A.F.R.

Neutral Citation No. - 2023:AHC:199785-DB

Court No. - 39

Case :- WRIT - A No. - 20745 of 2019

Petitioner :- Commissioner Kendriya Vidyalaya Sangathan
Respondent :- Central Administrative Tribunal Bench And Another
Counsel for Petitioner :- Narendra Pratap Singh
Counsel for Respondent :- Rishabh Agarwal,Shivam Pandey,Vinod Kumar

Hon'ble Saumitra Dayal Singh,J.
Hon'ble Rajendra Kumar-IV,J.

1. Heard Sri Narendra Pratap Singh, learned counsel for the petitioner; Sri Rishabh Agarwal, learned counsel for the respondents and perused the records.

2. Present writ petition has been filed by the Union of India against the order of the Central Administrative Tribunal, Allahabad Bench Allahabad, in Original Application No.330/203/2019, dated 17.05.2019, Jai Prakash Mishra versus Union of India and 4 others. By that order, the Tribunal has allowed that Original Application and declared the private respondent entitled to pension under GPF-cum-Pension scheme (hereinafter referred to as "the GPF scheme") as against the CPF scheme to which the respondent had been held entitled to, by the petitioner Union of India.

3. The facts of the case fall within a very narrow compass. The petitioner was appointed on the post of Primary Teacher by the Kendriya Vidyalaya Sangathan (hereinafter referred to as "KVS") on 03.10.1978. He retired on the post Trained Graduate Teacher (Biology), on 30.06.2012. At the time of his retirement the respondent was not granted benefit of the GPF scheme. He protested

and made that claim. It was rejected by the order dated 11.06.2018. That order became subject matter of challenge in the above Original Application. The same has been allowed.

4. The dispute revolves around the interpretation to be made to the Office Memorandum No.152-1/79-80/KVS/Budget/Part II, dated 01.09.1988 issued by the KVS. Relevant to our discussion, the said Office Memorandum is extracted below:-

> *"F.No. 152-1/79-80/KVS/Budget/Part.ll Dated:01.09.88*
>
> ***OFFICE MEMORANDUM***
>
> *Subject:- Change over of the Kendriya Vidyalaya Sangathan employees from the Contributory Provident Fund Scheme to Pension Scheme.*
>
> ……..
>
> *In the 51st Meeting of the Board of Governor of the Kendriya Vidyalaya Sangathan held on 31 May, 1988, it was approved that Kendriya Vidyalaya Sangathan will implement mutatis-mutandis the decision taken by the Govt. of India on the recommendations of the Fourth Central Pay Commission for its employees for the change over from Contributory Provident Fund Scheme to Pension Scheme in the manner as indicated in the Ministry of Personnel, Public Grievances and Pensions (Deptt. Of Pension and Pensioners, Welfare) O.M. No. 4/1/87-PIC dated 01.05.1987.*
>
> *2. It has, accordingly, been decided that persons joining service in the Sangathan on or after 01.01.1986 shall be governed only by the G.P.F. cum-Pension Scheme and will have no option for C.P.F. Scheme. However, for all CPF beneficiaries, who were in service on 01.01.1986, the decision taken shall be implemented in the manner herein after indicated.*
>
> *3. All C.P.F. beneficiaries, who were in service on 01.01.1986 and who are still in service on the date of issue of these orders 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 C.P.F. Scheme, if they so desire. The option will have to be exercised and*

conveyed to the concerned Head of office/Principal by 31.01.1989, in duplicate, in the form enclosed (one form may be sent to this office while the other kept with personal records of the employee concerned) if the employees wish to continue under the CPF Scheme. If no option is received by the Head of office/Principal by the above date and in this office through them by 28.02.1989 the employee will to be deemed to have come over the Pension Scheme. The Head of office/Principal are to forward in one lot options exercised by employees for retention of CPF Scheme received by them, to reach Sangathan's Office latest by 28.02.1989. Where no option to continue under the CPF Scheme is received by them from any, nil report be sent by due date viz. 28.02.1989.

3.3. The CPF beneficiaries, who were in service on 01.01.1986, but have since retired and in whose case retirement benefits have also been paid under the CPF Scheme, will have an option to have their retirement benefits calculated under the Pension Scheme Provided they refund to the Sangathan, the Sangathan contribution (management Share) to the Contributory Provident Fund and the interest thereon, drawn by them at the time of settlement of the CPF account. Such option shall be exercised latest by 31.01.1989.

