REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7698 OF 2009

MODERN TRANSPORTATION CONSULTATION SERVICES PVT. LTD. & ANR. ..... APPELLANT(S)

VS.

CENTRAL PROVIDENT FUND COMMISSIONER EMPLOYEES PROVIDENT FUND ORGANISATION & ORS. ..... RESPONDENT(S)

JUDGMENT

Dinesh Maheshwari, J.

1. In this appeal by special leave, the appellants (writ petitioners) have called in question the judgment and order dated 07.05.2008 in FMA No. 537 of 2007 whereby, the Division Bench of High Court at Calcutta has reversed the order dated 07.04.2006, as passed by the learned Single Judge in W.P. No. 2982(W) of 2005.

2. By the aforesaid order dated 07.04.2006, the learned Single Judge of High Court allowed the writ petition filed by the appellants while upholding their contentions that the employees of Railways, who had withdrawn full amount of

provident fund while retiring and who were engaged by them on lump sum honorarium basis, should be treated as “excluded employees" for the purpose of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'the Act'/'the Act of 1952') and the Employees' Provident Funds Scheme, 1952 (hereinafter referred to as 'the Scheme of 1952'). However, in the Letters Patent appeal preferred by the Central Provident Fund Commissioner and the Regional Provident Fund Commissioner, the Division Bench of High Court totally disagreed with the learned Single Judge; and dismissed the writ petition while holding that the said employees, who retired after serving an exempted employer, would not fall within the category of excluded employees on re-employment and would be covered by the Act and the Scheme of 1952.

2. The basic question arising for determination in this appeal is as to whether the retired employees of Railways, who had withdrawn all the superannuation benefits, including full amount of accumulations in their provident fund accounts, are to be treated as "excluded employees" in terms of Paragraph 2(f) of the Scheme of 1952? If to be treated as "excluded employees", the said retired employees of Railways, on being re-employed by the appellants, may not be required to join the Fund created under the said Scheme of 1952 and consequently, the appellants may not be obliged to make any contribution in that regard.

3. The relevant factual aspects leading to the question aforesaid are not of much controversy and could be briefly summarised as follows:

3.1. The appellant No. 1, a Private Limited Company, had been engaged in manning the Captive Railway System of the respondent No. 4-Damodar Valley Corporation ('DVC'). The appellant No. 2 is said to be a Director of the appellant No. 1-company. The appellants would submit that their only connection with DVC had been a contract to supply the personnel for manning the cabins and gates on the railway-road; and they were receiving the remuneration for supplying the aforesaid personnel, who were retired employees of the Indian Railways and were engaged on a lump sum honorarium basis.

3.2. By his letter dated 18.02.2002, the Assistant Provident Fund Commissioner Circle-IV, Calcutta informed the appellant-company that the number of employees of its establishment being twenty-eight in the month of May, 1999, the establishment came within the purview of the Act of 1952 with effect from 01.05.1999. In reply, the Director of the appellant-company stated in his letter dated 05.03.2002 that all the persons engaged by the company, except two of them, were the retired Railway employees above 58 years of age; that all of them were working only on retainer basis; and that they were not covered under the Employees' Provident Fund Scheme. The said Assistant Provident Fund Commissioner, in his letter dated 03.05.2002, refuted the contentions of the appellants while referring to Paragraph 26 of the Scheme of 1952 and while

asserting, *inter alia*, that on and from 01.11.1990, an employee is eligible for enrolment as a member of the Scheme of 1952 from the date of joining an establishment covered under the Act of 1952; that there was no age bar for an employee to become a member of the Scheme of 1952; and that the employees in question were not excluded employees in terms of the Scheme of 1952.

3.3. It appears that the appellant-company applied for exemption under Section 17 of the Act and Paragraph 27 of the Scheme of 1952 on the ground that the persons concerned were retired Railway employees but then, no decision was taken on such representations. On the other hand, by yet another letter dated 22.05.2002, the appellant-company elaborated on its contentions that the employees in question, being retired employees of Railways, did not come within the purview of the Act of 1952 and were to be treated as "excluded employees" under Paragraph 26 of the Scheme of 1952. It was stated that these employees, whilst in the service of Railways, were not covered under the Scheme of 1952 but were covered under the General Provident Fund (‘GPF’) Scheme and had withdrawn all the superannuation benefits including Provident Fund (‘PF’) and pension and hence, they were not covered under the Act of 1952. It was also claimed that these employees were in receipt of more favourable benefits than those available under the Scheme of 1952 and had expressed their unwillingness to become the members of the Scheme of 1952. However, the authorities related with the Employees' Provident Fund Organisation (the contesting respondents

herein) maintained that the employees of an establishment were eligible for enrolment as members of the Scheme of 1952 irrespective of age; and the employees of the appellant company were not "excluded employees", as defined in the Scheme of 1952.

3.4. The appellant-company having failed to remit the requisite contribution in relation to the employees concerned, the competent authority under the Act of 1952 commenced proceedings under Section 7A thereof, for determination of the money due from the appellants. By its order dated 31.12.2004, the competent authority, after having heard the appellants, determined the amount payable by the appellant-company under various heads while holding, *inter alia*, that the provisions of the Act of 1952 were not repugnant to the GPF Scheme; that a person was entitled to draw double or multiple pension/s; and that the retirement of the employees from Railways would not take them within the definition of "excluded employees". Aggrieved, the appellants preferred the writ petition before the High Court at Calcutta [W.P. No. 2982(W) of 2005].

