

(1995) 03 BOM CK 0035

In the Bombay High Court

Case No : Writ Petition No. 1910 of 1992

Rhone-Poulenc Employees Union

APPELLANT

Vs

Regional Provident Fund Commissioner and Others

RESPONDENT

Date of Decision : 15-03-1995

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17, 17(2)

Citation : (1995) 3 BomCR 707 : (1996) 2 LLJ 1001

Hon'ble Judges : S.H. Kapadia, J

Bench : Single Bench

Advocate : J.P. Cama, instructed by and K.P. Anilkumar, for the Appellant; R.A. Dada, A.S.G., R.C. Master, for the Respondent

Final Decision : Dismissed

Judgement

S.H. Kapadia, J.—The above batch of Writ Petitions involve interpretation of provisions of Section 17(2) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 read with the Employees Provident Funds Scheme, 1952. For the sake of convenience facts in Writ Petition No. 1910/1992, briefly, are being stated. At the outset, it may be clarified that all the above writ petitions raise common question of law regarding power and the authority of the Regional Provident Fund Commissioner to impose the impugned conditions while granting individual exemption u/s 17(2) of the said Act, 1952. It may be clarified that in the above Writ Petitions we are not required to examine the constitutional validity or the vires of each of the said conditions. Basically the question involved in the group of petitions is the power of the Regional Provident Fund Commissioner to impose the impugned conditions while granting individual exemption u/s 17(2) of the said Act, 1952 read with the Scheme framed thereunder. With the above clarification, the facts in Writ Petition No. 1910 of 1992 may be seen. The petitioner is a Trade Union recognised under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. The said Union represents 1500 employees

employed by former May and Baker (India) Ltd. and now the 3rd respondent in the petition. By an order dated May 29, 1992, the Regional Provident Fund Commissioner imposed conditions on the company for granting exemption from the Statutory Scheme vide paragraph 27 which applies to individual applicant members. The petition is filed on behalf of 200 employees of the said Company and each of the employee has applied to the Regional Provident Fund Commissioner (hereinafter referred to for the sake of the brevity as "the R.P.F.C.") under paragraph 27 of the Statutory Scheme read with Section 17(2) of the said Act, 1952. The company which is the successor of May and Baker (India) Ltd, has its own Private Provident Fund Scheme from 1952 (i.e. prior to coming into force of the Employees Provident Fund Act, 1952 which came into force on March 4, 1952). The said Private Provident Fund did not apply for exemption at any time prior to July 1988 and even thereafter. Throughout the period up to 1988, individual employees made applications u/s 17(2) of the said Act, 1952 and exemptions were granted to the employees class of employees under the said section. It is not in dispute that at no point of time, prior to 1988, R.P.F.C. refused to grant exemption. Form No. 1 to the said Act, 1952 was filled in by individual employee. The said Form No. 1 came to be sponsored by the employer and on that footing exemptions were granted u/s 17(2) read with paragraph 27 of the Statutory Scheme up to 1988. It is the case of the Petitioner Union that the services rendered under the Statutory Government Fund were not up to the mark. The employees did not get the benefit in time. That the benefits under the Private Scheme were better than the benefits under the Statutory Scheme/Fund, and, in the circumstances, right up to 1988 individual employees exercised their rights u/s 17(2) although the Employers/establishment never applied for exemption as contemplated by Section 17(1) of the said Act, 1952. To complete the chronology of events, it may be mentioned that on April 16, 1987 the Central Government in respect of the establishments of which it was an appropriate Government issued a notification containing 29 conditions. The disputes started after 1987-88. Individual exemption applications which were made by Individual employees or class of employees came to be scrutinised by the R.P.F.C. These individual applications were made by the employees on the footing that the Private Schemes were in force from 1952 under which the Fund was created and vested in the trustees. That the large number of employees stood exempted u/s 17(2) up to 1988 and on that footing applications on individual basis came to be made by the employees to R.P.F.C. The R.P.F.C. after 1987-88 insisted inter alia that certain conditions as laid down by the Central Government in the above mentioned Notification should also be made applicable and they should be complied with as precondition to exemption application made individually u/s 17(2) of the Act. In the above circumstances, Writ Petition No. 3588/88 along with certain other writ petitions concerning other establishments came to be filed in this Court. Writ Petition 3588 of 1988 concerns May and Baker. The said Writ Petition was filed by the Employees Union inter alia challenging the revised conditions sought to be imposed by the R.P.F.C. as precondition to grant exemption u/s 17(2) of the said Act, 1952. By judgment and

order dated February 25, 1992, this Court (Shrikder dated February 25, 1992, this Court (Shrik-rishna, J) allowed the petition only on the first contention advanced on behalf of the Union Petitioner, namely, that the R.P.F.C. while withdrawing the exemption granted earlier should give hearing and an opportunity both to the employer and the employees as failure to give an opportunity would amount to violation of rules of natural justice and in the circumstances the writ petition was allowed only on that point. The R.P.F.C. was directed to hear the concerned parties in the matter of imposition of revised conditions and thereafter decide the matter in accordance with law. This judgment was given on February 24, 1992. Thereafter, by letters dated April 9, 1992, May 11, 1992 and the correspondence which ensued thereafter the dispute ultimately came before the R.P.F.C. who, on May 29, 1992, passed the impugned order inter alia stating that in the event of non- acceptance of the revised conditions which were similar to those mentioned in notification dated April 16, 1987 proposed to be imposed on the establishment for grant of individual exemption under paragraph 27, the department would withdraw the individual exemption already granted. In other words, by the impugned order the main conditions which the R.P.F.C. sought to impose as precondition was that the individual exemption will not be granted unless the applicant fulfils all the 28 conditions referred to in the show cause notice given to the employer. For the sake of clarity it may be useful to extract all the 28 conditions which the R.P.F.C. insisted on the applicant u/s 17(2) to fulfil.

