

THE HONOURABLE SRI JUSTICE NOOTY RAMAMOHANA RAO

Writ Petition No.3731 of 2009

11-09-2009

Battula Veeraswamy.

The Regional Provident Fund Commissioner, Barkathpura, Hyderabad and others.

Counsel for the Petitioner: party-in-person

Counsel for the Respondents: Sri A. Rajasekhar Reddy.

Sri B. Narasimha Sarma.

:ORDER:

This writ petition has been instituted essentially for securing the benefit of coverage under the Employees Pension Scheme, 1995 framed under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short 'the Act'). The material facts which are necessary for deciding the controversy in the writ petition are thus:

The writ petitioner initially joined the services of Accounts Department on 6.11.1959. While he was working as a Section Officer (Accounts), he came on deputation to Mishra Dhatu Nigam Ltd, Hyderabad, a Government of India Undertaking (hereinafter referred to as 'Midhani') on 27.1.1995. He came to be permanently absorbed later on in the service of Midhani with effect from 1.8.1976. The Deputy Controller General of Defence Accounts (AN) conveyed through his proceedings No. 29011(85)/74/AN/E, dated 18.1.1977 the sanction of the President to the permanent absorption of the writ petitioner in Midhani. It was made clear in the said order that on his permanent absorption in Midhani, the petitioner shall be eligible for pro rata pension and death cum retirement gratuity based on the length of qualifying service rendered by him under the Government of India, till the date of permanent absorption in Midhani, as admissible to the Officers of the Central Civil Services in force as at that time. The pro rata pension and the death cum retirement gratuity will be calculated, assured the aforementioned order, based on average emoluments which he would have drawn as a permanent Section Officer (Accounts) in the Defence Accounts Department, as of 1.8.1976, but for his deputation to Midhani. It was further made clear that the pro rata pension and the death cum retirement gratuity would be disbursable to the officer in addition to his pay in Midhani from the date of his absorption, provided he gives an undertaking that in the event of his services being terminated at the instance of either Midhani or on his own, within the period of two years from the date of retirement from the Government of India service and permanent absorption in Midhani, the approval of Government of India would be obtained by the officer before he takes up any private employment. It was further indicated that the amount of subscriptions together with interest standing thereon in the General Provident Fund account of the petitioner, if he so desires will be transferred to his new provident fund account under Midhani. Thus, the relationship of 'Master and Servant' between the Ministry of Defence and the writ petitioner has been brought to an end with the sanction of the President for the permanent absorption of the writ petitioner in the service of Midhani with effect from 1.8.1976. The writ petitioner had nearly completed 17 years of service in the Ministry of Defence by then and hence he was granted 'pension' and 'Gratuity' under the Central Civil Services (Pension) Rules, 1972. After getting absorbed in the service of Midhani, the writ petitioner became a Member of the Provident Fund Scheme, 1952 under the Employees Provident Fund and Miscellaneous Provisions Act, 1952. He started making contributions with effect from 1.1.1977 to the aforesaid fund. However, the Ministry of Personnel, Public Grievances and Pensions, Department

