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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 24.12.2019

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Date of Judgment: 10.01.2020

+ **LPA No. 111/2015**

MAHANAGAR TELEPHONE NIGAM LTD. Appellant

Through: Mr.Chandan Kumar, Advocate

Versus

UNION OF INDIA & ORS. Respondents

Through: Mr.Puneet Garg, Advocate for
R-2 to R-6.

Mr.Kumar Rajesh Singh,
Advocate with Ms.Punam
Singh, AR for R-9.
Ms. Kanwal Chaudhary,
Advocate for R-10 to R-13.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. The present appeal has been filed by Mahanagar Telephone Nigam Ltd. (hereinafter referred to as “appellant”), seeking to set aside the order dated 16.12.2014 whereby the Single Judge has dismissed the writ petition being WP(C) No.4309/2013 filed by the appellant. In the said petition, the appellant had sought quashing and setting aside of the show cause notice dated 30.11.2012 issued by the respondent no.5/Assistant Provident Fund Commissioner

(Exemption) as well as the show cause notice dated 07.05.2013 issued by the respondent no.6/Assistant Provident Fund Commissioner (Compliance-II). The appellant also challenged orders dated 11.01.2013 and 28.02.2013 passed by Regional Provident Fund Commissioner-I. A further declaration was sought that Condition No.25 of appendix 'A' to para 27 AA of the Employees' Provident Fund Scheme, 1952 (hereinafter referred to as "PF Scheme") is ultra vires the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "PF Act").

2. The appellant was constituted as a Government Company for imparting telephone and related services in various cities. As it was an establishment whose rules of provident fund with respect to the rates of contribution were not less favourable than those specified in Section 6 of the PF Act and as the employees were also in enjoyment of other PF benefits which on the whole were not less favourable to the employees than the benefits provided under the Act or Scheme in relation to the employees in any other establishment of similar character, the appellant made an application for exemption under Section 17(1)(a) of the PF Act on 24.12.1986.

3. Pending grant of exemption, respondent no.4 vide order dated 19.01.1988 granted relaxation under para 79 of the PF Scheme subject to certain conditions set out therein.

4. It is the case of the appellant that the exemption is still awaited and that the relaxation so granted did not put restriction as set out in para 25 of appendix 'A' of para 27 AA of the PF Scheme. The said para 27 AA was itself inserted through an amendment vide GSR No.18 dated 22.12.2000 and was given effect from 06.01.2001.

5. It was the case of the appellant that it constituted an MTNL Employees Provident Fund Trust which on the date of filing of the writ petition had approximately 13,000 employees. The Trust has run efficiently since then and has never defaulted in submitting its contribution.

6. By a letter dated 30.11.2012, respondent no.5 issued a show cause notice to the petitioner stating that the petitioner was in violation of para 25 of appendix 'A' of para 27 AA of the PF Scheme as it had suffered losses in the financial years 2009-10; 2010-11 and 2011-12.

7. The appellant responded to the show cause notice by its reply dated 24.12.2012 and brought to the notice of the respondent that it had suffered accounting losses only because it had to make an upfront payment of Rs.11,000 crores to the Government of India for 3G and BWA Spectrum. It paid the same from its reserves as well as by raising loans on which the appellant had to pay interest. The appellant also pointed out that this payment, however, did not affect its due compliance of the contributions required to be made under the PF Act.

8. By order dated 11.01.2013, respondent no.4 rejected the representation of the appellant and withdrew the said relaxation granted w.e.f. 31.01.2013. Respondent no.4 further directed for transfer of PF accumulations in respect of all employees to the Regional Provident Fund Commissioner, Delhi (North) w.e.f. 01.02.2013.

9. After the withdrawal of the relaxation, two Unions representing the petitioners' employees wrote letters to the respondent no.3 pointing out that the appellant had never defaulted in its contribution and the workmen were happy with the working of the Trust. A review of the order withdrawing the relaxation was sought. The same request was reiterated by the Trustees.