1. The employer in relation to the said establishment shall provide for such facilities for inspection and pay such inspection charges as the Central Government may from time to time direct under Clause (a) of Sub-section (3) of Section 17 of said Act read with sub-para 2 of para 27 of the Scheme within 15 days from the close of every month.

2.The rate of contribution payable under the Provident Fund Rules of the establishment shall at no time be lower than those payable under the said Act in respect of the unexempted establishments and the said scheme framed thereunder.

3. Any amendment to the Employees" Provident Fund Scheme, 1952 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 any amendment is likely to affect adversely, the interest of the employees of the said establishment, the Regional Provident Fund Commissioner, shall, before giving his approval give a reasonable opportunity to the employees to explain their point of view.

4. All employees (as defined in Section 2(f) of the said Act) who would have been eligible to become members of the Provident Fund had the establishment not been granted exemption shall be enrolled as members.

5. Where an employee who is already a member of the Employees Provident Fund (Statutory) or a Provident Fund of any other exempted establishment is employed in his establishment, the employer shall immediately enrol him as a member of the fund and arrange to have the accumulations in the Provident Fund Account of such employee with his previous employer transferred and credited to his account.

6. The employer shall establish a Board of Trustees for the management of the Provident Fund according to such directions as may be given by the Regional Provident Fund Commissioner from time to time, the Central Provident Fund Commissioner or the Central Government, as the case may be, from time to time.

7. The Provident Fund shall vest in the Board of Trustees who will be responsible for and accountable to Employees' Provident Fund Organisation inter alia for proper accounts of the receipts into and payments from the Provident Fund and the balances in their custody.

8. The Board of Trustees shall meet at least once in every three months and shall function in accordance with the guidelines that may be issued from time to time by the Central Government/Central Provident Fund Commissioner or an officer authorised by him.

9. The accounts of the Provident Fund maintained by the Board of Trustees shall be subject to audit by a qualified independent Chartered Accountant annually. Where considered necessary, the Regional Provident Fund Commissioner shall have the right to have the accounts re-audited by any other qualified auditor and the expenses so incurred shall be borne by the employer.

10. A copy of the audited annual Provident Fund Accounts together with the audited balance-sheet of the establishment for each accounting year shall be submitted to the Regional Provident Fund Commissioner within six months after the close of the financial year, (for this purpose the financial year of the provident fund shall be from April 1 to March 31).

11. The employer shall transfer to the Board of Trustees the contributions payable to the provident Fund by himself and the employees by the 15th of each month following the month for which the contributions are payable. The employer shall be liable to pay damages to the Board of Trustees for any delay in payment of the contributions in the same manner as an unexempted establishment is liable under similar circumstances.

12. The Board of Trustees shall invest the money in the fund as per directions that may be given by the Central Government from time to time. The Securities shall be obtained in the name of the Board of Trustees and shall be kept in the custody of a Scheduled Bank under the Credit Control of the Reserve Bank of India.

13. Failure to make the investment as per directions of the Government shall make the Board of Trustees severally and jointly liable to surcharge as may be

imposed by the Central Provident Fund Commissioner/Regional Provident Fund Commissioner or his representatives.

14. The Board of Trustees shall maintain a script wise Register and ensure timely realisation of interest and redemption proceeds.

15. The Board of Trustees shall maintain detailed account to show the contributions, credited, interest and withdrawal in respect of each employee.

16. The Board shall issue an annual statement of account to every employee within six months of the close of financial year.

17. The Board may instead of the annual statement of accounts, issue pass books to every employee, those passbooks shall remain in the custody of the employees and will be brought upto date by the Board on presentation by the employees.

18. The account of each employee shall be credited with interest calculated on the opening balance as on the 1st day of the accounting year at such rate as may be decided by the Board of Trustees but shall not be lower than the rate declared by the Central Government under para 60 of the said Scheme.

19. If the Board of Trustees are unable to pay interest at the rate declared by the Central Government for the reason that the return on investment is less or for any other reason then the deficiency shall be made good by the employer.

20. The employer shall also make good any other loss that may be caused to the Provident Fund due to theft, burglary, defalcation, misappropriation or any other reason.

21. The employer as well as the Board of Trustees shall submit returns to the Provident Fund Commissioner as the Central Government/Central Provident Fund Commissioner/Regional Provident Fund Commissioner may prescribe from time to time.

22. If the Provident Fund Rules of establishment provide for forfeiture of the employer's contributions in cases where an employee ceases to be a member of the fund on the lines of para 69 of the said Scheme, the Board of Trustees shall maintain a separate account of the amounts so forfeited and may utilise the same for such purposes as may be determined with the prior approval of the Central Provident Fund commissioner/Regional Provident Fund Commissioner.

23. Notwithstanding anything contained in the rules of the Provident Fund of the establishment, if the amount payable to any member upon his ceasing to be an employee of the establishment or transferable on his transfer to any other establishment by way of employer and employee's contribution plus interest thereon taken together with amount, if any payable under the pension rules be less than the amount that would be payable as employer's and employee's contributions plus interest thereon if he were a member of the Provident Fund under the said Scheme, the employer shall pay the difference to the member as

compensation or special contribution.

24. The employer shall bear all the expenses of the administration of the Provident Fund including the maintenance of accounts, submission of returns and transfer of accumulations.

