

(1993) 02 BOM CK 0073
In the Bombay High Court
Case No : Appeal No. 669 of 1988

Regional Provident Fund Commissioner and Others	APPELLANT
Vs	
Mafatlal Group Staff Association and Others	RESPONDENT

Date of Decision : 12-02-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 6

Citation : (1994) 1 BomCR 425 : (1993) 95 BOMLR 147 : (1993) 2 LLJ 1066 :
(1993) 2 MhLj 1377

Hon'ble Judges : S.H. Kapadia, J;M.L. Pendse, J

Bench : Division Bench

Advocate : M.I. Sethna, for the Appellant; Anand Grover and P.D. Shah, for the Respondent

Judgement

Kapadia, J

1. This appeal has been preferred by Regional Provident Fund Commissioner and Union of India against judgment and order dated June 25, 1987, by which the learned Single Judge in effect struck down paragraph 3(a) of the Employees' Provident Fund Scheme, 1952, framed u/s 6-A of the Employees Provident Funds and Miscellaneous Provision Act, 1952 on the ground that the said clause was ultra vires Article 14 of the Constitution.

2. The facts of the case lie within a very narrow compass. By Act 16 of 1971, the Employee's Provident Fund and Miscellaneous Provisions Act, 1952, Section 6-A was introduced whereby the Central Government was empowered to frame a statutory Scheme, called as the Employee's Family Pension Scheme to provide family pension and life insurance benefits to the employees of establishments or class of establishments to which the Provident Fund Act, 1952, applies. Under sub-section (2) of Section 6-A it is provided that the Central Government, by Notification, shall establish a Family Pension Fund in respect of employees covered under the Act. Under the said sub-section (2) of Section 6-A it is further

provided that the Family Pension Fund will consist of portion of employer's plus employees' contribution, not exceeding 1/4th of the amount payable as contribution u/s 6 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952. The statement of objects and reasons which led to the introduction of the Family Pension Scheme reads as follows :

"The Coal Mines Provident Fund and Bonus Scheme Act, 1948 and the Employee's Provident Funds Act, 1952 provide for the institution of provident funds for employees in coal mines, factories and other establishments. Provident Funds is an effective old age and survivorship benefit, but when the employee happens to die prematurely, the accumulations in the Provident Fund are too small to render adequate and long term protection to his family. With a view to providing long term financial security to the families of industrial employees in the event of their premature death, it is proposed to introduce a Family Pension Fund for the employees covered under the two Acts, and to create a Family Pension Fund for this purpose by diverting a portion of the employer's and the employee's contribution to the Provident Fund, to which will be added a contribution by the Central Government. out of the Fund so set up, it is proposed to pay Family Pension at prescribed scales to the survivors of employees who die while in service before reaching the age of superannuation."

The above objects clearly indicate that the Government decided to frame the Family Pension Scheme as it came to the conclusion that the provident fund was an effective old age and survivorship benefit, but when the employee happens to die prematurely, the accumulation in the provident fund was too small to render adequate and long term protection to his family. It is with this object that the Government decided to introduce the Family Pension Scheme. The said Section 6-A of the Act also indicates that the Family Pension Fund was established by diverting a portion of the employer's and the employees' contribution to the provident fund u/s 6 of the Provident Fund Act and to which will be added contribution by the Central Government. With the above salutary object, the Family Pension Scheme came into force from March 1, 1971.

3. For the purpose of deciding this appeal para 3 of the Scheme is reproduced as follows :-

"Membership of the Family Pension Fund. Subject to sub-paragraph (3) of paragraph (1), this scheme shall apply to every employee -

(a) who becomes a member of the Employees' Provident Fund or Provident Funds of factories and other establishments exempted u/s 17 of the Act on or after March 1, 1971;

(b) who has been a member of the Employees' Provident Fund or of Provident Funds of factories and others establishments exempted u/s 17 of the Act immediately before the commencement of this scheme and opts to exercise his own option under paragraph 4."

