

(2011) 09 DEL CK 0148
In the Delhi High Court
Case No : LPA No. 708 of 2002

R.D. Gupta and Others

APPELLANT

Vs

Delhi Transport Corporation and Another

RESPONDENT

Date of Decision : 20-09-2011

Acts Referred:

Constitution of India, 1950 — Article 32

Citation : (2011) 183 DLT 66

Hon'ble Judges : Dipak Misra, C.J.; Sanjiv Khanna, J.; Rajiv Sahai Endlaw, J

Bench : Full Bench

Advocate : Shankar Divate, for the Appellant; Avnish Ahlawat, Nitesh Kumar Singh and Latika Chaudhary for DTC, for the Respondent

Judgement

Dipak Misra, C.J.—Perceiving a manifest and irreconcilable conflict in the decisions rendered in LPA No. 1262/2007 dated 5 October, 2007, Delhi Transport Corporation v. Kishan Lal Sehgal and Ors. and DTC v. Madhu Bhushan Anand, 2010 (172) DLT 668, the Division Bench framed the following question and recommended for delineation by a larger Bench:

What is the effect of receipt of payment including higher ex-gratia amount and employer's share of provident fund to employees who had applied and opted for voluntary retirement under the VRS 1993, though the said employees were entitled to pension as per officer order No. 16 dated 27th November, 1992?

2. Because of the aforesaid reference, the larger Bench has been constituted and the matter has been placed before us.

3. The facts which are imperative to be exposited to answer the said reference are that the Delhi Transport Corporation (DTC) employees were governed by the Contributory Provident Fund Scheme. The employees of the DTC preferred a writ petition under Article 32 of the Constitution before the Supreme Court seeking a direction against the DTC for introduction of the pension scheme. In pursuance of the assurance given by the DTC before the Apex Court, the Office Order No.

16 dated 27th November, 1992 was issued. The said office order reads as under:

DELHI TRANSPORT CORPORATION

(A Government of India Undertaking)

I.P. Estate, New Delhi

No. Adm-I-S(4)/92

Dated 27.11.92

OFFICE ORDER No. 16

Sub: Introduction of Pension Scheme for the employees of the DTC as applicable to the Central Govt. Employees.

The introduction of Pension Scheme for the employees of the DTC has been sanctioned by the Central Government and conveyed by the M.O.S.T. vide letter No. RT-12019/21/88-TAG dated 23.11.92 as on the same pattern as for the Central Government employees subject to the following conditions:

1. The pension scheme would be operated by the LIC on behalf of DTC.
2. The date of effect of pension scheme would be 3.8.81.
3. All the existing employees including those retired w.e.f. 3.8.81 onwards would have the option to opt for the Pension Scheme or the Employees Contributory Provident Fund as at present, within 30 days from the date of issue of this O.O. for the implementation of the Pension Scheme as approved by the Government of India.
4. The Pension Scheme would be compulsory for all the new employees joining DTC w.e.f. 23.11.92 the date of sanction of the scheme.
5. The Pension Scheme would be operated by the LIC on behalf of DTC. The employees share in the EPF A/C of the DTC employees, who opt for LPA No. 708/2002 Page 3 of 25 pension scheme would be transferred to the LIC, for operating.
6. The employees who have retired on or after 3August, 1981 and the existing employees, who have drawn the employer's share, under the E.P.F. Act, partly or wholly shall have to refund the same with interest in the event of their opting for the Pension Scheme. The total amount to be refunded by the retired employees/ existing employees would be the amount that would have accrued, had they not withdrawn the employer's share.
7. Excess amount of gratuity, if already paid to ex-employees and which is not admissible under the Pension Scheme, will have to refunded by them before any benefit under the Scheme, is granted to them.
8. A due and drawn statement would be prepared in respect of retired employees

opting for Pension Scheme and the amount to be paid/refunded, would be worked out by the concerned unit, wherefrom the employee had retired from service.