of Pensions and Pensioners' Welfare through Office Memorandum dated 22.1.1990 directed all the former employees of the central government who got absorbed in public sector undertakings, like the petitioner, to opt for either being governed by the family pension scheme of the central government or to opt for continuing under the Employees Family Pension Scheme, 1971, brought forth under the Act. This option came to be accorded after due consideration of the request of the staff side at the 29th ordinary meeting of the National Council (Joint Consultative Machinery - JCM) to provide a chance of option to the absorbed employees between the family pension scheme of the central government or the Employees Family Pension Scheme, 1971 (henceforth referred to as 'EFPS 1971'). Accordingly, the writ petitioner opted to be governed by the family pension scheme of the central government. In view of this option exercised by the writ petitioner, the Midhani has forwarded to the Central Provident Fund Commissioner, New Delhi, applications of 28 employees absorbed by it from the central government, for the grant of exemption from the EFPS, 1971 in terms of Section 17(1-C) of the Act. Accordingly, the Central Provident Fund Commissioner through his notification dated 30.9.1991 exercised the power conferred by sub-section (1-C) of Section 17 of the Act, and granted exemption to the individual employees of Midhani mentioned in Schedule I thereof. The name of the writ petitioner figures at Sl. No. 9 of the 28 names found in Schedule I of the said notification. By virtue of this notification, these employees ceased to be governed by the EFPS, 1971 with effect from the date of issue of the said notification. Thus, the writ petitioner was declared to have ceased to be a member of EFPS, 1971 with effect from 30.9.1991. Accordingly, the writ petitioner has withdrawn all the benefits under EFPS, 1971 which has accrued as on the date of the exemption. The writ petitioner ultimately retired from service of Midhani on attaining the age of superannuation on 1.8.1994. EFPS, 1971 has been replaced by Employees Pension Scheme, 1995 with effect from 16.11.1995 (henceforth, for brevity, called EPS, 1995). Some of the important features of this scheme are contained in paras 1, 2, 3, 4, 6, 7, 9, 10, 16-A, 17 and 44. They read as under:

"1. Short title, Commencement and Application -

(1) This scheme may be called the Employees Pension Scheme, 1995; (2) (a) This scheme shall come into force on the 16th day of November, 1995 (b) Subject to the provisions of this Scheme the employees have an option to become the members of the Scheme with effect from the 1st April, 1993. (3) Subject to the provisions of Section 16 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, this Scheme shall apply to the employees of all factories and other establishments to which the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 applies or is applied under sub-section (3) or sub-section (4) of section 1 or section 3 thereof.

2. Definitions :- (1) In this Scheme unless the context otherwise requires :-

(i) "Act" means the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952).

(ii) "Actual Service" means the aggregate of periods of service rendered from the 16th November, 1995 or from the date of joining any establishment whichever is later, to the date of exit from the employment of the establishment covered under the Act;

(iii) "Commissioner" means a Commissioner for Employees' Provident Funds appointed under Section 5-D of the Act;

(iv) "Contributory Service" means the period of 'actual service' rendered by a member for which the contributions to the fund have been received or are receivable.

(v) "Eligible Member" means an employee who is eligible to join the Employees'

Pension Scheme.

(vi) "Existing Member" means an existing employee who is a Member of the Employees' Family Pension Scheme, 1971.

(viii) "Pension" means the pension payable under the Employees' Pension Scheme and also includes the Family Pension admissible and payable under the Employees' Family Pension Scheme, 1971 immediately preceding the commencement of the Employees Pension Scheme, 1995 with effect from the 16th November, 1995.

(ix) "Member" means an employee who becomes a member of the Employees' Pension Fund in accordance with the provisions of this Scheme. Explanation: An employee shall cease to be the member of Pension Fund from the date of attaining 58 years of age or from the date of vesting admissible benefits under the Scheme, whichever is earlier.

(x) "Non-Contributory Service" is the period of "Actual Service" rendered by a member for which no contribution to the "Employees' Pension Fund" has been received or are receivable.

(xii) "Past Service" means the period of service rendered by an existing member from the date of joining Employees' Family Pension Fund till the 15th November, 1995.

(xv) "Pensionable Service" means the service rendered by the member for which contributions have been received or are receivable.

(xviii) The words and expressions defined in the Act but not defined in this Scheme shall have the same meaning as assigned to them in the Act.

3. Employees' Pension Fund.

(1) From and out of the contributions payable by the employer in each month under Section 6 of the Act or under the rules of the Provident Fund of the establishment which is exempted either under clauses (a) and (b) of sub-section (1) of Section 17 of the Act or whose employees are exempted under either paragraph 27 or paragraph 27-A of the Employees' Provident Fund Scheme, 1952, a part of contribution representing 8.33 per cent of the Employee's pay shall be remitted by the employer to the Employees' Pension fund within 15 days of the close of every month by a separate bank draft or cheque on account of the Employees' Pension Fund contribution in such manner as may be specified in this behalf by the Commissioner. The cost of the remittance, if any, shall be borne by the employer.

