

R. Devanesan and R. Vasanthan Vs The Regional Provident Fund Commissioner Employee's Provident Fund Organization and The Management The Sri Ganapathy Mills Company Ltd.

Court: Madras High Court (Madurai Bench)

Date of Decision: Jan. 3, 2011

Acts Referred: Employees Provident Funds and Miscellaneous Provisions Act, 1952 " Section 7A

Hon'ble Judges: M. Venugopal, J

Bench: Single Bench

Advocate: V.O.S. Kalaiselvam, for the Appellant; K. Muralishankar, for R.1, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

M. Venugopal, J.

The Petitioners have filed the present writ of mandamus in directing the first Respondent/Regional Provident Fund

Commissioner, Tirunelveli to pay the pension legally to be paid to the Petitioners as per Employees" Provident Funds Pension Scheme, 1995 from

the date of resignation dated 5/3/2003 and 13/10/2003 respectively.

2. According to the learned Counsel for the Petitioners, the Petitioners had joined the services of the second Respondent/Sri Ganapathy Mills

Company Ltd as employees on 19/10/1980. At the time of their joining, they submitted their School Transfer certificates. Their Employees"

Provident Fund Account numbers are TN/273/998 and TN/273/990 respectively. Their Date of Birth as per school Transfer Certificates and also

the Declaration Forms submitted to E.S.I Corporation by the second Respondent are 27/12/1947 and 3/8/1952 respectively. The E.S.I Identity

cards also refer to the date of birth of the Petitioners are 27/12/1947 and 3/8/1952 respectively. In E.S.I Corporation records, the Petitioners date

of birth are entered as 27/12/1947 and 3/8/1952 respectively.

3. The learned Counsel appearing for the Petitioners urge before this Court that the first Respondent/Regional Provident Fund Commissioner,

Tirunelveli has issued circular to all the members of the Employees" Provident Fund organisation to furnish the revised Form 2 self-declaration form

so as to rectify the defects, if any in the proof of age immediately after the introduction of the Employees' Provident Funds Pension Scheme. As

directed by the first Respondent, the forms have been duly filled in and sent through the second Respondent with certificates for the proof of age

by the Petitioners. As such the revised Form No. 2 dated 21/2/1997 and 12/4/1997 nomination and declaration form have been sent to the first

Respondent through the second Respondent together with School Transfer Certificates. Moreover, Form -5 of the Employees' Provident Funds

Scheme, 1952 and the Employees' Pension Scheme, 1995 have been sent to the first Respondent through the second Respondent wherein the

date of birth of the Petitioners have been mentioned as 27/12/1947 and 3/8/1952 respectively.

4. Advancing his arguments, it is the contention of the learned Counsel appearing for the Petitioners that in case of doubt as to proof of age of the

Petitioners, the first Respondent/Regional Provident Fund Commissioner, Tirunelveli should have clarified with the Petitioners or through the

second Respondent/Sri Ganapathy Mills Company Ltd., in regard to the proof of age of the Petitioners. The first Respondent has not sent any

communication to the Petitioners or to the second Respondent with regard to the proof of age of the Petitioners. The Petitioners are of the firm

belief that proper entries would have been made by the first Respondent as regards the Date of Birth of the Petitioners. After completion of

minimum age of 50 years, the Petitioners are qualified to get the benefit of pension Scheme, since they were worked with the second

Respondent/Sri Ganapathy Mills company Ltd., and resigned from their service on 5/3/2003 and 13/10/2003 respectively, after completion of 55

years, 3 months and 8 days & 50 years respectively.

5. The principal contention projected by the learned Counsel for the Petitioners is that the first Respondent/Regional Provident Fund

Commissioner, Tirunelveli has failed to implement the pension Scheme eligible to the Petitioners and the Petitioners had sent letters to the first

Respondent requesting them to pay the pension under the scheme to which they are eligible. However, the first Respondent/Regional Provident

Fund Commissioner, Tirunelveli has sent reply dated 1/12/2003 and 19/3/2004 respectively informing the Petitioners that in the scheme

certificates, the date of birth of the Petitioners have been recorded as 1/4/1957 and 1/4/1958 respectively.