10. Respondent no.6 thereafter issued a show cause notice dated 07.05.2013 under Sections 14/14A of the PF Act, as to why prosecution should not be initiated against the appellant, post rejection of the request for restoration. It is this withdrawal of relaxation and the show cause notices which were challenged by the appellant by filing a writ petition before the learned Single Judge.

11. The appellant contended before the learned Single Judge that the relaxation order was sought to be withdrawn on the ground other than the grounds for grant of relaxation. The said Condition No.25 does not figure in Conditions 1 to 13 subject to which relaxation has been granted on 19.01.1988. It was further contended that reading of the relaxation order does not disclose that either Section 17 or para

27 AA were applied while passing the order. Even the date from which the relaxation was sought to be withdrawn was not as per law. It was also contended that Condition No.25 applies only to exemption and hence its violation could not be a ground to withdraw relaxation. The respondents cannot travel beyond the provisions of the principal enactment.

12. The appellant had further contended that Section 5 of the PF Act only grants a general power to formulate a scheme in accordance with the provisions of the PF Act. Section 17(1)(a) of the PF Act under which the appellant had applied for exemption, only requires that the rates of contributions made by an establishment are not less favourable than those specified in Section 6 and the employees are enjoying similar or better benefits. The appellant had placed reliance on the judgment of the Supreme Court in ***Global Energy Ltd. & Anr. Vs. Central Electricity Regulatory Commission* (2009) 15 SCC 570.**

13. The appellant had argued that delegation of power for carrying out the purposes of the Act is a general delegation. It does not authorise to lay down the guidelines. Exercise of this power cannot be done so as to bring into existence substantive rights. Since the Section itself does not lay down any pre-condition other than the rates of contribution being not less favourable than those in Section 6, the laying down of conditions by the respondents as has been stipulated in Condition No.25 tantamounts to laying down guidelines which cannot be done. Reliance was also placed on the judgment of

a Division Bench of this Court in ***Subhash Chander Agrawal Vs. Union of India & Ors.*** 2011 VIII AD (Delhi) 338. In a nutshell, the argument was that conferment of Rule making power does not enable the Authority to make a Rule which travels beyond the scope of the enabling Act or is inconsistent therewith. Thus, condition no.25 of appendix 'A' negates the effect of Section 17(1)(a) of the PF Act. Retrospective application of Condition No.25 is also questioned as the order was passed in 1988.

14. On the other hand, the respondent nos.2 to 6 had contended that the appellant is covered under the PF Act and was maintaining its own PF Trust by virtue of relaxation granted under Para 79 of the PF Scheme. On examination of the annual report/balance sheet of the appellant by respondent no.4, it was found that the establishment had reported losses for three consecutive financial years i.e. 2009-10; 2010-11 & 2011-12, which contravened condition no.25 of appendix 'A' to para 27 AA of the PF Scheme. Accordingly, a show cause notice dated 30.11.2012 was served upon the appellant with a direction to furnish a reply. The appellant furnished its reply and admitted that there were losses along with an intimation that a revival plan has been forwarded to the Ministry of Finance by the Department of Telecommunication and was under consideration. It was expected that the appellant would come out of the financial crunch soon. The respondents, however, argued that the justification so provided, had no bearing on the conditions for exemption and, therefore, the same had to be withdrawn. In these circumstances, an

order was passed withdrawing the relaxation and directing the appellant to transfer the PF accumulations in respect of all employees to the RPFC.