(2) The Central Government shall also contribute at the rate of 1.16 per cent of the pay of the members of the Employees' Pension Scheme and credit the contribution to the Employees' Pension Fund:

Provided that where the pay of the member exceeds rupees six thousand and five hundred per month the contribution payable by the employer and the Central Government be limited to the amount payable on his pay of rupees six thousand and five hundred only.

(3) Each contribution payable under sub-paragraphs (1) and (2) shall be calculated to the nearest rupee, fifty paise or more to be counted as the next higher rupee and fraction of a rupee less than fifty paise to be ignored. (4) The net assets of the Family Pension Scheme, 1971 shall vest in and stand transferred to the Employees' Pension Fund.

4. Payment of contribution

(1) The employer shall pay the contribution payable to the Employees' Pension

Fund in respect of 10[each member] of the Employees' Pension Fund employed by him directly or by or through a contractor. 10. Subs. by G.S.R.134 dated the 28th February, 96, for "the member" (w.e.f. 16th March, 1996) (2) It shall be the responsibility of the principal employer to pay the contributions payable to the Employees' Pension Fund by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor.

6. Membership of the Employees' Pension Scheme - Subject to sub-paragraph (3) of paragraph 1, the Scheme shall apply to every employee - (a) who on or after the 16th November, 1995, becomes a member of the Employees' Provident Fund Scheme, 1952 or of the Provident Funds of the Factories and other establishments exempted by the appropriate Government under Section 17 of the Act, or in whose case exemption has been granted under Paragraph 27 or 27-A of the Employees' Provident Fund Scheme, 1952, from the date of such membership;

(b) who has been a member of the ceased Employees' Family Pension Scheme, 1971 before the commencement of this Scheme from 16th November, 1995.

(c) who ceased to be a member of the Employees' Family pension Scheme, 1971 between 1st April 1993 and 15th November, 1995 and opts to exercise his option under Paragraph 7

(d) who has been a member of the Employees' Provident Funds or of appropriate Government under Section 17 of the act or in whose case exemption has been granted under Paragraph 27 or 27-A of the Employees' Provident Fund Scheme, 1952, on 15th November, 1995 but not being a member of the ceased Employees' Family Pension Scheme, 1971 opts to exercise his option under Paragraph 7.

7. Option for joining the Scheme - (1) Members referred to under sub-para (c) of Paragraph 6 who have died between 1st April, 1993 and 15th November, 1995 shall be deemed to have opted to join the scheme on the date of his death.

(2) Members referred to in sub-paragraph (c) of Paragraph 6 who are alive shall have the option to join the Scheme as per the provisions of Paragraph 17 from the date of exit from the employment.

(3) Members referred to in sub-paragraph (d) of Paragraph 6 shall have the option to join the Scheme as per the provisions of Paragraph 17 from 16th November, 1995.

9. Determination of Eligible Service -

The eligible service shall be determined as follows:

(a) In the case of "new entrant" the "actual service" shall be treated as eligible service. The total actual service shall be rounded off to the nearest year. The fraction of service for six months or more shall be treated as one year and the service less than six months shall be ignored. Explanation. In the case of employees employed seasonally in any establishment the period of "actual service" in any year, notwithstanding that such service is less than a year shall be treated as a full year.

(b) In the case of the "existing member" the aggregate of actual service and the 'past service' shall be treated as eligible service. Provided that if there is any period in the "past service" for which the contributions towards the Family Pension Scheme, 1971 has not been received, the said period shall count as eligible service only if the contributions thereof have been received in the Employees' Pension Fund.

Explanation: For the purpose of this sub-paragraph the total past service for less than six months shall be ignored and the total past service for six months

and above shall be rounded to a year.

10. Determination of Pensionable Service

(1) The pensionable service of the member shall be determined with reference to the contributions 16[received or receivable] on his behalf in the Employees' Pension Fund. 16. Subs. by G.S.R. 134 dated the 28th February, 1996 for "received" (w.e.f. 16th March, 1996) (2) In the case of the member who superannuates on attaining the age of 58 years, and/or who has rendered 20 years pensionable service or more, his pensionable service shall be increased by adding a weightage of 2 years.