6. The case of the Petitioners is that the first Respondent/Regional Provident Fund Commissioner, Tirunelveli has made wrong entries in the

scheme certificates and therefore, the second Respondent/Sri Ganapathy Mills Company Ltd., through its letters dated 24/9/2003 and 25/6/2004

respectively addressed to the first Respondent/Regional Provident Fund Commissioner, Tirunelveli has stated that the Petitioners date of Birth has

been wrongly mentioned as 1/4/1957 and 1/4/1958 respectively in the scheme certificates. But the actual date of birth of the Petitioners are

27/12/1947 and 3/8/1952 respectively and as such they are entitled to receive the pension.

7. As a matter of fact, for the letters of the second Respondent/Sri Ganapathy Mills Company Ltd dated 24/9/2003, 15/3/2004, 25/6/2004 and

4/8/2004 respectively, the first Respondent/Regional Provident Fund Commissioner, Tirunelveli has furnished replies dated 8/6/2004 and

30/9/2004 respectively in and by which it is mentioned that in regard to the age once given cannot be changed in future on any account and no

further correspondence will be entertained in this regard. But the second Respondent/Sri Ganapathy Mills Company Ltd., submitted the

justification certificates, Form 5 certificates, ESI identity cards, school Transfer Certificates along with the letters dated 16/1/2005 and 16/12/2004

respectively. All the required documents have been sent by the second Respondent/Sri Ganapathy Mills Company Ltd., to the first

Respondent/Regional Provident Fund Commissioner, Tirunelveli, but the first Respondent has failed to respond to the various letters addressed to

him.

8. The learned Counsel appearing for the Petitioners contend that the first Respondent/Regional provident Fund Commissioner has not disputed

the revised Form No. 2 and thereby accepted the said forms and also the School Transfer Certificates and in as much the Transfer Certificates are

genuine, the Petitioners were under the impression that the first Respondent has accepted the same.

9. The learned Counsel appearing for the Petitioners submit that the first Respondent, who is a quasi-judicial authority in disposing number of

petitions as per Section 7 A of the E.P.F Act and also to pass orders under other provisions of the Act has failed to provide an opportunity to the

Petitioners in accordance with the principles of natural justice.

10. The learned Counsel appearing for the Petitioners expatiating the submissions contend that as per the provisions of the Employees' Provident

Fund Scheme, 1995 under paragraph 16 - A of the Employees' Pension Scheme, 1995 none of the pension benefits under the Scheme shall be

denied to any member or beneficiaries for want of compliance of the requirements by the employer.

11. Apart from the above, it is the plea of the Petitioners that on the date of resignation, the Petitioners had rendered 55 years, 3 months and 8

days of service & 51 years 2 months and 10 days of service respectively and hence as per the Employees' Pension Scheme, since they had

crossed 50 years of age as per para 12 (7) of the said Scheme, they are eligible to receive the pension at 3% reduced pension. But this aspect of

the matter has not been appreciated by the first Respondent/Regional Provident Fund Commissioner, Tirunelveli in proper perspective which has

resulted in serious miscarriage of justice and therefore, prays for allowing the writ petitions in the interest of justice.

12. Per contra, it is the submission of the learned Counsel for the first Respondent/Regional Provident Fund Commissioner, Tirunelveli that the

Petitioners being employees of the second Respondent/Sri Ganapathy Mills Company Ltd., which is an establishment covered under the

Employees Provident Fund and Miscellaneous Provisions Act, 1952 and that they were enrolled to the Employees' Provident Fund with effect

from 1/4/1981 and their P.F. A/c Nos are TN/273/998 and TN/273/990 respectively. The age of the Petitioners as on 1/4/1981 was 24 years

and 23 years respectively as per the information provided by their employer through statutory returns at the time of enrolment and therefore, their

date of Birth have been arrived at as 1/4/1957 and 1/4/1958 respectively.

13. The learned Counsel appearing for the first Respondent submitted that the Petitioners had resigned from their service on 5/3/2003 and

13/10/2003 respectively and on receipt of the claim applications, as far as the Petitioner in W.P. (MD) No. 6382 of 2005 is concerned, his

provident fund account has been settled partly during July 2003 and as far as the Petitioner in W.P. (MD) No. 6384 of 2005 is concerned, his

provident fund account has been settled partly during January 2004 and full and final payment was made during August 2004. Moreover, the claim

in Form 10 D submitted by the Petitioners have been processed under a Scheme Certificate bearing Nos. 24481 and 26969 have been issued on

14/10/2003 and 19/3/2004 respectively as per the provisions under paragraph 12 (8) of Employees Pension Scheme, 1995 because of the reason

that they had not attained the minimum age of 50 years as on the date of submission of claim applications to receive reduced pension.