9. If any of the employee of DTC, who does not exercise any option within the prescribed period of 30 days or quit service or dies without exercising an option or whose option is incomplete or conditional or ambiguous, he shall be deemed to have opted the Pension Scheme Benefits.

Application forms for exercising option would be available with the unit officers and all employees including retired employees wishing to exercise option, should do so with the unit of their present working/where from they retired, within a period of 30 days from the date of issue of this office order.

The unit officers, after receiving the option from the ex-employees, will take further necessary action for getting the necessary forms completed, which will be supplied to them by the LIC for pension etc. they will also ensure the recovery of E.P.F. and the Gratuity from the Ex-employees before forwarding their applications as mentioned above. The cases of all officers will be dealt with at Headquarters.

The option received from the existing employees for not opting Pension may be kept in their personal file and entry made in their Service Book.

Sd/-

(L.C. Goyal)

DY. CHIEF GENERAL MANAGER (P).

[Underlining is ours]

4. As the scheme would reflect, the pension scheme was to be operated by the Life Insurance Corporation on behalf of the DTC. It is worth noting that the said pension scheme could not be implemented for manifold reasons with which we are not concerned. After series of deliberations, in the ultimate eventuate, the pension scheme became operational only in 1995. While the issue pertaining to the pension was pending and had not been concretized to a ripened scheme, the DTC introduced the Voluntary Retirement Scheme (for short "the VRS") on 3 March, 1993. The relevant part of the said scheme reads as follows:

Sub: Voluntary Retirement of Employees of Delhi Transport Corporation.

The matter pertaining to the introduction of voluntary Retirement Scheme for the employees has been under the consideration of Delhi Transport Corporation. Salient Features of the proposed voluntary Retirement Scheme are as under:

1. Applicability:

The scheme will be applicable to all regular employees of the corporation i.e. workers and executives who are appointed against regular vacancies in the

corporation.

2. Eligibility:

An employee must have completed ten years of service in this corporation or completed 40 years of age to qualify for consideration under the Scheme. For this purpose, period of deputation/retention of lien in the parent office in lieu of deputation prior to absorption in the regular service of the Corporation will be excluded.

3. Conditions covering voluntary retirement.

(a) Voluntary retirement will be normally allowed only in cases of incumbents of the posts which have been declared surplus or redundant. However, voluntary retirement Scheme could also be allowed in other cases depending on the merits of each case and in the interest of the corporation.

(b) Voluntary retirement cannot be claimed by any employee as a matter of right. The corporation will have the right not to grant Voluntary Retirement for reasons to be recorded in writing. Under no reasons will the relief under this scheme be allowed from a date earlier than the date of passing the orders.

(c) An employee in whose case any disciplinary case is pending will not be considered under this scheme until the disposal of the same.

4. An employee who had taken voluntary retirement will be eligible to the following refunds/payments:

(a) Balance in his PF Account as per rules of provident fund applicable to him.

(b) Encashment of refused leave and accumulated earned leave as per rules of the corporation applicable to him as if he retires under the normal rules of retirement.

(c) Gratuity as per payment of gratuity act and gratuity Rules of the corporation applicable to him.

(d) Three month notice pay as is applicable in the individual case as per the terms of him/her employment.

(e) An Ex-Gratia payment equivalent to 1-1/2 month's basic pay plus DA for such completed year of service limited to one month pay multiplied by the number of whose month of service left before normal date of retirement.

(f) Expenses for travelling for the entitled class for the employee and his/her family comprising his/her spouse and dependent members from the place of his/her posting to the place where he/she intends to settle down in India.

(g) Pensionary benefits as per office order No. 16 dt.27.11.92.

All amounts due to the Corporation will be adjusted against the payments under (d) and (e) above and the employee concerned should clear any outstanding

dues/advances taken before the date of effect of voluntary retirement.

Employees working on the post of Conductor in the Corporation are proposed to be covered under the Voluntary Retirement Scheme in the first instance. Such Conductors who are desirous of seeking voluntary retirement in the proposed Scheme may give their option in the prescribed Performa through proper channel within 15 days to be concerned Unit Officer who will forward the same to the Secretary, DTC Board.

