

(2015) 05 GUJ CK 0041

In the Gujarat High Court

Case No : Special Civil Application No. 16601 of 2010

Mukesh Balvantray Tripathi

APPELLANT

Vs

Ahmedabad Municipal Corporation and Others

RESPONDENT

Date of Decision : 08-05-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 115

Citation : (2015) 146 FLR 301 : (2015) 3 GLR 2433 : (2015) LabIC 2952

Hon'ble Judges : Sonia Gokani, J

Bench : Single Bench

Advocate : Vaibhava Vyas, for the Appellant; Niraj Ashar, Asst. Government Pleader and H.S. Munshaw, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sonia Gokani, J—Aggrieved by non-grant of pension, present petition is preferred seeking following prayers:--

"7. The petitioner respectfully prays that, on the basis of the facts and circumstances as mentioned hereinabove and which may be urged at the time of hearing, the Honourable Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction to the respondent authorities and may be pleased to:--

(A) direct the respondent Corporation to finalize the pension case of the petitioner and further be pleased to direct the respondent Corporation to make payment of arrears of pension, commutation of pension and other retiral benefits to the petitioner, and

(B) direct the respondent Corporation to make payment of interest, for the delayed payment of pension to the petitioner, at the rate which the Honourable Court may consider as just and proper, in the facts and circumstances of the case, and

(C) award the cost of the petition, and

(D) pending admission and final disposal of this petition the Honourable Court may be pleased to direct the respondent Corporation to make payment of provisional pension to the petitioner, and

(E) grant any other relief and pass any other order which the Honourable Court may consider as just and proper in the facts and circumstances of the case."

Petitioner on reaching the age of superannuation, retired on 31.7.2010. He joined services of respondent-Corporation on 16.12.1972 as a supervisor. He was eventually promoted on the post of Sluice Valve Inspector in the Water Supply Department of the respondent Corporation. It is his say that he served with the respondent-Corporation for 37 years. It appears that respondent-Corporation gave option to its employees for nearly 8 times from 1983 to 2001. It is the case of the petitioner that such options were also later on accepted upto 24.8.2003. He had given the option for shifting from CPF to GPF scheme twice in writing on 10.12.2002 so also on 14.7.2003. It is the say of the petitioner that the shift was not made at the end of the respondent-Corporation which has seriously jeopardized his interest. It is also his say that other similarly situated employees had later on been permitted to shift from CPF to GPF, and therefore, this Court needs to intervene and direct the respondent Corporation who has acted indiscriminately.

2. Affidavit-in-reply is filed by the Corporation stating inter alia that the petitioner has already been paid all retiral benefits which includes gratuity, leave encashment, group insurance scheme so also contributory provident fund to the tune of Rs. 5,87,932/- on 30.8.2010 and the same was accepted by the petitioner without any protest. It is the stand of the Corporation that with effect from 1.1.1983 pension scheme was introduced and for nearly 8 times, the employees were given the opportunity to opt for the same. Last such circular permitting the petitioner to give option in writing till 30.6.2001, was issued on 29.5.2001. This periodical extension of opportunity was on account of the fact that some employees might have missed out on giving of options.

It is the say of the Corporation that earlier group of Special Civil Application Nos. 15511 of 2007 to 15531 of 2007 was also preferred after having given delayed option of pensionary benefits and those petitioners remained unsuccessful.

Additional affidavit is also submitted by the petitioner to point out that in case of some of the employees, such decision is already been taken belatedly.

3. Learned advocate Mr. Vaibhav Vyas appearing for the petitioner has urged that the respondent Corporation cannot be permitted to adopt the discriminatory approach for the petitioner who served with an unblemished record for 37 years. It is his say that the opinion the respondent Corporation sought from learned senior advocate Mr. S.N. Shelat, also reflects that till August, 2003 the options were accepted. On the strength of such opinion, some of the employees have

already been given such benefit. The petitioner however has been denied the same. He on query, of course, has fairly submitted that there was no protest marked at the time of accepting CPF option.

4. Learned advocate Mr. Munshaw appearing for respondent Corporation has eventually submitted that when the petitioner was in the service, he at no point of time, opted within the time limit. His giving option after the expiry of the time limit would serve no purpose. Moreover, once having accepted CPF amount, his ties with the Corporation would sever. In cases of those employees who had preferred Special Civil Application Nos. 15511 of 2007 to 15531 of 2007, the petitioner has already taken a decision denying them the benefit on the ground that it was a delayed option.

5. Having heard learned Counsel for both the sides and having considered the submissions on record, certain undisputed facts at the outset require reference.