15. The respondent had further argued that the relaxation granted was as per para 79 of the PF Scheme and subject to the conditions set out therein. The revised conditions governing the grant of exemption under Section 17 and those stipulated in appendix 'A' would apply even during the relaxation period. The appellant has no option but to comply with the statutory provisions of the PF Act and the schemes framed thereunder. On the aspect of Section 5 of the PF Act, it was argued that the said provision enables the making of the schemes. The Central Government frames the schemes under the Act and Section 7 provides for their modification vide a Notification in the Official Gazette. Thus, the schemes framed pursuant to the said powers, are not Rules and cannot be treated as subordinate legislations. The grant of exemption is a power which emanates by the operation of the schemes. Exemption from the operation of the Act to an establishment is granted under Section 17(1)(a) or Section 17(1)(b) of the PF Act. The authority to grant exemptions is "appropriate Government" as defined in Section 2A of the PF Act. By an amendment to the PF Scheme, para 27AA was introduced by which it was provided that all exemptions granted or to be granted shall be subject to terms and conditions given in appendix 'A' with effect from 06.01.2001. Thus, before granting exemption, the funds of an establishment have to be scrutinized as well as their

contributions. Since the process of granting exemption takes time, the Government may issue a relaxation order in the meantime acting under para 79 of the PF Scheme. The Commissioner is empowered to pass a relaxation order on an application made for exemption under Section 17 of the PF Act. Once it is found that the appellant had reported losses, the respondents were justified in cancelling the relaxation orders.

16. Respondent nos.2 to 6 had submitted that the present case was different from the case of ***Shell India Markets Pvt. Ltd. v. Central Provident Fund Commissioner Bhavishya Nidhi Bhawan 2012 (3) KarLJ 313*** where the High Court of Karnataka had quashed the order withdrawing the relaxation on the ground that Condition No.25 was not a condition imposed in the relaxation order and there was a substantial difference between the two cases. The relevant part of the order reads as under:-

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

17. The respondents further relied on the order dated 19.01.1988 by which relaxation was granted to the appellant. Para 4 and para 27 of the said order read as under:-

“4. Any amendment to the said Scheme which is more beneficial to the employees than the existing rules of the

27.^{xxx}The “appropriate Government” may lay down any further conditions for continued exemption of the establishment.”^{xxx}

19. The learned Single Judge while deciding the writ petition came to a finding that the appellant was maintaining its PF Trust by virtue of relaxation under para 79 of the Scheme, but on examination by respondent no.4, it was found that the appellant had reported losses for three consecutive financial years and this was a clear contravention of Condition No.25. The appellant had in fact admitted the losses but had submitted that the revival plan was pending. The learned Single Judge held that the revised conditions governing the grant of exemption stipulated in appendix 'A' would

apply during the period of relaxation. Since the appellant was covered under the Act, it was bound to comply with the provisions of the Act and the schemes framed thereunder.

20. Learned Single Judge was of the view that detailed conditions for grant of exemption as provided in appendix 'A' could not be laid down in verbatim in a relaxation order and the same were clearly included in the Scheme vide an amendment which came into effect on 06.01.2001. Thus, according to the learned Single Judge, by a bare perusal of the relaxation order dated 19.01.1988, the conditions provided in appendix A were applicable to the appellant.

21. The learned Single Judge, relying on Condition No.25 of appendix 'A' to para 27 AA of the Scheme, came to a conclusion that a purposive construction would have to be given to the provisions so as to perpetuate the object of the Act which is a social welfare legislation. According to the learned Single Judge, the Scheme and its provisions would have to be construed in a manner which is beneficial to the employees and the appellant had not put forth any reason to show that the impugned condition was in any manner, adversarial to the workmen of the appellant.

22. Based on the admitted case of the appellant that it had suffered losses for three consecutive financial years, it was held that Condition 25 was contravened and, thus, the withdrawal of relaxation was in accordance with the mandate of law. The writ petition was thus dismissed by the Learned Single Judge.

23. It is this order which is assailed before us by the appellant.

24. Learned counsel for the appellant has reiterated the arguments made before the Learned Single Judge as noted above. It is argued that the Scheme made under the Act is a subordinate legislation and any amendments made to its provisions cannot apply retrospectively. The order of relaxation was passed on 19.01.1988, whereas the Amendment incorporating Condition No.25 came into effect from 06.01.2001 and, therefore, the provisions of the said conditions could not be applied by the respondent to withdraw the relaxation granted earlier.

