(2014) 12 DEL CK 0292

In the Delhi High Court

Case No : Writ Petition (Civil) 4309/2013 and CM. No. 10006/2013

Mahanagar Telephone Nigam Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 16-12-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 19(g)
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 14(B), 14A, 17, 17(1)(a)

Citation : (2015) 147 DRJ 406

Hon'ble Judges : Suresh Kait, J

Bench : Single Bench

Advocate : Chandan Kumar, Advocate for the Appellant; Rajiv Ranjan Mishra, Advocate for the Respondent

Judgement

Suresh Kait, J.

W.P. (C) 4309/2013

1. Vide the present petition, the petitioner seeks quashing and setting aside the show-cause notice dated 30.11.2012 issued by the respondent No. 4/Assistant Provident Fund Commissioner (Exemption), orders dated 11.01.2013 and 28.02.2013 passed by the respondent No. 4/Regional Provident Fund Commissioner-I (North) and the show-cause notice dated 07.05.2013 issued by the respondent No. 6./Assistant Provident Fund Commissioner (Compliance-II).

2. Further seeks declaration that Condition No. 25 of Appendix A of Para 27AA of the Employees'' Provident Fund Scheme, 1952, (for short ''the Scheme'') is ultra vires the Act.

3. Mr. Chandan Kumar, learned counsel appearing on behalf of the petitioner submitted that the petitioner made an application dated 24.12.1986 under Section 17(1)(a) of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952, (for short ''the Act'') for seeking exemption which is still

pending, however, vide order dated 19/25.01.1988, respondent No. 3/Additional Provident Fund Commissioner granted relaxation under paragraph 79 of the Scheme. The said relaxation so given did not put restriction as set out in Condition No. 25 of Appendix A to Para 27AA of the Scheme.

4. Thereafter, the petitioner constituted EPF Trust which has a membership of approximately 13000 employees. It has run efficiently since that period and the petitioner has never defaulted on its part to submit its contribution.

5. However, vide order dated 30.11.2012, the respondent No. 5 issued a show-cause notice contending that petitioner was in violation of Condition No. 25 of Appendix A to Para 27AA of the Scheme, as the petitioner had suffered loss for three consecutive Financial Years, i.e., 2009-10, 2010-11 and 2011-12.

6. For convenience, the said show-cause notice dated 30.11.2012 is reproduced as under:-

" WHEREAS M/s. Mahanagar Telephone Nigam Limited is an establishment covered under the provisions of Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred as Act) under P.F. Code No. DLO/8444 and is maintaining its own P.F. Trust by virtue of grant of relaxation under Para 79 of Employees'' Provident Fund Scheme, 1952 (hereinafter referred as Scheme).

And whereas on examining the Annual Report/Balance Sheet of the establishment, it has come to the notice that the establishment has reported losses for three consecutive financial years i.e., 2009-10, 2010-11 & 2011-12, which is contravention of Condition No. 25 of Appendix-A to Para 27AA of the Scheme, the contents of which are reproduced below:-

"A company reporting loss for three consecutive financial years or erosion in their capital base shall have their exemption withdrawn from the first day of the next/ succeeding financial year."

Now the Chairman-cum-Managing Director, being the person responsible for conduct of business of the establishment and also responsible for compliance of the provision of E.P.F. & M.P. Act 1952 and Schemes framed there under and being an employer covered within the definition of employer as defined under Section 2(e) of the Act, is hereby directed to show cause as to why the relaxation granted under Para 79 of the Scheme may not be withdrawn and the establishment may not be directed to comply as an un-exempted establishment, for violation of condition no. 25 of Appendix-A to Para 27AA of the EPF Scheme, 1952.

The reply should reach to the undersigned within 07 days of receipt hereof. If no satisfactory reply be received within stipulated time, it will be presumed that the establishment has nothing to say in this regard and action shall be taken without any further notice."

7. The petitioner replied to the aforesaid show-cause notice, whereby stated that it had suffered accounting losses only as it had to make an upfront payment of Rs. 11,000/- crores for 3G and BWA spectrum fee for the service area of Delhi and Mumbai. The petitioner paid the same from its reserves as well as by raising loans on which it had to pay interest, which did not affect its due compliance of payments of its contribution. However, vide order dated 11.01.2013, respondent No. 4 rejected the representation and withdrawn the said relaxation with effect from 31.01.2013, inter alia, directed for transfer of PF accumulations in respect of all employees to the Regional Provident Fund Commissioner, Delhi, as under:-

"....... AND WHEREAS on examining the Annual Report/Balance Sheet of the establishment, it has been observed that the establishment has reported losses for three consecutive financial years viz. 2009-10, 2010-11 & 2011-12, thereby invoking Condition No. 25 of Appendix-A to Para 27AA of the Scheme, which is reproduced as under:-

"A company reporting loss for three consecutive financial years or erosion in their capital base shall have their exemption withdrawn from the first day of the next/ succeeding financial year."

AND WHEREAS a Show Cause Notice, to this effect, was issued to the establishment on 30.11.2012. The establishment vide its reply dated 24.12.2012 has not contradicted the losses and the justification so provided by the establishment has no bearing on condition no. 25 of Appendix-A and therefore the merits of the case do not warrant the continuation of the relaxation granted to the establishment.

NOW, THEREFORE, I. A.M. Gupta, Regional Provident Fund Commissioner-I, Delhi (North) in exercise of the powers conferred on me under Para 79 of the EPF Scheme, 1952 hereby withdraw the relaxation granted to M/s. Mahanagar Telephone Nigam Limited, with effect from 31.01.2013 with the following directions:-

1. That the employer shall transfer the P.F. accumulations in respect of all the employees/members of the trust to RPFC, Delhi (North) along with Annexure-K reflecting membership details of the members and their P.F. accumulations as on date of transfer of funds to RPFC, Delhi(North) as per the provisions under Para 28 of the Scheme. Copy of EPFO Head Office letter no. Invest. I/Transfer of securities/2011 dated 12.12.2011 regarding transfer or securities in Demat form in favour of CBT, EPF is enclosed herewith for reference.