4. In the impugned order dated 07.04.2006, the learned Single Judge of High Court, though held that the Act was applicable to the establishment of appellants but, thereafter, concluded that on superannuation, the retired employees of the Railways would fall within the definition of “excluded employees”. The learned Single Judge observed that an employee, who had withdrawn full amount of his accumulation in the fund, on re-employment with any establishment not

exempted under Section 17 of the Act, would not be again treated as an employee to be covered under the Act. The learned Single Judge further observed that accepting the submissions of the authorities would create a situation where an employee, after being employed in any establishment and working for some time, may voluntarily retire from service and join another establishment and keep on doing so successively and get the benefit of various provisions of the Act of 1952. According to the learned Single Judge, even though the Act of 1952 is a piece of social benefit legislation, and its provisions are intended to protect the employees, who are considered to be the weaker section of society, yet, the enactment is not intended to create a largesse in favour of the employees at the cost of the employer. In the opinion of learned Single Judge, the retired employees of Railways cannot be compelled to become members of the Fund and else, the object and purpose of the expression “excluded employees” in the Scheme of 1952 would be rendered nugatory. The learned Single Judge also observed that when an employee earning more than Rs. 6,500/- was treated as an “excluded employee” because of the scale of pay as per Paragraph 2(f)(ii) of the Scheme of 1952, there was no reason as to why Paragraph 2(f)(i) would not apply in case of an employee who had withdrawn the full amount of his accumulations. The learned Single Judge further observed that in order to decide as to whether the provisions of the Act do not apply in respect of some of the employees, the provisions contained in Paragraph 2(f) of the Scheme of 1952 must be strictly construed; and having taken the benefit of one

Scheme, the employees cannot compel the employer to comply with the provisions of the Act. With these observations, the learned Single Judge allowed the writ petition and remanded the matter to the authorities for re-determination of the amount of provident fund payable by the appellants, after treating the retired employees as “excluded employees”, but after taking into account those employees who were seeking to be included under the Act voluntarily.

5. Aggrieved by the order so passed by the learned Single Judge, the Central Provident Fund Commissioner and the Regional Provident Fund Commissioner preferred the Letters Patent appeal that has been considered and allowed by the Division Bench of High Court at Calcutta by way of the impugned judgment and order dated 07.05.2008.

5.1. The Division Bench took note of the meaning assigned to the expressions “Fund” and “Scheme” in the Act of 1952 as also the definition of “excluded employee” in Paragraph 2(f) of the Scheme of 1952 and rejected the contentions of the writ petitioners that the employees in question were to be treated as excluded employees while observing as under:

> *“We are unable to accept the submission of Mr. Sengupta that the receipt of GPF and the Pension by the retired railway employees would be as if full payment has been received under paragraph 69(1). There can be no addition to the term “Fund” as defined under Section 2(h). It is also not possible to accept that since the Railway Employees have retired on superannuation and are beyond the age of 55 years, they would be on par with the “excluded employees”. There is no maximum age limit prescribed in any of the provisions of the Act or the 1952 Scheme for an employee to become a member of the Fund or the Scheme. It is claimed that the term “Scheme” refers only to the*

Employees Provident Fund Scheme framed under Section 5. The term "excluded employee" therefore has to be co-related to the employee who was a member of the "fund" as defined under Section 2(h) of the Act. Such an employee would be an "excluded employee" when the full amount has been withdrawn by him on retirement from service after attaining the age of 55 years i.e., in terms of Paragraph 69(1)(a). The provision being crystal clear does not admit of any other interpretation. Paragraph 69(1)(c) deals with an employee who withdraws the full amount standing to his credit immediately after migration from India for permanent settlement abroad and for taking employment abroad.

In our opinion, there can be no dissections of these provisions as proposed by Mr. Sengupta. Under paragraph 2(f)(i) a retired employee would be an excluded employee. Under Paragraph 2(f)(ii) an employee who is otherwise entitled to become a Member of the fund becomes an excluded employee as he is earning beyond the stipulated minimum that is required for an employee to become a Member of the Scheme. This provision clearly demonstrates the underlying principle of the Provident Fund Act is to provide social security for those employees who otherwise would not be in a position to save any money from their wages. Paragraph 2(f)(iv) again provides that an apprentice shall be an excluded employee till he becomes a fullfledged employee. There is a qualitative difference between Paragraph 2(f)(i) on the one hand and Paragraph 2(f) (ii) & (iv) on the other. Paragraph 2(f) 1(i) provides exclusion only to the employees who have already received retirement benefits. On the other hand, under Clause 2(f)(ii) and 2(f)(iv) an employee may be an excluded employee at one point and may not be at a subsequent point. But benefit of these provisions cannot be extended to any employees who are not erstwhile members of a fund administered by the Central Board, under Section 5A of the Act

