

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION/
INHERENT JURISDICTION**

SPECIAL LEAVE PETITION (C) NOS.8658-8659 OF 2019

The Employees Provident Fund Organisation & Etc. Appellant(s)

Versus

Sunil Kumar B. & Etc. Respondent(s)

WITH

W.P. (C) No.767/2021; SLP (C) No.3289/2021; CONMT. PET.(C) Nos.1917-1918/2018 IN C.A. Nos.10013-10014/2016; W.P. (C) No.406/2018; W.P. (C) No.368/2018; W.P. (C) No.393/2018; W.P. (C) No.395/2018; W.P. (C) No.374/2018; W.P. (C) No.372/2018; W.P. (C) No.385/2018; W.P. (C) No.360/2018; W.P. (C) No.1134/2018; W.P. (C) No.390/2019; W.P. (C) No.875/2019; W.P. (C) No.349/2019; W.P. (C) No.466/2019; W.P. (C) No.352/2019, SLP (C) Nos.16721-16722/2019, W.P. (C) NO.512/2019, W.P. (C) NO.511/2019, W.P.(C) NO.500/2019, CONTMT.PET(C)NOS.619-620/2019 IN C.A. NOS.10013-10014/2016, W.P.(C) NO.601/2019, W.P.(C) No.1312/2019, W.P.(C) No.832/2019, SLP(C) NO.2465/2021, SLP(C)NO.3287/2021, DIARY NO.46219/2019, W.P.(C) No.1218/2020, SLP(C)NO.1366/2021, W.P.(C) No.1459/2020, W.P.(C) No.1332/2020, SLP(C) NO.3290/2021, W.P.(C) No.86/2021, SLP(C) NO.1738/2021, SLP(C) No.1701/2021, W.P.(C) No.414/2021, W.P.(C) No.477/2021, SLP(C) NO.8547/2021, W.P.(C) No.233/2018, W.P.(C) No.69/2018, W.P.(C) No.141/2018, W.P.(C) No.118/2018, W.P.(C) No.250/2018, W.P.(C) No.380/2018, W.P.(C) No.371/2018, W.P.(C) No.367/2018, W.P.(C) No.369/2018, W.P.(C) No.411/2018, W.P.(C) No.466/2018, W.P.(C) No.804/2018, W.P.(C) No.594/2018, W.P.(C) No.884/2018, W.P.(C) No.778/2018, W.P.(C) No.874/2018, W.P.(C) No.1149/2018, W.P.(C) No.1167/2018, W.P.(C) No.1430/2018, W.P.(C) No.1433/2018, W.P.(C) No.1428/2018, W.P.(C) No.269/2019 and W.P.(C) No.327/2019,

O R D E R

1. By Order dated 25.02.2021 these matters were broadly divided in

four categories with lead matters being:-

“(i) SLP (C) No(s). 8658-8659/2019, 16721-16722/2019 [arising from the judgment dated 12.10.2018 passed by the High Court of Kerala];

(ii) SLP(C) Diary No(s). 46219/2019 [arising from the judgment dated 22.5.2019 passed by the High Court of Delhi] along with connected matter being SLP(C) No. 1366/2021 [arising from the judgment dated 16.12.2019 passed by the High Court of Delhi];

(iii) SLP(C) No. 2465/2021 [arising from judgment dated 28.08.2019 passed by the High Court of Rajasthan, Jaipur]; and

(iv) CONMT.PET.(C) No. 1917-1918/2018 in C.A. No. 10013- 10014/2016 [seeking implementation of the order dated 04.10.2016 passed by this Court in C.A.No.10013/201 :***R.C. Gupta & Ors. Etc. etc. vs. Regional Provident Fund Commissioner Employees Provident Fund Organization & Ors. Etc.¹***]”

2. SLP (C) Nos.8658 – 59 of 2019 challenging the Judgment and order dated 12.10.2018 passed by the Division Bench of the High Court of Kerala in Writ Petition (C) Nos.602/2015 and 13120/2015 were initially dismissed by this Court on 01.04.2019.

