

(2008) 05 CAL CK 0007
In the Calcutta High Court
Case No : FMA No. 537 of 2007

Central Provident Fund Commissioner and Another APPELLANT
Vs
Modern Transportation Consultancy Service Pvt. Ltd. and RESPONDENT
Others

Date of Decision : 07-05-2008

Acts Referred:

Civil Procedure Code Amendment Act, 1973 — Order 41 Rule 22
Constitution of India, 1950 — Article 14, 226, 227
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 14A, 16, 16(3), 17
Income Tax Act, 1961 — Section 35

Citation : (2008) 4 CHN 33 : (2009) 120 FLR 712 : (2009) 3 LLJ 137

Hon'ble Judges : Surinder Singh Nijjar, C.J.; Indira Banerjee, J

Bench : Division Bench

Advocate : Kalyan Bandopadhyay and Mihir Kundu, for the Appellant; Partha Sarathi Sengupta, Arunava Ghosh, Kushal Paul and T.K. Sarkar for Respondent Nos. 1 and 2 and Soumya Majumder, Dinabandhu Das and Dipankar Ghosh, for the Respondent

Final Decision : Allowed

Judgement

Surinder Singh Nijjar, C.J.—This letters patent appeal has been filed by the Central Provident Fund Commissioner impugning the judgment of the learned Single in W.P. No. 2982(W) of 2005 dated 07.04.2006. Since the issue raised herein is intrinsically legal, we may notice only the skeletal facts.

2. The writ petitioner No. 1, a Private Limited Company (hereinafter referred to as the company) is engaged in manning the Captive Railway System of Damodar Valley Corporation (hereinafter referred to as the DVC), the proforma respondent No. 4. Its only connection with DVC is a contract to supply personnel for manning the cabins and gates on the railway road. It receives the remuneration for supplying the aforesaid personnel. It had engaged 28 persons who were retired employees of the Indian Railways on a lumpsum honorarium basis. By letter

dated 18th February, 2002, the company was informed that its establishment came under the purview of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act). In reply, the company by letter dated 5th March, 2002 informed that all its employees were retired Railway staff and working only on contract basis. They were all over 58 years of age and, therefore, would not be covered under the Act. By another letter dated 22nd May, 2002, the company elaborated that the employees being retired employees did not come within the purview of the Act. It was stated that these employees whilst in the service, of the Railways were not covered under the Employees' Provident Fund Scheme, 1952 (hereinafter referred to as the 1952 Scheme) but were covered under the General Provident Fund (GPF) and drew all the superannuation benefits including Provident Fund (PF) and pension. They could not be treated as employees covered under the Act. In other words, it was claimed that these employees were entitled to be treated as "excluded employees", under paragraph 26 of the 1952 Scheme. It was claimed that these employees are in receipt of benefits which are more favourable than the benefits available under the 1952 Scheme. They have, therefore, expressed their unwillingness in writing to become members of the 1952 Scheme. The department was, however, of the opinion that the employees of an establishment are eligible for enrolment as members of the 1952 Scheme irrespective of age. It concluded that the employees of the company were not "excluded employees" as defined under the 1952 Scheme. Therefore, they were required to be covered under the Act irrespective of the fact that they were getting pension under the relevant GPF Rules. Faced with this situation the company by way of abundant caution applied for exemption u/s 17 of the Act and paragraph 27 of the 1952 Scheme on the ground that the employees are retired Railway personnel. No decision was taken on the representation of the company. In the meantime, the competent authority under the Act, commenced proceedings u/s 7A of the Act against the company. After hearing the petitioners, the competent authority by order dated 31st December, 2004, determined the amount payable by the petitioner under various heads. Aggrieved by the aforesaid order, the company challenged the same by way of writ petition.

3. In the order impugned in the writ petition, the Provident Fund Commissioner concluded that even a retired Government employee in private sector concern, is required to subscribe to the Act. It is held that this is evident from the fact that even the retired defence personnel working in private sector concerns are under the ambit of the Act. It has also been observed that the provisions of the EPFA are not repugnant to the GPF Act. Since a person is entitled to draw double or multiple pension, the retirement of the employees from the Railways on superannuation would not fall within the definition of "excluded employee".