The 'Fund' created by the exempted establishment under Section 17(1)(a) cannot be equated with the Fund which is established by the Central Board under Section 5(1). Nor can it be added to the definition of Fund under Section 2(h) of the Act. It is for this reason that the appropriate Government can only exempt an establishment from the operation of the scheme under Section 17(1) upon forming an opinion that the employees of such an establishment enjoyed benefits which are not less favourable to the employee than the benefits available under the Act or any Scheme made under the Act. In fact, the exemption can only be granted on consultation with the Central Board. This provision is made only to give supervisory control to the Appropriate Government over individual employers seeking exemption. But this provision cannot be put on the same pedestal as Section 5(1) of the Act. It is admitted position that employees of the Railways are not members of the 1952 Scheme. Therefore, these retired employees cannot be treated as excluded employees covered under Paragraphs 69(1)(a) and 26 of the

1952 Scheme. There is a clear distinction between a fund which is created by the Central Government and is administered by the Central Board under Section 5(1)(a) and a fund created by a private employer, exempted under Section 17(1) and administered by Board of Trustees under Section 17(1A) and (b). There can be no intermingling of the two provisions. "

5.2. In view of the above, the Division Bench concluded on the matter in the following:

"In view of the above, we find that the judgment of the learned Single Judge is not sustainable in law. We are unable to hold that retired employees of the Railways can be treated as excluded employees. We are also unable to hold that, not including the retired employees in the category of excluded employees would in any manner contravene the provisions of the Act or the Scheme. We are unable to accept that bringing the Railway employees within the purview of the Act and the Scheme would result in unjust enrichment of the retired employees. We are of the opinion that an employee who retires after serving an exempted employer would not fall within the category of excluded employees on re-employment and would be covered by the Act and the 1952 Scheme. We are also unable to accept that since the employees covered under Paragraph 2(f)(i) and (ii) are excluded employees, all employees who had drawn the full amount from any other Provident Fund should also be treated as excluded employees.

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

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

6. Assailing the judgment aforesaid, learned counsel for the appellant has strenuously argued that the Division Bench of High Court has erred in interpreting the term "excluded employee" and in holding that the retired employees of the Railways, even when they had withdrawn the full amount from their provident fund, cannot be treated as excluded employees. The learned counsel emphasised on the submissions that the retired Railway employees, who

were covered under GPF Scheme while in service, who had drawn all the superannuation benefits including the PF, and who were also receiving pension under the CPG rules, would fall within the definition of "excluded employees" as contained in clause (i) of Paragraph 2(f) of the Scheme of 1952. Learned counsel submitted that as per Paragraph 26 thereof, the Scheme of 1952 shall apply to all the employees other than excluded employees; and, as per Paragraph 2(f)(i), an excluded employee is the one who, having been a member of a provident fund, had withdrawn the full amount of his accumulations in the fund under clause (a) or (c) of sub-paragraph (1) of Paragraph 69. Therefore, according to the learned counsel, the employees concerned in the present case ought to be treated as “excluded employees”, for having withdrawn their PF accumulated with the Indian Railways after having reached the age of superannuation. Further, according to the learned counsel, if these employees are not treated as “excluded employees”, it would amount to their unjust enrichment, which has never been the intention of the Act of 1952 or the Scheme thereunder. The learned counsel contended that the Division Bench of High Court has erred in holding that Paragraph 69 of the said Scheme does not apply to the case of retired Railway employees and such retired employees, though not covered under the Act, came to be so covered on their re-employment in an establishment covered under the said Act. According to the learned counsel, the Division Bench has erred in interpreting the definitions of ‘Fund’ and ‘Scheme’ and in restricting the definition of ‘Fund’ under Section 2(h) of the Act by holding that even after retiring from the

Railways and receiving the benefits under GPF Scheme, the said employees are not "excluded employees" as the said employer is not covered under the Scheme of 1952.

7. *Per contra*, learned counsel for the contesting respondents has referred to the object as also the arrangement of the Act of 1952 and has particularly submitted that two different sets of provident fund Schemes are envisioned: on one hand is the Scheme contemplated by Section 5 of the Act, the Scheme of 1952 being that Scheme; and on the other hand, there could be other Scheme/s, as permissible under Section 17 of the Act of 1952. According to the learned counsel, coverage of the employees referable to the Act of 1952 by one of the Schemes of provident fund is the rule and generally, such employees would be covered by the Scheme of 1952 with the exception that such coverage may not be necessary when the employees receive the benefits under some other Scheme, which are not less than those available under the Scheme of 1952. Learned counsel for the respondent submitted that in the framework of the Scheme of 1952, only some specific classes of employees are treated as “excluded employees”, as defined in Paragraph 2(f) thereof; and, as per clause (i) of Paragraph 2(f), only such an employee would be excluded who was earlier the member of the Fund under the Scheme of 1952 and had withdrawn all the benefits thereunder. According to the learned counsel, the present appeal is devoid of merits for the reason that the Railway employees, who were not

covered under the Scheme of 1952, do not fall within the definition of “excluded employees” as per Paragraph 2(f) of the Scheme of 1952, even if they had withdrawn the amount standing to their credit in any provident fund created under any other Scheme.

8. We have bestowed thoughtful consideration to the rival submissions and have examined the record of the case with reference to the law applicable.