6. The petitioner for the first time gave the option for shifting from CPF to GPF scheme on 10.12.2002. Second time option was given by him on 14.7.2003. It is the stand of the Corporation that eight times by way of circulars issued in the name of Chief Accountant, the employees of the Corporation were given the opportunity to exercise the option. First such circular was issued on 25.10.1983. Thereafter, on 38.3.1984, 31.5.1984, 21.1.1985, 25.1.1991, 11.2.1993, 18.8.1998 and 29.5.2001 circulars were issued where dates were fixed for receiving the options. Such opportunities were periodically given for exercise of such options. Admittedly, last such option was given to the employees of corporation by way of circular dated 29.5.2001 and time limit set therein was dated 30.6.2001. However, the petitioner belatedly opted for such shift. Yet another aspect which requires reference is that the petitioner continued to contribute towards CPF. On his retirement on 31.7.2010, he has been paid the entire amount of CPF being the amount of Rs. 5,87,932/- and such amount has been accepted by him without any murmur. His other retiral benefits also have been made to him by cheques, which includes gratuity, leave encashment, and group insurance scheme. First time after his availing option in the year 2002-03 he had made representations to the Corporation in the year 2008. The respondent Corporation did reply to such representation on 28.8.2007 stating therein that as he did not avail the same well within the time, his right cannot be considered. The only point on which the petition hinges is the opinion of the senior Counsel of the Corporation where the learned senior Counsel has made a passing reference of the option forms having been accepted till 24.8.2003.

7. It is the say of the petitioner that the employees were aware of the extension of the time limit. The pension scheme had been discontinued with effect from 1.4.2004. The State Government also discontinued the same from the said date. Senior advocate Mr. Shelat, therefore in his opinion dated 17.9.2007 had referred to the decision of the Apex Court rendered in V.K. Ramamurthy Vs. Union of India, AIR 1996 SC 2658 : (1996) 74 FLR 2218 : (1996) 7 JT 296 : (1996) LabIC 2275 : (1996) 5 SCALE 829 : (1996) 10 SCC 73 : (1996) 4 SCR 583 Supp :

(1997) 1 SLJ 16 : (1996) 2 UJ 536 , wherein the Apex Court had rejected the application of the writ petitions who did not exercise the option for pension scheme. In that case, they were given option. They were provided with six opportunities for exercising option but did not avail of them. The decision cited by the employees cannot govern their relationship for exercise of the option to Pension Scheme. There is no deeming provision under the Scheme. They were required to exercise option. Several opportunities were offered to them. Therefore, in law they are not entitled to the benefit of Pension Scheme now.

8. Reference of 24.8.2003 is the only point on which much is harped upon. For what set of employees this date has been extended is not clearly reflected in the affidavit-in-reply nor in the pleadings of the petitioner. The question, therefore, would be whether the petitioner can insist upon acceptance of his plea beyond the stipulated period of 30.6.2001. In fact by way of a circular this scheme of course was closed from 1.4.2004. Again after those forms were accepted till 24.8.2003 as has been referred to in the said opinion whether those employees had given the option beyond the period of 30.6.2001, had been in fact given the benefit of pensionary scheme is not emerging on record.

9. In fact, this Court in Special Civil Application No. 5799 of 2011 had the option to deal with the group of employees who were aggrieved by the rejections of their representation, which was made pursuant to the direction given in Special Civil Application Nos. 15511 of 2007 to 15531 of 2007. As is apparent from the record, such representation came to be rejected by the Municipal Commissioner on 20.10.2007 on the ground that those employees were aware of all eight circulars and had not opted for the scheme within time.

10. With regard to 96 employees who were permitted for pensionary scheme, issue was raised before this Court, in the affidavit-in-reply of the Deputy Municipal Commissioner, the same has been dealt within the following manner at paragraph 8 onwards:--

"8. It is further contended that the allegations made against Mr. Utpal Chimanlal Padia for his having been granted the benefit of GPF Scheme are ex facie wrong. It is submitted that previously the employees of Municipal Corporation were covered by the Scheme of GPF. However with effect from 1.1.1983, it was resolved to implement the Scheme. Therefore, the option was invited from employees and the last date of such option was extended by way of several circulars issued in this respect and such a date fixed was extended upto 29.5.2001. It is the say of the respondent-Corporation that the Finance Department accepted several options in the meanwhile and it was only on the date of retirement that these facts were revealed to the Municipal Corporation and, therefore, the Finance Department examined nearly 96 cases between 30.6.2001 and 14.8.2003, who had opted for pension scheme and, there option was revealed through deduction of GPF in the computerized payroll statement, which reached the Finance Department on the date of their superannuation. Since subsequently this fact was noticed by the Deputy Chief Accountant Officer,

therefore, Municipal Commissioner's attention was drawn by Chief Accountant and, it was resolved that such employees may be granted benefit of pension scheme. A decision in this respect has been taken by the Municipal Commissioner on 13.4.2005 and such circulars are annexed with the petition. Affidavit-in-rejoinder is filed by Secretary, Mr. Gor, wherein he has stated that the Circular is substantive and indicative that those employees, who were desirous of opting for CPF Scheme had to fill up the option form but those who had opted to join GPF Scheme were not required to fill up any option form and, therefore, by default they could be treated to have opted for GPF Scheme.