2. That the establishment shall comply as an un-exemption establishment with effect from 01.02.2013 and accordingly shall file all statutory returns to RPFC, Delhi (North).......... "

8. Learned counsel for the petitioner submitted that two Trade Unions representing petitioners'' employees, namely, MTNL Majdoor Sangh and Mahanagar Telephone Nigam Kamgar Sangh, being respondents Nos. 7 and 8

respectively, wrote letters to respondent No. 3 stating that petitioner had never defaulted in paying its contribution and that they were happy with the way Trust worked. Accordingly, they sought review of the order dated 11.01.2013.

9. On 30.1.2013, the petitioner also requested the respondent No. 3 to review its order dated 11.01.2013. A Trustee (Staff Side) also made request to the respondent No. 1 on 12.03.2013 for retention of MTNL EPF Trust with the petitioner. However, respondent No. 6 issued a show-cause notice dated 07.05.2013 under Sections 14/ 14A of the Act, as to why prosecution should not be initiated against the petitioner post rejection of restoration request by order dated 28.02.2013.

10. Learned counsel further submitted that the order dated 28.02.2013 was never received by the petitioner and it came to know that its request for restoration was rejected only when show cause notice dated 07.05.2013 was served upon it. The petitioner thereafter obtained a copy of order dated 28.02.2013 from the respondent office.

11. Learned counsel submitted that the relaxation order was sought to be withdrawn on another ground rather than what is imposed in the relaxation order. The said Condition No. 25 of Appendix A to Para 27AA of the Scheme does not figure in conditions 1 to 30 of the relaxation order dated 19.01.1988.

12. A reading of relaxation order dated 19.01.1988 does not disclose that either Section 17 or Para 27AA or condition stipulated in Appendix-A have been made applicable to the said order mutatis mutandis.

13. It is further submitted that withdrawal of relaxation with effect from 31.01.2013 rather than from the first day of the next/succeeding financial year is in violation of mandate of Condition No. 25, which has been referred to in order dated 11.01.2013. The provision for withdrawal of exemption cannot be selectively used to withdraw relaxation as Condition No. 25 which applies only to exemption and not relaxation. If it does not apply to relaxation, then provision for withdrawal of exemption altogether cannot be applied to withdraw relaxation.

14. Learned counsel submitted that show cause notice dated 30.11.2012 was issued for withdrawal of "relaxation" and not for withdrawal of "exemption". The respondent cannot travel beyond the provisions of the principal enactment. The nature and object of the scheme shall be in conformity with the principal enactment. Thus, it is ultra vires of the Act. By purported exercise of power under enabling Section 5 of the Act, power to make Scheme has been so exercised as to bring into existence substantive dissimilarities, which is not contemplated by provisions of the Act.

15. On the aforesaid issue, learned counsel for the petitioner submitted that Section 5 of the Act only grants a general power to formulate a Scheme in accordance with the provisions of the Act. Section 17(1)(a) of the Act, under which the petitioner applied for exemption, only requires that with respect to

such establishment, "...... the rates of contribution are not less favourable than those specified in Section 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any Scheme in relation to the employees in any other establishment of similar character........ "

16. To strengthen his arguments, learned counsel for the petitioner has relied upon a case of Global Energy Ltd. and Another Vs. Central Electricity Regulatory Commission, , wherein held as under:-

"17. Regulation 6A has been inserted. The said provision is imperative in character. It is couched in negative language. It provides for disqualifications.

Indisputably, a subordinate legislation should be read in the context of the Act. Thus read, Regulation 6A should be construed in terms of the requirements contained in Section 52 of the Act, namely, technical requirement, capital adequacy, requirement and creditworthiness for being an electricity trader.

It affects the creditworthiness of the applicant. It also affects the credit effectiveness, namely, (1) financial integrity of the applicant; (2) his competence; (3) his reputation and character; and (4) his efficiency and honesty.

It affects a pending proceeding. Because of the said amendment, an interim licence granted in favour of the appellant stood revoked.

This, however, would not mean that an amendment made in a regulation would under no circumstance, affect pending proceeding.

18. It is now a well settled principle of law that the rule making power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act.

We may, in this connection refer to a decision of this Court in Kunj Behari Lal Butail and Others Vs. State of H.P. and Others, , wherein a Three Judge Bench of this Court held as under:

"We are also of the opinion that a delegated power to legislate by making rules "for carrying out the purposes of the Act" is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself."

(See also State of Kerala and Others Vs. Unni and Another, , A.P. Electricity Regulatory Commission Vs. R.V.K. Energy Pvt. Ltd. and Another,

19. The power of the regulation making authority, thus, must be interpreted keeping in view the provisions of the Act. The Act is silent as regards conditions

for grant of licence. It does not lay down any pre-qualification therefore. Provisions for imposition of general conditions of licence or conditions laying down the pre-qualifications therefore and/or the conditions/qualifications for grant or revocation of licence, in absence of such a clear provision may be held to be laying down guidelines by necessary implication providing for conditions/ qualifications for grant of licence also."

17. Mr. Chandan Kumar, learned counsel further submitted that delegation of power for carrying out the purposes of the Act is a general delegation. Such a delegation of power does not authorise to lay down guidelines. Exercise of this power cannot be done in a manner to bring into existence substantive rights. The authority shall exercise the power keeping in view the provisions of the Act. In this case, Section 17(1)(a) of the Act does not lay down any pre-condition other than that the rates of contribution are not less favourable than those specified in Section 6 of the Act. Hence, laying down of condition, as has been stipulated in Condition No. 25 of Appendix A, in absence of any provision in the Act, tantamount to laying down of guidelines.