4. The learned Single Judge has come to the conclusion that the Act is applicable to the establishment of the petitioner. The learned Single Judge further concluded that on superannuation the retired employees of the Railways would fall within the definition of "excluded employees". It is further observed that in

case the view-point of the authorities is accepted, there would be no "excluded employees" at all. It is further observed that in such circumstances, an employee who has withdrawn full amount of his accumulation in the fund, on re-employment with any establishment not exempted u/s 17 of the Act would be again treated as an employee to be covered under the Act. It is further observed by the learned Single Judge that if the submissions of the respondent authorities are accepted, it may create a situation whereby an employee after being employed in any establishment and working for sometime may voluntarily retire from service and join another establishment and keep on doing the same successively and get benefit of the various provisions of the Act. EPFA is a piece of social benefit legislation and its provisions are intended to protect the employees who are considered to be the weaker Section of the society. But the provision of the said Act, is not intended to create a largesse in favour of the employees at the cost of other employer. In the opinion of the learned Single Judge, retired employees of the Railways cannot be compelled to become members of the fund. Otherwise, the object and purpose of including the expression "excluded employees" in the 1952 Scheme would be rendered nugatory. It is also observed by the learned Single Judge that if the provision of paragraph 2(f)(i)(ii) is applicable in case of an employee earning more than Rs. 6,500/- and is treated as an "excluded employee" because of the scale of pay, there is no reason why paragraph 2(f)(i)(ii) would not apply in case of an employee who has withdrawn the full amount of his accumulation in the fund. The justification for these observations as given by the learned Single Judge seems to be that "the circumstances for withdrawing the full amount of accumulation of the fund have to be in accordance with paragraph 69." According to the learned Single Judge, by not including the retired employees of the Railways within paragraph 2(f), the provision cannot be rendered nugatory. The learned Single Judge has also concluded that in order to decide as to whether the provisions of the Act do not apply in respect of some employees, the provisions of paragraph 2(f) of the 1952 Scheme must be strictly construed. It is finally concluded by the learned Single Judge that various provisions regarding Provident Fund payable to an employee is to give him protection. Various establishments adopt various modes and one is not repugnant to the other. Therefore, having taken the benefit of one scheme, the employees cannot statutorily compel the petitioner to comply with the provisions of the Act. With these observations the learned Single Judge has allowed the writ petition and the order passed by the Provident Fund Authorities has been set aside. The matter has been remanded back to the authorities for re-determination of the amount of the Provident Fund payable by the petitioner after treating the retired employees as "excluded employees". Hence, the present letters patent appeal.

5. We have heard the learned Counsel for the parties.

6. Mr. Kalyan Bandopadhyay, learned Senior Counsel appearing for the appellant, has submitted that the learned Single Judge ought not to have entertained the writ petition as remedy of appeal was available to the writ petitioner. In support

of this submission, the learned Counsel has relied on a Division Bench decision in the case of Assistant Provident Fund Commissioner, Asstt. P.F. Commissioner, Employees" Provident Fund Organisation Vs. Pawan Kumar Agarwala and Others, .

7. On merits Mr. Bandopadhyay Counsel submitted that if any one has received the benefit under the EPFA and the 1952 Scheme he would be an "excluded employee" and would not fall within the class of employees covered by paragraph 26 of the 1952 Scheme. But, if the benefit of Provident Fund has been received under any other Act, in that case on re-employment, he cannot be treated as an "excluded employee". Therefore, even retired Railway employees would be covered under paragraph 26, and must become members of the fund. Learned Counsel further submitted that under the Act, there is no definition of "excluded employee", but the definition is in paragraph 2 (f)(i)(ii)(iv) of the 1952 Scheme." Therefore, the definition of "excluded employee" cannot be read into the Act nor can it restrict the classes of employees covered u/s 2(f) of the Act. Learned Counsel further submitted that the conclusions reached by the learned Single Judge are wholly incorrect. It is submitted that the learned Single Judge has proceeded on a wrong factual basis. Section 2(f) of the Act, which defines the term "employee", does not exclude any employee. Therefore, the definition of "excluded employee" has to be strictly construed. It cannot be extended. The purpose of the Provident Fund legislation is to provide social security to the employees either on superannuation or when their services are terminated. Therefore, the provisions cannot be set at naught by interpretation. Learned Counsel submitted that the definition of employee as given in Section 2(f) of the Act, cannot be whittled down to exclude the retired Railway employees from the ambit of paragraph 26 of the 1952 Scheme.