25. The employer shall display on the notice board of the establishment, a copy of the rules of the fund as approved by the appropriate authority and as and when amended thereto along with a translation of the salient points thereof in the language of the majority of the employees.

26. The Regional Provident Fund Commissioner may lay down any further conditions or continue exemption of the establishment.

27. The employee shall enhance the rate of Provident Fund contributions appropriately if the rate of Provident Fund contribution for the class of establishment in which his establishment falls is enhanced under the said Act so that the benefits under the Provident Fund Scheme of the establishment shall not become less favourable than the benefits provided under the said Act.

28. The exemption granted under para 27 of the Scheme is liable to be cancelled for violation of any of the above conditions.

The R.P.F.C. by impugned order made it very clear that exemption shall be granted only if the said 28 conditions are complied with as per Section 17(1) of the said Act, 1952. By the impugned order, the R.P.F.C. made it very clear that even in cases where the exemption were granted in the past between period 1982 to 1988 will require compliance of the 28 conditions whose validity is not in issue in the present petition and that in future all the applicants u/s 17(2) shall comply with the 28 conditions sought to be imposed by the R.P.F.C. (For the sake of brevity the said conditions are hereinafter referred to as "the revised conditions"). Being aggrieved by the impugned decision/imposition of the revised conditions, the above Writ Petitions have been filed. As stated above, Writ Petition No. 1910/1992 is filed by the Employees Union. At this stage, it may be mentioned that some of the above Writ Petitions have been filed by the employers. Writ Petition No. 1051 of 1993 is filed by the Contract Advertising (India) Ltd. against whom the order has been passed by the R.P.F.C. on February 18, 1992 stating that the R.P.F.C. has received exemption applications in form No. 1 forwarded under the covering letter by the company and seeking individual exemption under paragraph 27 of the Statutory Scheme. By the said order, the R.P.F.C. clearly insisted that the exemption shall be granted to individual applicants/employees subject to maximum of 50% of the employees applying in respect of the concerned establishment and that the exemption shall be granted in consonance with the provisions of Section 17 of the Said Act, 1952. Since the conditions prescribed by the R.P.F.C. as revised conditions were not being fulfilled, form No. 1 came to be returned back to the company. Being aggrieved by the decision, the company has filed Writ Petition No. 1051 /93. In the above petitions, a detailed reply has been filed on behalf of the R.P.F.C. By the said

affidavit, it has been pointed out that the Act, 1952 is a benevolent piece of legislation; that the Act provides for framing of a statutory scheme and the Statutory Scheme contains various provisions prescribing the procedure required to be followed in the matter of claiming exemption; that according to the provisions of the said Act, 1952 establishments are categorised into two parts, exempted and unexempted and the exempted establishments are those establishments which are exempted pursuant to the provisions of Section 17 of the Act; that the principle idea behind granting exemption either to the establishment or to the individual employee or class of employees was that the benefit which an employee gets should not be less favourable than the benefit under the Act and the Statutory Scheme; that the above guiding factor was the provisions contained in Section 17 regarding exemption. That as per the said affidavit, the R.P.F.C. sought to impose the above impugned conditions in order to bring on par both the individual employees' exemption and exemption to be given to establishment. That the said revised conditions have been imposed u/s 17(2) of the Act in consonance with the notification dated April 16, 1987 of the Central Government and since the establishment refused to accept these conditions which are basically to protect the interest of the subscribers who seek exemption under paragraph 27, a suggestion has been made to the establishment to seek exemption from the appropriate Government u/s 17(1) of the Act.

2. On behalf of the petitioner, it has been contended that in the matter of granting individual exemption u/s 17(2) read with paragraph 27 of the Scheme the R.P.F.C. cannot prescribe a policy stating that the exemption will be granted only if you have 500 or more persons claiming individual exemption. Then such a policy would be contrary to Section 17(2) of the Act. For this purpose heavy reliance is placed on the judgment of this Court in *May and Baker's case* (supra). Secondly, it is contended on behalf of the petitioners that there is no power vested in the R.P.F.C. to compel the establishment to apply for exemption and that the R.P.F.C. cannot force any establishment to apply for and obtain exemption u/s 17(1) of the said Act, 1952. As a limb of the same argument it is also contended on behalf of the petitioners that the R.P.F.C. cannot, in the present case, refuse individual exemption applications u/s 17(2) read with paragraph 27 of the Scheme on the ground that the establishment/employer has refused to apply u/s 17(1) of the Act. It is contended that the Legislature has given right to an individual employee to apply for exemption u/s 17(2) of the Act and it is not open to the R.P.F.C. to reject an individual application on an extraneous ground that the establishment/employer has not applied for exemption from the provisions of the Act as well as the Scheme u/s 17(1) of the Act. It is contended on behalf of the petitioners that the employees do not have power to force the employers to obtain exemption u/s 17(1) of the Act and if the employer refuses to apply then the rights vested in the employees to claim individual exemption u/s 17(2) cannot be defeated on that ground. It is contended in support of the said argument that Section 17(2) contemplates a