Thereafter, SLP (C) Nos. 16721-22/2019 at the instance of Union of India challenging the very same judgment dated 12.10.2018 came up before this Court on 12.07.2019. While condoning the delay in preferring said SLPs, this Court directed that said SLPs be listed along with Review

1 (2018) 4 SCC 809

Petition (C) Nos.1430-31/2019 (which had since then been preferred against the order dated 01.04.2019 in SLP(C) Nos.8658-59/2019) in open Court.

3. When both sets of matters were listed before this Court on 29.01.2021, the submissions on behalf of the petitioners were noted as under:-

“Mr. C.A. Sundaram, learned Senior Advocate appearing for the petitioners in said Review Petitions invited our attention to the order dated 21.12.2020 passed by another Division Bench of the High Court of Kerala by which the correctness of the earlier decision dated 12.10.2018 was doubted and the matter was referred to Full Bench of the High Court.

Mr. Sundaram, also invited our attention to the decision of this Court in *M/s Pawan Hans Ltd. & Ors. vs. Aviation Karmachari Sanghatana & Ors* [2020(2)SCALE 194²] and specially paragraph 6.6 of the decision.

It was submitted that as a result of the directions issued by the High Court in its order dated 12.10.2018, benefit would get conferred upon employees retrospectively which, in turn, would create great imbalance.”

4. Thereafter, this Court recalled the order dismissing SLP (C) Nos.8658-8659 of 2019 and the entire bunch of matters was directed to be listed for disposal.

5. It may be noted here that the Division Bench of the High Court of Kerala in its order dated 12.10.2018 had relied upon the decision of two Judges of this Court in *R.C. Gupta*¹. Said decision had set aside the

² Also reported : (2020) 13 SCC 506

judgment and order passed by the Division Bench of the High Court of Himachal Pradesh in LPA Nos.411-12 of 2012 which had *inter alia* accepted the submission that under the proviso to Clause 11(3) of the Employees' Pension Scheme there was a cut-off date. Paragraphs 7, 9 and 10 of the decision in **R.C. Gupta**¹ were as under:-

“7. Reading the proviso, we find that the reference to the date of commencement of the Scheme or the date on which the salary exceeds the ceiling limit are dates from which the option exercised are to be reckoned with for calculation of pensionable salary. The said dates are not cut-off dates to determine the eligibility of the employer-employee to indicate their option under the proviso to Clause 11(3) of the Pension Scheme. A somewhat similar view that has been taken by this Court in a matter coming from the Kerala High Court³, wherein Special Leave Petition (C) No. 7074 of 2014 filed by the Regional Provident Fund Commissioner was rejected by this Court by order dated 31-3-2016⁴. A beneficial scheme, in our considered view, ought not to be allowed to be defeated by reference to a cut-off date, particularly, in a situation where (as in the present case) the employer had deposited 12% of the actual salary and not 12% of the ceiling limit of Rs 5000 or Rs 6500 per month, as the case may be.

....

9. We do not see how exercise of option under Para 26 of the Provident Fund Scheme can be construed to estop the employees from exercising a similar option under Para 11(3). If both the employer and the employee opt for deposit against the actual salary and not the ceiling amount, exercise of option under Para 26 of the Provident Scheme

³ Union of India v. A. Majeed Kunju, Writ Appeal No.1135 of 2012, order dated 5-3-2013 (Ker)

⁴ Reg. Provident Fund Commr. v. A. Majeed Kunju, 2016 SCC OnLine SC 1744, wherein it was directed:

“SLPs (C) Nos.7074-76, 7107-108, 7224 of 2014 and 697 of 2016.

Heard the learned counsel for the parties and perused the relevant material. We do not find any legal and valid ground for interference. The special leave petitions are dismissed. SLPs (C) Nos.19954 and 33032-33 of 2015.