8. Answering this submission, learned Counsel Mr. Arunava Ghosh, learned Counsel for the respondents/writ petitioners, submitted that remedy of appeal would not be an absolute bar to the entertainment of the writ petition. In support of this submission learned Counsel has relied on:

- 1) L. Hirday Narain Vs. Income Tax Officer, Bareilly, ;
- 2) S.G. Tin Printers Private Ltd. v. R.P.F. Commissioner and Ors. reported in 2000(3) CLT 364(HC);
- 3) L.K. Verma Vs. H.M.T. Ltd. and Another,

9. On merits learned Counsel submitted that the purpose of the PFA and the 1952 Scheme is to provide some social security and not unjust enrichment of the employee at the cost of the subsequent employer, Mr. Partha Sarathi Sengupta, learned Counsel, also, appearing for the respondents/writ petitioners, further added that the plea with regard to the alternative remedy being a mixed question of law and fact, ought to have been raised by the appellant before the learned Single Judge. At the appellate stage it cannot be permitted to be raised.

10. On merits, Mr. Sengupta, submits that if the interpretation given by the department is accepted, it would lead to creating two categories of retired employees depending, only, on the fortuitous circumstance as to whether they were the members of the 1952 Scheme or some other scheme whilst in service of the previous employer. If such an interpretation is accepted, the employees who retired with the lesser benefit under the Act and 1952 Scheme would be excluded, whereas those who retired under the more generous General Provident Fund Scheme would be covered under the 1952 Scheme. This, according to Mr. Sengupta, would be violative of Article 14 of the Constitution of India and would make the Scheme ultra vires. Mr. Sengupta submits that for the purposes of the Act and 1952 Scheme, the definition of "employee" is given in Section 2(f) of the Act. However, the employees covered by the definition of "excluded employee" as given in para 2(f) of the 1952 Scheme would not be covered by paragraph 26. Rationale for excluding the categories of employees mentioned in paragraph 2(f) (i)(ii) is that they are not in need of social security in the form of retirement benefits. Since the purpose of the Act is to provide retirement benefits, a retired employee cannot be compelled to join the 1952 Scheme. The provisions of the Act, according to Mr. Sengupta, have to be construed by considering the text as well as the context of the provision. This according to the learned Counsel is evident from the fact that the definitions Section of the Act itself provides a clue to the manner in which the various words or phrases occurring in the Act are to be interpreted. The use of the term "unless the context otherwise requires" clearly indicates that the Court is required to interpret the term "employee" by keeping in mind the objects and reasons of the Act.

11. The Court is required to interpret the term in such a manner that the object of the Act is sub served. In support of this submission, the learned Counsel has relied upon *Utkal Contractors and Joinery Pvt. Ltd. and Others Vs. State of Orissa and Others*, . Learned Counsel submitted that a perusal of paragraph 69 would lead to the conclusion that retired employees cannot be compelled it to become members of the fund. From age of 55 years, an employee becomes entitled to withdraw the full amount. It would, therefore, be a futile exercise to compel the retired employees to again become members of the fund. Learned Counsel further submitted that there can be no distinction between the exempted funds and funds created by the Central Board of Trustees. According to the learned Counsel the funds created u/s 5A and Section 17(1A) are covered by statutory provisions. Therefore, there is no qualitative difference between the fund administered by the Central Board u/s 5A and the fund administered by the Board of Trustees u/s 17(1A). Thus, there can be no distinction between the retired employees covered under the 1952 Scheme and the GPF Rules of the Indian Railways. Therefore, there is no justifiable reason to treat the retired employees of the Railways differently from the retired employees who had been covered under the 1952 Scheme. Clearly, the action of the respondents is arbitrary and violates Article 14 of the Constitution of India. Learned Counsel further submitted that the action, if any, ought to have been taken against the

principal employer DVC and not against the petitioner contractor. On the basis of the submission it is submitted by the learned Counsel that the judgment of the learned Single Judge has to be affirmed.

12. In reply, the learned Counsel Mr. Kalyan Bandopadhyay submits that in this case we are concerned with the definition of employee for the purposes of Section 6 of the Act. The only definition of employee is contained in Section 2(1) of the Act. Similarly, the definition of "Fund" is clearly set out in Section 2(h) of the Act. Scheme is defined in Section 2(1) to mean a scheme framed u/s 5 of the Act. The definitions of "Employee", "Excluded employee", the "Fund" and "Scheme" appearing in different provisions of the Act being clear and unambiguous have to be given their literal meaning. Therefore, it is not necessary to seek the aid of "Statement of Objects and Reasons" of the Act as submitted by Mr. Sengupta. Learned Senior Counsel submitted that by interpreting, the Courts cannot legislate. In support of this submission the learned Counsel has relied on :

1. Jinia Keotin and Others Vs. Kumar Sitaram Manjhi and Others,
2. A.N. Roy, Commissioner of Police and Anr. v. Suresh Sham Singh reported in 2006 AIR SCW 3522.