different type of exemption than what is contemplated by Section 17(1) and the parameters of the sub-sections operate in different sphere/field. It is also contended that where the appropriate Government has to decide the applications for exemption u/s 17(1), it is the R.P.F.C. who has to decide the individual exemption application made by the employee or a class of employees u/s 17(2) read with paragraph 27 of the said Scheme. It is contended that the R.P.F.C. has a very limited jurisdiction/authority in the sense that it has only to compare the Statutory Scheme with a Private Provident Fund Scheme and ascertain whether which of the two is more beneficial to the employees and the inquiry required to be made by the R.P.F.C. u/s 17(2) is only restricted to the said question and, therefore, R.P.F.C. has no power or authority to impose revised conditions and particularly calling upon the employers to apply for exemption u/s 17(1) of the Said Act, 1952. It is further contended that Section 17(2) read with paragraph 27 of the Scheme does not confer power on R.P.F.C. to impose any conditions as precondition to grant exemption and that this power is only vested in the appropriate Government. It is contended that R.P.F.C. cannot insist on employers/establishment obtaining exemption u/s 17(1) of the Act, which, according to the petitions, is totally an extraneous condition, which, in any event cannot be complied with by an individual employee or class of employees who apply u/s 17(2) of the Act. The petitioners have also contended that the impugned action taken by the R.P.F.C. was contrary to the circular of November 26, 1963 which clearly indicates the rights are vested in the individual to apply for exemption under the provisions of Section 17(2) of the said Act and no fetter can be placed on the said right of exemption. It is also contended on behalf of the petitioners that in the above group of petitions we have a case where exemptions were granted u/s 17(2) over the years by the R.P.F.C. from 1952 upto 1988. More than 50% of the total work force in each establishment have obtained exemption and in the circumstances the R.P.F.C. cannot insist with regard to applications received after 1988 on the revised conditions and if such impugned revised conditions are insisted upon with regard to new entrants to the fund, it would create serious anomalies inasmuch as within the same establishment there will be two categories of employees, namely, those who are covered under the Private Scheme and those who are governed by Statutory Scheme. It is further contended that in the above circumstances particularly with regard to the schemes which have been approved over the years both under the Income tax Act as well as under this Act, the R.P.F.C. is not entitled to impose the above mentioned revised conditions. It is not in dispute that from 1955 upto 1988 the R.P.F.C. has never insisted on the individual employee or class of employees or even on the establishments/employers to obtain exemption u/s 17(1) of the Act and over the years from 1952 to 1988 individual exemptions were granted without the R.P.F.C. insisting on the employers getting exemption u/s 17(1) of the Act from the appropriate Government.

3. In reply to the above contentions, on behalf of the respondents, Mr. Dada the Additional Solicitor General has contended that if one goes through the

provisions of the Provident Fund Act, 1952 read with the Statutory Scheme as a whole, it is clear that Section 17 of the Act is a complete Code by itself in the matter of exemption and that the Legislature has treated, in effect, both the types of exemptions on par. That the result of the establishment getting exemption or the individual employee getting the exemption is the same. That Legislature has in the context of the various provisions of the Act laid down that once an exemption is given u/s 17 it results in an exempted establishment as defined u/s 2(fff) of the Act. That once the Act applies to an establishment every employer in the first instance is required to become the member of the Statutory Fund under the Statutory Scheme framed u/s 5 of the Act and when exemption is given such an employee becomes exempted employee as defined u/s 2(ff) of the Act. In other words, such an employee and the establishment have to opt out of the Statutory Scheme. In other words, the applicant seeks exemption in the manner provided under the Statutory Scheme which is formulated u/s 5 read with Schedule II which contains different matters including exemption and it is for this reason that the Legislature has referred to only exemption u/s 17 and therefore it cannot be said that exemption u/s 17(1) stands on a different footing as compared to exemption u/s 17(2). Mr. Dada has taken this Court through the various provisions of the Act and the Scheme and has submitted that looking to the functioning of the Fund over the years and in view of the past administrative experience, the R.P.F.C. decided to insist on the revised conditions being followed by the applicants. The said revised conditions are the same as insisted on by the Central Government vide notification dated April 16, 1987 issued u/s 17(1)(a) because the R.P.F.C. thought it fit to incorporate those conditions as the same were in the interest of members/subscribers to the fund. Mr. Dada submitted that looking to the Scheme of Section 17 the tenets which are applicable to the Management and administration of the Statutory Fund u/s 17(1) are made applicable even to the provisions of Section 17(2) by reason of the impugned orders passed by the R.P.F.C. so that a uniformity is maintained and also so as to ensure the viability of the fund in future. Mr. Dada farther submits that u/s 17(3) of the Act the R.P.F.C. is given power to issue such directions both with regard to exempted establishments as well as exempted employee or class of employees and as long as those directions are in conformity with the directions of the Central Government, it is not open to the petitioners to object to the authority of the R.P.F.C. to impose such conditions. Mr. Dada farther submitted that, in the present case as held by the Supreme Court in the case of N.K. Jain and others Vs. C.K. Shah and others, notwithstanding the exemption granted u/s 17 of the Act the Government does not lose its hold over the Private Scheme framed by the establishment and there are built-in safeguards u/s 17 itself so as to protect the interest of the employees and Section 17(4) is one such safeguard. Mr. Dada, therefore, contended that as regards the administrative control over the Management of the Fund even if the Fund is a Private Provident Fund the R.P.F.C. does not lose its control and it is certainly empowered to issue directions regarding the administration and the Management of the fund. Mr. Dada further submitted that in any event a privilege is granted to the employee

or class of employees to opt out of the Statutory Scheme. It is not a matter of right. In the above circumstances, the R.P.F.C. has the authority to insist that the establishment must obtain exemption u/s 17(1) of the Provident Fund Act, 1952. Mr. Dada made it very clear that in view of the amendment to the Act and the Scheme as of 1988 the R.P.F.C. has now decided in the interest of uniformity between the pre-existing Scheme and the Existing Private Scheme to impose the said revised conditions even to employees covered by individual exemption during the period 1952-1988.