25. The next contention is that Condition No. 25 of Appendix 'A' to para 27 AA of the Scheme is contrary and repugnant to the provision of the PF Act which is the principal enactment. It is also sought to be argued that the relaxation given was only an interim arrangement and the grant of exemption was still pending with the appropriate Government. The conditions stipulated in para 27 AA only provide for withdrawal of exemption and not of relaxation. It is also argued that a bare perusal of the conditions subject to which relaxation was granted, would show that none of the conditions even remotely provided that the financial condition of an establishment would have any bearing on the relaxation and, thus, no new conditions can be brought in by the respondent.

26. Learned counsel for the respondent nos.2 to 6 has also reiterated the arguments made before the learned Single Judge which

we have noted above and are not being repeated for the sake of brevity. Insofar as learned counsel for respondent nos.10 to 13 is concerned, it is significant to point out that the workmen are now not supporting the appellant and are taking a stand that the appeal should be dismissed. The reason for taking the said stand is that according to the workman the EPFO has recently issued a Circular dated 23.03.2017 on account of which the pension of the employees would enormously increase if they were subscribing to the EPFO and are not a part of a Trust. It is argued that it would be more beneficial for them to derive the benefit of the latest circular which makes them eligible for a higher pension based on the actual contribution from the salary and only on account of the pendency of the present appeal they are being deprived of the benefit of the Circular.

27. We have heard the learned counsels for the parties.

28. The power of the Government to exempt an establishment from the operation of all or any of the provisions of the PF Scheme is derived from Section 17(1)(a) of the PF Act. The said section is reproduced as under :-

"17. Power to exempt.-

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

(a) any establishment to which this Act applies if, in the opinion of the appropriate Government, the rules of its

provident fund with respect to the rates of contribution are not less favourable than those specified in section 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any Scheme in relation to the employees in any other establishment of a similar character”

29. The power to grant exemption is with the “appropriate Government”, which is defined in Section 2(a) of the said Act. By an amendment made to the Scheme, para 27AA was introduced by which all exemptions already granted or to be granted under Section 17 of the Act or under paragraph 27AA of the Scheme were subject to terms and conditions given in Appendix A with effect from 06.01.2001. The relevant condition with which this case is really concerned is Condition no.25 of Appendix A and which is reproduced as under:-

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

30. Before granting exemption to an establishment, the application of the establishment as well as the status of the fund is required to be scrutinized for grant of exemption. Since the process of granting exemption takes time, many a times relaxation is granted to the establishment in the interregnum under paragraph 79 of the Scheme.

31. In the present case, respondent no.3 was satisfied while granting relaxation that the establishment may be eligible for granting exemption by the appropriate authority and thus the relaxation order was issued at that point in time in the year 1988. However, it was subsequently found that the establishment had reported losses for three consecutive financial years and this was found to contravene Condition No.25 in Appendix A. A perusal of condition no.25 clearly indicates that a Company which records losses for three consecutive financial years shall have its exemption withdrawn from the first day of the succeeding financial year. In the present case, it is the admitted case of the appellant that it suffered losses in three financial years. Thus, in our view the action of withdrawal of the relaxation does not suffer from any illegality.

32. In the case of ***Pratap Chandra Mehta vs. State Bar Council of Madhya Pradesh and Ors., (2011) 9 SCC 573***, the Supreme Court held that the Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act while ensuring that the Rules framed are not ultra vires the parent statute. In our view, the learned single Judge has rightly held that it may not always be necessary to spell out guidelines for delegated legislation when discretion is vested in the authorities delegated with such power. The learned single Judge is also right in his observation that the conditions for grant of exemption as provided in Appendix A to paragraph 27AA of the Scheme could not have been laid down in verbatim in the relaxation order issued to the appellant as in any case

they were a part of the provisions mentioned in the Scheme itself after amendment. Thus, this contention of the appellant is also ill founded that the condition for grant of exemption as provided in Appendix A should have been laid down in the relaxation order.