Clause 4 of the said Scheme 1971, deals with option to the said employees to join the Scheme. Clause 4 lays down that every member who was a member of the Provident Fund prior to March 1, 1971, is entitled to opt within the stipulated period, to become a member of the Family Pension Scheme. Such an option was not given to employees who become members of the Employees' Provident Fund after March 1, 1971. Under Clause 9 of the said Scheme 1971, the Family Pension Fund, which is established as indicated above, consists of contributions payable by the employers and the employees every month u/s 6 of the Provident Fund Act, 1952. Clause 9 further provides that a part of the total contribution towards Provident Fund shall be remitted to the Family Pension Fund. Under Clause 9 (2), the Central Government is also required to contribute to the Family Pension-cum-Life Assurance Fund. Under Clause 28, the rate of Family Pension, in case of a member who dies during the period of reckonable service before attaining the age of 60 years, is mentioned. Under Clause 28-A, further supplementary reliefs to pensioners under the said Scheme 1971, as amended from time to time, is also provided. Clause 32 of the said Scheme 1971, provides for retirement-cum-withdrawal benefits which is also known as survival benefits. Clause 34-D lays down that the Government is bound to value the Family Pension Fund at intervals of three years, after taking into account the report of the actuarial valuer.

4. The analysis of the above Scheme, therefore, contemplates that in case of employees who are employed prior to March 1, 1971, and who are the members of the Employees Provident Fund Act, 1952, an option is given to join or not to join the said Scheme 1971, which option has not been given to employees/members of the Provident Fund Act, 1951, who joined their employment and the Provident Fund after March 1, 1971. It is denial of this option to the latter category of employees which has given rise to the above Petition filed by Respondent No. 1 herein and the principal ground on which the said paragraph 3 (a) of the said Scheme 1971, was challenged was that by reason of denial of option to employees joining after March 1, 1971, their fundamental right under Article 14 of the Constitution stood violated. It was also alleged that the return, which is contemplated under the Provident Fund, which accrues to the person on the retirement under the Provident Fund Act, was much higher than the return which the employees earned under the Family Pension Scheme and to that extent, the employees are deprived of their right to property.

5. By an affidavit-in-reply dated December 3, 1984, filed on behalf of the appellants, the said contentions of the respondent Nos. 1 to 3 have been denied. By the said affidavit-in-reply, it has been pointed out that the Family Pension Scheme has been introduced with the salutary purpose of encouraging savings on the part of the industrial employees; that the said Scheme provides for an additional benefit apart from provident funds, particularly to the industrial employees who suffer death during their service; that apart from the family pension benefit there is also a life assurance benefit which is provided under the Scheme and so also withdrawal or survival benefit which accrues to those

employees who cease to be the members of the Provident Fund on attaining the age of superannuation. The Affidavit further points out that broadly three benefits are conferred by way of the above Scheme read with the Provident Fund Act, viz., widow's pension, life assurance benefit and also retirement-cum-withdrawal benefit. The said Affidavit read with the reports of the Actuary also show that the Scheme of the Provident Fund Act which includes the Pension Scheme 1971, deals with basically the three welfare funds viz. Employees' Provident Fund, Deposit Insurance Scheme and Family Pension Scheme and the surplus which is generated in either of the three Schemes is used for implementation of the above three welfare funds. They also show that the Scheme has to be reviewed every three years and if there is a surplus, then additional benefits are provided so that an additional benefits are provided so that an additional benefit from time to time is being conferred by generation of surplus under the Scheme. By the said Affidavit it is also pointed out that under the Family Pension Scheme in case of death of an industrial employee while in service, family pension is paid at a stipulated rate, which is again subject to revision from time to time, for the first seven years and thereafter at a stipulated rate on a sliding scale to the widow till her death or remarriage or the eldest surviving minor son till he attains the age of majority. So also, the life assurance benefit is provided, which, at the time of filing of the Affidavit, was Rs. 2,000/-. Similarly, under Part-B of the Scheme, in case of cessation of employment before attaining the age of 60 years or on attaining the age of 60, the employee will also get the withdrawal benefit of an amount equivalent to his own share of contribution. It is not in dispute that the Scheme has been reviewed from time to time and additional benefits are conferred upon the members. Some of the said benefits have been exhaustively enumerated in paragraph 9 of the said Affidavit-in-reply filed on December 3, 1984. By the said Affidavit, the appellants denied any loss to employees by joining the said Pension Scheme. On the contrary, Annexure "A" to the said Affidavit dated December 3, 1985, clearly indicated that the employee who contributes the amount towards Family Pension scheme also gets the benefit of family pension at the rate of Rs. 400/- for the first seven years and thereafter at the rate of Rs. 200/- as also the life assurance benefit and the cost of the said benefits is substantially higher as compared to the contribution made by the employees.