3 A. In view of the above rival contentions the question which we are required to examine are as follows: Whether the R.P.F.C. is empowered to impose the impugned conditions; that whether the R.P.F.C. is entitled to insist on compliance of the conditions failing which the establishment must obtain exemption u/s 17(1) of the Act; that whether the R.P.F.C. has the authority to issue such directions or whether it is only the Central Government or the appropriate Government which has been given such power to issue conditions and whether insistence on the employer/establishment to obtain exemption u/s 17(1) is Justified or germane consideration to be taken into account by the R.P.F.C. while granting exemption u/s 17(2) of the Act and whether the said conditions could be applied retrospectively. This warrants examination of that Act, various provisions of the Act and the Scheme 1952. Before examining the Scheme of the Act and the Statutory Scheme, the historical background regarding the working of Statutory Scheme is required to be taken into account. The R.P.F.C. has to administer a Statutory Fund contemplated by the Scheme. The said Accounts run into lakhs. As regards the above 8 petitions, a statement has been furnished to me which itself indicates that the exemption are sought by the employees. The number of employees in each company are in the vicinity on an average of 1,500. In the above petitions we are concerned with sizable number of applications numbering about 900 to 1000. It is in this light that for administrative reasons it appears that at one point of time the R.P.F.C. insisted that the sizable number of applications vis-a-vis such establishment must be received and a sizeable number of people should apply for exemption. For the last several years in this Court this issue has been repeatedly agitated both by the employers and the employees. In the circumstances, this matter is required to be decided in large perspective and not only on the question of hearing being given to the concerned parties. As regards the administrative experience gained by the R.P.F.C. over the years, the same is reflected in the 30th Annual Report and the Annual Report of the Employees Provident Fund Organisation maintained under the Act, 1952 by the R.P.F.C. The above report indicates that the committee on exempted establishment was constituted in October 1980. The said Committee examined the working of the exempted establishments. Various meetings were held up to March, 1993. The committee submitted interim reports. The committee made certain recommendations and the follow up action as suggested indicates that even by the Annual Report of 1983 it was recommended that the provisions of Section 7A and Section 8 of the Act should

be amended suitably to empower the employees Provident Fund Authorities to decide the quantum of arrears due from the exempted establishments in respect of employees eligible for the membership but not enrolled as members of the fund and to issue recovery certificates for any amount due from these establishments. Under Clause v.6(iii) of the said report way back in 1983 it was recommended that the employers should be made liable to make good the defalcated amounts as the exempted funds were administered under the direct supervision of the employers. Similarly, under Clause v.6(iv) it was recommended that the condition of crediting interest at the rate not lower than the rate declared by the Government from time to time in respect of the unexempted establishment should be strictly complied with by the exempted establishments. Similarly, under Sub-clause v. it was recommended that the securities should be in the name of the Board of Trustees and the custody thereof should vest with a nationalised Bank. Similarly, under Sub-clause xiii. it was recommended that where the majority of the employees in an establishment had been granted exemption under para 27 or 27(A) of the Scheme, the provisions u/s 17(1A) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 be made applicable to such establishments. This clause is very important particularly while construing the provisions dealing with paras 26 and 27 of the Statutory Scheme to which I shall presently refer. In fact, para 26 has been amended in 1990 in order to bring it in line with clause xiii of the recommendation of the said report. The impugned revised conditions are in the line with the recommendations of the Working Committee. In the light of these recommendations the Act and the Statutory Scheme has been amended and the provisions are made more stringent and greater powers have been given to R.P.F.C. to administer and control the Private Provident Fund. In the light of the above observations we are required to examine the Scheme and the provisions of the said Act, 1952.

4. At the outset, it be mentioned that the Act came into force on March 4, 1952. u/s 1 which deals with the extent and the application of the Act, it is laid down that the said Act shall apply to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and to any other establishment employing twenty or more persons or class of such establishment which the central Government may, by notification in the Official Gazette specify. In other words, the Act applies to every establishment which is a factory engaged in any industry or to any other establishments notified by the Central Government. u/s 1(4) it is provided that where it appears to the Central Provident Fund Commissioner, that the employer and the majority of employees in relation to any establishment have agreed that the provision of this Act should be made applicable then the Central Provident Fund Commissioner may by notification in the Official Gazettes, apply the provisions of this Act to that establishment on and from the date of such agreement or from any subsequent date specified in such agreement. Section 2(fff) defines exempted establishment. This sub-section is very important for the