List these special leave petitions on 26-4-2016. As prayed for, liberty is granted to file additional documents.”

is inevitable. Exercise of the option under Para 26(6) is a necessary precursor to the exercise of option under Clause 11(3). Exercise of such option, therefore, would not foreclose the exercise of a further option under Clause 11(3) of the Pension Scheme unless the circumstances warranting such foreclosure are clearly indicated.

10. The above apart in a situation where the deposit of the employer's share at 12% has been on the actual salary and not the ceiling amount, we do not see how the Provident Fund Commissioner could have been aggrieved to file the LPA before the Division Bench of the High Court. All that the Provident Fund Commissioner is required to do in the case is an adjustment of accounts which in turn would have benefited some of the employees. At best what the Provident Commissioner could do and which we permit him to do under the present order is to seek a return of all such amounts that the employees concerned may have taken or withdrawn from their provident fund account before granting them the benefit of the proviso to Clause 11(3) of the Pension Scheme. Once such a return is made in whichever cases such return is due, consequential benefits in terms of this order will be granted to the said employees."

6. Relying on the decision in *R.C. Gupta*¹, the Division Bench of the High Court of Kerala made following observations in the judgment which is under challenge in matters of the first category: -

"32. The Apex Court has thus found the insistence on a date for exercise of the joint option to be without any justification. In other words, the proviso to paragraph 11 of the Pension Scheme does not stipulate a cut off date at all. Any such stipulation of a cut-off date for conferring benefits under the Pension Scheme would have the effect of classifying the employees into persons who have retired before or after the said date"

6.1 The Division Bench of the High Court then found that the effect of the amendment to the Pension Scheme created following classes of pensioners on the basis of the date namely 01.09.2014: -

- “(i) employees who have exercised option under the proviso to paragraph 11(3) of the 1995 Scheme and continuing in service as on 01.09.2014;
- (ii) employees who have not exercised their option under the proviso to paragraph 11(3) of the 1995 Scheme, and continuing in service as on 01.09.2014;
- (iii) employees who have retired prior to 01.09.2014 without exercising an option under paragraph 11(3) of the 1995 Scheme.
- (iv) employees who have retired prior to 01.09.2014 after exercising the option under paragraph 11(3) of 1995 Scheme.”

6.2 The amendments to the Pension Scheme were therefore found to be arbitrary and the Writ Petitions were allowed with following directions: -

- “(i) The Employee’s Pension (Amendment) Scheme, 2014 brought into force by Notification No.GSR. 609€ dated 22.08.2014 evidenced by Ext.P8 in W.P.(C) No.13120 of 2015 is set aside;
- (ii) All consequential orders and proceedings issued by the Provident Fund authorities/respondents on the basis of the impugned amendments shall also stand set aside.
- (iii) The various proceedings issued by the Employees Provident Fund Organization declining to grant opportunities to the petitioners to exercise a joint option along with other employees to remit contributions to the Employees Pension Scheme on the basis of the actual salaries drawn by them are set aside.
- (iv) The employees shall be entitled to exercise the option stipulated by paragraph 26 of the EPF Scheme without being restricted in doing so by the insistence on a date.”

7. Challenging the view taken by the High Court Mr. C.A. Sundaram, learned Senior Advocate *inter alia* relied upon the decision of the Constitution Bench of this Court in ***Krishena Kumar Vs. Union of India***⁵. Paragraphs 1 and 2 of said decision disclose that the petitioners in SLP (C) No.8461 of 1986 and in WP No.1165 of 1989 had retired with Provident Fund benefits and their claims to switch to pension scheme after retirement having been rejected, specific challenge was raised. In support of such challenge, reliance was placed on the decision of this Court in ***D.S. Nakara and Others vs. Union of India***⁶. The challenge was rejected by the Constitution Bench with following observations: -