6. After taking into account the above facts the learned Single Judge came to the conclusion that although the Scheme is undoubtedly beneficial to every employee, the Scheme suffer from vice of discrimination as the Government has not given the benefit of option to employees who join after March 1, 1971, which option is given to those employees who have jointed prior to March 1, 1971. The learned Single Judge proceeded on the basis that when the said Scheme 1971, was introduced on March 1, 1971, a dichotomy was introduced between the above two classes and the Scheme favours those employees who jointed the Provident Fund Scheme prior to March 1, 1971, and there was no justification for disparity or such a dichotomy. According to the learned Single Judge, no rational

basis has been indicated by the Affidavit-in-reply to show why such a dichotomy is created and why the benefits of option should not be given to employees who jointed the Scheme after March 1, 1971, and why the Scheme should be made compulsory for the other employees. According to the learned Single Judge, the above division was not based on any rational principle and in the circumstances, it was violative of Article 14 of the Constitution. In coming to the above conclusion, the learned Single Judge placed heavy reliance on the judgment of the Supreme Court in the case of D.S. Nakara and Others Vs. Union of India (UOI), . In the circumstances, the learned Single Judge came to the conclusion that paragraph 3(a) of the said Scheme 1971, was ultra vires Article 14 of the Constitution. However, without striking down the said paragraph, the learned Single Judge reformulated paragraph 3 (b) of the Scheme which, in substance, indicates that every employee, irrespective of his date of joining the Scheme, should be given an option to join the Family Pension Scheme.

7. Against the said judgment, the present appeal has been preferred.

8. Mr. Sethna, on behalf of the appellants, submitted that the learned Single Judge erred in coming to the conclusion that paragraph 3(a) of the Scheme was ultra vires Article 14 of the Constitution. Mr. Sethna submitted that the Scheme was formulated to provide additional benefits in addition to the provident fund to industrial employees. He further submitted that as and by way of a welfare measure, the above Scheme was introduced into the provisions of Employees Provident Fund Act, 1952. He further submitted that it was a statutory Scheme which conferred large number of benefits to the employees. He further submitted that as of today, the Scheme covers 122 lacs employees all over India and it gives benefit not only by way of pension, but it gives benefit of life assurance. He also pointed out that there is no loss suffered by individual employees as contended by the Respondents, particularly if the cost of the benefits are taken into account. Mr. Sethna also points out that the actuarial calculation made in the year 1985 at the time when the Scheme was at a nascent stage as also the actuarial calculations indicated by the Report of 1992 clearly shows that the Scheme has been reviewed from time to time and additional benefits have also been given to the employees under the Scheme. Mr. Sethna submitted that there is no discrimination in having two separate classes of employees. The said Scheme is a statutory scheme and it was introduced with effect from March 1, 1971. Mr. Sethna pointed out that the said Scheme was made compulsory for industrial employees joining service after March 1, 1971, particularly for the reason that for such new employees contribution to the Provident Fund could be stipulated as a condition of service, which stipulation cannot be put in respect of employees who have jointed their establishments prior to March 1, 1971. He further submitted that the contributions paid by the employees prior to March 1, 1971, towards provident fund could not have been diverted into the Pension Scheme as indicated above and to obviate legal implications, the above option was given and, therefore, there was no discrimination between the two classes as found by the learned Single Judge. Mr. Sethna also submitted that apart from