9. For determination of the question involved in this matter, appropriate it would be to briefly take note of the objects and reasons behind the Act of 1952 as also the relevant provisions thereof and the relevant stipulations in the Scheme framed thereunder i.e., the Scheme of 1952.

9.1. The background aspects had been that, taking note of the need to provide for the institution of contributory provident funds for the purpose of financial security of industrial workers, the Government of India promulgated the Employees' Provident Fund Ordinance with effect from 15.11.1951, which was later on replaced by the Act of 1952[1]. Thus, the concept underlying the enactment had been of providing for compulsory contributory provident funds for safeguarding the future of industrial workers. Elaborate provisions have been made in the Act for creation of a Fund, to be settled in accordance with a Scheme to be framed by the Central Government. However, the Act also

1 The Act was originally enacted on 04.03.1952 as "The Employees' Provident Funds Act, 1952" (No. 19 of 1952); its nomenclature was changed to "The Employees' Provident Funds and Family Pension Fund Act, 1952" w.e.f. 23.04.1971; and its nomenclature was again changed to the present one i.e., "The Employees' Provident Funds and Miscellaneous Provisions Act, 1952" w.e.f. 01.08.1976.

provides for continuation of such of the other provident funds, which are offering equal or more advantageous terms to the employees concerned and are operating efficiently.

9.1.1. In the Act of 1952, the expression “employee” is defined in clause (f) of Section 2 as under:

> *“(f) “employee” means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets, his wages directly or indirectly from the employer, and includes any person,-*
>
> *(i) employed by or through a contractor in or in connection with the work of the establishment;*
>
> *(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment;”*

9.1.2. The concepts of “exempted employee” and “exempted establishment” are defined in clauses (ff) and (fff) of Section 2 of the Act of 1952 as under:

> *“(ff) “exempted employee” means an employee to whom a Scheme or the Insurance Scheme, as the case may be, would, but for the exemption granted under section 17, have applied;*
>
> *(fff) “exempted establishment” means an establishment in respect of which an exemption has been granted under section 17 from the operation of all or any of the provisions of any Scheme or the Insurance Scheme, as the case may be, whether such exemption has been granted to the establishment as such or to any person or class of persons employed therein;”*

9.1.3. The expression “Fund” is defined in clause (h) of Section 2 of the Act of 1952 as under:

> *“(h) “Fund” means the provident fund established under a Scheme;”*

9.1.4. The expression “Scheme” means the one framed under Section 5 of the Act of 1952 and is defined in clause (l) of Section 2 as under:

> *“(l) “Scheme” means the Employees Provident Fund Scheme framed under section 5;”*

9.1.5. Section 5 of the Act of 1952, providing for the Employees’ Provident Fund Scheme, reads as under[2]:

> ***"5. Employees’ Provident Funds Scheme. –*** *(1) 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 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.*
>
> *(1A) The Fund shall vest in, and be administered by, the Central Board constituted under section 5A.*
>
> *(1B) Subject to the provisions of this Act, a Scheme framed under sub-section 1 may provide for all or any of the matters specified in Schedule II.*
>
> *(2) A Scheme framed under sub-section 1 may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in the Scheme."*

9.1.6. For the purpose of the question at hand, sub-section (1) and sub-section (1-A) of Section 17 of the Act of 1952, relating to the powers of the appropriate

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2 The original Section 5 has undergone several changes by way of amendments. The relevant amendments to be noticed for the present purpose are that by Act No. 37 of 1953, original Section 5 was re-numbered as sub-section (1), the expressions for establishment of Fund soon after framing of Scheme were added, and sub-section (2) was also inserted. Moreover, by Act No. 28 of 1963, Sub-section (1A) to Section 5 (providing for vesting and administration of Fund in and by the Central Board) was inserted. The provisions relating to Central and State Boards and co-related aspects were also inserted as Sections 5A to 5E by the said Act No. 28 of 1963, which need not be dilated upon, for being not relevant for present purpose.

Government to grant exemption and the consequence thereof, could also be taken note of 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; or*
>
> *(b) any establishment if the employees of such establishment are in enjoyment of benefits in the nature of provident fund, pension or gratuity and the appropriate Government is of opinion that such benefits, separately or jointly, are on the whole not less favourable to such employees than the benefits provided under this Act or any Scheme in relation to employees in any other establishment of a similar character:*
>
> *Provided that no such exemption shall be made except after consultation with the Central Board which on such consultation shall forward its views on exemption to the appropriate Government within such time limit as may be specified in the Scheme.*
>
> *(1A) Where an exemption has been granted to an establishment under clause (a) of sub-section (1),-*
>
> *(a) the provisions of sections 6, 7A, 8 and 14B shall, so far as may be, apply to the employer of the exempted establishment in addition to such other conditions as may be specified in the notification granting such exemption, and where such employer contravenes, or makes default in complying with any of the said provisions or conditions or any other provision of this Act, he shall be punishable under section 14 as if the said establishment had not been exempted under the said clause (a);*
>
> *(b) the employer shall establish a Board of Trustees for the administration of the provident fund consisting of such number of members as may be specified in the Scheme;*
>
> *(c) the terms and conditions of service of members of the Board of Trustees shall be such as may be specified in the Scheme;*

(d) the Board of Trustees constituted under clause (b) shall–

(i) maintain detailed accounts to show the contributions credited, withdrawals made and interest accrued in respect of each employee;

(ii) submit such returns to the Regional Provident Fund Commissioner or any other officer as the Central Government may direct from time to time;

(iii) invest the provident fund monies in accordance with the directions issued by the Central Government from time to time;

(iv) transfer, where necessary, the provident fund account of any employee; and

(v) perform such other duties as may be specified in the Scheme.