purpose of deciding this matter. It defines exempted establishment to mean an establishment in respect of which an exemption is granted u/s 17 from the operation of all or any of the provisions of any scheme, whether such exemption has been granted to the establishment as such or to any person or class of persons employed therein. In other words, whether an exemption is given to the establishment or to employee(s) it results by legal fiction into an exempted establishment as defined u/s 2(fff). Both the exemptions are treated as one in effect and for the purposes of the Act. On an employee obtaining exemption he falls in category of exempted employee as defined u/s 2(ff) of the Act. Section 5 of the Act, 1952 lays down that the Central Government may by notification in the Official Gazette frame a Scheme to be called the Employees' Provident Fund Scheme for the establishment of provident Fund under this Act in respect of establishments or class of establishments to which the Statutory scheme shall apply. Now Section 5(1) of the Act contemplates, therefore, that the Statutory Scheme is required to be framed by the Central Government. That the said Statutory Scheme shall be for the establishment of a Statutory Provident Fund under the said Act. That the said Provident Fund shall be for the benefit of employees or for class of employees. That the Scheme shall specifically specify the establishments or class of establishments to which the Statutory Scheme shall apply. That after the Statutory Scheme is framed, a Statutory Provident Fund is required to be established in accordance with the provisions of the Act and the Statutory Scheme. In other words, the Statutory Provident Funds is conceptually different from a Statutory Scheme. At this stage, it may be clarified that in the above circumstances, the Act contemplates two types of funds, namely, Statutory Provident Fund and the Private Provident Fund. This contradistinction must be kept in mind. An employee is required to become a member of the Fund. An employee who is working in an establishment to which the Act applies is duty bound to become member of the Statutory Fund. The Fund is vested in the Central Board constituted u/s 5A of the Act. u/s 5(13) it is provided that subject to the provisions of the Act, the Statutory Scheme framed u/s 5(1) may provide for all or any of the matters specified in Schedule II to the Act. Schedule II lays down the matters required to be taken into account by the Government while framing the Scheme. Item No. 1 of Schedule II lays down that the Statutory Scheme was for employees or class of employees who shall join the Statutory Fund and the conditions under which employees may be exempted from joining Fund or from making any contribution therein. The word shall in Item 1 of Schedule II is important. It shows that in the first instance employee(s) shall be required to join the statutory fund and he can opt out of the statutory scheme only on conditions and within framework of the Statutory Scheme. It also shows that individual employee or a class of employees can seek exemption only as a matter of privilege and not as of right and therefore the R.P.F.C. is entitled to impose such conditions as deems fit. u/s 5(2) it is further provided that the Statutory Scheme framed under Sub-section (1) may also provide that any of its provisions shall take effect prospectively or retrospectively or on and from such date as may be specified in that behalf under the Scheme.

This sub-section is important because in the present case, the R.P.F.C. seeks to impose the revised conditions uniformly and with retrospective effect so as to cover even those employees who were earlier covered by the exemption given which is seriously opposed by the Petitioners. Section 5A deals with the constitution of the Central Board. u/s 5A (3) the Central Board is required to administer the Statutory Fund, which is vested in the Central Board in such a manner as may be specified in Statutory Scheme. Section 5D deals with the appointment of Officers. u/s 5D(3) the Central Board may appoint the Central Regional Provident Fund Commissioner to assist the Board with regard to administration of the Statutory Fund which vests in the Central Board. u/s 5E the Central Board is empowered to delegate to any of its Officers including the R.P.F.C. subject to such conditions and limitations, if any, as it may specify, such of its powers and functions under this Act as it may deem necessary to give effect for the efficient administration of the Scheme. Section 8 deals with the mode of recovery of moneys due from employers. Section 8(a) deals with recovery of the amount payable by an employer in relation to any establishment to which the Act applies whereas Section 8(b) provides for recovery of any amount due from employer of an exempted establishment. This Section also indicates that it is the employer who alone is required and who is responsible to pay the contributions, accumulation charges and damages. He is the person concerned who has to administer and manage the Fund which is vested under any Scheme. If it is a Private Provident Fund, he is the Officer who has to administer the Private Provident Fund Scheme and if he makes defaults with regard to such contributions he will be responsible as an employer in relation to an establishment. Secondly, the said Section also indicates that he will be responsible even as an employer in relation to an exempted establishment. In other words, the entire scheme of the Act deals with the liability and responsibility of the employer in relation to any establishment to which a Statutory Scheme applies. Similarly, it deals with the responsibility of an employer in relation to an exempted establishment. It is not open to the employer to say that because he has not applied for exemption he is not liable to pay the amounts u/s 8(b) of the Act. This is because Section 17 contemplates on exemption being granted whether by the Appropriate Government to the establishment or by the R.P.F.C. to a class of employees it results in exempted establishment. The Scheme of Section 8, therefore, supports the contention advanced by Mr. Dada on behalf of the Respondents. This also supports interpretation placed by me with regard to Section 2(fff) of the Act read with Section 5 of the said Act, 1952. Similarly, Section 8G deals with application of certain provisions of the Income Tax Act to the provisions of the Provident Fund Act and the Statutory Scheme. In this connection it is important to note that the provisions of II and HI Schedules to the Income Tax Act, 1961 is made applicable mutatis mutandis subject to certain modifications to the provisions of this Act. The provisions of the Income Tax Act indicates that it is the employer who is required to manage the Private Provident Fund. The said Private Provident Fund vests in the Trustees who are required to comply with the conditions of the

Income Tax Act. It is not the employee or the subscriber or the beneficiary who is required to comply with the conditions of the Act but the employer who is solely responsible to comply with the conditions under the Income Tax Act. In other words u/s 8G of the Act read with Section 9 of the Act the Private Fund must be a Fund which is approved under the Income Tax Act. Section 10 of the said Act deals with protection against the attachment. It says that the amount standing to the credit of any member in the Fund or of any exempted employee in a provident Fund shall not be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Court in respect of any debt or liability incurred by the employee or the exempted employee. Section 11(1)(a) deals with priority of payment of contributions in relation to an establishment to which the Act applies whereas Section 11(1)(b) relates to priority of payment of contribution by an employer in relation to exempted establishment where the employer or the Company becomes insolvent or is ordered to be wound up. Here also dichotomy is seen between the provisions of Section 11(1)(a) and the provisions of Section 11(1)(b). This dichotomy also supports the contention of the Respondents that it is the employer who has to take steps to administer and protect the Fund and the liability accrues to him if he fails. Such employer may be an employer in relation to an establishment to which the Act applies or he may an employer in relation to an exempted establishment. Here also there is no exemption separately mentioned u/s 17(1) or u/s 17(2) of the Act. In other words, once the appropriate Government grants exemption u/s 17(1) of the Act or where the R.P.F.C. grants exemption u/s 17(2) of the Act for the purposes of the Act, net result is that it is an exempted establishment. The idea being that it is only in such circumstances that the R.P.F.C. or the Government can control and ensure the viability of the Fund and can make the employer liable both in relation to an establishment to which the Statutory Scheme applies or in relation to an exempted establishment in respect of contributions payable under the Act. In the circumstances all the above provisions discussed show that it is an exempted establishment which results on account of exemption being granted u/s 17(1) or exemption being granted pursuant to an order u/s 17(2) of the Act and, therefore, the R.P.F.C. is certainly justified in imposing such conditions as he deems fit under the provisions of Section 17(2) of the Act. If the net result of grant of exemption is an exempted establishment then the R.P.F.C. is certainly authorised to impose revised conditions. In the present case, he has bodily lifted those conditions which were made applicable by the Central Government to control the Industries in 1987. In the above circumstances, the Scheme of the Act and the Statutory Rules and the Statutory Scheme clearly indicate that Section 17 read as a whole constitute one complete Code dealing with exemptions and it is not possible to bifurcate the parameters of Section 17(1) vis-a-vis Section 17(2) of the Employees' Provident Funds Act because it will defeat the very object of the Act and it will defeat the entire scheme of the Provident Fund Act, 1952. u/s 13(2) the Inspector is therefore required to inquire whether conditions of exemption u/s 17, have been complied with or not. The Section also indicates that the Act applies clearly not

