

10.12.2024
Court No.13
Item No.3
AP/PA

RVW 173 of 2021
With
I.A. No. CAN 1 of 2022

Ambujaksha Mahanti
Versus
Indian Institute of Management, Calcutta & Ors.

Mr. Anindya Kumar Mitra, Ld. Sr. Adv.
Mr. ShamitSanyal, Adv.
Mr. Dip Jyoti Chakraborty, Adv.

... For the applicant.

Mr. L.K. Gupta, Ld. Sr. Adv.
Mr. D.N. Ray, Adv.
Mr. Bhaskar Mukherjee, Adv.
Ms. Debadrita Dutta, Adv.

... For the Respondent no. 1,2 & 3.

1. The RVW 173 of 2021 has been filed by the 5th appellant/writ petitioner, seeking review of the order dated 14th November 2020, passed by a coordinate bench of this Court in FMA No. 711 of 2017. The matter has been assigned to this bench as His Lordship who passed the judgment has been elevated as Chief Justice of another High Court.

2. The said appeal in which the judgment dated 14th November, 2020 was passed was directed against the judgment and order passed by a Single Bench of this Court, dated 27th June 2016 dismissing the Writ Application.

3. Ld counsel for the respondents has submitted that SLP No. 1561 of 2023 was filed against the said

judgment dated 14th February, 2020 by the other writ petitioners in which the present review applicant was arrayed as a respondent. The said SLP has been converted into a civil appeal by order dated 16th February, 2024 passed by the Hon'ble Supreme Court. Hence Counsel argues that the appeal should not be entertained.

4. It, however, appears that the Supreme Court in its order dated 13th March, 2023, has observed that the case of the review applicant herein, being a respondent in the SLP, differed from that of the appellants therein, since he had not exercised the option to remain under the CPF Scheme of the employer. The case of the other appellants before the Supreme Court was that they had exercised the such option. It further appears that an application filed by the review applicant, for being transposed as an appellant before the Supreme Court was rejected by order dated 16th February, 2024. The review application is thus entertained.

5. Review is sought both on the ground that there is error apparent on the face of the judgment dated 14th February, 2020, as also in view of the new facts and documents discovered by the applicant. The said documents could not be brought to the notice of the said bench.

6. The said documents are as follows:-

a. The minutes of the meeting dated 12th December, 2017, between the Chairman of the Board of Governors

of the respondent IIM for consideration of pension to all the petitioners.

b. A Balance Sheet dated 31st March, 2018.

c. A copy of the response dated 14th January, 2019 of the respondent IIM.

7. The errors apparent on the face of the record in the order dated 14th November, 2020, according to the applicant, are as follows:

i. The Division Bench at the last paragraph in Page 2 of the said order has stated as follows:

“On 24th July, 1987 the Director of the Institute published a notification on the basis of the recommendation of the 4th Pay Commission revising the provisions inter alia regarding pension, death gratuity, family pension and so on. The notification clarified that all the CPF beneficiaries who were in service from 1st January, 1986 should be deemed to have migrated to the pension scheme on that unless they specifically opted out of it and desired to remain under the CPF scheme.”

Pursuant to the aforesaid notification dated 24th July, 1987, the review applicant, who did not exercise any fresh option to remain under CPF, was to have been automatically shifted to the GPF Scheme by legal fiction. The said Bench erred in ignoring the same.

ii. At page 9 of the said judgment which is as hereunder:

“On a combined reading of the above administrative orders, notifications, circulars, the appellants had to expressly opt for either of the two schemes. If they did not, they would be governed by the CPF scheme. From the supplementary affidavit filed by the Institute it is quite clear that all the appellants except

the appellant Nos. 4 & 5 had filed option forms expressly opting out of the GPF-cum-Pension-cum-Gratuity Rules and the revised scale of pay. These were not appended to the writ petition or to their affidavit-in-reply.”