33. We do not agree with the contention of the appellant that the provisions of Condition No.25 or Para 27AA of the PF Scheme are ultra vires the parent Act. Section 17 of the Act clearly provides that an exemption would be granted to an establishment to which the Act applies only if in the opinion of the appropriate Government, the Rules of its provident fund are not less favourable than those specified in Section 6 and the employees are also in enjoyment of the other provident fund benefit not less favourable than those under the said Act. Condition No.25 in our view is in tune with the purpose behind Section 17 of the Act, in as much as if the establishment is running into losses then certainly it cannot grant to its employees better benefits than available under the Act. In the case of ***State of Tamil Nadu and Anr. vs. P. Krishnamurthy and Ors., (2006) 4 SCC 517***, it has been held by the Supreme Court that the nature, object and the Scheme of the Act as also the area over which power has been delegated will have to be considered while deciding the validity of the subordinate legislation. The relevant para of the judgment of the Apex Court is reproduced as under:-

"15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that

it is invalid. It is also well recognized that a subordinate legislation can be challenged under any of the following grounds:

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

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

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

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

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

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

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

Where the delegated legislation is furthering the object and scheme of the parent Act, the Court should proceed with caution before declaring the legislation invalid. The PF Act being a social welfare legislation was enacted with the objective of making provisions for the future of the industrial workers after their retirement as well as for their dependents. Hence, any beneficial amendment to the Scheme would only be intra vires the principle Act.

34. The appellant before us has not been able to dispute the fact that in fact during the relevant period, the establishment was suffering losses and therefore we do not find that the withdrawal of relaxation was in any manner detrimental to the employees of the establishment. In this regard we may also point out that the order dated 19.01.1988 vide which relaxation was granted itself stipulated in paragraph 4 that any amendment to the Scheme which is more beneficial to the employee than the existing rules shall be made applicable to them automatically. Paragraph 4 has already been extracted in the earlier part of the judgment. In para 27 of the order it is stated that the appropriate government may lay down any further conditions for continued exemption of the establishment. Further, in para 31 of the order, it is important to note that the relaxation is liable for withdrawal for breach of any of the conditions or for other sufficient cause. Thus, the term “other sufficient cause” essentially covers the future contingencies as well. The appellant has become ineligible for the grant of exemption as per the revised conditions for

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

35. Learned counsel rightly distinguished the judgment in the case of ***Global Energy Ltd. & Anr. (supra)*** relied upon by the appellant. In the said case Rule 5 of the Appellate Tribunal for Foreign Exchange (Recruitment, Salary and Allowances and Other Conditions of Service of Chairperson and Members) Rules, 2000 and clauses (b) and (f) of Regulation 6A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading License and other related matters) (Amendment), Regulation 2006 were declared *ultra vires* the Constitution as well as the main Act in the abovementioned cases on the ground that the powers exercised as provided in the enabling provision were beyond the scope of the principal Act. These are Rules unlike the Schemes in the present case.

36. Respondents are also right in contending that the factum of time envisaged in Condition No.25 is applicable for withdrawing exemption, whereas relaxation can be withdrawn with immediate effect, as and when any violation/ transgression comes to the notice of the concerned Authority.

37. During the course of the hearing, the appellant has brought on record a proposed revival scheme. This, in our view, does not affect the controversy which this Court is required to decide in the present appeal.

38. We thus do not find any infirmity in the judgment of the learned Single Judge. The appeal has no merit and is hereby dismissed with no orders as to costs.

JYOTI SINGH, J

G.S.SISTANI, J

JANUARY 10th, 2020/aa/yg/

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