9. As can be noted from Circular No. 52 of 1.2.1984 issued by the Chief Accountant Department, the sanction was obtained from the State Government on 16.1.1984 for the proposed pension scheme vide Resolution 428 dated 26.7.1983. This came into effect from 1.1.1983. Those employees who joined Municipal Corporation on 1.1.1983 or subsequent thereto were given effect of such pension scheme satisfactorily. However, those who were in the service prior to 1.1.1983 and were in the service on the date on which such circular was issued, were given the option."

11. Thus it is apparent that on account of inadvertence on the part of the Finance Department in case of 96 employees, the option forms were accepted between 30.6.2007 to 14.8.2003 coupled with the fact that their GPF fund also has been denied in the computer payroll statement and the same had reached to the Finance Department on the date of their superannuation. In such background the benefit of pension scheme was made available to them. It was an exceptional circumstance by those employee who joined the Municipal Corporation on 1.1.1983 and thereafter were already given the pensionary benefits and those who joined prior thereto were given the option.

12. It is clearly mentioned that those employees, who were desirous to continue in the CPF Scheme shall have to fill up prescribed form for giving such an option and shall have to submit the same to the Chief Accountant after obtaining signature of the officer along with the service book. Such an affidavit was to be filed by only those employees, who were desirous to continue in the CPF Scheme and the rest of the employees were to be treated under the pension scheme. Such an option was to be accepted till 29.4.1984 and no extension was permissible thereafter. They were those employees, who retired on 1.1.1983 and, thereafter were given such an option. There are other circulars periodically issued and last one was of 14.8.2003, which mentioned that there were sufficient opportunities given for opting for GPF Scheme. However, no such option would be accepted nor any change would be made in the computer data in respect of such option. Subsequent thereto, there was a communication issued by the Deputy Municipal Commissioner (Finance) of 13.4.2005 by a specific mentioning that those employees who had given option for shifting from CPF scheme to GPF scheme till 14.8.2003 only will have to be treated for the purpose of pension and not the rest. This also was permitted beyond the stipulated period. Options were

sent to the computer department by the concerned heads of the departments and their GPF contribution was deducted already for many months. This exception can never be made the base. Petitioner herein has already enjoyed CPF benefits and now belatedly has requested to grant him pensionary benefits.

13. The decision of Apex Court rendered in the case of PEPSU Road Transport Corporation, Patiala Vs. Mangal Singh and Others, AIR 2011 SC 1974 : (2011) 129 FLR 1101 : (2011) 3 LLJ 308 : (2011) 6 SCALE 53 : (2011) 11 SCC 702 : (2011) 2 SCC(L&S) 322 : (2011) 4 UJ 2516 : (2011) AIRSCW 3197 : (2011) 4 Supreme 1 , also requires consideration at this stage. The Corporation had challenged the decision of the High Court before the Apex Court and the respondents before the Apex Court had subscribed to the CPF and gratuity schemes. The option given were not exercised well within time. They had already availed retiral benefits arising out of CPF and gratuity without any protest, and thereafter, they made the pensionary benefit under pension scheme after retirement with unreasonable delay of more than 8 years. In such circumstances, the Apex Court denied any benefit to the employees in following manner:--

"35. Now we will try to explain the essential distinction between these two retirement benefits that an employee may derive at the time of his retirement from service. The C.P.F. was introduced with the object of providing social security to the employees working in factories and other establishments, after their retirement. The C.P.F. was instituted as a Compulsorily Contributory Provident Fund by the enactment of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Provident Fund Act"). The employee registered under the Provident Fund Act shall be entitled to claim all benefits available under the C.P.F. Scheme framed under the Act. This C.P.F. Scheme requires opening of the account for the employee by the employer. The Government/employer is under the continuous obligation to deposit equal or matching contribution made by the employee in his account till he retires. Once the employee is retired, then his rights qua Government/employer's contribution into his C.P.F. account finally crystallizes. After retirement, this entire C.P.F. amount is paid to the employee as a retrial benefit. On the receipt of C.P.F. amount, the relationship between employee and employer ceases to exist without leaving any further legal right or obligation qua each other.