13. Mr. Bandopadhyay distinguished the judgments cited by Mr. Sengupta. It is submitted that in the case of Collector of Customs, Calcutta and Ors. v. Biswanath Mukherjee reported in 1974 CLJ 251, this Court considered a judgment which has relied on an earlier judgment of the Supreme Court. In fact, no law was laid down by the Supreme Court. High Court has only drawn a logical conclusion from the facts that were narrated by the Supreme Court. This, according to the learned Counsel, is not permissible. A decision of the Supreme Court is an authority for what it decides and not what can logically be reduced therefrom. Every judgment is a precedent on the facts of a particular case. Therefore, the judgment can only be interpreted by looking into the factual background of a case on the basis of which the judgment of the Supreme Court has been rendered. In support of this proposition, the learned Counsel has relied on:

1. Uttaranchal Road Transport Corporation and Ors. v. Mansaram Nainwal reported in 2006 AIR SCW 3928;
2. Commissioner of Customs (Port), Commnr. of Customs (Port), Chennai Vs. Toyota Kirloskar Motor Pvt. Ltd.,

14. Finally, it is submitted by Mr. Bandopadhyay that the points of law raised by Mr. Sengupta are not pleaded in the writ petition. Therefore, those need not be considered by the Court at this stage.

15. We have considered the submissions made by learned Counsel for the parties. We have also perused the judgement of the learned Single Judge.

16. We may notice here the preliminary objections raised by Mr. Bandopadhyay with regard to the availability of an alternative remedy. We are of the considered opinion that the objections, if any, ought to have been taken at the earlier stage of the proceeding before the learned Single Judge. Mere existence of an alternative remedy, by way of appeal, would not be a complete bar for entertainment of a writ petition by the High Court under Article 226 of the Constitution of India. It is well-settled that even in cases where a remedy of statutory appeal is provided, it is permissible for the High Court to entertain a writ petition in the facts and circumstances of a particular case.

17. In the case of S.G. Tin Printers Private Ltd. (supra) it has been held as follows:

10. ...It is a well-settled principle of law that the Writ Court exercises only judicial restraint in the matter of entertaining writ application, when an alternative remedy is available, but the Court usually does not throw out a writ application on the ground of availability of an alternative remedy when a question arises as regards jurisdiction of the authority to pass an order which is impugned before the Writ Court or there has been a violation of the principles of natural justice and/or fundamental rights of the petitioner....

18. In the case of L. Hirday Narain (supra), the Supreme Court has held as follows:

12. An order u/s 35 of the Income Tax Act is not appealable. It is true that a petition to revise the order would be moved before the Commissioner of Income Tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commission in revision, because at the date on which the petition was moved the period prescribed by Section 33A of the Act had not expired. We are unable to hold that because a revision application could have been moved for, an order correcting the order of the Income Tax Officer u/s 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits.

19. Again in the case of L.K. Verma (supra) the Supreme Court has held as follows :

20. The High Court in exercise of its jurisdiction under Article 226 of the Constitution, in a given case although may not entertain a writ petition inter alia on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. Despite existence of an alternative remedy, a Writ Court may exercise its discretionary jurisdiction of Judicial review inter alia in cases where the Court or the Tribunal lacks inherent jurisdiction or for enforcement of a fundamental right or if there has been a violation of a principle of natural justice or where vires of the act is in question. In the aforementioned circumstances, the alternative remedy has been held not to operate as a bar, See State of Rajasthan Vs. Prakash Chand and Others, , Mrs. Sanjana M. Wig Vs.

Hindustan Petro Corporation Ltd.,

21. In any event, once a writ petition has been entertained and determined on merit of the matter, the Appellate Court, except in rare cases, would not interfere therewith only on the ground of existence of alternative remedy See Smt. Kanak and Another Vs. U.P. Avas Evam Vikas Parishad and Others, . We therefore, do not see any Justification to hold that the High Court wrongly entertained the writ petition filed by the respondent.