16A. Guarantee of pensionary benefits None of the pensionary benefits under the Scheme shall be denied to any member or beneficiary for want of compliance of the requirement by the employer under sub-paragraph (1) of paragraph 3 provided, however, that the employer shall not be absolved of his liabilities under the Scheme.

17. Payments on Exercise of Option -

(1) Beneficiaries of the deceased members of Employees' Family Pension Scheme, referred to in sub-para (1) of Paragraph 7, shall receive higher of the benefits available under the Employees' Family pension Scheme, 1971 or under this Scheme.

(2) Members referred to in sub-paragraph (2) of Paragraph 7, shall have the option to join this Scheme by returning the amount of withdrawal benefit received, if any, together with interest at the rate of 8.5 per cent per annum from the date of payment of such withdrawal benefit and date of exercise of the option, to receive monthly pension as per the provisions of this Scheme.

(3) Members referred to in sub-paragraph (3) of Paragraph 7 shall be deemed to have joined the ceased Employees' Family pension Scheme, 1971, with effect from 1.3.1971 on remittance of past period contribution with interest thereon.

44. Repeal and savings.

(1) On commencement of this Scheme, the Employees' Family Pension Scheme, 1971, in force immediately before such commencement shall cease to operate with effect from the 16th November, 1995.

(2) Notwithstanding anything contained in sub-paragraph (1) every nomination made under the Employees' Family Pension Scheme, 1971, and every form regarding the details of Family of an employee for the purposes of the Employees' Family Pension Scheme, 1971, shall be deemed to have been made under the provisions of this Scheme.

(3) All orders/authorisations/Pension Payment Orders issued under the Family Pension Scheme, 1971, shall be deemed to have been made under this Scheme. (emphasis is brought out)

Since paragraph 6(c) has provided that the present scheme shall apply to those employees who ceased to be the members of EFPS, 1971 between 1.4.1993 and 15.11.1995, but who opt to come over under paragraph (7), the writ petitioner has preferred this writ petition questioning the validity of the notification dated 30.9.1991 granting exemption to him along with others by the Central Provident Fund Commissioner. He also prayed for consequential directions to the respondents to permit him to opt for the EPS, 1995 in terms of Para 7 thereof, notwithstanding the benefit of CCS Pension Rules by which he was governed. It will be important at this stage to notice that this writ petitioner has instituted, earlier WP No. 6527 of 2007 in this court. That writ petition was decided along with another connected WP No. 14711 of 2007 vide the judgment rendered on 16.7.2008. Both the writ petitions came to be disposed of with

directions to the Central Provident Fund Commissioner to verify the following and pass appropriate orders thereafter within a period of three months:-

- a) whether there existed any scheme comparable to, or more beneficial than the one under the Employees Family Pension Scheme 1971 in the PSU's, where the petitioners were working as on the date on which they were required to exercise their option under official memo, dated 22.1.190, issued by the Government of India;
- b) whether the petitioners are entitled to revoke their options exercised by them and to come under the purview of the 1995 Scheme; and if so,
- c) the conditions subject to which the re-entry into the 1995 scheme can be ordered.

In terms of this judgment, the Central Provident Fund Commissioner passed orders, which in turn came to be communicated by the Assistant Provident Fund Commissioner (Legal), Regional Office, Employees' Provident Fund Organisation, Hyderabad on 26.12.2008, answering the issues directed to be examined by this court in its judgment rendered in WP No. 6527 and 14711 of 2007 in the following manner:

(a) The employees of the PSU M/s. Mishra Dhatu Nigam Ltd. (MIDHANI) were covered by the EFPS 1971 as on the date on which the petitioner was required to exercise the option. However the petitioner had opted for the pension scheme of Central Government under CCS (Pension) Rules, 1971 in lieu of EFPS' 1971 as the latter was more beneficial than the Employees Family pension Scheme, 1971. Accordingly the member was exempted through the Notification dated 30.9.1991 invoking the powers under Section 17(1-C) of the Act.

