

**(2011) 05 DEL CK 0358**

**In the Delhi High Court**

**Case No :** Letters Patent Appeal No. 708 of 2002

R.D. Gupta and Others

APPELLANT

Vs

D.T.C. and Another

RESPONDENT

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**Date of Decision :** 09-05-2011

**Acts Referred:**

**Citation :** (2011) 6 ILR Delhi 277

**Hon'ble Judges :** Dipak Misra, C.J.; Sanjiv Khanna, J

**Bench :** Division Bench

**Advocate :** Shankar Divate, for the Appellant; Avnish Ahlawat and Nitesh Kr. Singh, for the Respondent

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## **Judgement**

Sanjiv Khanna, J.—The present Letters Patent Appeal raises a repugnancy in view of several decisions of this Court in which it appears conflicting views have been expressed. Fortunately for us the blur and indistinctness has been cleared by a detailed judgment dated 10th August, 2010 in W.P.(C) No. 14027/2009 in Delhi Transport Corporation Vs. Madhu Bhushan Anand, wherein several judgments on the subject have been examined and dealt with but there are some aspects on which we find that repugnancy still exists. Before we advert to facts of this particular appeal, background relating to filing of present appeal may be noticed.

2. Delhi Transport Corporation (DTC) employees were governed by Contributory Provident Fund scheme. The employees had filed a writ petition before the Supreme Court seeking direction against DTC for introduction of pension scheme. Pursuant to assurance given by the DTC before the Supreme Court an Office Order No. 16 dated 27th November, 1992 were 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 pension scheme would be transferred to the LIC, for operating.
6. The employees who have retired on or after 3rd August, 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 be 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).

3. The pension scheme was to be operated by the Life Insurance Corporation on behalf of DTC. The pension scheme however, could not be implemented for various reasons with which we are not concerned. Ultimately, the pension scheme became operational only in 1995.

4. While the issue with regard to pension was pending and was somewhat inchoate, DTC introduced Voluntary Retirement Scheme (VRS, for short) on 3rd March, 1993. The relevant covenants of the said scheme read as under:

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 traveling 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) Pensioner benefits as per office order No. 16 date 27.11.92.

All amounts due to the Corporation will be adjusted against the payments under (d) & (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. Thereafter, DTC introduced two more VRSs in the year 1994 and 1995. In the VRS 1994 it was expressly stipulated 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 VRS. Other salient features of the proposed VRS will remain the same as announced earlier vide this officer circular dated 03.03.1993.

6. The VRS 1995 had a similar clause.

7. It is clear that there is a difference between the VRS 1993 and those introduced and implemented in 1994 and 1995. In the VRS floated in the year 1994 and 1995 it was expressly stipulated that the employees who opt for voluntary retirement would not be entitled to join the pension scheme. The Supreme Court in *D.T.C. Retired Employees Association and Others Vs. Delhi Transport and Others etc. etc.*, in view of express stipulation in the VRS 1994 and 1995 has held that the employees opting for the voluntary retirement under the said scheme would not be entitled to benefit of pension scheme. The ratio of said decision is based and edified on the specific stipulation in the two schemes.

8. In the present case we are concerned with VRS 1993 and not VRSs 1994 and 1995. Clause 4(g) of VRS 1993 had stipulated that the pensioner benefit as per the office order No. 16 dated 27th November, 1992 would apply. One of the aspects which arise for consideration is the effect of the said clause. Literally it means that employees who had opted for VRS under 1993 Scheme would be entitled to pension benefits. On the other hand, as noticed above, the pension scheme became operational only in 1995. However, the Appellants herein were offered retirement with effect from 31st May, 1993, but these did not include pension benefit as the pension scheme became operational in 1995. They were paid retirement benefit under the Contributory Provident Fund Scheme. The retirement benefits included higher amount to gratuity, payment made ex-gratia and employer's share of provident fund. Even after 1995 the Appellants were not paid pension.

9. The contention of the Appellants is that they have opted for pension scheme therefore, should be paid pension. This, it is submitted, is in accord with Clause 9 of the order dated 27th November, 1992 and Clause 4(g) of the VRS 1993. Mere fact that the Appellants were paid retirement benefits as the pension scheme was made operational from 1995 makes no difference. In this connection, the Appellants have relied upon decision of Division Bench in LPA No. 1262/2007 dated 5th October, 2007, *Delhi Transport Corporation v. Kishan Lal Sehgal and Ors.*, in which it has been held as under:

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 favor 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 case 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 not 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, 2000 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.

10. The Respondent, on the other hand, has relied upon Madhu Bhushan Anand (supra). In this case it was noticed that some of employees who had opted for

voluntary retirement under VRS 1993 had written letters that they opt out of the pension scheme and be retained as members under Contributory Provident Fund Scheme. Referring to these cases, in *Madhu Bhushan Anand (supra)* has been held as under:

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 opted 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 pensioner 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 the pension scheme, though the date when he did so is not on record.

11. In Madhu Bhushan Anand (supra), the Division Bench also considered cases of employees who were granted voluntary retirement under 1993 VRS but were not paid pension benefits and were covered by Clause 9 of the office order No. 16 dated 27th November, 1992 or had opted for pension scheme. However, these persons have not been paid pensioner benefits but were paid higher ex-gratia and employers share of provident fund. Right to pension in these cases was denied by the Division Bench for 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 opted 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.

12. One of the contentions raised by the employees, who had opted under VRS 1993, was compulsion and coercion as it was uncertain when the pension scheme would come into effect. The said contention was also rejected by the Division Bench in following paragraphs:

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 notated.

44. In our opinion these Respondents have no claim whatsoever to receive pension. They notated 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 an avoidable 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.

13. In *Madhu Bhushan Anand (supra)*, the Division Bench did not examine the effect and ratio of *LPA No. 1262/2007, Kishan Lal Sehgal (supra)*. We feel that there is conflict in the ratio expressed in *Kishan Lal Sehgal (supra)* and *Madhu Bhushan Anand (supra)*. The ratio of the two decisions cannot be reconciled for difference in facts or on any other ground. In these circumstances, we feel that matter should be referred to a larger Bench. The following question is accordingly referred to 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?

14. The matter be placed before the Hon"ble the Chief Justice on the administrative side for directions and constitution of a larger Bench.