20. In view of the above, we are of the considered opinion, that it would be impermissible for the appellant to raise the preliminary objection at this stage with regard to the entertainment of the writ petition by the learned Single Judge. In the case of Paban Kumar Agarwal (supra) the petitioner had moved the High Court only at the stage of show-cause notice having been issued by the Provident Fund authority directing the petitioner to show cause why they should not be prosecuted under Sections 14 and 14A of the Act for non-deposit of the Provident Fund. After hearing the parties, the learned Single Judge had stayed the recovery proceedings on the ground that only an order u/s 7A of the 1952 Act is appealable. It was in these circumstances that the Provident; Fund Commissioner had filed the appeal. It was submitted before the Division Bench that the learned Single Judge committed an error of jurisdiction in not rejecting the writ petition at the threshold as not being maintainable. It was also submitted that remedy of appeal being statutory in nature cannot be brushed aside on the ground that alternative remedy is not an absolute bar. Learned Counsel had relied on judgment of the Supreme Court in the case of Sumedico Corporation and Another Vs. Regional Provident Fund Commr., . It was also submitted that the writ petition would also not be maintainable as the writ petitioners had pleaded that only a show-cause notice had been issued. In support of this submission learned Counsel had relied on the judgments of the Supreme Court in the cases of The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another, and Union of India v. Kunisetty Satyanarayan reported in 2007 AIR SCW 607.

21. Taking into consideration the aforesaid submission, the Division Bench observed as follows:

We have considered the submissions made by the learned Counsel for the parties. We are of the considered opinion that remedy of appeal having been provided before the Appellate Tribunal the petition would not be maintainable.

22. These observations cannot be read in isolation. Indeed these are only the first three lines of a fairly lengthy paragraph which is as under:

...It is a settled position of law that the High Court ought not to entertain a writ petition under Article 226/227 of the Constitution of India when an adequate alternative remedy of appeal is provided in the statute itself. This may not be an absolute bar but it is not to be lightly ignored or bye-passed. Indeed a writ petition may be entertained only to correct an error apparent on the face of the

record or grave errors of jurisdiction.

23. Therefore, only in exceptional circumstances can a writ petition be entertained. The law with regard to the principles governing the exercise of jurisdiction by the High Court under Article 226/227, when the remedy of statutory appeal is available have been restated by the Supreme Court in the case of U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another, . Hon''ble Justice Arijit Pasayat, speaking for the Bench, observed:

16. ...There are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First, is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings themselves are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

17. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of valuable injustice to the writ petitioner to force him to adopt the remedies provided by the statute....

(E.S)

20. In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

21. In U.P. State Bridge Corporation Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect are the decisions in Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke, Rajasthan SRTC v. Krishna Kant, Chandrakant Tukaram Nikam v. Municipal Corporation of Ahmedabad and in Scooters India v. Vijai E.V. Eldred.

24. The same view is reiterated by the Supreme Court in the case of Uttaranchal Forest Development Corpn. and Another Vs. Jabar Singh and Others, . Hon''ble Justice Dr. A.R. Lakshmanan, speaking for the Bench observed:

44. In the instant case, the workmen have not made out any exceptional circumstances to knock the door of the High Court straightaway without availing the effective alternative remedy available under the Industrial Disputes Act. But the dispute relates to enforcement of a right or obligation under the statute and a specific remedy is, therefore, provided under the statute. The High Court should not deviate from the general view and interfere under Article 226 of the Constitution except when a very strong case is made out for making a departure. There are several decisions to the same effect. The respondents have not made out any strong case for making a departure. Accordingly, the conclusion is inevitable that the High Court was not justified in entertaining the writ petition.

25. Keeping in view the aforesaid observations of the Supreme Court, it was observed by the Division Bench:

In the present case we have grave doubt as to whether the proceedings can be said to be without jurisdiction....

26. A perusal of these observations would clearly show that in the facts and circumstances of that case, it was held that the writ petition would not be maintainable. In our opinion, Mr. Bandopadhyay is not correct in laying emphasis on the use of the words "not maintainable" in the aforesaid judgment. The expression clearly has to be read in the context that in the given facts and circumstances of that case, the writ petition ought not to have been entertained by the learned Single Judge. The objection had been taken by the Provident Fund Commissioner at the earliest, when the learned Single Judge was only considering the question of interim relief. Provident Fund Commissioner was in appeal against the interim order granted by the learned Single Judge. The writ petition had yet to be decided on merits. In the present case, we decline to entertain the preliminary objection since the same was not taken at the earliest, before the learned Single Judge.

27. The crucial question for determination in this appeal is whether the retired Railway employees fall within the definition of "excluded employees" as contained under Clause 2(f)(i) of the Scheme. A perusal of the facts narrated above would show that the writ petition has been filed by the employer. The relief claimed is "a writ of mandamus commanding the respondent authorities to treat the petitioner company as a company not covered by the said Act" and "a writ of mandamus commanding the respondent authorities to treat the retired Railway employee engaged in the petitioner's company as excluded employee and not covered under the said Act and said Scheme." The aforesaid two prayers make it clear that aggrieved party in these proceedings is not the retired Railway employees.