(b) As per the Exemption Notification dated 30.9.1991 the petitioner cannot revoke the option once exercised in favour of CCS Pension. Moreover the petitioner had ceased to be a member of EFPS from the date of the above notification with reference to para 6 of EFPS 1971 whereby the petitioner had become entitled to withdraw the benefits from the date of the above exemption.

(c) As the membership of the petitioner under EFPS, 1971 had ceased with effect from the date of notification, there is no provision as such under the Employees' Pension Scheme, 1995 which would enable the petitioner an entry into the Employees' Pension Scheme, 1995.

In the circumstances, the petitioner is not entitled for membership and pension under the Employees' Pension Scheme, 1995."

(emphasis is brought out)

The respondents have filed a detailed counter in the matter and reiterated the same stand which they have taken for setting out that the writ petitioner is not entitled to become a member of EPS 1995. Therefore, the questions that fall for consideration in this writ petition are these: (1) Whether the orders of the Central Provident Fund Commissioner, granting exemption in terms of sub-section (1-C) of Section 17 of the Act on 30.9.1991, are justified, legal and valid?

(2) If the writ petitioner ceased to be a member of EFPS, 1971 by virtue of the exemption granted on 30.9.1991, can he be precluded from becoming a member of EPS, 1995?

Employees Provident Fund and Miscellaneous Provisions Act has been ushered in by the Parliament for conferring certain assured benefits upon the class of employees engaged in any industry in which 20 or more persons are employed. This Act is a social security measure which provides for terminal

benefits which are unattachable and unwithdrawable, excepting in compelling circumstances such as to help the beneficiary to buy a house or for meeting the expenses of a marriage or for providing assistance for educational facilities of his wards etc. This Act is intended to instil a sense of compulsory savings by the employees to help them in their later period of life. The scheme of the Act is woven around the concept of creating a "financial nest" to which the eggs would be contributed compulsorily both by the employer and the employee, largely, in equal measure throughout the period of coverage spanning the entire length of employment. The accrued sum, which includes the interest earned on the deposits so made, is liable for disbursement to employee at the time of his retirement or upon his untimely death, to the dependants of the beneficiaries. For securing pension on a month to month basis as an additional component of social security, the EPS, 1995 has been put in place.

It would also be appropriate to notice some of the important features of the Act. Under Section 5 of the Act, the Central Government has been empowered to frame the Employees Provident Fund Scheme for establishment of provident funds under the Act for the benefit of the employees. The said fund was vested in a Central Board, to be administered by it. Section 5A of the Act gave power to the Central Government to constitute a Multi Member Board of Trustees for the Central Board and endowed the Board with the power to invest the funds for securing most appropriate returns, to be distributed to the beneficiaries. Under Section 5D of the Act, the Central Government has been empowered to appoint a Central Provident Fund Commissioner, who shall be the Chief Executive Officer of the Central Board and function under its control and superintendence. Section 6 of the Act is the most crucial piece of legislation which charged every employer to make a compulsory contribution at a fixed percentage of the basic wages of those employed by him. The percentage of contribution was initially fixed at 6.25% which has been raised to 8.33% and has since been raised to 10% with effect from 22.9.1997. Section 6 also thrust a compulsion on every employee to contribute in equal measure and left the choice to such an employee to contribute much more. As was already noticed, Section 6 was the charging provision creating an obligation and compulsion for the employer and the employee to set apart and contribute certain percentage of the basic wages towards retiral benefits. Section 6A empowered the Central Government to frame the Employees Pension Scheme for the purpose of providing superannuation pension, retiring pension or permanent total disablement pension, as the case may be, to the employees or in case of their untimely death to the widows. Section 6C of the Act also empowered central government to establish Employees Deposit - Link Insurance Scheme for the purpose of providing life insurance benefits to the employees. Section 6D requires all such schemes referred to supra, to be placed before each House of the Parliament so as to secure its scrutiny, guidance and control. If the Parliament makes any modifications or alterations, the schemes shall be given effect to in the modified form. Section 7 also vested power in the Central Government to vary or modify, either prospectively or retrospectively, the provident fund scheme or pension scheme or the insurance scheme as the case may be. Section 11 of the Act accorded a statutory recognition of priority to the contributions liable to be made by an employer, in case the same is a company. Section 14 of the Act empowered false statements or false representations made as punishable with imprisonment for a term which may extend to one year or with fine, which may extend to Rs.5,000/- or with both. Thus, an element of sanctity is sought to be attached to the statements and representations that are made and liable to be made by the employers. If an offence is committed by a company, being an employer, Section 14-A rendered every person, who at the time of committing such an offence was incharge of and was responsible for the company for the conduct of its business, together with the company, as accountable and liable to be proceeded against. Section 17 of the Act contemplated granting of exemptions from the operation of the provisions of the Act or any of the schemes framed thereunder, setting out the deserving factors for grant of such exemptions. A conspectus reading of all the aforementioned provisions makes this much clear: The provisions contained in the Act ought to be construed and treated as a