*** *** *** "

9.2. After having taken note of the relevant provisions of the Act of 1952, essential it is to take into comprehension the relevant provisions and stipulations of the Scheme of 1952 that has been, as noticed, framed by the Central Government under Section 5 of the Act of 1952.

9.2.1. Noteworthy it is that there is no definition of an "excluded employee" in the Act of 1952. In fact, this expression comes in operation for the purpose of exclusion of certain employees from compulsion to join the Fund created under the Scheme of 1952. Therefore, this expression is defined only in the Scheme of 1952, in clause (f) of paragraph 2 thereof, as under:

"(f) "excluded employee" means—

(i) an employee who, having been a member of the Fund, withdrew the full amount of his accumulations in the Fund under clause (a) or (c) of sub-paragraph (1) of paragraph 69;

(ii) an employee whose pay at the time he is otherwise entitled to become a member of the Fund, exceeds fifteen thousand rupees per month;[3]

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

(iii) [omitted][4]*;*

(iv) an apprentice.

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

9.2.2. Paragraph 26 of the Scheme of 1952 specifies the classes of employees entitled to, and required to, join the Fund as also the co-related aspects. Useful it shall be to keep in view the fact that the expression "Fund", as occurring in Paragraph 26 refers to the Fund created under the Scheme of 1952[5]. This Paragraph 26 reads as under:

"26. ***Classes of employees entitled and required to join the fund.****-*

(1) (a) Every employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies, other than an excluded employee, shall be entitled and required to become a member of the Fund from the day this paragraph comes into force in such factory or other establishment.

(b) Every employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies, other than an excluded employee, shall also be entitled and required to become a member of the fund from the day this paragraph comes into force in such factory or other establishment if on the date of such coming into force, such employee is a subscriber to a provident fund maintained in respect

3 At the relevant point of time, in sub-clause (ii) the figures had been 'six thousand and five hundred rupees' in place of the present figures of ‘fifteen thousand rupees’

4 Sub-clause (iii) and explanation thereto were omitted by GSR 1467 dated 02.12.1960

5 The contra-distinction of this "Fund" with a "private provident fund" is noticeable in sub-paragraph (5), where reference is made to an exempted establishment.

of the factory or other establishment, or in respect of any other factory or establishment (to which the Act applies) under the same employer:

Provided that where the Scheme applies to a factory or other establishment on the expiry or cancellation of an order of exemption under section 17 of the Act, every employee who but for the exemption would have become and continued as a member of the Fund, shall become a member of the fund forthwith.

(2) After this paragraph comes into force in a factory or other establishment, every employee employed in or in connection with the work or that factory or establishment, other than an excluded employee, who has not become a member already shall also be entitled and required to become a member of the fund from the date of joining the factory or establishment.

(3) An excluded employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies shall, on ceasing to be such an employee, be entitled and required to become a member of the fund from the date he ceased to be such employee.

(4) On re-election of an employee or a class of employees exempted under paragraph 27 or paragraph 27 A to join the fund or on the expiry or cancellation of an order under that paragraph, every employee shall forthwith become a member thereof.

(5) Every employee who is a member of a private provident fund maintained in respect of an exempted factory or other establishment and who but for exemption would have become and continued as a member of the fund shall, on joining a factory or other establishment to which this Scheme applies, become a member of the fund forthwith.

(6) Notwithstanding anything contained in this paragraph an officer not below the rank of an Assistant Provident Fund Commissioner may, on the joint request in writing of any employee of a factory or other establishment to which this Scheme applies and his employer, enroll such employee as a member or allow him to contribute more than fifteen thousand rupees of his pay per month if he is already a member of the fund and thereupon such employee shall be entitled to the benefits and shall be subject to the conditions of the fund, provided that the employer gives an undertaking in writing that he shall pay the administrative charges payable and shall comply with all statutory provisions in respect of such employee."

9.2.3. For comprehension of all the relevant provisions and stipulations, a reference to sub-paragraph (1) of paragraph 69 of the Scheme of 1952 is also

pertinent and the same, as applicable at the relevant point of time, may be noticed as under[6]:

> ***"69. Circumstances in which accumulations in the Fund are payable to a member.-*** *(1) A member may withdraw the full amount standing to his credit in the Fund—*
>
> *(a) on retirement from service after attaining of the age of 55 years:*
>
> *Provided that a member, who has not attained the age of 55 years at the time of termination of his service, shall also be entitled to withdraw the full amount standing to his credit in the Fund if he attains the age of 55 years before the payment is authorized;*
>
> *(b) on retirement on account of permanent and total incapacity for work due to bodily or mental infirmity duly certified by the medical officer of the establishment or where an establishment has no regular medical officer, by a registered medical practitioner designated by the establishment;*
>
> *(c) immediately before migration from India for permanent settlement abroad or for taking employment abroad;*
>
> *(d) on termination of service in the case of mass or individual retrenchment;*
>
> *(dd) on termination of service under a voluntary scheme of retirement framed by the employer and the employees under a mutual agreement specifying, inter alia, that notwithstanding the provisions contained in sub-clause (a) of clause (oo) of section 2 of the Industrial Disputes Act, 1947, excluding voluntary retirements from the scope of definition of "retrenchment" such voluntary retirements shall for the purpose be treated as retrenchments by mutual consent of the parties;*
>
> *(e) in any of the following contingencies, provided the actual payment shall be made only after completing a continuous period of not less than two months immediately preceding the date on which a member makes the application for withdrawal:—*
>
> *(i) where a factory or other establishment is closed but certain employees who are not retrenched, are transferred by the employer to other factory or establishment, not covered under the Act;*

6 This paragraph 69 and its sub-paragraphs and clauses have also undergone several amendments from time to time; however, the contents as reproduced herein are more or less in the same form, as are applicable to the present case.

(ii) where a member is transferred from a covered factory or other establishment to another factory or other establishment not covered under the Act, but is under the same employer; and

(iii) where a member is discharged and is given retrenchment compensation under the Industrial Disputes Act, 1947 (14 of 1947);"

10. Before proceeding further, we may take note of a decision of this Court referred to by the learned counsel for the parties, being that in the case of ***N.K. Jain and Ors. v. C.K. Shah and Ors.***: **(1991) 2 SCC 495**. The relevant background aspect of the said case had been that the establishment in question was governed by the provisions of the Act of 1952 but was exempted under Section 17; and had its own trust in respect of the provident fund contributions. However, the establishment failed to pay such contributions for some period during the year 1974 and there was a default. The question was as to whether such default would entail prosecution also, or only the exemption was to be cancelled ? The said case, being related to a different fact situation and different controversy may not have a direct bearing on the present matter but, the observations of this Court, illuminative on the setup and framework of the Act and the Scheme of 1952, could be usefully reproduced as under:

"7. On a perusal of the above extracted provisions of the Act the following aspects to the extent relevant to the present case can be spelt out. The management of an establishment has to contribute to the provident fund and the government under Section 5 can frame a Scheme called Employees' Provident Fund Scheme and such a Scheme was framed in the year 1952. The Scheme provides for the establishment of provident fund under the Act for employees of the establishments specified therein. Section 6 is the material provision and deals with contributions which may be provided under the Scheme and also prescribes the rate of contribution to the fund and that the employees' contribution should be equal to the contribution payable by

the employer. Section 14 deals with the penalties and Section 14(1-A) lays down that an employer who contravenes, or makes default in complying with the provisions of Section 6 shall be punishable with imprisonment for a term which may extend to six months but shall not be less than three months in case of default in payment of the employees' contribution which has been deducted by the employer from the employees' wages. But for adequate reasons it can be less. Paragraph 76 of the Scheme also provides for punishment for failure to pay such contributions to the fund. Then we have Section 17 which provides for the exemption. As per the said section the appropriate government may by notification and subject to such conditions, as may be specified in the notification, exempt from the operation of all or any of the provisions of any Scheme (in the present case 1952 Scheme) if the appropriate government is satisfied that the rules of the provident fund which a particular establishment is following in the matter of contribution to the provident fund are not less favourable than those specified in Section 6 and that the employees are also in enjoyment of other provident fund benefits. In other words the exemption from the operation of the Scheme is granted provided the particular establishment makes contribution as per its own rules governing the contribution to the fund, which in other words, can be called a provident fund scheme of its own are not less favourable than those specified in Section 6. Accordingly the exempted establishment has to provide for its employees the benefits which are in no way less favourable than the ones provided under the Act and the Scheme."

10.1. In the said case, this Court finally held that the failure to make the contributions by an exempted establishment to the provident fund as per its own rules may also attract the penalties under sub-sections (1-A) and (2-A) of Section 14 of the Act of 1952.

11. In the scheme and structure of the Act of 1952, it is but clear that for the specified establishments or class of establishments, the Central Government was to frame a Scheme, to be called "the Employees' Provident Fund Scheme"; and soon after framing of such Scheme, a Fund was to be established, which was to vest in, and administered by, the Board constituted under Section 5A. As noticed,

the expression “Fund” is defined in the Act of 1952 to mean the provident fund established under a Scheme; and the expression “Scheme” is defined to mean the Employees Provident Fund Scheme framed under Section 5. Indisputably, the Scheme of 1952 is the one framed by the Central Government in exercise of the powers conferred by Section 5 *ibid.* We shall examine the provisions of the Scheme of 1952 a little later. At this juncture, apposite it would be to take note of another feature of the Act of 1952 emanating from the provisions relating to exemption, as contained in Section 17 thereof.

12. By virtue of sub-section (1) of Section 17, an establishment could be exempted from the operation of all or any of the provisions of any Scheme if: (a) in regard to the establishment to which the Act applies, the appropriate Government is of opinion that the rules of its provident fund, with respect to the rates of contributions, are not less favourable for the employees than those specified in Section 6 and the employees are in enjoyment of other provident fund benefits which, on the whole, are not less favourable than the benefits available under the Act or under the Scheme in relation to any other establishment of similar character; and (b) in regard to any other establishment, the appropriate Government is of opinion that benefits in the nature of provident fund, pension or gratuity, as available to the employees of such establishment are, on the whole, not less favourable than the benefits provided under the Act or any Scheme in any other establishment of similar character.