This issue with the approval of competent authority.

5. As the factual matrix would further undrape, the DTC introduced two more VRSs in the years 1994 and 1995. In the VRS 1994, it was expressly postulated as under:

It is also notified for information of all such employees who opt for VRS that they would not be entitled to join Pension Scheme if they are allowed retirement under v. Other salient features of the proposed VRS will remain the same as announced earlier vide this officer circular dated 03.03.1993.

Be it noted, the VRS which was floated in the year 1995 did incorporate a similar stipulation.

6. On a studied scrutiny of the aforesaid schemes, it is clear as noon day that the clauses relating to the pension eligibility were different. The VRS 1993 had stipulated that the pensionary benefits would be payable as per the office order No. 16 dated 27.11.1992. In the VRSs that were floated in 1994 and 1995, there was express stipulation that the employees who opt for voluntary retirement would not be entitled to join the pension scheme.

7. The present intra-Court appeal is concerned with the VRS 1993 and not with the VRSs 1994 and 1995 and, therefore, we shall restrict our advertence to the VRS 1993. As noticed, Clause 4(g) of the VRS 1993 had stipulated that the pensionary benefits as per the Office Order No. 16 dated 27th November, 1992 would apply. There was a stipulation that all amounts due to the Corporation would be adjusted against the payments under Sub-clause (d) & (e) of the Clause 4 and the employee concerned should clear any outstanding dues / advances taken before the date of effect of voluntary retirement. If the said clause is appositely understood in the context of the Office Order dated 27th November, 1992 which we have reproduced hereinbefore, it would convey that the employees who had opted for VRS under the 1993 scheme would be entitled to pension benefits except in cases where an employee had specifically opted under the office order dated 27th November, 1992 to remain outside the pension scheme. However, another aspect which luminously arises to the forefront requiring consideration is that the said scheme became operational only in 1995. The Appellants in the present appeal, as the factual matrix would reveal, were offered retirement with effect from 31st May, 1993. They were not paid any pensionary benefits as the pension scheme had not become operational till 1995

and was in an inchoate stage. The Appellants were paid retiral benefits under the Contributory Provident Fund Scheme. It needs special emphasis to state that the retirement benefits included higher amount of gratuity, payment made ex-gratia and the employer's share of provident fund. Be it noted, even after 1995, the Appellants were not extended the benefit of pension.

8. It has been propounded that as the Appellants had opted for the pension scheme, they are entitled to pension. The said contention has been th pyramided on the bedrock of Clause 9 of the Order dated 27th November, 1992 read with Clause 4(g) of the VRS 1993. It has been canvassed that merely because they had been paid the retiral benefits because the pension scheme had not become operational and could become effective in 1995 only, the same would not make an iota of difference. This is a factor in favour of the Appellants. The said submission is further edified and reinforced on the basis of the decision rendered in Kishan Lal Sehgal and Ors. (supra).

9. To appreciate the controversy in totality, we think it apposite to reproduce what exactly has been held in Kishan Lal Sehgal and Ors. (supra):

4. On 3rd March, 1993 the Appellant notified a voluntary retirement scheme and the Respondents No. 1 to 3 applied for under the said scheme. They were relieved from their duties on 31st May, 1993, 30th....(sic) had already opted for pension scheme, they were entitled to pension on retirement and not covered by the Provident Fund Scheme. However as they were not paid pension, in April, 2005 the Respondents filed the aforesaid writ petitions praying for grant of pension on which the aforesaid order was passed by the learned single judge.

5. The pension scheme was announced on 27th November, 1992, prior to the retirement of the Respondents and they had opted for it. Though the Respondents availed the voluntary retirement scheme in 1993 and received the employee's share of the provident fund in 1996, but later they approached the Appellant for making pension scheme operational in their favour as they had opted for the said scheme and they were ready to return the money received by them along with interest. In the legal notice dated 15th February, 2005 issued by the Respondents to the Chairman-cum-Managing Director of the Appellant it was stated that the Respondents had the apprehension that the Appellant may not have implemented the pension scheme and therefore they had accepted the money.