the benefits under the Scheme, the object of the Scheme was to encourage savings, which in turn, also helps the economy of the country. In the circumstances, if it was submitted that taking into account the above totality of benefits under the Scheme, the learned Single Judge erred in coming to the conclusion that Clause 3 (a) of the Scheme, 1971, was ultra vires of Article 14 of the Constitution.

9. On behalf of the employees, Mr. Grover, the learned counsel, submitted that by virtue of the Pension Scheme, an immense loss is caused to the employees, particularly in the matter of survival benefits. He complained that the return which the employee received by way of interest on his contribution to the statutory provident fund was much higher than the return which the employee received after he became member of the Family Pension Scheme, which was non-cumulative. Mr. Grover further submitted that this loss amounted to pensioners being deprived of their property under Article 300-A of the Constitution. He further submitted that this loss amounted to appropriation of profits which accrued to the pensioners and similarly situated employees. Mr. Grover also placed reliance on the report of the Actuary for the year 1985 and submitted that if one goes through the recommendations of the said report, it is clear that the workmen were entitled to higher return even under the Provident Fund Scheme, 1971. He further submitted that there was no justification for creating two classes of employees and there was no nexus to the object sought to be achieved by not giving option to employees who joined after March 1, 1971, and in the circumstances if it was submitted that by reason of refusal of option and by making joining of Family Pension Scheme compulsory to employees after March 1, 1971, discrimination has resulted which is ultra vires Article 14 of the Constitution, and the learned Single Judge was right in coming to the said conclusion.

10. We find considerable merit in the submissions advanced by Mr. Sethna on behalf of the appellants. As indicated above, the statement of objects and reasons to the said Scheme indicates that in addition to provident fund, the Government decided to introduce a Family Pension Scheme, particularly in view of the facts that industrial employees are prone to accidents in large number of cases while working in industrial establishments and their widows and family members many a times suffer losses and the lump sum payments received by way of provident fund are not adequate to enable those families to face inflation and their daily needs. In the circumstances, the object was to give benefits to such employees in addition to withdrawal benefit to those employees who ceased to be in service on their attaining the age of superannuation. Further, the object of such Family Pension Schemes is to encourage savings, which in turn, provided a hedge against the exposure suffered by employees on account of fall in the rupee value and inflation. Further, such Schemes provide long term financial security to the families of industrial employees and in the present case, as indicated above, the object is achieved by diverting a small portion of the employer's/employee's contribution to the provident fund, to the Family Pension Scheme. In addition to that, the Central Government also contributes towards