12.1. When an exemption is granted to an establishment under clause (a) of sub-section (1) of Section 17 of the Act of 1952, several duties are cast upon the employer as specified in sub-section (1-A) thereof, with penal provisions in the event of default. We need not elaborate on various other provisions contained in Section 17. Suffice would be to notice for the present purpose that coverage of the employees like the one engaged in the establishment of appellants is the rule; and ordinarily, the employees are expected to be covered by the Scheme framed under Section 5 of the Act of 1952 with the exception being that in case of availability of equivalent or more favourable benefits in an establishment, the appropriate Government could grant exemption. As per sub-section (2) of Section 17, even the Scheme may make a provision for exemption but the basic requirement being again that the persons or the class of persons to be exempted are entitled to such benefits which are, on the whole, not less favourable than the benefits provided under the Act and the Scheme thereunder i.e., the Scheme of 1952[7]. All the requirements of Section 17 make the position undoubtedly clear that the provisions are intended to ensure optimum benefits for the employees and even the exemption is granted only on the satisfaction of appropriate

7 Sub-section (2) of Section 17 reads as under:

(2) Any Scheme may make provision for exemption of 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, if such person or class of persons is entitled to benefits in the nature of provident fund, gratuity or old age pension and such benefits, separately or jointly, are on the whole not less favourable than the benefits provided under this Act or the Scheme:

Provided that no such exemption shall be granted in respect of a class of persons unless the appropriate Government is of opinion that the majority of persons constituting such class desire to continue to be entitled to such benefits.

Government about existence of equivalent or more favourable provident fund Scheme for the employees concerned.

13. The Scheme of 1952 was framed by the Central Government on 02.09.1952 i.e., within 6 months of the enactment of the Act of 1952. The provisions of the Scheme are generally made applicable, subject to the provisions of Sections 16 and 17 of the Act, to all the factories and other establishments to which the Act applies or is applied under sub-sections (3) and (4) of Section 1 or under Section 3 of the Act. The provisions of the Scheme of 1952 have been extended to various establishments from time to time under clause (b) of sub-paragraph (3) of Paragraph 1 thereof. As per Paragraph 26 of the Scheme of 1952, every employee employed in or in connection with the work of the factory or other establishment to which this Scheme applies, is entitled to, and is obliged to, become a member of the Fund from the date the Scheme would come into force for such factory or establishment, except the “excluded employees”. Significantly, even an "excluded employee", on ceasing to be so i.e., on ceasing to be an “excluded employee”, is entitled to, and is required to, become a member of the Fund from the date of such cessation**.**

13.1. In the framework of the Scheme of 1952, exclusion is provided under clause (i) of Paragraph 2(f) thereof to an employee who had been a member of the Fund and had withdrawn full amount of his accumulations in the Fund under clause (a) or (c) of Paragraph 69(1). Now, clause (a) of the said Paragraph 69(1)

of the Scheme of 1952 refers to a member who would withdraw the full amount standing to his credit in the Fund on retirement from service after attaining the age of 55 years. Clause (c) is not relevant for the present purpose as the same relates to a member who withdraws the amount before migration from India for permanent settlement or taking employment abroad but then, a comprehensive look at various clauses of paragraph 69(1) makes it clear that reference therein is to a member of the Fund who withdraws full amount standing to his credit for different eventualities like regular retirement; retirement for disablement or incapacity; migration from the country; termination of service; accepting a voluntary retirement scheme; closure of the factory; transfer from a covered factory or establishment to another factory or establishment not covered under the Act etc.

14. It is not a matter of much debate in this case that the appellants otherwise answer to the description of "employer" under the Act of 1952 and their establishment is covered thereunder. The basic contention urged in this matter on behalf of the appellants is that the persons engaged by them had been the members of General Provident Fund while working as the employees of Railways and had withdrawn the full amount of accumulations in GPF and are, therefore, to be treated as “excluded employees”. This contention has fundamental shortcomings as pointed out *infra*.

14.1. The crucial aspect to be considered in this matter is as to whether the definition of “excluded employees” in Paragraph 2(f) as also the stipulation in Paragraphs 26 and 69 of the Scheme of 1952 refer to any provident fund or only to the Fund under the Scheme of 1952? As noticed above, in the setup and structure of the Act of 1952, specific distinction is maintained between the Fund, which is created by the Central Government under Section 5(1) of the Act and any other provident fund, which is created by an employer. Significantly, clause (f) of Paragraph 2 of the Scheme of 1952 refers to “the Fund" and not to "any Fund”; and Paragraphs 26 and 69 also refer to “the Fund" and not to "any Fund”. The determiner “the”, as occurring in Paragraph 2(f) as also Paragraph 69 before the expression "Fund" makes it clear that the reference therein is only to *the Fund* which is created under the Scheme of 1952 and it is not a general reference to any Fund. The requirement of joining the Fund under Paragraph 26 *ibid.* is also of joining that Fund which is created under the Scheme of 1952. In other words, obviously and undoubtedly, the Fund referred to in Paragraphs 2(f), 26 and 69 of the Scheme of 1952 is that Fund, which is created under the Scheme of 1952 and the reference is not to any other Fund. Thus, to be covered under the expression “excluded employee” by virtue of clause (i) of paragraph 2(f) read with clause (a) of paragraph 69(1) *ibid.*, the employee must be such who was a member of the Fund established under the Scheme of 1952 and who had withdrawn full amount of his accumulations in the said Fund on retirement from service after attaining the age of 55 years.