6. On going through the records we find that the facts of this case are identical with the case DTC v. Vir Bhan decided by this Bench on 24th May, 2007. In the said clause also the employee had availed of the voluntary retirement scheme and was allowed to retire on 31st May, 1993. He had also taken the....(sic). In the said case we have held that though the employee had no opted for the pension scheme within the prescribed period of thirty days, but Clause-9 of the office Order dated 27th November, 1992 was applicable to the employee and the subsequent option exercised by the employee for getting provident fund and

gratuity instead of pension scheme should not have been accepted by the DTC. We upheld the order of the learned Single judge in that case holding that the employee was entitled to pension.

7. We may also refer to the judgment of a Division Bench of this Court in DTC v. Bajinath Bhargava and Ors. - LPA No. 33/1998 decided on 16th March, 200 wherein on the question of entitlement to ex gratia amount, the Court recorded the statement of the counsel for the DTC that DTC had decided to not to contest the said issue as it had already started paying pension to all eligible employees having 20 years of service even when they had not refunded the ex gratia amount taken at the time of the voluntary retirement scheme. The learned Single judge has also referred to the same in the impugned judgment in the present case.

8. In view of the delay by the Respondents No. 1 to 3 in approaching the Court, learned Single judge has directed that pension shall be payable to them w.e.f. 1st April, 2005 only and the Respondents have been directed to also refund the employer's share/contribution to CPF received with interest at the rates as applicable

[Emphasis added]

10. The learned Counsel for the DTC has drawn inspiration from the decision in Madhu Bhushan Anand (supra) and has assiduously urged that the said decision lays down the law correctly and the same is applicable to the facts of the case. It is apt to note that in the case of Madhu Bhushan Anand (supra), the employees who had opted for voluntary retirement under VRS 1993 had written letters that they had opted out of the pension scheme and be retained as members under the Contributory Provident Fund Scheme. The Division Bench, while dealing with the controversy, has held thus:

35. The claim of the Respondents in category 1 and category 2 may be taken up together for the reason whether they exercised a positive option to be brought under the pension scheme or having exercised no option whatsoever and hence as deemed optees being brought under the pension scheme, their status would be the same as entitled to be brought under the pension scheme under the notification dated 27.11.1992. Since all these Respondents applied for being voluntarily retired when the scheme notified on 3.3.1993 was extended from time to time in the year 1993, they certainly would be entitled to pension for the reason Clause 4(g) of the scheme notified on 3.3.1993 clearly stated that such persons would be entitled to pensionary benefits. But, there are certain further facts which need to be noted qua them. The case of the Corporation is that having opted under the pension scheme or deemed to have opted under the pension scheme, the said Respondents specifically opted out from the pension scheme and by the time they retired under the Voluntary Retirement Scheme, the pension scheme had not been formally brought into effect (as noted above it was formally brought into effect for the retirees who retired post 1.11.1995),

they filed applications specifically stating that they intend to opt out of the pension scheme and be retained as members under the Contributory Provident Fund Scheme and thus on accepting their offers to be voluntarily retired the Corporation paid over to them not only their share in the Contributory Provident Fund Account but even the management's share, which they accepted without demur and hence could not rake up the issue after 12 to 15 years i.e. when they filed either writ petitions in this Court which were transferred to the Central Administrative Tribunal or filed Original Applications before the Central Administrative Tribunal.