only to the establishment covered by the Act and the Statutory Scheme but also the establishments to whom the exemptions are expressly granted u/s 17 of the Act which as stated hereinabove is the effect of the exemption being granted either u/s 17(1) or 17(2) of the Act. Similarly, Section 14B deals with the power to levy and recover damages where there is non-fulfillment of the conditions of exemption u/s 17. This section also does not indicate any distinction between the conditions u/s 17(1) or conditions u/s 17(2) of the Act. The uniformity is maintained throughout all the provisions of the Act which I have referred to above. It is for this reason that the Legislature has used the word "exempted establishment" u/s 2(fff) of the Act read with Section 5 of the said Act, 1952. In cases of Private Provident Fund which are in existence prior to the Act or the Scheme it is provided that Funds are transferable to the Scheme under the Act vide Section 15(2) of the Act. Section 17 deals with the power to exempt. Section 17(1) empowers the Appropriate Government to grant exemption to an establishment, prospectively or retrospectively, from the operation of all or any of the provision of the Statutory Scheme whereas Section 17(2) provides for exemption from the Statutory Scheme to be given to any person or class of persons employed in an establishment to which the Scheme applies. Section 17(2) read with para 27 gives power to R.P.F.C. to grant exemption on such conditions as may be specified in the order. Proviso to para 27 of the Scheme 1952 lays down that an employee is entitled to exemption if the benefit in the nature of provident Fund, gratuity or pension under the Private Scheme is more favourable than under the Statutory Scheme. In other words, Section 17(1) gives power to the Government to exempt an establishment from the Scheme whereas Section 17(2) read with para 27 gives power to R.P.F.C. to grant exemption to an employee if the employee fulfils the conditions laid down by the Commissioner. Section 17(3) of the Act provides, inter alia, that where in respect of any person or class of persons exemption is granted u/s 17 whether such exemption is granted to the establishment or to a person or class of persons such exemption shall be given subject to the employer maintaining accounts, filing returns, making investments etc. as the Central Government may direct. Section 17(5) lays down that where any exemption u/s 17 is cancelled, the amount of accumulations shall be transferred from the Private Fund to the Statutory Fund. Section 17(3), therefore, indicate that exemption u/s 17 is one and only exemption and there is no separate exemption contemplated as contended by the Petitioner. In other words, all the above provisions of the Act indicates that the Legislature has not segregated exemption into two separate compartments but the Legislature only referred to exemption u/s 17 as a whole and not Section 17(1) or Section 17(2). This is because, as stated above, effect of exemption u/s 17(1) or 17(2) is the same. It results in an establishment falling in the definition of the word "exempted establishment" as defined u/s 2(fff). It is because both the Statutory Fund as well as Private Fund is required to be supervised by the R.P.F.C. as well as the Government. The R.P.F.C./Government are not Trustees for the Private Provident Fund. But they have to supervise the administration, management, the viability and protection of the Private Fund. A Private Fund

may also be exposed to risk factors. For example when the Companies are wound up or dissolved on several occasions this Court finds that notwithstanding the provisions of Section 17(3), Section 17(4) and Section 17(5) of the Act, the R.P.F.C. is not able to recover the amount. On several occasions the Companies come within the purview of B.I.F.R. In such cases the revised conditions play a very important role. For example, if a Trustee of a Private Provident Fund is required to give undertaking to the R.P.F.C. or if the R.P.F.C. is able to take collateral/security then in such cases R.P.F.C. can enforce the conditions qua the Trustees of the Private Provident Fund. From 1952 to 1988 I find that none of the establishments herein have ever applied for exemption. None of the establishments have agreed or undertaken to the R.P.F.C. to implement the conditions and over the years only individual employee or class of employees have obtained exemptions which cannot save the Fund or protect the Fund from risk factors which arise on account of economic or financial adverse circumstances. The submission or returns as directed by the Government or making investments in Government Securities or taking penal action for not maintaining accounts or for violation of the Statutory conditions, although necessary, may not be foolproof and in the circumstances the R.P.F.C. can certainly insist on additional conditions which could protect the Private Fund from the risk factors. It is in this light that all the revised conditions may be seen.

