R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 1846 OF 2018

Sachin Vijay Desai .. Petitioner

Versus

Union of India & Ors. .. Respondents

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- Dr. Milind Sathe a/w Mr. Keanan Nagporwala and Mr. Rushil Mathur i/by Kochhar & Co for the Petitioner
- Mr. Ashutosh Gole for Respondent No. 1
- Mr. Suresh Kumar for Respondent Nos. 2 and 3

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CORAM : AKIL KURESHI &
S.J. KATHAWALLA, JJ.

DATE : AUGUST 7, 2019.

ORAL JUDGMENT (Per Akil Kureshi, J.)

1. The petition is filed by an individual. He has challenged certain provisions of the Employees' Provident Funds Scheme, 1952 (hereinafter referred to as **"the Scheme"**). His grievance is that the Scheme provides for ceiling of contribution that an employee can make to the provident fund, with a matching ceiling of the employer's contribution, irrespective of the salary of the employee and his willingness to make the contribution. According to the petitioner, such provisions in the Scheme are arbitrary and discriminatory.

2. Brief facts are as under:-

Petitioner is an employee of respondent No. 4, a company registered under the Companies Act. Respondent No. 4 company has been registered under the Scheme. The petitioner as an employee of respondent No. 4 company, makes regular contribution to the fund in terms of the Scheme. The Scheme was amended under order dated 3.9.2010 w.e.f. 11.9.2010 which introduced a special category of workers referred as ‘international workers’. In relation to these workers, the Scheme contains provisions somewhat different from the rest of the employees. We would take note of the relevant provisions contained in the Scheme in detail later. For the present, sufficient it to record that the grievance of the petitioner is that in relation to the employees other than international workers, the Scheme prescribes a ceiling of the contribution which the employee can make to the fund and corresponding ceiling of the contribution that the employer would therefore make in the account of such employee. The petitioner would point out that no such ceilings are prescribed in case of the workers which are International Workers. This in brief, is the discrimination according to the petitioner.

3. Appearing for the petitioner, learned counsel Dr. Milind Sathe submitted that there is no earthly reason why the local workers should be treated differently from the intentional workers. The term 'international workers' would also include persons of Indian origin which can permanently settled down in the country. Learned counsel for the petitioner submitted that the Provident Fund Act is a social welfare legislation. The scheme framed under the said Act is meant to provide social security to the employees of organized and unorganized sector. The provisions of the Scheme should, therefore, be interpreted bearing in mind the object behind it. Heavy reliance was placed on the decision of the Supreme Court in the case of **D.S. Nakara & Ors. Vs. Union of India** [1] to contend that when a clause in the scheme is shown to be discriminatory, the offending part should be struck down thereby enlarging the scope of the Scheme.

1 (1983) 1 SCC 305

4. On the other hand, learned counsel for the respondent Nos. 2 and 3 opposed the petition contending that the international workers form a separate and distinct class. Their cases cannot be compared with the local employees. The provisions made in the Scheme, therefore, are not arbitrary or discriminatory.

5. In the exercise of the powers conferred by Section 5 of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952, the Central Government has framed the said Scheme. The Scheme would apply to the various organizations provided in sub-paragraph (3) of paragraph 1 of the Scheme. Chapter IV of the Scheme pertains to membership of the fund. Paragraph 26 contained in the said Chapter pertains to class of employees entitled to join the fund. Relevant portion of this paragraph 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 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.

………..

(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 rupees [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."

Paragraph 26A of the Scheme pertains to retention of membership and reads as under:-

"26A. Retention of membership

(1) A member of the Fund shall continue to be member until he withdraws under paragraph 69 the amount standing to his credit in the Fund or is covered by a notification of exemption under section 17 of the Act or an order of exemption under paragraph 27 or paragraph 27A.

Explanation :- In the case of claim for refund by a Member under sub-paragraph (2) of paragraph 69, the Membership of the Fund shall be deemed to have been terminated from the date the payment is authorized to him by the authority specified in this behalf by the Commissioner irrespective of the date of claim.

(2) Every member employed as an employee other than an excluded employee, in a factory or other establishment to which this Scheme applies shall contribute to the Fund, and the contribution shall be payable to the Fund in respect of him by the employer. Such contribution shall be in accordance with the rate specified in paragraph29:

Provided that subject to the provisions contained in sub-paragraph (6) of paragraph 26 and [in paragraph 27], or sub-paragraph (1) of paragraph 27- A, where the monthly pay of such a member exceeds [fifteen thousand rupees] the contribution payable by him, and in respect of him by the employer, shall be limited to the amounts payable on a monthly pay of [fifteen thousand rupees] including [dearness allowance, retaining allowance (if any) and cash value of food concession]]."