18. To strengthen his arguments, learned counsel for the petitioner has relied upon a case of Subhash Chand Aggarwal Vs. Union of India (UOI) and Others, , whereby the Double Bench of this Court held as under:-

"33. Rule 6(j)(v) is contrary to Section 25 of the main enactment and is beyond the scope and ambit of the main enactment. Section 25 of the Act protects pre/ post consolidation interest or rights in the land. The principle of equivalence is the underlying principle though the type of holding may undergo a change in the consolidation proceeding i.e. a holder may acquire right in different types of land in village. A new restriction or dilution of rights is not permitted in view of the express stipulation in Section 25. The enactment in Section 25 clearly provides that the rights, after the new land is allotted, shall not undergo any change and will remain the same. Thus the main enactment prohibits any change in rights in the land as a result of the consolidation proceedings. However, under Rule 6 (j)(v), the nature of the right in the industrial plot becomes non transferable and non amalgamable. Thus a new restriction is imposed. But Section 25 prohibits new restrictions in the scheme of consolidation though depending on the type of land opted for allotment, the restrictions/conditions under the general law depending upon the type of holding are protected by Section 25 of the Act. Thus, Rule 6(j)(v) is in direct conflict and contrary to Section 25 of the Act, the main enactment. Rule 6 (j)(v), which prohibits transfer or amalgamation of the allotted industrial land, therefore and as sequitur, cannot be sustained. The aforesaid Rule is clearly in conflict and contrary to Section 25 of the Act.

34. The main enactment does not envisage a complete bar or prohibition on transfer of any type of land in absolute terms. It is not pleaded and no provision in any enactment has been pointed out, under which industrial plots or land used for industrial purpose are not transferable or cannot be amalgamated.

35. The main enactment is not concerned with the transfer of land after the scheme is implemented. During the implementation of scheme for consolidation after the notification is issued, certain restrictions have been put on transfer or partition, but these continue during the term of the scheme and till the scheme for consolidation is implemented. The main enactment does not deal with post consolidation rights. It is clear from the aforesaid provisions that the statutory enactment is to provide for mode and manner of consolidation. The enactment is applicable, when the notification is issued, remains in force till repartition is affected. The Rule has introduced a new/fresh restriction in the post consolidation holding, which is beyond the scope, sphere and concern of the main enactment. We are not concerned with whether any such restriction on transfer could have been framed under the Delhi Land Reforms Act, 1954 (Reforms Act, for short) or the rules framed therein. Presently as noticed below there is no absolute/complete restriction.

36. Rule 6 (j)(v) cannot be sustained as it has no nexus with the object, purpose and scope of the enactment itself. By the very nature, every person affected by the scheme for consolidation or repartition should have a stake and rights in the new holding. The scheme of consolidation is enforced with their consent and will. This ensures democratic functioning at the grass root level."

19. Learned counsel submitted, thus, the impugned Rule was contrary to said Section of the Act and beyond the scope and ambit of main enactment.

20. Learned counsel further submitted that conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

21. Even while executing a delegated authority under Section 5 of the Act, such authority by way of Condition No. 25 of Appendix A to Para 27AA of the Scheme, has effectively amended Section 17(1)(a) of the Act and added a proviso thereto, which was beyond its power. In any way, letters written by two Trade Unions and one Trustee from employee side to the respondents to withdraw the impugned order as they were in receipt of everything which they had been receiving in past, clearly shows that the petitioner is complying even the other requirement of Section 17(1)(a) of the Act which is, "....and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any Scheme in relation to the employees in any other establishment of similar character"

22. Thus, Condition No. 25 of Appendix A negates the effect of the said Section of the Act. A delegated Authority cannot exercise power so delegated to nullify/ negate/make redundant the Act or part thereof.

23. To support his case, learned counsel for the petitioner has relied upon a case decided by the High Court of Karnataka titled as "Shell India Markets Pvt. Ltd.

Vs. Central Provident Fund Commissioner Bhavishya Nidhi Bhawan", on 10.02.2012, wherein held that:-

"5. Having heard the learned Advocates appearing for parties, I am of the view that following points arise for my consideration:

(1) Whether condition No. 25 of Appendix A is ultra vires and violative of Article 14 and Article 19(g) & (6) of Constitution of India?

(2) Whether the withdrawal order passed by second respondent dated 01.06.2011 (Annexure L) is to be sustained or quashed?

(3) What order?

xxxx xxxx xxxx

17. It is to be noticed in the instant case that while granting relaxation order dated 13-14/10/2009 Annexure-G, Commissioner has imposed several conditions namely 1 to 40 and condition No. 39 and 40 would be of relevance for determining rival contentions raised in this regard. They read as under:

39. The relaxation is liable to be cancelled for violation of any of the above conditions.

40. The provisions of section 7A, 7B, 8B, 14, 14(B) of the Employees'' Provident Funds & Miscellaneous Provisions Act, 1952 and the provisions made thereunder would apply mutatis-mutandis during the period of relaxation.