compulsory scheme providing for social security measures in favour of the large working classes engaged in factories and establishments across the country. The features noticed supra would render any violation thereof as punishable offences.

A combined reading of Articles 36, 37, 41 and 47 of our Constitution makes it clear that the principles enunciated thereunder are liable to be construed as fundamental principles of governance of the country by the State. Article 41 specifically sets out that the State shall make effective provision for securing to its citizens the right to assistance in cases of old age and sickness and disablement. Article 47 in fact directs the State to consider it as a duty to raise the level of nutrition and standard of living of its people. Though the principles contained in Part IV of our Constitution are not enforceable, but vis a vis the State, they are required to be considered as the guiding navigational tools for its onward march. When once it is recognised that it is the duty of the State to raise the standard of living of its citizens and also provide for assistance to them in old age and in cases of sickness and disablement, it becomes imperative to construe the provisions contained under the Act and the schemes framed thereunder, being beneficial social security measures to as wide a possible interpretation, as it would enhance and advance the objectives behind the Act and the schemes framed thereunder. MIDHANI is undoubtedly an undertaking where more than 20 persons are employed at any given point of time and consequently is covered by the sweep of the Act. If a person is employed in MIDHANI, he has to be compulsorily covered by the provisions of the Act as well as the schemes framed thereunder. That would enure for the benefit of such an employee in the evening of his life. That will save him from an undesired want to earn for his living notwithstanding his declining physical prowess. It was intended to ensure that the employee would live after his retirement with dignity and with a sense of security. Most importantly, he will not be constrained to feel his living, after retirement as a burdensome affair. But, it is for a purpose and with a purpose. Sub-section (1-C) of Section 17 as it existed as on 30.9.1991 deserves a closer look. It reads:

"Pre-amended Section 17(1-C) : The Central Provident Fund Commissioner may, by notification in the official Gazette, and subject to such conditions as may be specified therein, exempt, whether prospectively or retrospectively, any employee or class of employees or any establishment from the operation of all or any of the provision of the Family Pension Scheme, if such employee, class of employees or the employees of such establishment is or are in enjoyment of benefits in the nature of family pension, and the Central Provident Fund Commissioner is of the opinion that such benefits are on the whole not less favourable to such employees than the benefits provided under this Act or the Family Pension Scheme in relation to employees in any other establishment of a similar character."