“32. In *Nakara*⁵ it was never held that both the pension retirees and the PF retirees formed a homogeneous class and that any further classification among them would be violative of Article 14. On the other hand the court clearly observed that it was not dealing with the problem of a “fund”. The Railway Contributory Provident Fund is by definition a fund. Besides, the government’s obligation towards an employee under CPF Scheme to give the matching contribution begins as soon as his account is opened and ends with his retirement when his rights qua the government in respect of the Provident Fund is finally crystallized and thereafter no statutory obligation continues. Whether there still remained a moral obligation is a different matter. On the other hand under the Pension Scheme the government’s obligation does not begin until the employee retires when only it begins and it continues till the death of the employee. Thus, on the retirement of an employee government’s legal obligation under the Provident Fund account ends while under the Pension Scheme it begins. The rules governing the Provident Fund and its contribution are entirely different from the rules governing pension. It would not, therefore, be reasonable to

5 (1990) 4 SCC 207

6 (1983) 1 SCC 305

argue that what is applicable to the pension retirees must also equally be applicable to PF retirees. This being the legal position the rights of each individual PF retiree finally crystallized on his retirement whereafter no continuing obligation remained while, on the other hand, as regard Pension retirees, the obligation continued till their death. The continuing obligation of the State in respect of pension retirees is adversely affected by fall in rupee value and rising prices which, considering the corpus already received by the PF retirees they would not be so adversely affected ipso facto. It cannot, therefore, be said that it was the ratio decidendi in *Nakara*⁵ that the State's obligation towards its PF retirees must be the same as that towards the pension retirees. An imaginary definition of obligation to include all the government retirees in a class was not decided and could not form the basis for any classification for the purpose of this case. *Nakara*⁵ cannot, therefore, be an authority for this case."

8. Mr. Sundaram relied upon the observations that Pension Retirees and Provident Fund Retirees did not form a homogeneous class and that the Rules governing the Provident Fund Scheme were entirely different from the Rules governing Pension Scheme.

After inviting our attention to the various provisions of the Employees' Pension Scheme, it was submitted that the difference between the Provident Fund Scheme on the one hand and the Pension Scheme on the other was well recognised. Under the former scheme, the contributions made by the employer and the employees during the employment of the employee would be made over to the employee along with interest accrued thereon at the time of his retirement. Thus, the obligation on the part of the operators of the Provident Fund Scheme would come to an end, after the

retirement of the employee; whereas the obligation under the Pension Scheme would begin when the employee retired. Under the former scheme, the liability was only to pay interest on the amount deposited and to make over the entire amount at the time of his retirement. On the contrary, in the latter scheme, it would be for the operators of the Pension Scheme to invest amount deposited in such a way that after the retirement of the concerned employee the invested amount would keep on giving sufficient returns so that the pension would be paid to the concerned employee not only during his life time but even to his family members after his death. If the option under paragraph 11(3) of the Scheme, was to be afforded well after the cut-off date, it would create great imbalance and would amount to cross-subsidization by those who were regularly contributing to the Pension Scheme in favour of those who come at a later point in time and walk away with all the advantages.

It was submitted that the emphasis on investment of the amount in both the funds would qualitatively be of different dimension. The difference between two schemes which was fulcrum of the decision in **Krishena Kumar**⁵ was not so noted in the subsequent decision in **R.C. Gupta**¹. In his submission it would not be a mere adjustment of amount to transfer from one fund to another as stated in **R.C. Gupta**¹ and that the decision in **R.C. Gupta**¹ was required to be re-visited.

9. These, and the other submissions touching upon the applicability of the principle laid down in the decision in ***R.C. Gupta***¹ go to the very root of the matter. Sitting in a Bench of two Judges it would not be appropriate for us to deal with said submissions. The logical course would be to refer all these matters to a Bench of at least three Judges so that appropriate decision can be arrived at.

10. The principal questions that arise for consideration are whether there would be a cut-off date under paragraph 11(3) of the Employees' Pension Scheme and whether the decision in ***R.C. Gupta***¹ would be the governing principle on the basis of which all these matters must be disposed of.

11. The Registry is, therefore, directed to place these matters before the Hon'ble the Chief Justice for requisite directions so that these matters can be placed before a larger Bench.

.....J.
(UDAY UMESH LALIT)

.....J.
(AJAY RASTOGI)

New Delhi,
August 24, 2021