14. Continuing further, the Petitioners in their letters dated 19/11/2003 and 25/6/2004 respectively have requested for the change of their date of

birth from 1/4/1957 to 27/12/1947 & 1/4/1958 to 3/8/1952 respectively. However, they have been informed through their letters dated

1/12/2003 and 13/9/2004 respectively issued by the first Respondent that the age furnished at the time of joining the Mills/establishment cannot be

changed at a later point of time. The second Respondent/Sri Ganapathy Mills Company Ltd., through its letters dated 15/3/2004 had mentioned

that 27/12/1947 is the correct date of birth of the Petitioner in W.P. (MD) No. 6382 of 2005 and it is necessary that the Petitioner in W.P. (MD)

No. 6382 of 2005 has to avail the pension benefits in time. Again, the second Respondent has been informed as per letters dated 8/6/2004 and

2/11/2004 respectively of the first Respondent that the age once given cannot be changed at a subsequent point of time. Legal notices dated

19/4/2005 and 11/4/2005 respectively had been sent by the Petitioners to the first Respondent/Regional provident Fund Commissioner, Tirunelveli

and a suitable reply has been sent by the first Respondent through its letters dated 8/6/2005 and 8/7/2005 respectively informing that the age once

furnished by the employer in the statutory returns at the time of enrolment in E.P.F cannot be changed or altered later.

15. The learned Counsel appearing for the first Respondent contends that on introduction of Employees Pension Scheme, 1995 with effect from

16/11/1995 all the members under the said Scheme were required to execute Form 2 (revised), so as to furnish the complete details of family

members and also nominee for the purpose of the scheme and indeed the Petitioners had submitted nomination and declaration Form 2 dated

21/2/1997 in and by which the Date of Birth of the Petitioners has been mentioned as 27/12/1947 and 3/8/1952 respectively and since nearly, 6

lakhs accounts of Provident Fund subscribers are there, it is practically impossible to inform each and every member.

16. The Head Office of the first Respondent has issued instructions that the date of birth furnished by the existing members of Family Pension

Scheme, 1971 in Form 2 (revised) after instruction of Employees Pension Scheme, 1995 shall not be taken and only the age/date of birth already

furnished in the statutory returns at the time of enrolment is to be taken for computing benefits as per Employees Pension Scheme, 1995. Form 2 is

not the statutory return prescribed for changing or altering the date of birth already furnished.

17. The Petitioners as per the information available on the source document Form 9 will be attaining the age of 50 years only on 1/4/2007 and

1/4/2008 respectively. Return Form No. 5 is a monthly return to be submitted by the Employer, furnishing the details of employees enrolled to the

Employees" Provident Fund Scheme, 1952 during particular month. On receipt of claim in Form 10 -D, as the Petitioners had not attained the

minimum age of 50 years, Scheme Certificate dated 14/10/2003 and 19/3/2004 respectively mentioned in paragraph 12 (8) of Employees Pension

Scheme 1995 have been issued. The Petitioners through their letters dated 19/11/2003 and 25/6/2005 respectively requested to change their date

of birth.

18. Added further, the particulars furnished in the nomination and declaration Form 2 is only for updating the details of family members and

execution of nomination for the purpose of paying nominee pension and it is not practically possible to inform each and every member.

19. The core contention put forward on the side of the first Respondent/Regional Provident Fund Commissioner, Tirunelveli is that the date of

birth/age particulars provided by the existing members of the Family Pension Scheme, 1971 as on 15/11/1975 cannot be changed and any change

in the particulars after the introduction of Employees Provident Fund Scheme, 1995 i.e., after 16/11/1995 cannot be accepted. In short, the date

of birth/age particulars provided at the time of enrolment alone shall be taken into account for the purpose of computing various benefits under the

Scheme. Form No. 2 is a nomination and declaration form which can be submitted by the Provident Fund members whenever they want to file

nomination or they want to change the existing nomination. The particulars furnished in the nomination declaration Form 2 is only for updating the

details of family members etc. The Petitioners will be attaining the age of 50 years on 1/4/2007 and 1/4/2008 respectively only. He can draw

reduced pension as provided under paragraph 12 (7) only from 1/4/2007 and 1/4/2008 respectively. Hence, they have been issued with the

Scheme certificates in accordance with the provisions of paragraph 12 (8) of Employees' Pension Scheme, 1995.