18. It has been made specifically clear in the said order that it is liable to be cancelled for violation of any of the conditions stipulated or imposed therein. In other words it means that violation of conditions 1 to 38 imposed under the said order of relaxation would result in cancellation of such order. However, a reading of the above order in its entirety does not disclose that neither Section 17, or paragraph 27AA or condition stipulated in Appendix-A have been made applicable to the said order mutatis mutandis. The power to impose conditions while granting relaxation order is vast and unfettered which is vested with the Commissioner. If he feels and desires that conditions stipulated in Appendix-A is required to be made applicable even while granting a relaxation order, he would be entitled to impose even those conditions and incorporate the same in his order of relaxation. However, without such stipulation it would be impermissible for him to cancel the relaxation order by stating one of the conditions found in Appendix-A has been violated. It is no doubt true that power to do includes power to undo. However, the withdrawal of relaxation order can be on account of violation of any of the conditions specified in the relaxation order at 1 to 38 as stipulated in the relaxation order itself and not for violation of any other condition or term''s which is not to be found in the relaxation order. Thus, the contention of the learned counsel for petitioner that Commissioner does not have power to withdraw the relaxation order once issued cannot be accepted and it is hereby rejected. In the instant case, the Commissioner having granted the

relaxation order has sought for withdrawal of the same on a ground other than what is imposed in the relaxation order, and as such issuance of show cause notice and consequential cancellation of relaxation order is bad in law to this extent.

19. Though, Sri. Harikrishna Holla has made an effort to persuade this court that under paragraph 27AA of the scheme read with Appendix-A. Commissioner can exercise such power for cancellation or withdrawal of relaxation order same cannot be accepted for the simple reason that paragraph 27AA refers to "exemptions already granted or to be granted hereinafter u/s. 17 of the Act or paragraph 27AA of the scheme". It does not speak anything about relaxation order that would be passed by the Commissioner in exercise of his power under paragraph 79 of the Scheme. The exercise of power under paragraph 27AA is relatable to the power being exercised by the "appropriate Government" while granting such exemption and paragraph 79 refers to exercise of the power by the Commissioner while granting relaxation during the pendency of the application for exemption and as such these two powers exercised by two authorities namely the ''appropriate Government'' as well as ''Commissioner'' are separate, distinct and independent. It is seen from the impugned order as referred to supra that Commissioner has issued the show cause notice to the petitioner establishment and after considering the reply has passed the withdrawal order on the ground of violation of condition No. 25 found in Appendix-A which admittedly did not find a place in the conditions imposed at No. 1 to 38 while granting the relaxation order. As such the order impugned in the writ petition cannot be sustained and same is liable to be quashed and accordingly it is hereby quashed."

24. While concluding his arguments, learned counsel for the petitioner submitted that till date the petitioner has neither contravened nor has made any default in complying with any provision of the Act nor it has violated any condition subject to which exemption was granted. Accordingly, once respondents'' impugned actions are held beyond authority, show cause notice under Sections 14/ 14A of the Act for criminal prosecution also fails to survive.

25. On the other hand, Ms. Aparna Bhat, learned counsel appearing on behalf of the respondents No. 2 to 6 submitted that the petitioner/Establishment is covered under the Act and was maintaining its own Provident Fund Trust by virtue of grant of relaxation under Para 79 of the Scheme. On examination of the Annual Report/Balance Sheet of the petitioner by the respondent No. 4, it was found that the petitioner/Establishment has reported losses for three consecutive financial years, i.e., 2009-10, 2010-11 and 2011-12, which in turn is in contravention of the Condition No. 25 of Appendix A to Para 27AA of the Scheme. Accordingly, a show cause notice dated 30.11.2012 was served upon the petitioner/Establishment with a direction to furnish a reply as per the queries raised by the Department. The petitioner/Establishment vide letter dated 24.12.2012 furnished their reply to the show cause notice in question and admitted that there were losses along with an intimation that the revival plan has

already been forwarded to the Ministry of Finance by the Administrative Ministry (DOT) and the same is under consideration and expected that the Government would likely accede to their request and petitioner will come out of the financial crunch soon. The justification so provided by the petitioner in its reply dated 24.12.2012 had no bearing as far as the status of conditions for exemption were concerned. Consequently, the relaxation that was granted pending grant of exemption had to be withdrawn. Accordingly, an order dated 11.01.2013 was passed by the competent authority, i.e., respondent No. 4 with a direction that the relaxation granted under para 79 of the Act has been withdrawn and further, inter alia, directed the petitioner to transfer the PF accumulations in respect of all employees to the Regional Provident Fund Commissioner.

26. Subsequently, the petitioner made a request to the respondent No. 3 to review its order dated 11.01.2013. The petitioner''s application for restoration was rejected vide order dated 28.02.2013 and thereafter on 07.05.2013, the respondent No. 6 issued a show cause notice under Sections 14/ 14A of the Act as to why prosecution should not be initiated against the petitioner/ Establishment post rejection of restoration request.

27. Ms. Bhat further submitted that the relaxation granted to the petitioner/ Establishment by the respondent No. 3 vide its order dated 19.01.1988 was as per Paragraph 79 of the Scheme subject to the conditions set out therein and the provisions made under the Act would apply and the same has been submitted by the petitioner as well in paragraph 2.2 of the Writ Petition. Further, the revised conditions governing the grant of exemption under Section 17 of the Act stipulated in Appendix A would apply even during the period of relaxation. As the petitioner/Establishment covered under the Act, it is required to comply with the statutory provisions of the Act and also the provisions of the Schemes framed under the Act, namely, EPF Scheme, 1952, EPS Scheme, 1995 and EDLI Scheme, 1976.

28. Learned counsel further submitted that Section 5 of the Act provides for making of the Scheme and the powers granted under the same, the "Appropriate Authority", i.e., Central Government may frame the Scheme for the establishment of provident funds under the Act. Section 7 of the Act provides for the Modification of Scheme by the Central Government vide a notification in the Official Gazette and the same shall apply either prospectively or retrospectively.

29. Section 5 of the Act reads as under:

"The Central Government may, by notification in the Official Gazette, frame a Scheme to be called the Employees'' Provident Funds Scheme for the establishment of provident funds under this Act for employees or for any class of employees and specify the [establishments] or class of [establishments] to which the said Scheme shall apply [and there shall be established, as soon as may be after the framing of the Scheme, a Fund in accordance with the provisions of this Act and the Scheme."