8. While holding that the review applicant and the appellant no. 4, in the said proceeding, had not exercised the option to remain under the CPF scheme post the notification dated 24th July, 1987, the bench committed an error apparent on the face of record, in not holding that the applicant must be deemed to have migrated to the GPF scheme.

9. The facts relevant to the case are that the review applicant along with 4 other faculty members of the IIM, Kolkata were all appointed before 1985 in the IIM. They had all exercised option in the year 1985 to remain under the CPF scheme and continued as such.

10. The IIM, Kolkata issued a notification dated 24th July, 1987 to implement the 4th Pay Commission revision of pay scales pursuant to the Office Memorandum dated 14th April 1987 and 1st May 1987 respectively issued by the Central Government modifying the provisions of Central Civil Services (Pension) Rules, 1972. The writ petitioners and all employees of the IIM were all required to exercise option afresh to remain under the CPF scheme, in default whereof they would be treated as having automatically migrated to GPF-cum-Pension-cum-Gratuity Rules that was introduced for the faculty of the IIM, Kolkata.

11. The relevant portion of the said Notification is set out herein below:

“It has been ordered that the employees (governed by the revised scale of pay) who do not elect specifically within a period of six months from the date of this notification to remain in the CPF scheme will automatically be brought on to the pension scheme after the expiry of the said period.”

12. Admittedly, the review applicant did not exercise any option to remain under the CPF scheme in terms of the said Notification. By reason of the legal fiction in the Notification dated 24th July, 1987 set out hereinabove, he ought to have been automatically treated as having been covered under the GPF-cum-Pension-cum-Gratuity Scheme of the IIM, Kolkata.

13. The legal fiction referred to in Para 7 of the said decision of the Supreme Court in the case of ***Union of India v. S.L. Verma & Ors.*** reported in **(2006) 12 SCC 53** arises from the circular itself, similar to the Notification dated 24th July 1987 set out hereinabove. The language of the circular similar to the one in **S. L Verma (Supra)** provides that those who had not exercised option to remain under the CPF Scheme, would automatically, be deemed to have migrated to the aforesaid GPF-cum-Pension-cum-Gratuity Scheme.

14. The said ***S.L Verma decision Supra*** was cited before and a paragraph was set out by the Coordinate Bench in the order dated 14th November 2020.

15. In the aforesaid **S.L. Verma decision (Supra)** at paragraphs 3, 4 and 7 it was held as follows:

“1.Respondent 14 i.e. the Bureau of Indian Standards, which is an autonomous body, pursuant to and in furtherance of an office memorandum dated 1-5-1987 issued by the Government of India asked its employees to give their option whether to continue under the Provident Fund Scheme or not. The said office memorandum dated 1-5-1987 assumes importance in view of the language used therein to which we intend to immediately advert to. The office memorandum is prefaced with calling for repeated options in the past asking the employees to switch over to the Pension Scheme. It was mentioned that such option had been asked for on 6-6-1985. The Central Government notices that despite the same, some of the employees still continued in the CPF Scheme. It further notices the recommendations of the Fourth Central Pay Commission to the effect that CPF beneficiaries in service on 1-1-1986 would be deemed to have switched over to the Pension Scheme on that date unless they specifically opt out to continue under the CPF Scheme. It is not in dispute that the said recommendations of the Fourth Central Pay Commission had been accepted by the Central Government and the same is applicable to the employees of Respondent 14, Bureau of Indian Standards. Para 3 and para 3.2 of the said office memorandum read as under:

“3. All CPF beneficiaries, who were in service on 1-1-1986 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 CPF Scheme, if they so desire. The option will have to be exercised and conveyed to the Head of the Office concerned by 30-9-1987 in the form enclosed if the employees wish to continue under the CPF Scheme. If no option is received by the Head of the Office by the above date the employees will be deemed to have come over to the Pension Scheme.”

3. Despite the clear intent and purport of the said office memorandum dated 1-5-1987, Respondents 1 to 13 herein continued to be treated as if they had still been continuing under the CPF Scheme.