3.4 In the case of CPF beneficiaries, who were in service on 01.01.1988, but have since retired, and in whose case the CPF account has not already been paid, will be allowed retirement benefits as if they were borne on pensionable establishments unless they specifically opto by 31.01.1989 to have their retirement benefits settled under the CPF Scheme.

3.5 In the case of CPF beneficiaries, who were in service on 01.01.1986, but have since died, either before retirement or after retirement, the case will be settled in accordance with para 3.3 or 3.4 above as the case may be. Options in such cases will be exercised latest by 31.01.1989 by the widow/widower and in the absence of widow/widower by the eldest surviving member of the family, who would have otherwise been eligible to family pension under the family Pension Scheme if such scheme were applicable.

3.6 The option once exercised shall be final.

3.7 In the type of cases covered by paragraph 3.3 and 3.5 involving refund of Sangathan's contribution to the contributory provident fund together with interest drawn at the time of retirement, the amount will have to be refunded latest by the 31.01.1989. If the amount is not refunded by the said

date, simple interest thereon will be payable at 10% per annum for period of delay beyond 31.01.1989.

4.1 In the case of employees who are deemed to come over or who opt to come over to the Pension Scheme in terms of paragraph 3.3, 3.4 and 3.5, the retirement and death benefits will be regulated in the same manner as in case of temporary/ permanent Sangathan servants, as the case may be, borne on pensionable establishment.

4.2 In the case of employees referred to above, who come over or are deemed to come over to the Pensions Scheme, the Sangathan's Contribution to the CPF together with interest thereon credited to the CPF account of the employee will be resumed by the Sangathan. The employees contribution together with the interest thereon at his credit in the CPF account will be transferred to the GPF account to be allotted to him on his coming over to the Pension Scheme.

4.3 Action to discontinue subscriptions/contributions to CPF account may be taken only after the last date specified for exercise of option viz 31.01.1989."

5. Learned counsel for the petitioner Union of India would submit, respondent had opted in favour of the CPF scheme before the cut off date 28.02.1989. Referring to the Supplementary Affidavit filed in these proceedings, it has been strenuously urged-arising from that choice expressed, the respondent was allotted CPF Account No. 3111. Contributions were made accordingly. The respondent never objected to that arrangement during his years in service. Only after four years of retirement, a false claim was made by him, in that regard.

6. In such circumstances, the order of the Tribunal is stated to be in the teeth of the decision of the Supreme Court in ***KVS and others versus Jaspal Kaur and another, (2007) 6 SCC 13*** and a division bench decision of this Court in ***Kendriya Vidyalaya Sangthan and 4 others versus Prakash Chand and another, (Writ A No.26380 of 2016), decided on 07.12.2019***.

7. On the other hand, learned counsel for the respondent would contend, the Office Memorandum dated 01.09.1988 created a legal fiction that the claim of all existing employees of the KVS would migrate to GPF scheme. That deeming fiction could be reversed by any employee by specifically opting to be retained under the CPF scheme. Therefore non-exercise of option by the respondent gave rise to absolute legal effect caused by the legal fiction i.e. to migrate the respondent to the GPF scheme, on the own force of the law. No other or further action was required to be taken by the employee to perfect his right under the GPF scheme. Also, emphasis has been laid on the fact that that option had to be exercised only once that too before the cut off date 31.01.1989. Neither any specific pleading was ever raised by the Union that the respondent ever exercised that option nor any evidence has been brought on record in support of such an objection. Therefore, merely because the petitioner may have continued to make deductions and account for the same under the CPF scheme, it did not have the effect of overriding the legal fiction created by the Office Memorandum dated 01.09.1988. Such conduct on part of the Union did not create any other legal right to the parties.

8. In support of his submissions, learned counsel for the respondent has relied on ***Union of India and another versus S.L. Verma and others, (2006) 12 SCC 53; University of Delhi versus Shashi Kiran and others, 2022 SCC online SC 594***. Thereafter, he has also relied on the decisions of the Jharkhand High Court, Madras High Court and Delhi High Court in ***Union of India and others versus Priyabrat Singh, 2022 SCC online Jhar. 985; N. Subramanian versus Commissioner KVS and others, 2017, SCC online Mad. 12661*** and ***KVS and another versus V.D. Pandey, 2019 SCC online Del. 11655***.