30. Section 6 of the Act further provides that:

"6. Contributions and matters which may be provided for in Schemes.-The contribution which shall be paid by the employer to the Fund shall be ten per cent of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable to each of the employees (whether employed by him directly or by or through a contractor), and the employees'' contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding ten per cent of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words "ten per cent", at both the places where they occur, the words "twelve per cent" shall be substituted:

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words "ten per cent.", at both the places where they occur, the words "twelve per cent" shall be substituted:

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee.

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupees, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee.

Explanation 1.-For the purposes of this section, dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

Explanation 2.-For the purposes of this section, "retaining allowance" means an allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services."

31. Learned counsel submitted that the Schemes framed pursuant to the powers under Section 5 of the Act are not Rules. Hence, the same cannot be treated as subordinate legislation. The Act also provides for grant of exemption from the operation of the Schemes framed under the Act.

32. Ms. Bhat submitted that exemption from the operation of the Act to an Establishment as a whole is granted either under Section 17(1)(a) or Section

17(1)(b) of the Act.

33. Section 17(1)(a) of the Act is relevant for adjudication in the instant case, therefore, the same is reproduced as under:-

"17. Power to exempt.-

(1) The appropriate Government may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt, whether prospectively or retrospectively, from the operation of all or any of the provisions of any Scheme-

(a) any establishment to which this Act applies if, in the opinion of the appropriate Government, the rules of its provident fund with respect to the rates of contribution are not less favourable than those specified in section 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any Scheme in relation to the employees in any other establishment of a similar character"

34. Learned counsel submitted that the Authority to grant this exemption is the ''Appropriate Government'', as defined in Section 2(a) of the Act (Central/State Government, as the case may be) and notified in the Gazette. By an amendment made to the Scheme, paragraph 27AA was introduced, by which it is stated that all exemptions already granted or to be granted hereafter under Section 17 of the Act or under paragraph 27AA of the Scheme, shall be subject to terms and conditions as given in the Appendix A with effect from 06.01.2001.

35. The relevant extract, i.e., Condition No. 25 of Appendix A is as follows:

"25. A company reporting Joss for three consecutive financial years or erosion in their capital base shall have their exemption withdrawn from the first day of the next/succeeding financial year."

36. Therefore, before granting exemption to an establishment, the application of the establishment as well as the rules of the fund are required to be scrutinized for considering the grant of exemption. As it may take some time to process the application, the Regional Provident Fund Commissioner/Central Provident Fund Commissioner, as the case may be, may issue a relaxation order to the establishment under paragraph 79 of the Scheme. The respondent No. 3, on being satisfied that the petitioner/Establishment at that time was eligible to be granted exemption by the Appropriate Authority, issued a relaxation order in favour of the petitioner.

37. Learned counsel further submitted that the Commissioner is empowered to pass a relaxation order in respect of which an application for exemption under Section 17 of the Act has been received and subsequent to such relaxation having been given, it was found that the petitioner/Establishment had reported losses for three consecutive financial years, i.e., 2009-10, 2010-11 and 2011-12,

which in turn is in contravention of the aforesaid condition. Thus, the respondent was justified in cancelling the relaxation order.

38. Learned counsel for the respondents No. 2 to 6 submitted that the present case is quite different from Shell India Markets Pvt. Ltd. (supra), wherein the High Court of Karnataka had quashed the order withdrawing the relaxation on the ground that Condition No. 25 of Appendix A was admittedly not a condition imposed in the relaxation order while granting the relaxation and held:

"[8].... In the instant case, the Commissioner having granted the relaxation order has sought for withdrawal of the same on a ground other than what is imposed in the relaxation order, and as such issuance of show cause notice and consequential cancellation of relaxation order is bad in law to this extent."

39. Learned counsel submitted that there is a substantial difference between the Shell India Markets Pvt. Ltd. (supra) and the present matter. In this regard, learned counsel for the respondents has relied upon the order dated 19.01.1988 vide which the relaxation was granted to the petitioner, wherein in paragraph 4, it has been clearly stated as follows:

"4. Any amendment to the said Scheme which is more beneficial to the employees than the existing rules of the establishment shall be made applicable to them automatically. No amendment of the rules of the provident fund of the said establishment shall be made without the previous approval of the Regional Provident Fund Commissioner and where an amendment is likely to affect adversely the interest of the employees if the said establishment, the Regional Provident Fund Commissioner shall, before giving the approval, give reasonable opportunity to the employees to explain their point of view."

Further, paragraph 27 of the aforesaid order states as follows:

"27......... The "appropriate Government" may lay down any further conditions for continued exemption of the establishment."

40. Learned counsel submitted that the conditions for grant of exemption as provided in Appendix A to paragraph 27AA of the Scheme could not have been laid down in verbatim in the relaxation order issued to the petitioner as the same were included in the Scheme vide an amendment which came in effect on 06.01.2001. Hence, on perusal of aforementioned paras 4 and 27 of the relaxation order dated 19.01.1988, the conditions as provided in Appendix A would be applicable constructively.

41. Furthermore, it has been stated in para 31 of the said order that the above relaxation is liable for withdrawal for breach of any of the aforesaid conditions or for other sufficient cause.

42. The term "other sufficient cause" essentially covers the future contingencies as well. In the present case, the petitioner/Establishment has become ineligible for the grant of exemption as per the revised conditions for grant of exemption,

i.e., Condition No. 25 of Appendix A to Para 27AA of the Scheme. Therefore, in view of the above, it is crystal clear that Condition No. 25 of Appendix A to Para 27AA of the Scheme would apply automatically as per the order of relaxation passed by the Commissioner in exercise of his power under paragraph 79 of the Scheme.