36. Qua these Respondents, it may be noted that the Respondent of W.P.(C) No. 14027/2009 submitted a letter dated 2.3.1995 specifically stating that he does not want to opt for the pension scheme and desires his dues to be paid as per his CPF Account. The Respondent of W.P.(C) No. 565/2010 likewise submitted a letter on 12.7.1995. The Respondent of W.P.(C) No. 598/2010 likewise submitted a letter in the year 1994 and reaffirmed the said fact in the letter dated 5.11.1998. The Respondent of W.P.(C) No. 754/2010 likewise submitted a letter on 20.4.1995. The Respondent of W.P.(C) No. 1902/2010 likewise submitted a letter on 14.7.1995. The 3 Respondents of W.P.(C) No. 2274/2010 likewise submitted letters on 11.3.1994, 15.3.1994 and 9.6.1995 respectively. The Respondent of W.P.(C) No. 3919/2010 likewise submitted a letter on 22.7.1996. The Respondent of W.P.(C) No. 423/2010 likewise submitted a letter on 5.10.1994. The Respondent of W.P.(C) No. 756/2010 likewise submitted a letter on 15.3.1994 as claimed by the DTC but denied by said Respondent. We note that DTC has produced said letter and additionally has relied upon a list prepared on 12.4.1994 where the name of said Respondent is at serial No. 113 and notes his opting out for pension. The Respondent of W.P.(C) No. 832/2010 likewise submitted a letter on 5.9.1995. The Respondent of W.P.(C) No. 752/2010 likewise submitted a letter on 7.12.1993. The Respondent of W.P.(C) No. 401/2010 also opted out of LPA No. 708/2002 Page 15 of 25 the pension scheme, though the date when he did so is not on record.

11. In the said case, the Division Bench adverted to the cases of the employees who were granted voluntary retirement under 1993 VRS but not paid pension benefits and who were covered by Clause 9 of the Office Order th dated 27th November, 1992 or had opted for the pension scheme despite that they had not been paid pensionary benefits but only paid higher ex-gratia amount and the employer's share of provident fund. The Division Bench expressed the view that they were not entitled to pension by ascribing the following reasons:

30. Pertaining to the remaining 18 writ petitions, we may divide the same into 3 further categories which emerge from the facts noted by us in para 6 and 8 above. The said 18 writ petitions are divided: Category 1-Respondents of W.P.(C) Nos. 14027/2009, 401/2010, 565/2010, 598/2010, 754/2010, 1902/2010, 2274/2010 and 3919/2010 who specifically opted for the pension schemes when they submitted their offer for being voluntarily retired as per the terms and

conditions notified in the VRS Scheme notified on 3.3.1993 which was made applicable by reference to the subsequent schemes notified in the year 1993. Category 2-Respondents of W.P.(C) Nos. 423/2010, 756/2010, 832/2010, 752/2010, 793/2010, 1384/2010, 1386/2010 and 2051/2010 who having not submitted any options have to be treated as deemed optees for the pension scheme when they submitted their offer for being voluntarily retired as per the terms and conditions notified in the VRS Scheme notified on 3.3.1993 which was made applicable by reference to the subsequent schemes notified in the year 1993. Category 3-Respondents of W.P.(C) No. 4906/2010 and the writ Petitioner of W.P.(C) No. 4689/2010 who specifically opted to be retained in the Contributory Provident Fund Scheme.

31. We take category 3 first. Surprisingly, one claimant being the Respondent of W.P.(C) No. 4906/2010 has succeeded before the Tribunal and the other i.e. the Petitioner of W.P.(C) No. 4689/2010 has lost, notwithstanding their cases being identical.

[Emphasis added]

12. In the said case, a contention was propounded to the effect that those who had opted under the VRS 1993 was due to compulsion and coercion as it was uncertain when the pension scheme would come into effect. The Division Bench, repelling the said contention, stated as follows:

43. The compulsion alleged by them is the uncertainty of pension being released. As noted hereinabove the pension scheme notified on 27.11.1992 could not take off because LIC did not fund the scheme as envisaged and later on the Central Government agreed to fund the scheme on 31.10.1995 and indisputably those who retired after 1.11.1995 were paid pension. Thus, the compulsion resulting as the consequence of the uncertainty of pension being released, which may have been uncertain when the said Respondents opted out to receive pension and reverted to receive benefit under CPF, came to an end on 1.11.1995. The silence of these Respondents for periods ranging from 12 to 15 years when they took recourse to legal action is clearly indicative of there being no compulsion. The silence of these Respondents speaks for itself. It is apparent that with the passage of time these Respondents became clever by a dozen and thought why not take the benefit of a few who likewise went to Court and obtained relief, by pulling wool over the eyes of the Court by pleading that their act of subsequently opting out of the pension scheme was meaningless because the contract stood concluded, a submission which was accepted by the Courts without considering the further issue of contract being novated.