the Family Pension Scheme. Taking into account the above objects of the Act, it is clear that large number of be benefits have been provided under the Family Pension Scheme. Broadly, the said benefits are widow pension, lie assurance benefit and withdrawal benefit. It is for these benefits that the cost is required to be taken into account and in order to value the cost of the benefits, an Actuary goes into various aspects like the salary scale, the prospective number of employees to join the Scheme, the mortality rate and the future projections with regard to the number of people who are likely to retire today and in future as also the interest rate which is payable on the investments and after taking into account the said cost of benefits, the report is submitted as is done in the present case. Taking into account the steps taken by the Government to evaluate cost of the benefits, it is clear that the scheme has not only been proved to be viable, but over the years it has been generating surplus which is funded back into the scheme and a large number of additional benefits including reduction in the rate of contribution has been given. It is also to be noted that the said surplus cannot be fritted away by distributing the said amount to the employees as of day-to-day without taking into account the future projections. It is in this light that, based on the said report, the Government has issued a Notification also on October 29, 1992, which also indicates that while calculating the survival benefits, the Government has taken into account "a factor" depending on the number of years of service which an employee puts in and other relevant factors. This factor is based on the basis of interest which accrues to an employee under the Provident Fund Act, the reason being that while calculating the said factor, the Government has to keep in mind the cost of the benefits and if those benefits are to be taken into account, then the employee cannot insist that he is entitled to the return to be calculated on the basis of the interest which accrues to the provident fund. Rate of interest has to be discounted for the said benefit and the withdrawal benefit and taking an overall view of the matter, we find that the valuation of the benefits done by the Government are fully in consonance with the Scheme, 1971. As indicated above, the learned Single Judge has come to the conclusion that the return under the Scheme is not commensurate with the return under the Employees Provident Fund and Miscellaneous Provision Act, 1952. The learned Single Judge has given individual illustrations to come to the said conclusion. We do not agree with the approach of the learned Single Judge for the reason that the Scheme covers 122 lacs of workmen. Secondly, at the relevant time, the salary scale is also required to be taken into account. The illustration which the learned Single Judge has given deals with salary Rs. 1,000/- payable to an employee who has put in service of 30 years in 1980. The Affidavit filed on behalf of the Government clearly shows that during that period large number of industrial employees were covered in the salary scale of Rs. 300/- to Rs. 400/- and, therefore, it is not realistic to take into account the salary of Rs. 1,000/- which, by 1980 standards, was on a higher side. The learned side. The learned Single Judge in the present case has failed to take into account the total package under the Scheme and the cost of the benefit covered under the package. The learned Single Judge has also failed to appreciate that it

is from the contribution to the provident fund that a portion is diverted to the Family Pension Scheme and taking into account the above three welfare funds like Provident Fund, Deposit Insurance Fund and the Family Pension Scheme as a Whole, the Scheme 1971, is perfectly justified and it has nexus to the object sought to be achieved. As indicated here in above, the learned Single Judge has principally struck down paragraph 3(a) of the said Scheme, 1971, on the ground that no reason for creating such a class of employees has been given by the Government and, therefore, the classification between pre-March, 1971, and post-March, 1971 employees was unjustified and ultra vires Article 14 of the Constitution. This finding of the learned Single Judge is also required to be set aside for the reason that the option was given for the reason that a statutory Scheme came to be introduced from March 1, 1971, and such a Scheme could not make it compulsory as a condition of service, to contribute to the Pension Scheme by industrial employees who had joined the Provident Fund prior March 1, 1971. In industrial jurisprudence new condition of service of this nature cannot be introduced unilaterally. Secondly, it is also clear that a part of the provident fund accumulation is diverted to the Pension Scheme which was not possible in the case of the employees under the Provident Fund Act, 1951 (see *Som Prakash Rekhi v. Union of India* 1981 I LLJ 29. Thirdly, apart from the above two factors, the family Pension scheme has to proceed on the viability of the Scheme which include large number of factors required to be taken into account and if the viability is to be included, then the Actuary as well as the Government has to consider the contributions which would flow into the Fund from the optees as well as the contributions which would flow into the provident fund from the employees who would join or are likely to join in future periods. The Scheme also takes into account future salary scales and all factors mentioned above, to make the Family Pension Fund viable. Viability depends on large number of factors. In the circumstances, after taking into account the above factors, the Government decided that an option be given to those who joined after March 1, 1971. In any event, the Scheme is statutory in nature and we do not find any merit in the contention of the employees that they are entitled as a matter of right to the same rate of interest under the Family Pension Scheme as that which accrued to them under the Provident Fund Scheme. The Government can always revise the rates, depending on large number of factors including economic factors. Secondly, there is no merit in the contention on behalf of the employees that they have been deprived of their property under Article 300-A of the Constitution inasmuch as the Government has appropriated their profits compulsorily to the Family Pension Scheme. It was submitted that the return is not in commensurate with the return under the Provident Fund Scheme and, therefore, the Scheme is violative of his fundamental rights. As indicated above, there is no merit in the said submission for the reason that the said submission proceeds on the basis that the cost of benefits like widow pension, life assurance benefits and withdrawal benefits should not be taken into account. If cost of all the benefits are taken into account, then the return which accrues to the employees is fully in consonance with the object of the Scheme. Further, the additional benefits which