43. Learned counsel submitted that the respondents are duty bound to act in accordance with the provisions of the Act and the various Schemes framed thereunder. They have thoroughly followed the letter of law as the application of paragraph 79 for grant of relaxation is in essence an appendage to Section 17 of the Act and conditions set out in Condition No. 25 of Appendix A to Para 27AA of the Scheme derives its applicability from Section 17 of the Act.

44. Learned counsel submitted that Section 17 of the Act and Condition No. 25 of Appendix A to Para 27AA of the Scheme are relating to grant of exemption and not that of relaxation. It is submitted that in this context, the purpose of granting relaxation to an establishment has to be looked at. Before granting exemption to an establishment, the application of the establishment as well as the rules of the fund are required to be scrutinized for considering the grant of exemption. As it may take some time to process the application, the Regional Provident Fund Commissioner/Central Provident Fund Commissioner, as the case may be, may issue a relaxation order to the establishment. Hence, it is that interim period between the application for exemption made by an Establishment and the grant of exemption by the Provident Fund Commissioner that the relaxation order is issued so as to remove the hardships faced by the Establishment during that time.

45. Learned counsel submitted that in the instant case, the relaxation was so withdrawn by the respondent No. 4 because the petitioner had violated the Condition No. 25 of Appendix A to Para 27AA of the Scheme and in the absence of a valid justification from the petitioner/Establishment, it was satisfied that the pending application for exemption of the petitioner would not be allowed by the appropriate Government. Thereby, the whole purpose for allowing the petitioner the continued enjoyment of the relaxation was defeated. Hence, the conditions set out in Appendix A, wherein paragraph 27 AA was inserted through an amendment vide G.S.R. No. 18 dated 22.12.2000 (to be effective from 06.01.2001) will apply.

46. Learned counsel further submitted that the enabling provision, i.e., Section 5 of the Act provides for making of the Scheme and vide the powers granted under the same, the "Central Government" may frame a Scheme for the establishment of provident funds under the Act.

47. Ms. Bhat submitted that the contentions of the petitioner/Establishment in this regard that Section 5 of the Act does not provide for such wide powers so as to bring into existence the said provision which imposes terms and conditions for the grant of exemption does not hold good.

48. Learned counsel submitted that so far as the submission of the petitioner counsel that substantive changes cannot be made to the principal Act vide an enabling provision for rule making. The Rules cannot be made supplant the provision of the enabling Act but as supplement is concerned, the provision for granting relaxation is only under the Scheme, and if the petitioner''s argument is accepted then there can be no relaxation as relaxation is also granted under the same Scheme. There is no provision for grant of relaxation in the Act. The argument of the rule making power does not apply and is totally out of context as the action of the respondents was not under the rules but under the Scheme.

49. In support of the arguments case, learned counsel for the respondents has relied upon a case of State of Tamil Nadu and Another Vs. P. Krishnamurthy and Others, , wherein the Apex Court held as under:

"15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a subordinate legislation can be challenged under any of the following grounds:

(a) Lack of legislative competence to make the subordinate legislation.

(b) Violation of fundamental rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the statute? under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules)

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or nonconformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity. "

50. Learned counsel submitted that the provision under challenge herein is not hit by any of the grounds discussed above. Even if it is contended that the provision under challenge does not conform to the statute under which it is made or exceeds the limits of authority conferred by the enabling Act as provided in Ground (f) above, the nature, object and Scheme of the enabling Act has to be considered before declaring the provision invalid.

51. Learned counsel further submitted that in the instant case, the Employees Provident Funds and Miscellaneous Provisions Act, 1952, being a social welfare legislation was enacted with the main objective of making some provisions for the future of industrial workers after their retirement and for their dependents in case of death. Hence, an amendment to the Scheme which is more beneficial to the employees shall be definitely welcomed and intra vires the Principal Act when the same is not inconsistent or in violation of any of the existing provisions of the Act.

52. To strength her case, learned counsel for the respondents has relied upon the case of Pratap Chandra Mehta Vs. State Bar Council of M.P. and Others, , wherein while discussing about the conferment of extensive meaning, it has been opined by the Supreme Court that the Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act while ensuring that such rules framed are within the field circumscribed by the parent Act. It is also clear that it may not always be absolutely necessary to spell out guidelines for delegated legislation when discretion is vested in such delegated bodies. In such cases, the language of the rule framed as well as the purpose sought to be achieved would be the relevant factors to be considered by the Court.

53. Learned counsel submitted that the case of Global Energy Ltd. & Anr. (supra), relied upon by the petitioner/Establishment is not of much consequence in the present case.

54. Further submitted that Rule 5 of the Appellate Tribunal for Foreign Exchange (Recruitment, Salary and Allowances and Other Conditions of Service of Chairperson and Members) Rules, 2000 and clauses (b) and (f) of Regulation 6A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading License and other related matters) (Amendment), Regulation 2006 were declared ultra vires the Constitution as well as the main Act in the abovementioned cases on the ground that the powers exercised as provided in the enabling provision were beyond the scope of the principal Act. These are rules unlike the Schemes in the present case.

55. Also relied upon the case of Shell India Markets Pvt. Ltd. (supra), wherein while upholding the validity of Condition No. 25 of Appendix A to Para 27AA of the Scheme, the High Court of Karnataka observed as follows:

"[15]... It is seen under sub Section (2) of Section 17 of the Act, the appropriate Government is empowered to exempt any person or class of persons employed in any establishment to which the Scheme applies from the operation of all or any of the provisions of the Scheme, in the event of such person or class of persons is entitled to benefits in the nature of provident fund, gratuity or old age pension and such benefits provided under the EPF Act or the Scheme. In the instant case, the exemption sought for by the first petitioner establishment has not yet been granted. The grant of such exemption by the appropriate Government would be subject to such conditions as may be specified in the exemption order, exempting such establishment from the operation of all or any of the provisions of the EPF Scheme and in any event it would be subject to the terms and conditions as specified in Appendix-A. The revised conditions governing the grant of exemption u/s. 17 of the EPF Act are stipulated in Appendix-A, enumerated at 1 to 31...."