28. It is the employer. No employee has come forward and claimed the status of being an excluded employee. We are of the considered opinion that the writ petition has not been filed to protect the rights of the employees. Rather it is claimed that compelling the employer to contribute under the scheme would lead

to "unjust enrichment" of the employee. We, therefore, need not dwell on the submissions made with regard to the discrimination that would be caused to the retired Railway employees, in case, they are compelled to become members of the 1952 Scheme. The points raised by Mr. Sengupta were not argued before the learned Single Judge, nor are there any pleadings to that effect.

29. We are unable to accept the submission of Mr. Sengupta that the additional points argued before the learned Single Judge being purely legal do not require any pleadings. In our opinion, in order to substantiate the plea of hostile discrimination or arbitrary categorization of "excluded employees", necessary materials had to be placed on record before the learned Single Judge.

30. Be that as it may, even on merits, we are of the considered opinion, that the learned Single Judge erred in law in holding that the Railway employees would fall under the definition of "excluded employee". A bare perusal of the provisions of the Act would show that the definition of "Fund" u/s 2(h) is clear. It simply reads as follows:

2(h). "Fund" means the Provident Fund established under a scheme.

Scheme is defined u/s 2(1) which is as under:

2(1) "Scheme" means the Employees' Provident Fund Scheme framed u/s 5.

31. Section 5(1) provides that as soon as the scheme is framed under the Act for establishment of Provident Fund under the Act, a fund has to be established by the Central Board.

32. Section 5(1A) provides that the fund shall vest in, and be administered by, the Central Board constituted u/s 5A. A bare perusal of Section 5A shows that the Central Board is a very broad based authority having representatives of the Central Government, State Governments, Employers of the establishments to which the scheme applies as well as representatives of the employees in the establishments to which the scheme applies. These provisions when read in harmony lead only to the conclusion that the only fund contemplated is the fund under the scheme. Any other fund is clearly excluded from the scheme of the Act. Therefore, the receipt of retiral benefits by the retired Railway employees, would not put them in the category of excluded employee.

33. The exception sought to be argued by Mr. Sengupta is based on the definition of excluded employee as given in Clause 2(f)(1) of the Scheme. This provision is as follows:

(f). "excluded employee" means-

(i) an employee who, having been a member of the Fund, withdrew the full amount of his accumulations in the Fund under [Clause (a) or (c) of] subparagraph (1) or paragraph (69);]

(ii) an employee whose pay at the time he is otherwise entitled to become a

member of the Fund, exceeds [six thousand and five hundred rupees] per month;

Explanation.-"Pay" includes basic wages with dearness allowance, [retaining allowance (if any) and cash value of food concessions] admissible thereon;]

(iv) an apprentice.

Explanation.- An apprentice means a person who, according to the certified standing orders applicable to the factory or establishment, is an apprentice, or who is declared to be an apprentice by the authority specified in this behalf by the appropriate Government;]

34. We are unable to accept the submission of Mr. Sengupta that the receipt of GPF and the pension by the Retired railway employees would be as if full payment has been received under paragraph 69(1). There can be no addition to the term "Fund" as defined u/s 2(h). It is also not possible to accept that since the Railway employees have retired on superannuation and are beyond the age of 55 years, they would be on par with the "excluded employees". There is no maximum age limit prescribed in any of the provisions of the Act or the 1952 Scheme for an employee to become a member of the Fund or the Scheme. It is claimed that the term "Scheme" refers only to the Employees Provident Fund Scheme framed u/s 5. The term "excluded employee" therefore has to be correlated to the employee who was a member of the "Fund" as defined u/s 2(h) of the Act. Such an employee would be an "excluded employee" when the full amount has been withdrawn by him on retirement from service after attaining the age of 55 years i.e., in terms of paragraph 69(1) (a). The provision being crystal clear does not admit of any other interpretation. Paragraph 69(1)(c) deals with an employee who withdraws the full amount standing to his credit immediately after migration from India for permanent settlement abroad and for taking employment abroad.

35. In our opinion, there can be no dissections of these provisions as proposed by Mr. Sengupta. Under paragraph 2(f)(i) a retired employee would be an excluded employee. Under paragraph 2(f)(ii) an employee who is otherwise entitled to become a member of the fund becomes an excluded employee as he is earning beyond the stipulated minimum that is required for an employee to become a member of the scheme. This provision clearly demonstrates the underlying principle of the Provident Fund Act is to provide social security for those employees who otherwise would not be in a position to save any money from their wages. Paragraph 2(f)(iv) again provides that an apprentice shall be an excluded employee till he becomes a full fledged employee.