9. In each of those cases, in absence of any express consent given by the employee to be retained under the CPF scheme, all the three High Courts have ruled in favour of the employee on the issue of continued deduction under the CPF scheme. It has been held that such deduction did not create any right in favour of the Union so as to prevent the employee from claiming the benefit under the GPF scheme. Those decisions are described to have attained finality upon successive dismissal of Special Leave to Appeals filed by the Union before the Supreme Court. He has also referred to certain other decisions of the Madras High Court to the same effect.

10. As to the decision of the coordinate bench of this Court in ***Kendriya Vidyalaya Sangthan and 4 others versus Prakash Chand and another (supra),*** it has been submitted that the same is wholly distinguishable. In that case the employee specifically admitted during course of the proceedings that he had opted under the Office Memorandum 01.09.1988, to be retained under the CPF scheme. It is on that fact admission made that a reasoning emerged in that case that the said employee was not entitled to reverse his choice and to later claim benefit of the GPF scheme.

11. Having heard learned counsel for the petitioner and having perused the record, we find, prior to issuance of Office Memorandum dated 01.09.1988 there may have existed an option with the employees to choose between the CPF scheme and GPF scheme. Yet, by virtue of Clause No.3 of the said Office Memorandum, a legal fiction was created to necessarily migrate all existing employees (as on 01.01.1986), to the GPF scheme. The only exception to the applicability of that legal fiction could arise under Clause 3.2 of the Office Memorandum in favour of any existing

employee who may have explicitly opted to remain under the CPF scheme by exercising that option in writing by the date 31.01.1989. That written communication was further required to be received by the Principal by 28.02.1989, in duplicate - to allow for retention of one copy at his Office and the other to be preserved in the personal records of the employee. By virtue of Clause 3.6 the option once exercised was made final i.e. irrevocable.

12. Thus the migration of existing employees, from the CPF scheme to the GPF scheme was automatic i.e. by operation of law. The only condition required to be fulfilled was, the employee must have been on the role of KVS on the cut off date, namely, 01.01.1986.

13. Any existing employee seeking to escape the automatic application of the Office Memorandum was burdened to make a specific application to that effect, in writing, on or before the cut off date 31.01.1989. That evidence was required to be created in duplicate with one copy to be preserved in the Principal office and the other in the original service record of the employee concerned, before 28.02.1989.

14. In the present case, no pleading was ever raised by the Union that the respondent exercised his option to remain in the CPF scheme before the cut off date 31.01.1989. Neither a copy of such application has been produced either before the Tribunal nor this Court nor details of the same have been furnished. Therefore, primary evidence does not exist of any step taken by the respondent to remain governed under the CPF scheme or to avoid the legal fiction created by Clause 3 of the Memorandum dated 01.09.1988.

15. What the Union seeks to rely on is secondary evidence. Here, it is not the case of the Union that the respondent was never governed by the CPF scheme. Therefore, no reliance may be placed on the document annexed to the supplementary affidavit being Closing Balance Statement of General Provident Fund. That document may only constitute evidence that the authorities of the Union of India continued to treat the private respondent as an employee government by the CPF scheme. That act of negligence or omission that may have been committed by the concerned officers of the Union of India may never be read as secondary evidence as may substitute the mandatory and the only requirement prescribed under the Office Memorandum dated 01.01.1989 - to submit a written application, in duplicate clearly expressing the option to remain under the CPF scheme, before the prescribed cut-off date.

16. In face of the legal fiction arising under Clause 3.2 of the Office Memorandum and in view of the finality attached to that status by virtue of Clause 3.6 of the said Office Memorandum, the act of continued deductions towards CPF, beyond the cut off date would never confer any right to the parties, contrary to the rights springing by force of law under the Office Memorandum dated 01.01.1989.