6. Chapter V of the Scheme pertains to contributions. Relevant portion of paragraph 29 contained in the said Chapter reads as under:-

"29. Contributions

(1) The contribution payable by the employer under the Scheme shall be at the rate of [ten per cent] of the [basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any)] payable to each employee to whom the Scheme applies:

[Provided that the above rate of contribution shall be [twelve] per cent in respect of any establishment or class of establishments which the Central Government may specify in the Official Gazette from time to time under the first proviso to sub-section (1) of section 6 of the Act.]

NOTE

For International Workers this proviso will be as under as per G.S.R. No. 148 dated 3rd September, 2010 (w.e.f. 11.9.2010)

(2) The contribution payable by the employee under the Scheme shall be equal to the contribution payable by the employer in respect of such employee:

[Provided that in respect of any employee to whom the Scheme applies, the contribution payable by him may, if he so desires, be an amount exceeding [ten per cent] or [twelve per cent], as the case may be, of his basic wages, dearness allowance and retaining allowance (if any) subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Act]

7. Paragraph 83 contained in Chapter X pertaining to miscellaneous provisions provides special provisions in respect of international workers. Relevant portion of this paragraph reads as under:-

"**83. Special provision in respect of International Workers**. – The Scheme, shall, in its application to international Workers as defined in this paragraph, be subject to the following modifications, namely:-

(i) For clause (f) of paragraph 2, the following clause shall be substituted, namely:-

[(f) "**excluded employee**" means:-

(i) an International Worker, who is contributing to a social security programme of his country of origin, either as a citizen or resident, with whom Indian has entered into a social security agreement on reciprocity basis and enjoying the status of detached worker for the period and terms, as specified in such an agreement ;or

(ii) an International Worker, who is contributing to a social security programme of his country of origin, either as a citizen or resident, with whom India has entered into a bilateral comprehensive economic agreement containing a clause on social security prior to 1st October, 2008, which specifically exempts natural persons of either country to contribute to the social security fund of the host country;]

(2) After clause (i) of paragraph 2, the following c1lause shall be substituted,namely:-

(ja) "**International Worker**" means,-

(a) an Indian employee having worked or going to work in a foreign country with which India has entered into a social security agreement and being eligible to avail the benefits under a social security programme of that country, by virtue of the eligibility gained or going to gain, under the said agreement;

(b) an employee other than an Indian employee, holding other than an Indian Passport, working for an establishment in India to which the Act applies;

[Provided that the worker who is a Nepalese national on account of Treaty of Peace and Friendship of 1950 and the worker who is a Bhutanese national on account of India-Bhutan Friendship Treat of 2007, shall be deemed to be an Indian worker].

3. For paragraphs 26, 26-A and 26-B, the following paragraphs shall be substituted, namely:-

26. Class of international Workers entitled and required to join the Fund.

(1)(a) Every international Worker (other than an excluded employee),employed as on 1st day of October, 2008, in an establishment to which this Scheme applies, shall be entitled and required to become a member of the Fund with effect from the 1st day of November,2008.

(2) Every International Worker (other than an excluded employee), employed after the 1st day of October, 2008 in an establishment to which this Scheme applies, who has not become a member already shall be entitled and required to become a member of the Fund from the date of his joining the establishment.

(3) Where the Scheme applies to an establishment on the expiry or cancellation of an order of exemption under section 17 of the Act, every International Worker who, but for the exemption would have become and continued as a member of the Fund shall become a member of the Fund forthwith.

(4) An excluded employee of an 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 ceases to be such employee.

(5) On re-election of a class of International Workers exempted

under paragraph 27-A to join the Fund or on the expiry of cancellation of an order under that paragraph, every International Worker, who but for such exemption would have become and continued as a member for the Fund, shall forthwith become a member thereof.

(6) Every International Worker who is a member of a private provident fund maintained in respect of an exempted establishment and who, but for the exemption, would have a become and continued as a member of the Fund shall, on joining an establishment to which this Scheme applies, become a member of the Fund forthwith."

8. As per sub-paragraph (1)(a) of paragraph 26, every employee employed or in connection with the work of a factory or other establishment to which the Scheme applies, other than an excluded employee, shall be entitled and required to become a member of the fund from the day the said provision comes into force for such factory or establishment. Sub-paragraph (2) of paragraph 26A provides that every member employed as an employee other than an excluded employee to which the Scheme applies shall contribute to the fund and the contribution shall be payable to the fund in respect of the employee by the employer in accordance with the rate specified in paragraph 29. A proviso to sub-paragraph (2) is of considerable importance. It provides that subject to the provisions contained in sub-paragraph (6) of paragraph 26 and paragraph 27 or sub-paragraph (1) of paragraph 27A, where the monthly pay of a member exceeds Rs. 15,000/-, the contribution payable by him and in respect of him by the employer would be limited to the amount payable on a monthly pay of Rs. 15,000/-. Under sub-paragraph (6) of paragraph 26, this limit can be relaxed or increased.