36. There is a qualitative difference between paragraph 2(f)(i) on the one hand and paragraphs 2(f)(ii) & (iv) on the other. Paragraph 2(f)(i) provides exclusion only to the employees who have already received retirement benefits. On the other hand, under Paragraphs 2(f)(ii) and 2(f)(iv) an employee may be an excluded employee at one point and may not be at a subsequent point. But benefit of these provisions cannot be extended to any employees who are not

erstwhile members of a fund administered by the Central Board, u/s 5A of the Act.

37. The "Fund" created by the exempted establishment u/s 17(1)(a) cannot be equated with the Fund which is established by the Central Board u/s 5(1). Nor can it be added to the definition of Fund u/s 2(h) of the Act. It is for this reason that the appropriate Government can only exempt an establishment from the operation of the scheme u/s 17(1) upon forming an opinion that the employees of such an establishment enjoyed benefits which are not less favourable to the employee than the benefits available under the Act or any scheme made under the Act. In fact, the exemption can only be granted on consultation with the Central Board. This provision is made only to give supervisory control to the appropriate Government over individual employers seeking exemption. But this provision cannot be put on the same pedestal as Section 5(1) of the Act. It is admitted position that employees of the Railways are not members of the 1952 Scheme.

38. Therefore, these retired employees cannot be treated as excluded employees covered under paragraphs 69(1)(a) and 26 of the 1952 Scheme. There is a clear distinction between a fund which is created by the Central Government and is administered by the Central Board u/s 5(1)(a) and a fund created by a private employer, exempted u/s 17(1) and administered by Board of Trustees u/s 17(1A) and (b). There can be no intermingling of the two provisions.

39. In our opinion, the judgment of the Supreme Court in the case of Utkal Contractors and Joinery Pvt. Ltd and Ors. (supra) cited by Mr. Sengupta would not be applicable in the facts and circumstances of this case. We are unable to hold that the provisions defining "employee", "excluded employee" or "fund" are either vague or uncertain. Therefore, it would not be necessary to resort to the objects and reasons of the Act for seeking any further clarification of the aforesaid terms. In fact, if the submission made by the learned Counsel is accepted, additions would have to be made to the language employed by the legislature. It is well-settled proposition of law that in interpreting the provision of law, the Court is not permitted to enlarge the scope of legislation or intention when the language of the statute is plain and unambiguous. In other words whilst construing a particular provision, the Court cannot reconstruct the provision.

40. In the case of A.N. Roy (supra) it is observed as follows:

22. It is now well-settled principle of law that the Court cannot enlarge the scope of legislation or intention when the language of the statute is plain and unambiguous. Narrow and pedantic construction may not always be given effect to. Court should avoid a construction, which would reduce the legislation to futility. It is also well-settled that every statute is to be interpreted without any violence to its language. It is also trite that when an expression is capable of more than one meaning the Court would attempt to resolve the ambiguity in a

manner consistent with purpose of the provision, having regard to the great consequences of the alternative constructions.

41. Similarly, in the case of *Jinia Keotin and Others Vs. Kumar Sitaram Manjhi and Others*, it is observed as follows:

5. ...In the light of such an express mandate of the legislature itself, there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in Sub-section (3) of Section 16 of the Act but also would attempt to Court re-legislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself....

42. We may now consider the objection raised by Kalyan Bandopadhyay that the points now raised and argued by the writ petitioner were not argued before the learned Single Judge and, therefore, the same cannot be considered in appeal in support of the judgment of the learned Single Judge. In reply to the aforesaid Mr. Sengupta has relied on a Division Bench judgment of this Court in the case of *Collector of Customs, Calcutta (supra)*.

43. He submits that on the principles underlying Order 41 Rule 22 of Civil Procedure Code, the appellant would be entitled to support the judgment of the learned Single Judge on all grounds available to the appellant whether they were urged before the learned Single Judge or not, as these are based on interpretation of statute. No new facts have to be pleaded. Considering this submission, the Division Bench has held that "It is well-settled that under Order 41 Rule 22 of the Civil Procedure a respondent who has not preferred any appeal or cross-objection is only entitled to support the decree on any of the grounds decided against him, but he cannot challenge the decree itself without filing an appeal from cross-objection". While so concluding the Division Bench also observed as follows:

36. In the case of the (5) *Management of Northern Railway Co-operative Society Ltd. Vs. Industrial Tribunal, Rajasthan, Jaipur and Another*, an appeal was preferred to the Supreme Court against the decision of the Industrial Tribunal, Rajasthan. The Supreme Court observed that the decision of the Tribunal could be supported on grounds which were not accepted by the Tribunal or on other grounds which might not have been taken notice of by the Tribunal while they were patent on the face of the record. In our view the principle laid down by the Supreme Court applies to this case. Accordingly, we hold that it is open to the respondent to support the decision appealed against on the grounds decided against him as also on the grounds which though not taken notice of by the learned Trial Judge but are patent on the face of the record.