4. The Central Government as also Respondent 14 Bureau of Indian Standards have proceeded on some legal misconception that it was obligatory on the part of the said employees to give a positive option for the said purpose. For the first time on 2-2-1999, Respondent 14 requested the Union of India for grant of another chance to the respondents to switch over to Pension Scheme stating that they purported to have exercised their option for CPF Scheme on the cut-off date.

7. The Central Government, in our opinion, proceeded on a basic misconception. By reason of the said office memorandum dated 1-5-1987 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 Respondents 1 to 13 in view of the legal fiction created, became the members of the Pension Scheme. Once they became the members of the Pension Scheme, Regulation 16 of the Bureau of Indian Standards (Terms and Conditions of Service of Employees Regulations, 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 14 has correctly arrived at a conclusion that an anomaly would be created and in fact the said purported option on the part of Respondents 1 to 13 was illegal when a request was made by Respondent 14 to the Union of India for grant of approval so that all those employees shall come within the purview of the Pension Scheme. In our opinion, the Ministry of Finance proceeded on a wrong premise that the Pension Scheme was not in existence and it was a new one. Two legal fictions, as noticed hereinbefore, were created, one by reason of the memorandum, and another by reason of the acceptance of the recommendations of the Fourth Central Pay Commission with effect from 1-1-1986. In terms of such legal fictions, it will bear repetition to state, Respondents 1 to 13 would be deemed to have switched over to the Pension Scheme, which a fortiori would mean that they no longer remained in the CPF scheme.”

16. There is a striking resemblance of the facts in the ***S.L. Verma case (supra)*** to the facts of the instant case insofar as the review applicant is concerned. It appears from a plain reading of the aforesaid Notification dated 24th July, 1987, which superseded earlier notifications read with the Office Memorandum dated 1st May, 1987, that the Central Government was seeking to encourage employees directly under it and autonomous bodies under various Ministries, to opt for GPF-cum-Pension-cum-Gratuity Scheme which is more beneficial than the CPF scheme.

17. The Division Bench, in the order dated 14th February, 2020, need not have gone beyond the Circular dated 27th July, 1987 insofar as the review applicant is concerned. In fact the review applicant, had not even

exercised option under the Notification dated 13th November, 1990. By the said Notification, the IIM proposed to implement revised pay scales for its employees, the faculty.

18. Notwithstanding the above, he was allowed the benefit of the revised pay scales. It is wholly irrelevant for the review applicant that he did not formally protest when the Institute's documents, regarding his pay and emoluments, which indicated that he was still under the CPF scheme. It is equally irrelevant that the review applicant obtained loans from his service benefits mentioning the same as a withdrawal from the CPF account. The actions of the IIM are contrary to and militate against the deeming fiction under the Memorandum dated 24th July, 1987.

19. This Court, therefore, clearly finds error apparent on the face of the record in the Judgment dated 14th February, 2020 insofar as the review applicant is concerned. He ought to have been treated as having migrated to the GPF-cum-Pension-cum-Gratuity Scheme for not having exercised any option in terms of the Circular dated 24th July, 1987.

20. Mr. L.K. Gupta, learned Senior Advocate, has vehemently argued before this Court that the stand of the writ petitioner in the application for review can at best be considered an erroneous decision by the Division Bench. There can be no review of an erroneous decision. Reference in this regard is made to the case of

Parsion Devi & Ors. v. Sumitri Devi & Ors. reported in **(1997) 8 SCC 715**. Reliance is also placed on the decision of the Supreme Court in the case of ***Aruna Dev Upadhyaya v. Integrated Sales Services Ltd. & Anr.*** reported in **(2023) 8 SCC 11** particularly paragraphs 28-35 and 45 thereof.

21. This Court clearly finds that the errors in the case do not need any long-drawn process of reasoning. The errors in the order dated 14th November, 2020 are clear and apparent. The error, strikes this Court, by merely looking at the records and findings of the Court. The said decisions, therefore, do not come to the aid of the Respondent.