14.2. On the plain interpretation aforesaid, we have not an iota of doubt that the retired Railway employees, who had withdrawn their accumulations in General Provident Fund or any other Fund of which they were members, could not have been treated as “excluded employees” for the purpose of the Scheme of 1952 for the reason that such a withdrawal had not been from the Fund established under the Scheme of 1952. In fact, there was no occasion for them to make any withdrawal from the Fund established under the Scheme of 1952 because they were never the members of the said Fund. In other words, the employees in question were not answering to the requirements of clause (i) of paragraph 2(f) read with clause (a) of paragraph 69(1) of the Scheme of 1952 and hence, were not the “excluded employees”. The Division Bench of the High Court has rightly rejected the contention of appellants that every employee, who had withdrawn full amount from any provident fund, should be treated as an “excluded employee”. In our view, the answer by the Division Bench of the High Court is in accord with law and deserves to be approved.

15. We may also take note of and deal with a few ancillary aspects. The appellants, in their initial response to the proposition for coverage of the employees in question under the Scheme of 1952, attempted to state that most of the said employees were above 58 years of age and that they had expressed unwillingness to join the Fund under the said Scheme. It does not appear from the record if the concerned employees categorically made any such expression

of unwillingness. Even otherwise, as noticed, the provisions of the Act and the stipulations of the Scheme of 1952 are mandatory in character and the application thereof could not have been averted by the appellants or the said employees except on certain eventualities as mentioned in Section 17 of the Act as also Paragraph 26 of the Scheme of 1952. Such eventualities are indeed non-existent in the present matter. So far the aspect relating to age is concerned, the operation and effect of the Act and the Scheme of 1952 are not restricted with reference to any age limit of the employee. Such a suggestion relating to the age of the employees had been entirely baseless and has rightly been disapproved.

15.1. Apart from the above, the appellants also alleged that they had applied for exemption and no decision was taken on their representation. In this regard, it is noticed that the appellant had not made any such submission that they had any better and beneficial scheme for their employees. In any case, there is no concept of any holidaying in payment of contribution by the employer by merely moving an application for exemption; and when there was no order of exemption under Section 17 by the competent authority, the appellant-company was under the liability to make payment of its contribution.

16. Before concluding, we may also point out that the observations by the learned Single Judge of High Court in this matter, that clause (i) of Paragraph 2(f) of the Scheme of 1952 has to be applied in relation to the withdrawal from any provident fund and else, an employee may keep on successively deriving

benefits, remain rather unwarranted because the principle underlying the enactment and the Scheme of 1952 is to provide financial security to the employees. The concept of exclusion from the Scheme of 1952 is limited to the class/es of employees mentioned in Paragraph 2(f) only; and the area of operation of this exclusion clause cannot be expanded by way of an assumption about the alleged extra advantage likely to be driven home by an employee. In fact, even the assumption of the learned Single Judge does not appear apt in the framework of the Act and the Scheme of 1952. Whatever an employee gets by virtue of the Act of 1952 is basically the accumulation in his provident fund account, where he and his employer do contribute. The learned Single Judge had gone to the extent of observing that when the employees earning more than the particular amount (Rs. 6,500/- per month at the relevant time) were excluded under clause (ii) of Paragraph 2(f) of the Scheme of 1952, the retired employees who had received their accumulations could also be excluded under clause (i) of Paragraph 2(f). With respect, we are unable to find any logic in these observations because the stipulation in clause (ii) of Paragraph 2(f) relates to an entirely different class of employees with reference to the quantum of their pay; and exclusion of such class of employees as per clause (ii) cannot lead to any corollary that clause (i) be also expanded beyond its plain language. The order passed by the learned Single Judge, being based on entirely irrelevant considerations, has rightly been disapproved by the Division Bench of High Court.

17. To summarise, in the framework and setup of the Scheme of 1952, the concept remains plain and clear that if a person is member of the Fund created thereunder i.e., under the Scheme of 1952 and withdraws all his accumulations therein, he may not be obliged to be a member of the same Fund under the Scheme of 1952 over again and could be treated as an “excluded employees”. However, such is not the relaxation granted in relation to an employee who was earlier a member of any other Fund but later on joins such an establishment where he would be entitled to membership of the Fund created under the Scheme of 1952. This framework of the provisions and stipulations appears to be best serving the interest of employees, while providing them with continued financial security. Therefore, we find no reason to take any view different than the one taken by the Division Bench of the High Court in this case.

18. For what has been discussed hereinabove, this appeal fails and is, therefore, dismissed.

.....J.
(ABHAY MANOHAR SAPRE)

.....J.
(DINESH MAHESHWARI)

New Delhi
Dated: 26th March, 2019.