56. Ms. Bhat, learned counsel for the respondents submitted that as per order dated 11.01.2013, date of withdrawal of relaxation with effect from 11.01.2013 is in accordance with the mandate of law and completely valid. However, it is submitted on behalf of the petitioner/Establishment that in any case, the withdrawal of relaxation "with effect from 31.01.2013" rather than "from the first day of the next/succeeding financial year" is in violation of the mandate of Condition No. 25 itself which has been referred to in order dated 11.01.2013 as the said Condition No. 25 of Appendix A to Para 27 AA of the Scheme is for the purpose of withdrawal of exemption and not relaxation. It is reiterated that relaxation was granted while the application for exemption was pending.

57. Learned counsel submitted that in the instant case, the relaxation was so withdrawn by the respondent No. 4 because when the respondent No. 4 examined the Annual Report/Balance Sheet of the petitioner/Establishment and found that it has reported losses for three consecutive financial years, i.e., 2009-10, 2010-11 and 2011-12, which is in contravention of Condition No. 25 of Appendix A to Para 27AA of the Scheme and in the absence of a valid justification from the petitioner/Establishment, it was satisfied that the pending application for exemption of the petitioner would not be allowed by the appropriate Government and hence, there was no need to continue with the relaxation.

58. Ms. Bhat submitted that the contention of the petitioner/Establishment that the withdrawal of relaxation "with effect from 31.01.2013" rather than "from the first day of the next/succeeding financial year" is in violation of the mandate of Condition No. 25 of the Appendix A is baseless. She submitted that the factum of time as envisaged in said Condition No. 25 is applicable for the purpose of withdrawing exemption whereas, the relaxation so granted to an Establishment can be withdrawn with immediate effect from the time any violation/ transgression comes to the notice of the concerned authority.

59. Ms. Bhat submitted that the show cause notice dated 30.11.2012 issued by the respondent No. 5, orders dated 11.01.2013 and 28.02.2013 passed by the respondent No. 4 and show cause notice dated 07.05.2013 issued by the respondent No. 6 under Sections 14/ 14A of the Act are valid and hold good in the eyes of law as admittedly, the petitioner/Establishment had reported losses for three consecutive financial years, i.e., 2009-10, 2010-11 & 2011-12, which in turn is in contravention of the Condition No. 25 of Appendix A to Para 27AA of the Scheme. Therefore, a show cause notice dated 30.11.2012 was issued to the petitioner/Establishment with a direction to furnish a reply as per the queries raised by the Department. As the petitioner/Establishment''s reply dated 24.12.2012 had no bearing on the Condition No. 25 of Appendix A to Para 27AA of the scheme and was not supported by any documents, therefore, the merits of

the case did not warrant continuation of the relaxation granted to the petitioner/ Establishment.

60. Consequently, on 11.01.2013 the relaxation granted to the petitioner/ Establishment under para 79 of the Act was withdrawn with further direction that they transfer the PF accumulations in respect of all employees to the Regional Provident Fund Commissioner. Thereafter, the petitioner made a request for retention of MTNL EPF Trust and for restoration of the relaxation order. But finding no merit in the said application, on 28.02.2013 the request of the petitioner for restoration of the relaxation order was rejected and on 07.05.2013 and were directed to show cause as to why prosecution should not be launched against them for contravening the above provisions of the Act and the Scheme framed thereunder.

61. I have heard the learned counsel for the parties.

62. Admittedly, the petitioner/Establishment was maintaining its own Provident Fund Trust by virtue of grant of relaxation under Para 79 of the Scheme. On examination of the Annual Report/Balance Sheet of the petitioner by the respondent No. 4, it was found that the petitioner has reported losses for three consecutive financial years, i.e., 2009-10, 2010-11 and 2011-12, which in turn is in contravention of the Condition No. 25 of Appendix A to Para 27AA of the Scheme. Pursuant to show cause notice dated 30.11.2012, the petitioner admitted that there were losses and intimated that the revival plan has already been forwarded to the Ministry of Finance by the Administrative Ministry (DOT) and the same is under consideration and expected that the Government would likely accede to their request and petitioner will come out of the financial crunch soon. Accordingly, an order dated 11.01.2013 was passed by the respondent No. 4 with a direction that the relaxation granted under para 79 of the Act has been withdrawn and further directed the petitioner to transfer the PF accumulations in respect of all employees to the Regional Provident Fund Commissioner.

63. Thereafter, the petitioner made a request to the respondent No. 4 to review its order dated 11.01.2013, however, the same was rejected vide order dated 28.02.2013. Pursuant thereto, the respondent No. 6 issued a show cause notice dated 07.05.2013 under Sections 14/ 14A of the Act as to why prosecution should not be initiated against the petitioner.

64. The revised conditions governing the grant of exemption under Section 17 of the Act stipulated in Appendix A would apply even during the period of relaxation. Since the petitioner is covered under the Act, it is required to comply with the statutory provisions of the Act and also the provisions of the Schemes framed under the Act, namely, EPF Scheme, 1952, EPS Scheme, 1995 and EDLI Scheme, 1976.

65. Section 5 of the Act provides for making of Scheme and the powers granted under the same, the Central Government, which is the Appropriate Authority may frame the Scheme for the establishment of provident funds under the Act.