17. In ***Union of India versus S.L. Verma and others (supra)*** with respect to a *pari materia* Office Memorandum dated 01.05.1987, a similar fact situation existed inasmuch as beyond the cut off date, contribution continued to be deducted under the CPF scheme. In that light, the Supreme Court negated the identical contention raised by the Union of India. It held as under:-

"7. The Central Government, in our opinion, proceeded on a

basic misconception. By reason of the said Office Memorandum dated 01.05.1987 a legal fiction was created. Only when an employee consciously opted for to continue with the CPF Scheme, he would not become a member of the Pension Scheme. It is not disputed that the said respondents did not give their options by 30.9.1987. In that view of the matter respondent Nos.1 to 13 in view of the legal fiction created, became members of the Pension Scheme. Once they became the member of the Pension Scheme, Regulation 16 of the Bureau of Indian Standards (Terms and Conditions of Service of Employees Regulation, 1988) had become ipso-facto applicable in their case also. It may be that they had made an option to continue with the CPF Scheme at a later stage but if by reason of the legal fiction created, they became members of the Pension Scheme, the question of their reverting to the CPF would not arise. Respondent No.14 has correctly arrived at a conclusion that an anomaly would be created and in fact the said purported option on the part of respondent No.1 to 13 was illegal when a request was made by respondent No.14 to the Union of India for grant of approval so that all those employees shall come within the purview of the Pension Scheme."

18. In ***KVS and others versus Jaspal Kaur and another (supra)***, the Court found (as noted in para 3 of the report) that a document existed to establish that many employees opted for the benefit of CPF scheme resulting in allotment of new CPF account numbers to them. In the present case, no such evidence has been shown to us as may establish that the petitioner had at any stage opted for the CPF scheme within the cut off date prescribed under Office Memorandum dated 01.01.1989. In the present case, it has not been shown to us that the respondent had opted for the CPF scheme. Mere continuance of deduction under CPF may itself not cause any legal effect as contemplated by the Supreme Court in the above described decision. Even change / revision of CPF number, not linked to prior application made by the respondent would be inconsequential.

19. That we note, wherever, statutory law prescribes a particular way to do a specific thing, the thing may other be done in that way or

not at all. Though, we have not intended to elevate the status of the Office Memorandum dated 01.09.1988 to that of statutory law and we recognize the same and as Executive Order only, yet, in absence of any contrary statutory or other law or Executive Order shown to exist. We do not see how the respondent may be seen to have opted to be retained under the CPF when the Union has failed to establish that he had submitted the application on the prescribed form in the prescribed manner. In absence of that application made by the respondent, he had migrated to GPF scheme, by operation of law.

20. Then, once that consequence arose in law, it full effect could not be avoided by either party on the evidentiary rule of acquiescence. Once, by law, the respondent was admitted to the GPF scheme, he could not be denied its benefit merely because he may not have resisted CPF contributions continued to be made thereafter. To allow for such contingency to arise / exist would be to read a new clause into the Office Memorandum dated 01.09.1988 i.e. an employee may (notwithstanding) anything also, not migrate an employee to GPF scheme and that employed may content to the same. Clearly that cause is not permissible.

21. In any case, the position in law was again considered by the Supreme Court in ***University of Delhi versus Shash Kiran and others (supra)***. After taking note of cases involving similar facts (as the present case) the Supreme Court described the same as ***(R.N. Virmani batch of cases)***. Then it proceeded to note that the learned single judge of the Delhi High Court had rejected the similar submission advanced by the University (in that case). It also noted the fact that upon intra court appeal, a division bench of the Delhi High Court had also dismissed that appeal. Thereafter the Supreme

Court affirmed that reasoning for the following reasons :-

> *"20. According to the notification dated 01.05.1987 two situations were contemplated. First, the deeming provision in terms of which the concerned employee was taken to have 'come over' to GPF. The second situation being where a conscious option was exercised before the cut-off date to continue to be under CPF. R.N. Virmani batch of cases was therefore rightly allowed by the learned Single Judge and the Division Bench of the High Court, as no conscious option was exercised by the cut-off date. Consequently, the concerned employees must be deemed to have 'come over' to GPF. Logically, it would be immaterial whether the concerned employee continued to make contribution assuming himself to be covered under CPF, even though contributions were made by the concerned authorities. The benefit was therefore rightly granted in favour of the employees and the entire contribution was directed to be refunded. The University has chosen not to appeal against that decision and thus the matter has attained finality.*
>
> *21. Theoretically, extension of the same principle would be that if no option was exercised before the cut-off date, but an option was exercised after the cut-off date was extended; and if no switchover could be allowed after the cut-off date, the decisions rendered by the learned Single Judge and the Division Bench in the N.C. Bakshi batch of cases were also quite correct. Consequently, irrespective of the fact that the concerned employees had exercised the option to continue to be under CPF, such exercise of option would be non est in the eyes of law. That in fact is the ratio of the decision in S.L. Verma's (supra) case. Thus, both these batches of cases were rightly decided by the learned Single Judge and the Division Bench. We, therefore, dismiss the appeal in N.C. Bakshi batch of cases."*

