Union Of India & Anr vs M.M. Sarkar on 8 December, 2009

Equivalent citations: 2009 AIR SCW 7621, 2010 (2) SCC 59, 2010 LAB. I. C. 575, AIR 2009 SC (SUPP) 2158, (2010) 124 FACLR 582, (2009) 14 SCALE 425, (2010) 1 SCT 479, (2010) 1 ALL WC 872, (2010) 1 LAB LN 28, (2010) 1 ALLMR 982 (SC), (2010) 2 SERVLJ 175, (2010) 1 MAD LJ 847, (2009) 6 SERVLR 756, (2010) 1 CURLR 19

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Bench: K S Radhakrishnan, R V Raveendran

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.8151 OF 2009
(Arising out of SLP [C] No.15031 of 2006]

Union of India & Ors. ... Appellants

Vs.

M. K. Sarkar ... Respondent

JUDGMENT

R.V.RAVEENDRAN,J.

Leave granted.

2. The respondent joined the Railway service on 10.2.1947. He was a subscriber to Contributory Provident Fund Scheme. Railways introduced the pension scheme vide Railway Board's letter dated 16.11.1957. Under the said scheme, those who entered Railway service on or after 16.11.1957, were automatically governed by the pension scheme. Those employees who were in service as on 1.4.1957 and those who joined between 1.4.1957 and 16.11.1957 were given an option to switch over to pension scheme instead of continuing under the Contributory Provident Fund Scheme. Those who did not opt for the pension scheme were given further opportunities to exercise options to switch over to the pension scheme, whenever the pension scheme was liberalised or made more beneficial, vide Notifications dated 17.9.1960, 26.10.1962, 17.1.1964, 3.3.1966, 13.9.1968, 15.7.1972, and 23.7.1974. The validity period of the Eighth Option under Notification dated 23.7.1974, which was

from 1.1.1973 to 22.1.1975, was extended from time to time upto 31.12.1978. Under the terms of the option, a retired railway employee who opted for the pension scheme had to refund to the government's contributions to the provident fund.

3. The respondent though aware of the introduction of the pension scheme and the options given on eight occasions between the years 1957 to 1974, consciously did not opt for the pension scheme and continued with the Contributory Provident Fund Scheme. Ultimately the respondent while serving as Controller of Stores, took voluntary retirement with effect from 15.10.1976. As on the date of his retirement, the eighth option to shift to pension scheme, was still open for exercise. But the respondent did not opt for the pension scheme, but received the Contributory Provident Fund dues, on his retirement.

4. More than 22 years after his retirement, and after receiving his dues under the Provident Fund Scheme, the respondent made a representation dated 8.10.1998, requesting that he may be extended the benefit of the pension scheme. He stated that he was willing to refund the amount received under the Provident Fund Scheme (by way of adjustment against the arrears of pension that would become payable to him on acceptance of his request for switch over to the pension scheme). The said request was not accepted. The respondent therefore approached the Central Administrative Tribunal, in OA No.657 of 1999, seeking a direction to the Railway Administration to permit him to exercise an option to switch over to pension scheme. The Tribunal by order dated 11.2.2004 disposed of the application by directing the appellants to take a decision on the representation of the respondent by a reasoned order, making it clear that it did not examine the claim on merits. In compliance with the said direction of the Tribunal, the chairman, Railway Board, considered the representation and passed a reasoned order dated 15.5.2004, rejecting the belated request of the respondent for switching over to the pension scheme as being untenable. He also distinguished the cases of other employees who were allegedly extended the benefit of exercising the option for belated switch overs, cited and relied upon by the respondent. The relevant portion of the order is extracted below:

> "Thus, the cases referred to in the preceding para are not relevant to the case of Shri Sarkar who had eight occasions to come over to the Pension Scheme during his service period. By the time, VIII Pension option was thrown open, vide Board's letter dated 23.7.1974 as extended from time to time upto 31.12.1978, Shri Sarkar was in service till 15.10.1976. He resumed as COS/NF Railway on 11.6.1976. Board's instructions dated 30.6.1976 extending the last date for exercising of option available under Board's letter dated 23.7.1974 to come over to the pension scheme upto 31.12.1976 was circulated by NF Railway vide their letter dated 17.7.1976. The said letter was circulated as per standard mailing list including HODs. Shri Sarkar, being the HOD himself at the relevant time, cannot deny having knowledge of the aforesaid Railway Board's instructions.
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> 5. The respondent challenged the order dated 15.5.2004 by filing a second application before the Tribunal. The following averments in the application made by the respondent are relevant:

"... those employees appointed earlier (to 1.4.1957), however continued to be on PF system, but were periodically given the opportunity to opt for pension, on inspection of merits of the scheme as and when new pension scheme was offered. ..... The applicant retired in 1976 and that in the meantime periodically for certain range of time, the employees were asked to submit options..... A considerable number of employees including the applicant did not submit option as the then scheme for pension introduced for the said limited period was not considered beneficial, since upto VII amended option, the scheme would hardly give any benefit to the said employees including the applicant. Later on, however, came the VIII option, through which a break through order vide railway Board's letter No. PC II (75) PB/3 dated 23.7.1974 was issued on the acceptance of the recommendation of the 3rd Pay Commission. The validity of the order although initially for six months was extended from time to time till 31.12.1978. It was, inter alia, laid down in the said order that in the case of those Railway Servants who are eligible for exercising option under this order but who have retired and settled up under the SRPF (contributory) Rules, the option for pension will be valid if they refund the entire government contribution. The Railway administration was accordingly to take urgent steps to bring the contents of the said letter to the notice of all concerned employees under their administrative control including those on leave or on deputation etc. It was also laid down that to facilitate circulation of this order, the Board desired that the contents of the order should be published by the Railway in their Gazette in an extra-ordinary issue as well suitable press releases also be issued.

The applicant states that he was on deputation from June 1972 to 8th January, 1975. Moreover on July 28, 1974 the applicant suffered an acute heart attack almost coinciding with the date of the issue of this order. Thereafter he was hospitalised for post Cardiac convalescence and accordingly was on leave for a long period. He was not even intimated about the content of the order by the respondents through any communication during his deputation..... .....The applicant also states that after retirement in October, 1976 the applicant was cut off from railway and was in darkness about their Pension policy. In 1998 the applicant came to know that some officers of administrative grades were given pensionary benefit with or without intervention of court since they had not been informed about option for pension."

The Tribunal by order dated 25.7.2005 allowed the application of the respondent and directed the appellants to permit the respondent to opt for pension scheme and also inform the respondent the amount that was required to be refunded in case he exercised the option. The Tribunal extracted the reasons assigned by the Chairman of the Railway Board in his order dated 15.5.2004 rejecting the request of respondent. Significantly, the Tribunal did not disagree with the said finding, nor refer to the enormous delay in making the claim. The Tribunal allowed the application, as the Railways had remained unrepresented and had not contested the claim, even though in the entire application there was no averment denying knowledge of the availability of the VIII Option dated 23.7.1974.

6. The appellants challenged the order of the Tribunal in WP (CT) No.467/2005. The High Court dismissed the writ petition by order dated 25.1.2006. The said order of the High Court is challenged in this appeal by special leave. The question for consideration is whether the respondent was entitled to exercise an option to switch over pension scheme, beyond the stipulated last date, that too twenty two years after retirement and receipt of the retirement dues under the Contributory Provident Fund Scheme.

7. When a scheme extending the benefit of option for switchover, stipulates that the benefit will be available only to those who exercise the option within a specified time, the option should obviously be exercised within such time. The option scheme made it clear that no option could be exercised after the last date. In this case, the respondent chose not to exercise the option and continued to remain under the Contributory Provident Fund Scheme, and more important, received the entire PF amount on his retirement. The fact that the respondent was the head of his department and all communications relating to the offer of Eighth Option and the several communications extending the validity period for exercising the option for pension scheme, were sent to the heads of the departments for being circulated to all eligible employees/retired employees, is not in dispute. Therefore, the respondent who himself was the head of his department could not feign ignorance of the Eighth Option or the extensions of the validity period of the Eighth Option. In fact, as noticed above, in his application before the Tribunal the respondent refers to all the options. He is careful to say that he was not `intimated' about the contents of the last order relating to extension of the option, but does not say that he was unaware of the order extending the benefit of option. The respondent consciously chose not to exercise the option as he admittedly thought that receiving a substantial amount in a lump sum under the provident fund scheme (which enabled creation of a corpus for investment) was more advantageous than receiving small amounts as monthly pension under the pension scheme. In those days (between 1957 when the pension scheme was introduced and 1976 when the respondent retired) the benefits under the provident fund scheme and pension scheme were more or less equal; and there was a general impression among employees that having regard to average life expectancy and avenues for investment of the lump sum PF amount, it was prudent to receive a large PF amount on retirement rather than receive a small pension for a few years (particularly as there was a ceiling on the pension and as dearness allowance was not included in the pay for computing the pension).