44. In our opinion these Respondents have no claim whatsoever to receive pension. They novated the contract by volition when they subsequently opted out of the pension scheme and DTC accepted the same and paid to them even the management's share in the CPF account. Their claims are hit by delay, laches and limitation. They are not entitled to plead that right to receive pension is a

continuous cause of action, for the reason, in law either pension can be received or benefit under the CPF account. If the management forces down the gullet of an employee payment under the CPF Scheme and the employee desires pension he has to approach the Court or the Tribunal within a maximum period of 3 years being the limitation prescribed to file a suit.

45. That apart, if it was the case of the Respondents that they were compelled to opt out of pension scheme on account of the uncertainty in the implementation of the pension scheme, they ought to have sought a declaration that their act of opting out of the pension scheme be declared null and void, being out of compulsion and for said prayer they ought to have made the requisite pleadings entitling them for such a declaration. Needless to state an act out of compulsion is a voidable act and not a void act. The Respondents have admittedly not done so. It is only in the rejoinder filed by them to the reply to their respective OA that a bald plea has been set forth that they acted out of compulsion when they opted out of the pension scheme.

[Emphasis added]

13. It is worth noting the decision rendered in Madhu Bhushan Anand (supra) and other connected matters were assailed in SLP(C) No. 31241/2010 by one of the employees and their Lordships on 3.12.2010 have passed the following order:

No ground is made out for our interference with the impugned judgment. The special leave petitions are dismissed.

14. The question that emanates for consideration is when an employee receives payments including higher ex-gratia amount and the employer's share of provident fund and had applied and opted for a voluntary retirement under VRS 1993, whether he would be entitled to get pension as per the th Office Order dated 27th November, 1992, when he had "opted" for pension specifically or by default. As has been held in the case of Kishan Lal Sehgal and Ors. (supra), the Division Bench had placed reliance on the th decision in DTC v. Vir Bhan decided on 24 May, 2007 in LPA No. 359/2007 wherein it had been held that the employee was entitled to pension. Thus, the decision rendered in Kishan Lal Sehgal and Ors. (supra) is based on Vir Bhan (supra). In the case of Vir Bhan (supra), the Division Bench referred to the Voluntary Retirement Scheme specially Clause 3 and Clause 9 and thereafter proceeded to state as follows:

3. The learned Single Judge held that Clause 9 of the aforesaid pension scheme is applicable to the Respondent. Therefore the Respondent had opted for pension scheme when he retired on 31.5.93. Even the Appellant vide letter dated 15.10.93 had informed the Respondent that he would be paid in terms of the pension scheme. The Respondent then submitted an application on 28.3.1994 for payment of provident fund and gratuity. The request was made after the Respondent had already retired on 31.5.1993. Thus the same should not have been acted upon and was not available as the Respondent was governed by the pension scheme. At a later stage the Respondent again stated that he was not

interested to have provident fund and should be paid benefits under the pension scheme and consequent upon which the aforesaid writ petition was filed in 1994 itself which stood allowed by the learned Single Judge. Learned Single Judge also noticed that the Respondent was paid only the employee share towards CPF in July, 1994 and the employer's share was released during the pendency of the petition.

15. In this regard, reference to the decision in LPA No. 330/2002 decided on 17.4.2002, DTC Retired Employees Association v. DTC, is worth noting:

It is not disputed that the members of the first Petitioner association and second and third Petitioners had exercised their option to withdraw from the pension scheme pursuant to the Circular of the Delhi Transport Corporation dated 10 February, 1994 and the same was accepted by the Respondent. Once the members of the Petitioner association and second and third Petitioners opted for Contributory Fund Scheme, they have no right to switch back to the pension scheme, especially when the Petitioners have availed of the benefits under the Contributory Provident Fund Scheme after opting out of the pension scheme.