20. The date of birth particulars furnished at the time of enrolment cannot be altered or changed at a later point of time and that too after leaving

the service. In this connection, the learned Counsel appearing for the first Respondent/Regional Provident Fund Commissioner, Tirunelveli relies on

the judgment of the Honourable Supreme Court in Civil Appeal No. 6142 of 2000 {arising out of SLP (Civil) No. 14116 of 1999} that the date

of birth cannot be changed long after joining the service and the said judgment will apply squarely to the present facts and circumstances of the

cases.

21. The second Respondent/Sri Ganapathy Mills Company Limited, in counters filed in W.P.M.P. No. 6926 and 6928 of 2005 in W.P. (MD)

Nos. 6382 and 6384 of 2005 respectively as among other things mentioned that in the School Certificates, the Petitioners date of birth is

mentioned as 27/12/1947 and 3/8/1952 respectively and that the second Respondent/Sri Ganapathy Mills Company Ltd., is on the firm belief that

proper entries would have been made by the first Respondent/Regional Provident Fund Commissioner, Tirunelveli as to the date of birth of the

Petitioners and on the date of resignation from the second Respondent, the Petitioners had completed the age of 50 years and as such the

Petitioners are eligible to receive the pension from the first Respondent as per Employees Pension Scheme, 1995.

22. The contention of the second Respondent/Mills as seen from the counters is that the first Respondent/Regional Provident Fund Commissioner

ought to have considered the genuineness of the case of the Petitioners and in fact has summarily rejected the letters of the second

Respondent/Mills furnishing all the documents and the first Respondent has to act necessarily in terms of the provisions of Employees Pension

Scheme, 1995 under paragraph 16 A of the Employees Pension Scheme, 1995.

23. The learned Counsel appearing for the first Respondent/Regional Provident Fund Commissioner, Tirunelveli relies on the decision of

Honourable Supreme Court in G.M. Bharat Coking Coal Ltd., v. Shib Kumar Dushad and Ors. reported in 2001 LLR 74, wherein it has held that

Employee filing a writ petition claiming that his Date of Birth to be corrected in service records as 9/2/1946 as mentioned in certificate acquired by

him, it is specifically mentioned that in case of dispute over the Date of Birth of an existing Employee, who has neither a Matriculation Certificate

Secondary School Certificate nor a statutory certificate in which the Manager has certified the entry regarding the Date of Birth to be authentic, the

employer is to refer the matter to the Medical Board and therefore, no fault can be found with the action taken by the Appellant to refer the case of

the Respondent to the Medical Board and the Medical Board as laid down in the instructions, is to consider the matter on the evidence available

with the colliery management in accordance with the requirement of medical jurisprudence. Further, in the present case, the Medical Board

determined the age of the Respondent to be 52 years in 1998 and the employer (Appellant) accepted such determination and there was hardly any

scope for the High Court to interfere with the Date of Birth as determined by the employer (Appellant herein) and issue of writ of mandamus that

the date as claimed by the employee should be accepted. Consequently, the judgment of the High Court was set aside.

24. In the revised Form 2 under the caption nomination and declaration form, the Petitioners date of birth is mentioned as 27/12/1947 and

3/8/1952 respectively. Even in paragraph 36 (2) (a) and (b) of the Employees Provident Funds Scheme and in paragraph 20 (2) of the

Employees" Pension Scheme, 1995, pertaining to the return of employees qualifying for membership of Central Provident Fund, Employees

Pension Fund and Employees Deposit link Insurance Fund to be sent to the Commissioner with Form 2, the date of birth of the Petitioners is

mentioned as 27/12/1947 and 3/8/1952 respectively. However, in the letters of the second Respondent/Mills dated 15/3/2004 and 25/6/2004

respectively addressed to the first Respondent/Regional Provident Fund Commissioner, Tirunelveli it is inter alia mentioned that "actually the date

of birth of the Petitioners is mentioned as 27/12/1947 and 3/8/1952 respectively and there are no past records available in their office pertaining to

the Employees Pension Scheme, 1995 and therefore, the second Respondent has requested to amend the date of birth of the Petitioners as