8. From 1980 onwards, gradually the pension scheme became more and more attractive as compared to the Contributory Provident Scheme, on account of various factors, like dearness allowance being included in the pay for computing pension, ceiling on pension being removed and liberalisation of family pension etc. But the respondent was well aware that not having opted for pension scheme and having received the PF amount on retirement, he was not entitled to seek switch over to pension scheme. But in 1996, when the respondent learnt that some others who had retired in and around 1973 to 1976 had been permitted to exercise the option in 1993-94 on the ground that they had not been notified about the option, he decided to take a chance and gave a representation seeking an option to switch over to pension scheme. 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.

9. The order of the Tribunal allowing the first application of respondent without examining the merits, and directing appellants to consider his representation has given rise to unnecessary litigation and avoidable complications. The ill-effects of such directions have been considered by this Court in C. Jacob vs. Director of Geology and Mining & Anr. - 2009 (10) SCC 115 :

> "The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly they assume that a mere direction to consider and dispose of the representation does not involve any `decision' on rights and obligations of parties. Little do they realize the consequences of such a direction to `consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to `consider'. If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The Tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored."

When a belated representation in regard to a `stale' or `dead' issue/dispute is considered and decided, in compliance with a direction by the Court/Tribunal to do so, the date of such decision can not be considered as furnishing a fresh cause of action for reviving the `dead' issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches. A Court or Tribunal, before directing `consideration' of a claim or representation should examine whether the claim or representation is with reference to a `live' issue or whether it is with reference to a `dead' or `stale' issue. If it is with reference to a `dead' or `state' issue or dispute, the court/Tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court or Tribunal deciding to direct 'consideration' without itself examining of the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the court does not

expressly say so, that would be the legal position and effect.

10. Even on merits, the application has to fail. In Krishena Kumar vs. Union of India - 1990 (4) SCC 207, 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.

11. The respondent relied on the decision of a two-Judge Bench of this Court in Union of India vs. D.R.R. Sastri - 1997 (1) SCC 514 in support of his claim. The said decision is clearly distinguishable on facts. In that case, the respondent, a railway employee, had gone on deputation to Heavy Engineering Corporation, and later resigned from railway service with effect from 26.6.1973 and was absorbed in the service of the said Corporation. When the Liberalised Pension Scheme was introduced by the Railway Board by letter dated 23.7.1974, an opportunity was given to all persons governed by the Provident Fund Scheme who were in service of Railways as on 1.1.1973 to opt for the pension scheme. The Railway Board directed that the availability of such option should be brought to the notice of all retired railway servants who were in service as on 1.1.1973, The respondent therein who had left the Railway service on 26.6.1973 was not informed of the availability of the option. He could not therefore exercise the option. In fact, he retired from service of the Heavy Engineering Corporation without any pension as that Corporation had also no pension scheme. The respondent therein approached the Central Administrative Tribunal in 1993 alleging that he came to know about the said option only in 1993 and that his representation dated 12.6.1993 for relief was rejected by the Railway Board on 13.7.1993. The Tribunal held that the respondent should be given the opportunity to exercise his option to shift to pension scheme, in terms of the Railway Board's letter dated 23.7.1974, as he was prevented from exercising his option by the failure of Railways to inform him about the option. The Tribunal also took note of the fact that another railway employee was allowed to exercise the option long after the date for exercising the option had expired, but the respondent was not given a similar benefit. The said decision of the Tribunal was affirmed by this Court. The decision in D.R.R. Sastri is of no assistance as it does not lay down any proposition that the last date prescribed for exercising option is not relevant or that option could be exercised at any time, even if a last date had been stipulated for exercise of the option. That case was decided on its peculiar facts as the employee (who was on deputation and who resigned from the service of railways on 26.6.1973 when on deputation) was not made aware of the option to which he was entitled, even though there was a specific instruction that all employees who had retired after 1.1.1973 should be informed about the option. The facts of this case are completely different. Here the employee was in service of the Railways itself before and at the time of retirement. He was working as the Head of the Department and was receiving all communications relating to option for being circulated to all employees in his department. Therefore, the question of respondent not being aware of the option does not arise.