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56. The Regulation 4(iii) of the Regulations is a deeming provision to the effect: firstly, if an employee fails to exercise his option within a period of 6 months from the date of issue of these Regulations and; secondly, even on exercise of option, if an employee fails to refund the amount of advance taken from employers contribution of the C.P.F. within 6 months from the date of issue of these Regulations, then it shall be deemed that employee has opted to continue

for the existing C.P.F. Benefit. Therefore, the failure on the part of the respondents to opt for the Pension Scheme and refund the advance taken from the employer's contribution of C.P.F. will disentitle them from claiming any benefit under the Pension Scheme. Therefore, we cannot sustain the Judgment and order passed by the High Court."

14. In the case of Union of India (UOI) and Others Vs. M.K. Sarkar, (2010) 124 FLR 582 : (2009) 15 JT 70 : (2010) 2 LLJ 321 : (2009) 14 SCALE 425 : (2010) 2 SCC 59 : (2009) 1 SCR 249 , the option was given for pension and such option from provident fund to pension was availed long after retirement. The Apex Court held that when the scheme stipulated the benefit to be made available only to those who exercise the option within the specified time, it has to be exercised within such time:

"13. Having enjoyed the benefits and income from the provident fund amount for more than 22 years, the respondent could not seek switch over to pension scheme which would result in respondent getting in addition to the PF amount already received, a large amount as arrears of pension for 22 years (which will be much more than the provident fund amount that will have to be refunded in the event of switch over) and also monthly pension for the rest of his life. If his request for such belated exercise of option is accepted, the effect would be to permit the respondent to secure the double benefit of both provident fund scheme as also pension scheme, which is unjust and impermissible. The validity period of the option to switch over to pension scheme expired on 31.12.1978 and there was no recurring or continuing cause of action. The respondent's representation dated 8.10.1998 seeking an option to shift to pension scheme with effect from 1976 ought to have been straight away rejected as barred by limitation/delay and laches."

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17. Even on merits, the application has to fail. In Krishena Kumar and Others Vs. Union of India and others, AIR 1990 SC 1782 : (1990) 3 JT 174 : (1991) 1 LLJ 191 : (1990) 2 SCALE 44 : (1990) 4 SCC 207 : (1990) 3 SCR 352 , a Constitution Bench of this Court considering the options given to the Railway employees to shift to pension scheme, held that prescription of cut off dates while giving each option was not arbitrary or lacking in nexus. This Court also held that provident fund retirees who failed to exercise option within the time were not entitled to be included in the pension scheme on any ground of parity. Therefore, the respondent who did not exercise the option available when he retired in 1976, was not entitled to seek an opportunity to exercise option to shift to the pension scheme, after the expiry of the validity period for option scheme, that too in the year 1998 after 22 years."

15. In the case of Rajasthan Agriculture University, Bikaner Vs. State of Rajasthan and Others, AIR 2014 SC 473 : (2013) 139 FLR 538 : (2013) 11 JT 550 : (2014) 1 LLN 30 : (2013) 10 SCALE 604 : (2013) 12 SCC 610 : (2014) 1 SCT 307 : (2014) 1 SLJ 39 , after stipulated date the employee had made an option which was not considered. Deeming fiction was incorporated in the notification stipulating that the employees who failed to exercise their option in writing either for pension scheme or for Contributory Provident Fund (CPF scheme), with a stipulated time period would be deemed to have opted for pension scheme. The Apex Court held that those employees who exercised the option after the stipulated period, which was generously accepted by the appellant university, there would be non-availability of benefit of deeming fiction. The employee had exercised his option for continuing under the CPF scheme after the stipulated time period. He was highly literate and was held to have known the consequence when he opted for CPF scheme. The Apex Court quashed the order of the High Court which directed the university to give the pension to the employee as if he had opted for pension scheme on the ground of estoppel, acquiescence and waiver. The Apex Court allowed the appeal of the employer.

16. Section 115 of the Indian Penal Code states that when a person by his declaration, act or omission permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed to deny the truth of that being. The doctrine of estoppel is to secure justice between the parties as per the decision of the Apex Court in the case of R.S. Madanappa and Others Vs. Chandramma and Another, AIR 1965 SC 1812 : (1965) 3 SCR 283 The Apex Court in the aforementioned decision has also taken note of the doctrine of estoppel while upholding the plea of the employer. It is not the case of the petitioner that the petitioner was not aware of such circulars or had come to know about it at a later date. It could be noticed that there was no deeming provision under the scheme. In the instant case when the petitioner had already exercised the option at a later date and his having enjoyed his CPF benefit at the time of retirement without any protest, the petition deserves rejection. As already discussed the option was given beyond the stipulated period and that itself is a ground to deny him the benefit even thereafter his CPF fund has already been paid to him on his reaching the age of superannuation. Acceptance to the same without any challenge or protest would further vindicate the stand of the Corporation of denying him the shift to the pension scheme.

Petition is dismissed with no order as to costs.