notification dated 22nd August, 2014 has been finally decided by the Hon'ble Supreme Court in the case of ***Employees Provident Fund Organisation and Another v. Sunil Kumar B. and Others***, reported in **2022 SCC OnLine SC 1521**. He says that the Hon'ble Supreme Court has since despite declaring the provisions contained in the Notification dated 22nd August, 2014, as legal and valid has, however, read down certain provisions of the scheme. By placing reliance on two several departmental instructions dated 29th December 2022 and 20th February, 2023, it is submitted that in compliance of the direction issued by the Hon'ble Supreme Court, in the judgment delivered in the case of ***Employees Provident Fund Organisation and Another*** (supra), the Employees Provident Fund Authorities have opened a window for the petitioners to submit options both under proviso to paragraph 11(3) as also paragraph 11(4) of the said Scheme. It is submitted that the

petitioners are covered by the aforesaid instructions and as such, this Hon'ble Court should direct the Employees Provident Fund Authorities to permit the petitioners to exercise option, in terms of the judgment delivered by the Hon'ble Supreme Court in ***Employees Provident Fund Organisation and Another*** (supra), as also in the light of the two departmental instructions issued by the respondent authorities. He says that the aforesaid direction is necessary, since the aforesaid matter has been pending before this Hon'ble Court and is considered as sub judice, unless the aforesaid direction is given the Provident Fund Authorities shall not accept the option forms from the petitioners and the petitioners shall lose their claim for higher pension.

4. The affidavit-in-opposition filed on behalf of the Provident Fund Authorities is taken on record. Mr. Prasad learned advocate representing the Provident Fund Authorities by placing reliance on the judgment delivered in the case of ***R.C. Gupta & Ors. v. Regional Provident Fund Commissioner, Employees Provident Fund Organization & Ors.***, reported in **(2018) 14 SCC 809**, submits that exercise of option under paragraph 26(6) of the Employees Provident Fund Scheme, 1952 is a necessary precursor to exercise option under proviso to paragraph 11(3) of the said Scheme. He says that in the instant case, since the petitioners claim to have exercised option under paragraph 26(6) of the Employees' Provident Fund Scheme 1952, the petitioners

who had not retired from service as on 1st September, 2014, shall be entitled to the benefit of the judgment delivered in the case of ***Employees Provident Fund Organisation and Another*** (supra). He, however, submits that the Provident Fund Authorities have already issued departmental instructions dated 29th December, 2022 and 20th February, 2023. He says if the petitioners are otherwise eligible then there would be no difficulty on the part of the Provident Fund Authorities to accept their option forms in terms of paragraph 5 of the departmental instruction dated 20th February, 2023. By referring to Annexure R-1 of the Affidavit in opposition, he says that only three petitioners had retired after 1st September, 2014.

5. Despite service, none appears on behalf of the respondent nos. 6 and 7.
6. Heard the learned advocates appearing for the respective parties and considered the materials on record. I find that the larger issue which falls for consideration in the aforesaid writ applications has already been decided by the Hon'ble Supreme Court in the case of ***Employees Provident Fund Organisation and Another*** (supra). I also find that the Hon'ble Supreme Court in paragraph 46 thereof has been, *inter alia*, pleased to observe as follows: -

“46. We accordingly hold and direct:—

(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.*

(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 paragraph 11(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.

(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.”

7. As would appear from the above, only those ex-employees of the respondent nos. 6 and 7 who had exercised option as required 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 as required 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 nos. 6 and 7 claim to have exercised their option as required under the proviso to 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.

8. As such, without going into any controversy at this stage and taking into consideration the affidavit filed by the Provident Fund Authorities it would appear that in Annexure R-1, the Provident Fund Authorities have identified the petitioners who were in service as on 1st September, 2014. Particulars of such petitioners are detailed hereinbelow:

3.	Amalesh Bhattacharjee	WB/DGP/27546/50	03/11/2014
6.	Sukumar Bhattacharya	WB/DGP/27546/37	28/07/2015
8.	Pramathes Das	SB/DGP/27546/55	01/09/2015

9. Mr. Prasad has, however, submitted that the Provident Fund Authorities in compliance of the directions passed by the Hon'ble Supreme Court have already issued the 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.

10. Having regard to the aforesaid, I direct both respondent nos. 6, 7 and the Provident Fund Authorities to act in terms of the directions issued by the Hon'ble Supreme Court in the case of ***Employees Provident Fund Organisation and Another*** (supra). The respondent nos. 6 and 7 are thus directed to jointly exercise option along with eligible petitioners indicated

hereinabove in the manner as directed by the Hon'ble Supreme Court, within the time specified, having due regard to the departmental instructions dated 20th February, 2023, issued by the provident fund Authorities.

11. In the light of the aforesaid, the respondent nos. 5 being the Assistant Provident Fund Commissioner (pension), Regional/sub Regional office, Employees Provident Fund Organization (EPFO), Red Cross Road, City Centre, Durgapur, District – Burdwan, Pin-713213, is directed to accept the option forms, from the eligible petitioners as indicated hereinabove and the respondent nos.6 and 7 and to re-compute the pensionary benefits payable to the aforesaid eligible petitioners, by issuing revised pension payment orders upon making adjustments and by realizing additional contributions as may be necessary, and to complete the entire exercise within a period of two months from the date of furnishing the joint option forms, both by the eligible petitioners as also by respondent nos. 6 and 7. The connected application being CAN 1 of 2020, having become infructuous, stands disposed of.
12. With the above observations and directions, the writ petition being WPA 7664 of 2020 is disposed of.
13. There shall be no order as to costs.

14. 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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