27/12/1947 and 3/8/1952 respectively to avail the pension benefits in time. The first Respondent through its Assistant Accounts Officer dated

8/6/2004 and 13/9/2004 respectively had sent replies to the second Respondent/Mills that as far as their age is concerned, once given by a

member cannot be changed in future on any account and that no further correspondence in this regard shall be entertained. Again, the second

Respondent/Mills has sent a reply to the first Respondent/Regional Provident Fund Commissioner, Tirunelveli dated 16/1/2005 and 16/12/2004

respectively that as per their records, the Petitioners Date of Birth is mentioned as 27/12/1947 and 3/8/1952 and the ESI Identity Card xerox

copies also mentions the Date of Birth of the Petitioners as 27/12/1947 and 3/8/1952 respectively and therefore, requested to disburse the pension

to the Petitioners at the earliest.

25. It is not in dispute that the Petitioners/members had issued a Lawyers' notices dated 19/4/2005 and 11/4/2005 respectively to the first

Respondent/Regional Provident Fund Commissioner, Tirunelveli inter alia stating that the Petitioners after completing 23 years of service is not able

to receive the benefits of Employees Provident Fund benefits and even as per the Scheme Certificates, they have to wait for 10 years to receive

their position and the action of the first Respondent is in violation of Employees Provident Fund Act and principles of natural justice and amount to

deficient service and therefore, has called upon the first Respondent to disburse the pension with effect from 30/10/2003.

26. To the Lawyers' notices dated 19/4/2005 and 11/4/2005 respectively issued by the writ Petitioners, the first Respondent/Regional Provident

Fund Organisation have sent replies dated 8/6/2005 and 8/7/2005 stating that the Date of Birth of the Petitioner in W.P. (MD) No. 6382 of 2005

has been arrived as 1/4/1957 and the same has been furnished in the Scheme Certificate No. 24481 and the particular of the members' age once

furnished by the Employer in the statutory returns at the time of enrolment cannot be altered later and that too after leaving the service and after

settlement of accounts.

27. On a careful consideration of the respective contentions, this Court is of the considered view that the age of the Petitioner in W.P. (MD) No.

6382 of 2005 has been given as 24 years as on 1/4/1981 by his employer namely the second Respondent/Mills in the statutory returns submitted

at the time of enrolment of the Petitioner and therefore, the date of birth of the Petitioner in W.P. (MD) No. 6382 of 2005 has been arrived as

1/4/1957 and the same has been mentioned in the Scheme certificate No. 24481.

28. The request of the Petitioners in the present writ petitions is that they are the sole bread winner of their respective families and they are now

without employment and as per paragraph 16 A of the Employees Pension Scheme, 1995 and as per the provisions of Employees Pension

Scheme, 1995, the pension benefits under the scheme shall not be denied to any member or beneficiary for want of compliance with the

requirement by the employer and since the first Respondent/Regional Provident Fund Commissioner, Tirunelveli has not acted in terms of the

Provident Fund Scheme and the Employees Provident Fund Act, the writ petitions have to be allowed and that the Petitioners have to be paid the

pension to which legally, they are entitled to.

29. The learned Counsel appearing for the first Respondent/Regional Provident Fund Commissioner invites the attention of this Court to paragraph

16 of the Employees Family Pension Scheme, 1971 in and by which, it is stated as follows:

Every employer in relation to a factory or other establishment to which the Act applies or is applied hereafter shall furnish to the Regional

Commissioner, particulars of all the branches and departments, owners, occupiers, Directors, partners, managers or any other pension or persons

who have the ultimate control over the affairs of such factory or establishment and also send intimation of any change in such particulars within

fifteen days of such change, to the Regional Commissioner by Registered Post

and in the said case, the same has not been done by the second Respondent/Mills and therefore, at a later point of time, it is not open to the

Petitioners to seek for alteration of change of date of birth.