(emphasis is supplied)

It undoubtedly empowers the Commissioner of Employees Provident Fund to grant exemption to any employee or a class of employees or any establishment from the operation of all or any of the provisions of the family pension scheme if such employee or class of employees in enjoyment of benefits in the nature of family pension and then the Commissioner is of the opinion that such benefits are on the whole not less favourable to such employees than the benefits provided for under the Act and the Family Pension Scheme. A careful analysis of this provision makes this much clear: that is, if the Commissioner is satisfied that an employee or a class of employees are already in enjoyment of benefits which are in the nature of pension/family pension extended to them by their present employer, which are no less favourable to the employee than the benefits provided under the EPF Act and the pension scheme, then alone he can grant exemption from the operation of the Pension Scheme put in place under the Act. It therefore pre-supposes, in no unambiguous terms, the existence of a pension/family pension scheme, deployed by the current employer, which provides

for benefits to be accrued to the employee upon his retirement or upon his untimely death which are at least similar if not more favourable, to be conferred under the Act and the family pension scheme. This brings out to the fore what are the benefits which are liable to be conferred under the Act and under the Family Pension Scheme enunciated under the Act: (1) A Provident Fund, to which both the employer and the employee are required to contribute compulsorily

(2) A monthly pension/family pension to the employee.

If an employer who is otherwise liable to be covered by the sweep of the Act does not provide for benefits of similar nature as set out supra to his employees, the power available under sub-section (1-C) of Section 17 can neither be invoked by the Commissioner nor an order of exemption can be passed by him. The condition precedent for invocation of the power by the Central Provident Fund Commissioner, is his satisfaction and formation of an opinion about the benefits which are made available by the current employer to its employees, which are no way, in scope and content, less favourable to its employees than those that would have become available if the said establishment is covered by the Act and the Pension Scheme thereunder. If there are no such benefits put in place by the employer at all, or the benefits put in place are less favourable to the employees, then the Central Provident Fund Commissioner, is incapable of granting exemption invoking the power under sub-section (1-C) of Section 17. In other words, the objective satisfaction of availability of better, if not equal benefits put in place by the employer to its employees than those provided under the Act and the Family Pension Scheme, is too sacrosanct to be allowed to be sacrificed by him. If an employer has already provided for payment of 'provident fund' and also 'pensionary benefits' to all such employees who retire in his establishment or upon their death, then such of those employees employed in such an establishment do not need to be compulsorily covered by the provisions of the Act and the Pension Scheme evolved thereunder. Upon retirement or unfortunate death, what is needed to be provided is a certain assured benefit for making the retired person or the dependants of such person to live in honour and with their heads held high. It is, therefore, simple and plain that it is not necessary that one benefit be conferred by the employer and another benefit under the Act be extended simultaneously to such an employee. In the contemplation of the Parliament, one set of benefits is good enough for achieving the principal objective of social security and hence a provision for granting exemption was made in Section 17(1-C) of the Act. Hence, to my mind, the question that is needed to be examined by the Central Provident Fund Commissioner before notifying the exemption in terms of sub-section (1-C) of Section 17 of the Act, is, the objective formation of an opinion based upon satisfaction that the employer/establishment like MIDHANI has put in place benefits such as payment of provident fund and also monthly pension/family pension for those employed in it upon their retirement/death. If there are no such benefits available in MIDHANI as of 30.9.191, the invocation of power under sub-section (1-C) of Section 17 of the Act becomes wholly unjust and improper. In fact, in the absence of any such benefits, if exemption is granted, then, the very basic objective and purpose of the Act would be frustrated and or defeated.

The Central Civil Services (Pension) Rules, 1972, which have been brought into force on 1st June, 1972, deserve a closer scrutiny, in the above context. Some of the relevant Rules are extracted hereinbelow.

3. Definitions.-

(d) 'Defence Service' means services under the Government of India in the Ministry of Defence, and in the Defence Accounts Department under the control of the Ministry of Finance (Department of Expenditure) (Defence Division), paid out of the Defence Services Estimates and not permanently subject to the Air Force Act, 1950 (45 of 1950) or the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) ;

(f) 'Family pension' means 'Family Pension, 1964', admissible under Rule 54 but does not include dearness relief ;

(j) 'gratuity' includes - (i) 'service gratuity' payable under sub-rule (1) of Rule 49 (ii) 'retirement gratuity/death gratuity payable under sub-rule (1) of Rule 50 ; and (iii) 'residuary gratuity' payable under sub-rule (2) of Rule 50 ;

(o) 'Pension' includes gratuity except when the term pension is used in contradistinction to gratuity, but does not include dearness relief

(q) 'Qualifying Service' means service rendered while on duty or otherwise which shall be taken into account for the purpose of pensions and gratuities admissible under these rules ;

5. Regulation of claims to pension or family pension (1) Any claim to pension or family pension shall be regulated by the provisions of these rules in force at the time when a Government servant retires or is retired or is discharged or is allowed to resign from service or dies, as the case may be.