9. The proviso to sub-paragraph (2) of paragraph 26A thus limits the contribution of an employee to the extent of Rs. 15,000/- irrespective of his salary. The matching contribution to be made by the employer at the rate of 10% or 12% as the case may be as provided in paragraph 29, would also be calculated on the basis of this ceiling. The main grievance of the petitioner is that this proviso limits the ability of an employee to contribute to the fund higher than the sum of Rs. 15,000/- per month and correspondingly limits the employer's contribution to the fund on such basis.

10. As noted, paragraph 83 makes special provision in respect of international workers. The term "international worker" has been defined in Clause (ja) of sub-paragraph 2 of paragraph 83. As per this definition in terms of clause (ja)(b), an employee than than an Indian employee, holding other that an Indian passport, working for an establishment in India to which the Act applies would be included within the meaning of term "international worker". In case of an international worker, who is otherwise to join the fund, as per the modifications provided in paragraph 83, paragraph 26 would be applied in modified form. This modified paragraph 26 which is applicable to the international workers, does not contain any ceiling of the contribution by an employee and corresponding contribution by the employer.

11. Having thus examined the scheme, we are of the opinion that the international worker forms a separate and distinct class by themselves. The definition of international worker comes into two parts. First part pertains to an Indian employee having worked or going to work in a foreign country with which India has entered into a social security agreement and is eligible to avail the benefits under a social security programme of that country. Second part pertains to an employee other than an Indian employee, holding other than an Indian passport who is working for an establishment in India to which the Act applies. The purpose of this special clause is thus obvious. Special provisions were sought to be made for such class of employees which would include the Indian workers going to work abroad and non-Indian workers going to be working in India. The purpose and object of making special provisions with respect to such employees, can easily be understood. In the first category falls those Indian workers having their employment abroad would be governed by social security programme of the country of employment. The second clause applies to non-Indian passport holder workers working in India which ordinarily would be a short term or a limited period employment.

12. As against this, the Scheme includes larger number of Indian employees in various establishments to which the Act applies. The fund is created to provide a social security in old age and after retirement. Complex considerations go into forming the scheme, making various provisions for contribution by an employee and the employer and the ability of the Fund to give returns on such contributions to the concerned employees. The formation of two clauses for differential treatment can be easily appreciated. The present is therefore, not a case where homogeneous clause of persons are sought to be artificially divided. It is a case where two separate and distinct classes of people are sought to be treated differently.

13. From the days of the judgment of seven Judges bench of the Supreme Court in the case of **Budhan Choudhry & Ors. Vs. The State of Bihar**[2], in cases of **Chiranjit Lal Chowdhuri Vs. The Union of India**[3] , **The State of West Bengal Vs. Anwar Ali Sarkarhabib**[4] and **Kathi Raning Rawat Vs. The State of Saurashtra**[5], it is clear that Article 14 prohibits class legislation but not reasonable classification. As held by the Constitution Bench of the Supreme Court in case of **The State of Jammu & Kashmir Vs. Shri. Triloki Nath Khosa & Ors.**[6] in order to establish that a legislation is discriminatory, the burden is on

2 AIR 1955 SC 191
3 (1950) 1 SCR 869
4 (1952) 1 SCR 284
5 (1952) 1 SCR 435
6 AIR 1974 SC 1

the petitioner to produce necessary material in support thereof. The legislation including subordinate legislation carries a presumption of constitutionality and it is for one who challenges it to establish the unconstitutionality thereof. The Scheme is framed in exercise of powers of delegated legislation. It is thus a piece of suboridnate legislation and also enjoys presumption of constitutionality.

14. The decision of the Supreme Court in the case of D.S. Nakara & Ors (supra) cited by the learned counsel for the petitioner has no applicability. It was a case in which the Government had framed a liberalized pension scheme which contained a cutoff date. The employees retiring prior to such cutoff date would not be eligible for the benefits of the liberalized pension scheme. It was in this background, the Supreme Court held that all retirees form a homogeneous class and the the Government could not have arbitrarily divided such retirees on the basis of the date of their retirement.

15. We do not find that the petitioner has made out any case for declaring the relevant provision as unconstitutional. Petition is dismissed.

[S.J. KATHAWALLA, J.] **[AKIL KURESHI, J]**