12. The Tribunal in this case has assumed that being `aware' of the scheme was not sufficient notice to a retiree to exercise the option and individual written communication was mandatory. The Tribunal was of the view that as the Railways remained unrepresented and failed to prove by positive evidence, that respondent was informed of the availability of the option, it should be assumed that there was non-compliance with the requirements relating to notice. The High Court has impliedly accepted and affirmed this view. The assumption is not sound. The Tribunal was examining the issue with reference to a case where there was a delay of 22 years. A person, who is aware of the availability of option, cannot contend that he was not served a written notice of the availability of the option after 22 years. In such a case, even if Railway administration was represented, it was not reasonable to expect the department to maintain the records of such intimation/s of individual notice to each employee after 22 years. In fact by the time the matter was considered more than nearly 27 years had elapsed. Further when notice or knowledge of the availability of the option was clearly inferable, the employee cannot after a long time (in this case 22 years) be heard to contend that in the absence of written intimation of the option, he is still entitled to exercise the option. This Court considered the meaning of `notice' in Nilkantha Sidramappa Ningashetti v. Kashinath Somanna Ningashetti etc. [AIR 1962 SC 666]. This Court held :

> "We see no ground to construe the expression `date of service of notice' in col. 3 of Art. 158 of the Limitation Act to mean only a notice in writing served in a formal manner. When the Legislature used the word `notice' it must be presumed to have borne in mind that it means not only a formal intimation but also an informal one. Similarly, it must be deemed to have in mind the fact that service of a notice would include constructive or informal notice. If its intention were to exclude the latter sense of the words `notice' and `service' it would have said so explicitly."

13. Learned counsel for the respondent lastly submitted that one K.V. Kasturi who had retired in 1973, was granted the benefit of exercising the option by an order dated 19.9.1994, and therefore, principles of equality and equal opportunity required that the Railways should give him the option. The Chairman of Railway Board, while rejecting the respondents' representation by order dated 15.5.2004 has clarified that K.V. Kasturi's case was similar to that of D.R.R. Shastri as he had also not been informed of the availability of option. There is another angle to the issue. If someone has been wrongly extended a benefit, that cannot be cited as a precedent for claiming similar benefit by others. This court in a series of decisions has held that guarantee of equality before law under Article 14 is a positive concept and cannot be enforced in a negative manner; and that if any illegality or irregularity is committed in favour of any individual or group of individuals, others cannot invoke the jurisdiction on courts for perpetuating the same irregularity or illegality in their favour also, on the reasoning that they have been denied the benefits which have been illegaly extended to others. See : Chandigarh Administration vs. Jagdish Singh - 1995 (1) SCC 745; Gursharan Singh & Ors. vs. New Delhi Municipal Committee & Ors. - 1996 (2) SCC 459; Faridabad C.T. Scan Centre vs. Director General, Health Services - 1997 (7) SCC 752; State of Haryana vs. Ram Kumar Mann - 1997 (3) SCC 321, State of Bihar & Ors. vs. Kameshwar Prasad Singh & Anr. - 2000 (9) SCC 94 and Union of India vs. International Trading Company

- 2003 (5) SCC 437. A claim on the basis of guarantee of equality, by reference to someone similarly placed, is permissible only when the person similarly placed has been lawfully granted a relief and the person claiming relief is also lawfully entitled for the same. On the other hand, where a benefit was illegally or irregularly extended to someone else, a person who is not extended a similar illegal benefit cannot approach a court for extension of a similar illegal benefit. If such a request is accepted, it would amount to perpetuating the irregularity. When a person is refused a benefit to which he is not entitled, he cannot approach the court and claim that benefit on the ground that someone else has been illegally extended such benefit. If he wants, he can challenge the benefit illegally granted to others. The fact that someone who may be not entitled to the relief has been given relief illegally is not a ground to grant relief to a person who is not entitled to the relief.

14. The appeal is therefore allowed and the orders of the Tribunal and the High Court are set aside and the original application of the respondent before the tribunal is dismissed.

.....J.
(R V Raveendran)

New Delhi;
December 8, 2009.

.....J.
(K S Radhakrishnan)