22. It is that reasoning which has been followed by division bench of the Jharkhand High Court in ***Union of India versus Priyabrat Singh (supra)***. Following ***University of Delhi versus Shashi Karan (supra)***, the Jharkhand High Court observed as below:-

> *"42. This Court is having two views of the Hon'ble Apex Court; one in the case of KVS and Others v. Jaspal Kaur and Others (Supra) and another in the case of University of Delhi v. Shashi Kiran and Others (Supra).*

43. The position of law is well settled that if there are two conflicting views of the Hon'ble Apex Court, the latest judgment is to be considered having the binding precedence, as has been held in Subhash Chandra and Another v. Delhi Subordinate Services Selection Board and Others [(2009) 15 SCC 458]. For ready reference, the relevant paragraph of the aforesaid judgment is quoted hereunder:-

> *96. A decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom. In S. Pushpa [(2005) 3 SCC 1], decisions of the Constitution Benches of this Court in Milind [(2001) 1 SCC 4] had not been taken into consideration. Although Chinnaiah [(2005) 1 SCC 394] was decided later on, we are bound by the same. It is now a well-settled principle of law that a Division Bench, in case of conflict between a decision of a Division Bench of two Judges and a decision of a larger Bench and in particular Constitution Bench, would be bound by the latter. (See Sardar Associates v. Punjab & Sind Bank [(2009) 8 SCC 257].*

44. This Court, taking into consideration the aforesaid position of law that the latest judgment of the Hon'ble Apex Court is required to be followed, therefore, is of the considered view that the view as has been taken by the Hon'ble Apex Court in University of Delhi v. Shashi Kiran and Others (Supra) is required to be followed herein also."

23. The Special Leave to Appeal No. 7099 of 2023 filed against that order is shown to have been dismissed by the Supreme Court vide order dated dated 26.09.2023.

24. The Madras High Court in ***N. Subramaniyam versus Commissioner KVS (supra)*** again had the occasion to consider the similar controversy. It rejected the claim of the Union on the following reasons:-

> *"13. From the above, it could be seen that the law is very settled that in the absence of specific option exercised by the employee towards CPF scheme, the employee was deemed to have come over the GPF scheme. Therefore, the order passed by the Tribunal dismissing the application is incorrect and*

cannot be sustained in law."

25. The SLP (C) - Diary No.10965 of 2018 is also shown to have been dismissed by the Supreme Court on 18.03.2019.

26. Similarly in ***KVS versus V.D. Pandey (Supra)***, the Delhi High Court took a similar view. The Special Leave to Appeal No.27639 of 2019 filed against that order is also disclosed to have been dismissed vide order dated 29.11.2019.

27. Insofar as the decision of a coordinate bench of this Court in ***KVS versus Prakash Chandra (supra)*** is concerned, the facts of that case were similar to that in case of ***KVS versus Jaspal Kaur (supra).*** The Court found, in no uncertain terms that it was admitted to the employee (in that case) that he had opted for the CPF scheme upon enforcement of the Office Memorandum dated 01.01.1989. By virtue of finality attached to that option once exercised, the coordinate bench ruled against the employee with respect to the claim to the benefits of the GPF scheme.

28. For the sake of clarity, it is noted, in the present case no such admission exists. Therefore, we have no hesitation in recording that the fiction in law created by Clause 3 of the Office Memorandum dated 01.09.1988 forcibly and its own, made the petitioner's case fall under the GPF scheme, forever.

29. The fact that the Union of India may have continued to make deductions under the CPF scheme did not militate or defeat the substantive right that arose to the respondent to claim benefit of applicability of the GPF scheme. That position in law arose solely by operation of law i.e., full enforcement of the legal fiction, noted above.

30. The writ petition lacks merit and is accordingly dismissed. No order as to costs.

31. However, it may be noted, the respondent may not be entitled to double benefits. While computing and granting the benefit under the GPF scheme, the petitioner Union of India shall remain entitled to make due deductions of amounts, if any, paid under the CPF scheme.

Order Date :- 9.10.2023
I.A.Siddiqui

(Rajendra Kumar-IV,J.) (S. D. Singh,J.)