[Emphasis supplied]

16. The aforesaid order was assailed before the Apex Court in SLP(C) No. 16135/2002 and their Lordships declined to interfere and dismissed the SLP. In Delhi Transport Corporation Vs. Mool Chand, , it has been held thus:

It appears that there was a voluntary retirement scheme (for short "VRS") in Delhi Transport Corporation, hereinafter referred to as "the Corporation, in 1993 which contained a provision for pension. The Respondent herein did not apply under that VRS scheme. Subsequently, the Corporation framed a new scheme dated 13.12.1995 in which it was specifically stated that those employees who opt for VRS under the new scheme will not get pension. The Respondent, admittedly, applied under this scheme.

2. Since there was a specific provision in VRS scheme dated 13.12.1995, we fail to see how the High Court has held that the Respondent will get pension in addition to VRS benefits. In view of above, we find that the impugned judgment of the High Court is erroneous and it is hereby set aside. The appeal is allowed accordingly. No order as to costs.

18. From the aforesaid pronouncement of law in the field by various Division Benches, it is noticed that the decision rendered in Kishan Lal Sehgal and Ors. (supra) did not take note of the earlier decision rendered in DTC Retired Employees Association (supra). The said decision was rendered prior in point of time. It is well settled principle of law that earlier Division Bench decision is a binding precedent on the later Division Bench. As is evincible, the decisions rendered in Kishan Lal Sehgal and Ors. (supra) and Vir Bhan (supra) have laid emphasis on Clause 9 of the Office Order dated 27th November, 1992. The concept of "deemed to have opted the pension scheme benefits" has been

accepted on the foundation that the same is binding on the DTC. If the language of Clause 9 is appositely understood, it would convey that if an employee does not exercise any option or quits service or dies without exercising an option or whose option is incomplete or conditional or ambiguous, he shall be deemed to have opted the pension scheme benefits. It does not lay down that if an employee deliberately applies for getting the benefit under the Contributory Provident Fund scheme and avails the benefits, then it would come under the realm of opting out of the pension scheme. It is an affirmative act to opt for the Contributory Provident Fund Scheme and to avail other benefits attached to it. The said benefits are higher ex gratia amount and the employer's provident fund contribution. There is subtle distinction between deemed inclusion to be under the pension benefit scheme but it would be an anathema to hold that even if an employee has voluntarily opted out and availed the benefits still he can take a somersault and claim to be brought LPA No. 708/2002 Page 23 of 25 within the pension scheme. As has been in the case of Madhu Bhushan Anand (supra) the same amounts to novation of contract of volition. To hold that who had applied and opted for the voluntary retirement under VRS 1993 and received all payments would still be entitled to pension regard being had to Clause 9 of the Office Order dated 27.11.1992 would result in placing a farfetched interpretation on Clause 9. In the case of DTC Retired Employees Association (supra) the Division Bench has clearly opined that such employees have no right to switch back to the pension scheme after they have opted out of the pension scheme. As we have indicated earlier, the decision in Madhu Bhushan Anand (supra) and DTC Retired Employees Association (supra) have not been interfered with by their Lordships of the Apex Court. In our considered opinion, Clause 9 of the scheme cannot be carried so far as to have an absurd impact on the scheme. Once the said benefits are availed of, the principle of opting out has to be made applicable. The concept of switch on and switch off has to be ostracized. When an employee accepts the benefits out of his own volition without any coercion, he cannot take a somersault and claim to have the benefits taking recourse to Clause 9 that he is deemed to be within the LPA No. 708/2002 Page 24 of 25 pension scheme. Thus analyzed, we are of the considered opinion that the decision in Madhu Bhushan Anand (supra) lays down the law correctly. The law laid down in Kishan Lal Sehgal and Ors. (supra) and Vir Bhan (supra) is not correct and, accordingly, the said decisions and the decisions on the said lines are overruled.

19. The reference is answered accordingly. The matter be placed before the appropriate Division Bench.