have been conferred by 1992 Notification also indicates that not only the Scheme is viable, but higher return is given to the employees. Thirdly, (we have to see) the total package by way of Provident Fund as well as pension which accrues to the person concerned is to be seen and if the totality of the benefits is taken into account, then there is no merit in the contention raised on behalf of the employees that they have been deprived of their profits/returns.

11. One more aspect is required to be mentioned viz., that the learned Single Judge has placed heavy reliance on the judgment of the Supreme Court in the case of *D. S. Nakara v. Union of India* (supra) to come to the conclusion that the above classification was ultra vires Article 14 of the Constitution. It is not necessary to go into the ratio of the said judgment of the Apex Court in the case of *Nakara* (supra) for two reasons. Firstly, in the present case, a statutory Scheme, by way of Family Pension Scheme is introduced for the first time from March 1, 1971 and, therefore, two classes which have been created constitute a reasonable classification having nexus to the object sought to be achieved which was not the case in the matter of *D. S. Nakara v. Union of India* (supra). Secondly, the said judgment of the Supreme Court has been considered in a later judgment in the case of *Chetan Anand Vs. State of Punjab*, . In the latter case the facts were that the petitioners were in service of Andhra Pradesh State Government and they retired during the period April 1, 1978 to October 28, 1979. The State Government appointed Pay Revision Commission to look into the matter and the Commission was directed to review existing retirement benefits and to make suitable recommendations. The Commission made its recommendation suggesting increased pay scales which was accepted by the Government from April 1, 1979, but the Government did not accept the Commission's recommendation regarding increase in the age of superannuation from 55 years to 58 years and the resultant amendments to the pension Rules of 1980. Pursuant Rules came to be revised and under the said Revised Pension Rules, the Government servants were divided into two categories viz., those Government servants who were in service on October 29, 1979 when the Revised Pension Rules came into force and Government servants who retired after October 29, 1979. The petitioners contended that by creation of these two categories of pensioners with different rates of pension, Article 14 stood violated. This contention of the petitioners regarding classification was turned down by the Apex Court. It was laid down by the Supreme Court in the said case of *Chaudhary Rao* (supra) that the claim of the petitioner based on *Nakara's* case proceeded on total misconception. It was laid down that where a classification is sought to be made for the first time by introducing a new Scheme of pension or a revised Scheme of pension and if it is based on a rational classification, then such a classification cannot be struck down and that the facts of *Nakara's* case (supra) were not applicable to such classification. In our opinion, the judgment of the Supreme Court in *Chaudhary Kesava Rao's* case (supra) squarely applies to the facts of the present case and in the circumstances, the learned Single Judge erred in coming to the conclusion that refusal of option to employee joining the

scheme after March 1, 1971, was ultra vires Article 14 of the Constitution. The said reasoning is, therefore, clearly erroneous and cannot be accepted.

12. In view of what is stated hereinabove, we find considerable merit in the Appeal preferred by the appellants. Accordingly, the Appeal stands allowed and the judgment and order of the learned Single Judge dated June 25, 1987, in Writ Petition No. 451 of 1980, stand overruled and set aside. It is hereby declared that paragraphs 3(a) and 3(b) of the Employees Family Pension Scheme, 1971, are intra vires Article 14 of the Constitution. However, in view of the above facts and circumstances, there will be no order as to costs.