22. In ***Sanjay Kumar Agarwal v. State Tax Officer*** reported in **(2024) 2 SCC 362**, it was held that a view taken by a Bench, which is manifestly distorted, can also be a ground for review. This Court also notices that there is a glaring omission and patent mistake, and a grave error has crept into the order.

23. The most glaring error in the order dated 14th November, 2020 in the finding of the Division Bench that the “review applicant has not chosen to come under the GPF and hence will not get pension.” In fact, the said observation is contradictory to the Court’s own finding that the review applicant comes under the 4th Pay Commission which mandates pension.

24. The bench appears to have carried the impression that an employee is required to exercise option to come

under GPF under the Memorandum dated 24th July, 1987. While the said bench quoted the paragraph 7 of the **S.L. Verma decision (Supra)** of the said order dated 14th November, 2020 it has erroneously ignored the purport of the same.

25. It is clear from the above and the findings of the Court in **S.L. Verma case (supra)** that the legal fiction, in the Circular dated 24th July, 1987 is a means to automatically cover those like the review applicant who did not exercise option under the Memorandum dated 24th July, 1987, to remain under the CPF scheme, to automatically migrate to the GPF-cum-Pension-cum-Gratuity Scheme.

26. Mr. Gupta argues before this Court that the petitioners had not made out any case under the Memorandum dated 24th July, 1987 in their pleadings either before the Single Bench or before the Division Bench of this Court. Mr. Mitra, learned Counsel for the review applicant has pointed out paragraph 10 of the Writ petition which is set out hereinbelow:

“10. The Board of Governors of the respondent No. 1 in its 95th meeting held on 2nd July, 1987 by a resolution adopted for implementation the order of the Government of India regarding the recommendation of the 4th Pay Commission for pay revision of the employees of respondent no. 1. In view of the decision to implement the pay revision of the employees of the respondent No. 1 as per the 4th Pay Commission on 24th July, 1987 the then respondent No. 3 issued a notification No.OSD/TBS/157 for information of all the employees which included members of faculty of respondent No.1 as to the amendment of Pension Rule- Option to remain in CPF Scheme. The notification was on the basis of the decision of Government of India in their Department of Pension and Pension Welfare OM No.2/1/87-PIC-II dated 14th April, 1987 modifying the provision of

Central Civil Services C.C.S. (Pension) Rules, 1972. The said notification inter alia stated that the employees governed by the revised pay scales who did not elect specifically within the period of 6 months from the date of the notification to remain in the CPF Scheme will automatically be brought to the Pension Scheme after the expiry of the said period and getting pension has become a right and implementation of such constitutional and statutory right can not depend upon the whims and caprice of the respondents. A photocopy of the said notification is annexed and marked as Annexure "P-2".

27. Even in the grounds for appeal, it appears from the Memorandum of appeal that grounds 2 to 3 were specifically urged before the Division Bench.

I. For that the Learned Judge erred in holding that the Appellants, at the material point of time, did not opt for GPF Scheme.

II. For that the Learned Judge erred in holding that Appellants had expressly applied for the CPF Scheme under the resolution taken at the Board level dated July 8, 1985 relevant facts and material evidences which would clearly demonstrates that the Appellants did, indeed, clearly opt for the GPF Scheme post the order dated 13th November, 1990.

28. In the Memorandum of review, ground 1(g) is urged by the applicant in support of the review application which is set out hereinbelow:

"I. (g) FOR THAT by reason of non-consideration of fact that appellant no.5 namely Ambujaksha Mahanti opted for CPF in 1985 but did not submit option form in 1987, there has been an error apparent on the face of the record while pronouncing the judgment dated 14th February, 2020 that by default, he should have been under the GPF-cum-Pension scheme only."

29. The Division bench has committed error apparent on the face of record, in ignoring the same.

30. The argument of the Institute, that the case of the applicant that in terms of the Memorandum dated 24th July, 1987, that the petitioner is automatically covered

under the GPF-cum-Pension-cum-Gratuity Scheme, has not been made in the pleadings, is therefore ex-facie, incorrect and cannot be accepted.