30. On a perusal of paragraph 16 A of the Employees Pension Scheme, 1995 speaks of guarantee of Pensionary benefits and as per the Scheme

of pensionary benefits cannot be denied to any member or a beneficiary for non-compliance of requirements by the employer under sub-paragraph

(1) of paragraph 3 provided, however, that the employer shall not be absolved of his liabilities under the Scheme.

31. As per paragraph 14 (1) of Employees' Pension Scheme, 1995 if a member has not rendered the eligible service prescribed in paragraph 10

on the date of exit, or on attaining 58 years of age, whichever is earlier, he shall be entitled to a withdrawal benefit as laid down in Table "D" or

may opt to receive the scheme certificate provided on the date of he has not attained 58 years of age.

32. This Court aptly points out that in the decision in Convent of Jesus and Mary v. Regional Provident Fund Commissioner, Dehradun reported in

2005 LLR 517, it is held that "for redressal of a grievance, an employer can file an appeal before the appellate Tribunal under the Employees"

Provident Fund and Miscellaneous Provisions Act, instead of a writ petition in the High Court.

33. It is to be noted that a review petition filed within the prescribed period against an order of the Provident Fund Commissioner is to be decided

on merits as per the decision in *Sinero Hotels (P) Ltd. v. Regional Provident Fund Commissioner, Panaji, Goa*, reported in 2005 LLR 919.

34. At this stage, this Court worth recalls the decision of the Honourable Supreme Court in *Ugra Chandra Mishra Vs. Union of India (UOI)* and

Others, , wherein it is laid down that "a member of Employees" Provident Fund having not exercised his option for Employee's Family Pension

Scheme, 1971, in terms of its paragraph 4 read with Form I, cannot claim that he had automatically become the member of Employee's Family

Pension Scheme.

35. As far as the case of the Petitioner in W.P. (MD) No. 6382 of 2005 is concerned, on receipt of claim in Form D inasmuch as the Petitioner

has not attained the minimum age of 50 years as on 14/10/2003 and the first Respondent on receipt of claim in Form 10 (D) has issued Scheme

Certificates in accordance with the provision under paragraph 12 (8) of Employees Pension Scheme, 1971, the Petitioner has not completed 50

years of age and any change in particulars after introduction of Employees" Provident Funds Scheme after 16/11/1995 cannot be accepted by the

first Respondent and also the age provided by the Petitioner at the time of his enrolment to the Employees" Provident Fund Scheme, 1952 cannot

be changed.

36. As far as the Petitioner in W.P. (MD) No. 6384 of 2005 is concerned, on receipt of claim in Form 10 (D) and since the Petitioner has not

attained the minimum age of 50 years, the Scheme Certificate dated 19/3/2004 as provided under paragraph 12 (D) of Employees Pension

Scheme, 1995 has been issued and the employer viz., the second Respondent/Mills as per letter dated 7/10/2004 has only furnished a fresh Form

5 instead of furnishing a copy of Form 5 submitted the original and also not furnished the justification for the age already furnished to the office of

the first Respondent and therefore, the request for change of Date of Birth has not been accepted and the same was informed as per letter dated

2/11/2004.

37. Therefore, the aspect of considering the documents furnished by the Petitioners after the introduction of Employees Pension Scheme, 1995

does not arise on any score. Indeed, the Petitioner draw or reduced Pension as per paragraph 12 (7) only from 1/4/2007 and therefore, they have

been issued with the Scheme Certificate in accordance with the provisions of paragraph 12 (8) of Employees Pension Scheme. To put it precisely,

the date of birth furnished by the Petitioners in a fresh Form 2 executed by an existing member under Family Pension Scheme, 1971 as on

15/11/1995 is not to be taken into account as per the existing instructions, as informed by the first Respondent/Regional Provident Fund

Commissioner.

38. In view of the qualitative and quantitative discussions mentioned supra and also this Court taking note of the entire gamut of the facts and

circumstances of the case in an integral manner comes to an inescapable conclusion that the date of birth/age provided by a member/Petitioner at

the time of enrolment of Employees' PF cannot be changed by him at a subsequent point of time and that too the Petitioners after leaving the

service. Viewed in that angle, the writ petitions filed by the Petitioners stand dismissed and resultantly, the writ petitions fail.

39. In the result, the writ petitions stand dismissed, leaving the parties to bear their own costs. Consequently, the connected Miscellaneous

Petitions are also dismissed.