4A. One more aspect is very important. It is contended on behalf of the Petitioners that the Central Government can impose conditions for granting exemption and that R.P.F.C. cannot impose the above conditions. It is contended on behalf of the Petitioners that the above 28 conditions are virtually usurping the power of the Central Govt. It is contended on behalf of the Petitioners that the R.P.F.C. has only to consider under the proviso to para 27 whether the benefits receivable by an individual under the Private Provident Fund Scheme are more beneficial than the benefits under the Statutory Scheme and if the condition is satisfied, the R.P.F.C. is duty bound to give exemption. It is contended that the R.P.F.C. however, has extended his authority by imposing 28 conditions which are similar to 29 conditions imposed by the Central Government vide Notification dated April 16, 1987, I do not find any merit in the said contention. If one goes through the above provisions of the Act and the Scheme 1952, there is a dichotomy between the Scheme and the Fund. As stated above, an individual is given the privilege to opt out of the Scheme. In the case of *N.K. Jain v. C.K. Shah* (supra) it is held by the Supreme Court that it is not a right but a privilege, and that the R.P.F.C. retains the control even in respect of the Private Provident Fund. Further a Fund under the provisions of the Act means a Statutory Fund. It is only after the Scheme is enacted that a Fund is established. The Statutory Fund vests in the Board whereas the Private Fund is required to be vested in the Trustees. The provisions of the Act discussed above and particularly Section 17 indicates that exemption from the Scheme is a concept different from the membership of the Fund. The various provisions of the Act and particularly Section 17 indicates that while granting exemption,

conditions can be imposed both by the Government as well as by the R.P.F.C. But conditions of exemption stand on a different footing from directives given by the R.P.F.C. with regard to administration, management, protection and supervision over a Private Provident Fund. Section 17(2) read with para 27 does not exclude the authority of the R.P.F.C. to give directives to protect the Private Provident Fund or to preserve the Private Provident Fund. In fact, such directives are necessary to protect the Fund. It may have an effect in the matter of giving exemption but that does not mean that appropriate directions from time to time cannot be given to the Trustees of the Private Fund. It also does not mean that directives to protect the Fund cannot be given to the Trustees. As stated hereinabove, on several occasions, the Private Fund may become sick. The said Private Fund may be opened to risks particularly when the Trustees do not give any type of undertaking and particularly when they do not submit to the authority of the R.P.F.C. as in the present case. In fact, the entire battle in this Petition is fought by the Trustees of the Private Provident Fund, through individual or a class of employees. The trustees of Private Provident Fund have never applied for exemption and in the circumstances it is in the interest of the employees that the above revised conditions have been imposed. It is in this context that para 26 also assumes importance. Under Paragraph 1(f) an excluded employee means an employee who receives salary beyond the prescribed ceiling. Under paragraph 1(1) Trustee means a member of the Board of Trustees. Membership of the Fund is covered by Chapter IV of the Scheme. Para 26 deals with class of employees who are required to join Statutory Fund as members. Para 26A deals with retention of membership under para 26 is withdrawn or cancelled. Para 27 deals with exemption of an employee to be given by the Commissioner on such terms and conditions as may be specified whereas paragraph 27A deals with the power of the Government to grant exemption to class of employees. In the above circumstances, it is clear that administration, management and preservation of the Fund stand on a different footing as compared to conditions of exemption. The R.P.F.C. is also entitled to impose conditions for granting exemption. His power cannot be only restricted to consideration of only one fact, namely whether an individual gets more benefit under the Private Fund as compared to Statutory Fund. It does not exclude his authority to issue directions with regard to the management, administration and protection/preservation of the Fund. These are two independent things. In the circumstances R.P.F.C. was entitled to impose the above mentioned conditions. To repeat, I am not considering in the present case the constitutional validity of the said conditions but only the power to issue such conditions. Accordingly, R.P.F.C. certainly has the power to issue the above directions and to that extent I do not find any merit in the contentions advanced on behalf of the Petitioners. Similarly, if these conditions are meant to subserve the objects referred to above and if those conditions are meant to protect the Private Provident Fund of the employee/employees then those conditions can equally apply even to those employees to whom during the period 1952 to 1988 exemptions were granted on individual basis. There is no question of retrospectivity in that sense. The Private

Fund which is approved under the Income Tax Act exists even today. That Fund is required to be protected. In the above circumstances, the R.P.F.C. after considering the working report of the various Committees, has decided to impose the conditions so that the Fund is protected from various risk factors to which it may be exposed as of today. In fact, all these conditions are in consonance with the report of the Committee on exempted establishments which suggested the imposition of conditions which are similar to the impugned directives. The said Committee has recommended the above terms to protect the Private Fund and to preserve the said Fund (See 30th Annual Report for the year 1982-83 of the Employees' Provident Fund Organisation).

5. In view of the above circumstances, there is not merit in the above Writ Petitions and the above Writ Petitions Nos. 1910/92, 2346/92, 1051/93, 1946/93, 1972/93, 2176/93, 1007/94, and 1507/94 are dismissed. Rule in each of the writ petitions is discharged with no order as to costs.

6. The R.P.F.C. will now decide the applications which are pending before him or proceedings which are pending before him in the light of this judgment. In some cases, I find that the matter is at the show cause notice stage. In some cases, the R.P.F.C. may be required to give fresh notice in the light of the observations made in this judgment and in some cases where matter is at the stage of Section 7A inquiry. It is not necessary for me to examine all these matters except to state that the R.P.F.C. will now proceed in accordance with the above directions and in the light of the observations made in this Judgment.

7. Mr. Cama applies for stay of the Judgment for 8 weeks. Mr. Dada has no objection. The above judgment and order is stayed for a period of 8 weeks from today. During the period of 8 weeks, interim order passed at the stage of admission shall continue to operate.

Certified copy expedited.