Section 7 of the Act provides for Modification of Scheme by the Central Government vide a notification in the Official Gazette and the same shall apply either prospectively or retrospectively. Therefore, the Schemes framed pursuant to the powers under Section 5 of the Act are not Rules. The Act also provides for grant of exemption from the operation of the Schemes framed under the Act.

66. The operation of the Act to an Establishment as a whole is granted either under Section 17(1)(a) or Section 17(1)(b) of the Act. To adjudicate the issue raised in the instant petition, Section 17(1)(a) of the Act is relevant, which is reproduced as under:-

"17. Power to exempt.-

(1) The appropriate Government may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt, whether prospectively or retrospectively, from the operation of all or any of the provisions of any Scheme-

(a) any establishment to which this Act applies if, in the opinion of the appropriate Government, the rules of its provident fund with respect to the rates of contribution are not less favourable than those specified in section 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any Scheme in relation to the employees in any other establishment of a similar character"

67. By an amendment made to the Scheme, paragraph 27AA was introduced, by which it is stated that all exemptions already granted or to be granted hereafter under Section 17 of the Act or under paragraph 27AA of the Scheme, shall be subject to terms and conditions as given in the Appendix A with effect from 06.01.2001.

68. The relevant extract, i.e., Condition No. 25 of Appendix A is as follows:

"25. A company reporting Joss for three consecutive financial years or erosion in their capital base shall have their exemption withdrawn from the first day of the next/succeeding financial year."

69. Admittedly, before granting exemption to an establishment, the application of the establishment as well as the rules of the fund are required to be scrutinized for considering the grant of exemption. As it may take some time to process the application, the Regional Provident Fund Commissioner/Central Provident Fund Commissioner, as the case may be, may issue a relaxation order to the establishment under paragraph 79 of the Scheme.

70. In the present case, the respondent No. 3, on being satisfied that the petitioner at that time was eligible to be granted exemption by the Appropriate Authority, issued a relaxation order in favour of the petitioner. The Commissioner is empowered to pass a relaxation order in respect of which an application for

exemption under Section 17 of the Act has been received and subsequent to such relaxation having been given, it was found that the petitioner/Establishment had reported losses for three consecutive financial years, i.e., 2009-10, 2010-11 and 2011-12, which in turn is in contravention of the aforesaid condition.

71. There is a considerable difference between Shell India Markets Pvt. Ltd. (supra) and the case in hand. Vide order dated 19.01.1988, while granting relaxation to the petitioner, in paragraph 4, it has been clearly stated that:

"4. Any amendment to the said Scheme which is more beneficial to the employees than the existing rules of the establishment shall be made applicable to them automatically. No amendment of the rules of the provident fund of the said establishment shall be made without the previous approval of the Regional Provident Fund Commissioner and where an amendment is likely to affect adversely the interest of the employees if the said establishment, the Regional Provident Fund Commissioner shall, before giving the approval, give reasonable opportunity to the employees to explain their point of view."

72. In paragraph 27 of the aforesaid order dated 19.01.1988, it is stated that the appropriate Government may lay down any further conditions for continued exemption of the establishment.

73. It is pertinent to mention here that the conditions for grant of exemption as provided in Appendix A to paragraph 27AA of the Scheme could not have been laid down in verbatim in the relaxation order issued to the petitioner as the same were included in the Scheme vide an amendment which came in effect on 06.01.2001. Hence, on perusal of aforementioned paras 4 and 27 of the relaxation order dated 19.01.1988, the conditions as provided in Appendix A would be applicable constructively.

74. In para 31 of the said order, it is important to note that the relaxation is liable for withdrawal for breach of any of the conditions or for other sufficient cause. Thus, the term "other sufficient cause" essentially covers the future contingencies as well. The petitioner has become ineligible for the grant of exemption as per the revised conditions for grant of exemption, i.e., Condition No. 25 of Appendix A to Para 27AA of the Scheme. Therefore, it is crystal clear that Condition No. 25 of Appendix A to Para 27AA of the Scheme would apply automatically as per the order of relaxation passed by the Commissioner in exercise of his power under paragraph 79 of the Scheme.

75. In the case of P. Krishnamurthy & Ors. (supra), it is held that the nature, object and scheme of the Act, and also the area over which power has been delegated under the Act will have to be considered while deciding the validity of the subordinate legislation. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should

proceed with caution before declaring invalidity.

76. The Employees Provident Funds and Miscellaneous Provisions Act, 1952, being a social welfare legislation, was enacted with the main objective of making some provisions for the future of industrial workers after their retirement and for their dependents in case of death. Hence, an amendment to the Scheme which is more beneficial to the employees shall be definitely welcomed and intra vires the Principal Act when the same is not inconsistent or in violation of any of the existing provisions of the Act.

77. In case of Pratap Chandra Mehta (supra), it has been opined by the Supreme Court that the Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act while ensuring that such rules framed are within the field circumscribed by the parent Act. It may not always be absolutely necessary to spell out guidelines for delegated legislation when discretion is vested in such delegated bodies. In such cases, the language of the rule framed as well as the purpose sought to be achieved would be the relevant factors to be considered by the Court. In the present case, the petitioner could not put forth a reason that the Scheme and provisions are not beneficial to the employees.

78. It is not disputed that the petitioner has reported losses for three consecutive financial years, i.e., 2009-10, 2010-11 and 2011-12, which is in contravention of Condition No. 25 of Appendix A to Para 27AA of the Scheme. Therefore, the withdrawal of relaxation with effect from 11.01.2013 is in accordance with the mandate of law.

79. In view of the above discussion and settled law, the present petition is dismissed with no order as to costs.

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With the disposal of the aforesaid writ petition, the present application has become infructuous. The same is accordingly dismissed.