31. The next argument of Mr. Gupta is that it is for the review applicant to demonstrate before the Single and Division Benches that he has not exercised option under the 1987 Circular and hence no such case should be entertained in review. This argument is outrageous and unacceptable since the Division Bench had clearly referred to the Memorandum dated 24th July, 1987 in the portion of the order set out herein above.

32. The final argument of Mr. Gupta is based on paragraph 23 and 26(2) of the decision of the Supreme Court in the case of ***Khoday Distilleries Ltd. & Ors. – Vs- Sri Mahadeswara Sahakara Sakkare Karkhane Ltd.*** reported in ***(2019) 4 SCC 376***. It is submitted that since the SLP filed by the other writ petitioners being SLP No. 1561 of 2023 has been admitted and directed to be listed as a Civil Appeal, by application of the dicta in ***Kunhayamed & Ors. –Vs- State of Kerala & Anr.*** reported in ***(2000) 6 SCC 359***, Clause 7 thereof, the instant review application should not be entertained.

33. This Court has carefully considered the argument, and finds that the Hon'ble Supreme Court has clearly held in its order dated 13th March, 2023 in the aforesaid SLP (supra), that the case of the review applicant herein is clearly different from that of the

appellants in the SLP. In fact, the review applicant's application for transposition as an appellant in the SLP was rejected by the Hon'ble Supreme Court. The review applicant is not an appellant before the Supreme Court.

34. The review application, therefore, clearly comes within the scope of order XXXXVII Rule 1A of the Code of Civil Procedure. In the ***Khoday case (supra)*** the review applicant first went to the Supreme Court by way of SLP which was dismissed in limine. He then came back before the High Court to file an application for review. His review application before the High Court was found maintainable by the Supreme Court and not hit by the Clause 7 of the findings of the ***Kunhayamed case (supra)*** as approved in paragraph 26(1) of the ***Khoday decision (supra)***. The present review application is, therefore, maintainable.

35. For the reasons stated hereinabove, this Court is inclined to allow the review application. The dismissal of the appeal in the order dated 14th February, 2020 only insofar as the review applicant is concerned is reviewed and recalled and it is ordered as follows :-

36. The applicant, as per the Memorandum of Institute dated 24th July, 1987, must be deemed to have come under, migrated to and covered by the GPF-cum-Pension-cum-Gratuity Scheme of the IIM at Kolkata. The applicant shall be treated as such, with effect from 27th July, 1987. Let the records of the IIM, Kolkata be rectified to the extent indicated above.

37. The petitioner shall comply with all Rules, requirements of the aforesaid GPF-cum-Pension-cum-Gratuity Scheme, in the IIM Kolkata.

38. The review applicant shall be liable to refund, within a period of one month from the date of communication to him, the quantum of employer's contribution towards provident fund along with simple interest at the rate of 8 percent per annum.

39. The said sum may alternatively be adjusted by the employer towards any sums due to the employee, for availment of the GPF cum Pension cum Gratuity Scheme as directed hereinbelow.

40. Let Pension Payment Order be issued to the petitioner by the IIM, Kolkata within a period of 45 days from the date of the aforesaid refund/adjustment. Let current pension be commenced within a month thereafter. Let all arrears of pension till date and gratuity, be paid to the petitioner with interest at the rate of 8% per annum, within 45 days of the issuance of the PPO.

41. It is made absolutely clear that the aforesaid order is confined to the review applicant only and not to any of the other writ petitioners, whose Civil Appeal is now pending adjudication before the Hon'ble Supreme Court.

42. The review application, RVW No. 173 of 2021 is allowed and disposed of consequently CAN 1 of 2022 is also disposed of.

43. There will however be no order as to costs.

44. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all formalities.

(Rajasekhar Mantha, J.)

(Ajay Kumar Gupta, J.)