44. Considering the objection raised by Mr. Bandopadhyay, we have examined

the judgment of the Supreme Court. We are, however, unable to accept the submission of Mr. Bandopadhyay that the Supreme Court did not lay down the principle laid down by the Division Bench. The Supreme Court clearly held as observed by the Division Bench that the order of the Tribunal could be supported on grounds which were not accepted by the Tribunal. The Supreme Court in the case of *Powari Tea Estate v. Barkataki (M.K.)* reported in 1965(2) Lab. LJ 102 (SC), had clearly held as follows:

But it appears from the record that the decision reached by the Labour Court can be justified on another ground to which the Labour Court has not referred, but which is patent on the record.

45. These observations were approved by the Supreme Court in the case of *Management of the Northern Railway Co-operative Credit Society Ltd., Management of Northern Railway Co-operative Society Ltd. Vs. Industrial Tribunal, Rajasthan, Jaipur and Another*,

46. Even, otherwise, the principle laid down by the Division Bench is binding on a Co-ordinate Bench unless it is shown to be contrary a larger Bench decision of this Court or to a judgment of the Supreme Court. For the aforesaid reason the other judgments of the Supreme Court cited by Mr. Bandopadhyay namely, (1) *Uttaranchal Road Transport Corporation and Ors. (supra)* and (2) *Commissioner of Customs (Port), Chennai (supra)* would not be applicable in this case.

47. *Uttaranchal Road Transport Corporation (supra)* it has been held as follows:

13. ...It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates - (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent....

48. In the case of *Commissioner of Customs (supra)* the Supreme Court observed as follows:

37 ...The ratio of a decision, as is well-known, must be culled out from the facts involved in a given case. A decision, as is well-known, is an authority for what it decides and not what can logically be deduced therefrom.

49. Applying these principles also, we are of the considered opinion, that the

judgment of the Division Bench in the case of Collector of Customs (supra) cannot be said to be not in accordance with the ratio of law laid down in the case of Management of the Northern Railway (supra).

50. Keeping in view the aforesaid principles, we have considered the submission made by Mr. Sengupta.

51. Mr. Sengupta further argued that the writ petitioner/company is only a contractor. Therefore, the proceedings could not have been initiated against it in view of paragraph 30(3) of the Scheme. This paragraph provides that it shall be the responsibility of the principal employer to pay both the contribution payable directly employed by him and also in respect of the employees employed through a contractor. Therefore, the writ petitioner/respondent being only a contractor could not be made liable under the Act. This submission of the learned Counsel is clearly answered by paragraph 36(B) of the Scheme which provides that every contractor shall, submit to the principal employer a statement showing the recoveries of contributions of employees employed by him. Furthermore, for the purposes of being covered under the Act. Section 2(e) provides that an employer means the owner or occupier of the factory etc.

52. Section 6 further provides that the contribution shall be paid by the employer to the Fund. Therefore, we do not find any merit in the aforesaid submission of the learned Counsel.

53. In view of the above, we find that the judgment of the learned Single Judge is not sustainable in law. We are unable to hold that retired employees of the Railways can be treated as excluded employees. We are also unable to hold that, not including the retired employees in the category of excluded employees would in any manner contravene the provisions of the Act or the scheme. We are unable to accept that bringing the Railway employees within the purview of the Act and the scheme would result in unjust enrichment of the retired employees.

54. We are of the opinion that an employee who retires after serving an exempted employer would not fall within the category of excluded employees on re-employment and would be covered by the Act and the 1952 Scheme. We are also unable to accept that since the employees covered under paragraph 2(f)(i) and (ii) are excluded employees, all employees who had drawn the full amount from any other Provident Fund should also be treated as excluded employees.

55. In view of the above, we allow this appeal and set aside the order passed by the learned Single Judge.

56. Consequently, the writ petition being W.P. No. 2982(W) of 2005 shall be dismissed.

57. Xerox certified copy of this judgment, if applied for, be given to the learned Counsel for the parties on usual undertakings.

Indira Banerjee, J.

I agree.