(2) The day on which a Government servant retires or is retired or is discharged or is allowed to resign from service, as the case may be, shall be treated as his last working day. The date of death shall also be treated as a working day :

Provided that in the case of a Government servant who is retired prematurely or who retires voluntarily under Clauses (j) to (m) of Rule 56 of the Fundamental Rules or Rule 48 or Rule 48-A, as the case may be, the date of retirement shall be treated as a non-working day.

7. Limitations on number of pensions

(1) A Government servant shall not earn two pensions in the same service or post at the same time or by the same continuous service. (2) Except as provided in Rule 19, a Government servant who, having retired on a superannuation pension or retiring pension, is subsequently re-employed shall not be entitled to a separate pension or gratuity for the period of his re-employment.

13. Commencement of qualifying service

Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity :

Provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post :
Provided further that -

(a)

in the case of a Government servant in a Group 'D' service or post who held a lien or a suspended lien on a permanent pensionable post prior to the 17th April, 1950, service rendered before attaining the age of sixteen years shall not count for any purpose, and

(b)

in the case of a Government servant not covered by clause (a), service rendered before attaining the age of eighteen years shall not count, except for compensation gratuity.

(c)

the provisions of clause (b) shall not be applicable in the cases of counting of military service for civil pension under Rule 19

14. Conditions subject to which service qualifies

(1) The service of a Government servant shall not qualify, unless his duties and pay are regulated by the Government, or under conditions determined by the Government.

(2) For the purposes of sub-rule (1), the expression "Service" means service under the Government and paid by that Government from the Consolidated Fund of India or a Local Fund administered by that Government but does not include service in a non-pensionable establishment unless such service is treated as qualifying service by that Government.

(3) In the case of a Government servant belonging to a State Government, who is permanently transferred to a service or post to which these rules apply, the continuous service rendered under the State Government in an officiating or temporary capacity, if any, followed without interruption by substantive appointment, or the continuous service rendered under that Government in an officiating or temporary capacity, as the case may be, shall qualify : Provided that nothing contained in this sub-rule shall apply to any such Government servant who is appointed otherwise than by deputation to a service or post to which these rules apply.

35. Superannuation pension

A superannuation pension shall be granted to a Government servant who is retired on his attaining the age of compulsory retirement.

36. Retiring pension

A retiring pension shall be granted -

(a)

to a Government servant who retires, or is retired, in advance of the age of compulsory retirement in accordance with the provisions of Rule 48 or 48-A of these rules, or Rule 56 of the Fundamental Rules or Article 459 of the Civil Service Regulations ; and

(b)

to a Government servant who, on being declared surplus, opts for voluntary retirement in accordance with the provisions of Rule 29 of these rules.

37. Pension on absorption in or under a corporation, company or body (1) A Government servant who has been permitted to be absorbed in a service or post in or under a Corporation or Company wholly or substantially owned or controlled by the Central Government or a State Government or in or under a Body controlled or financed by the Central Government or a State Government, shall be deemed to have retired from service from the date of such absorption and subject to sub-rule (3) he shall be eligible to receive retirement benefits if any, from such date as may be determined, in accordance with the orders of the Central Government applicable to him].

EXPLANATION. - Date of absorption shall be -

(i)

in case a Government employee joins a corporation or company or body on

immediate absorption basis, the date on which he actually joins that corporation or company or body;

(ii)

in case a Government employee initially joins a corporation or company or body on foreign service terms by retaining a lien under the Government, the date from which his unqualified resignation is accepted by the Government. (2) The provisions of sub-rule (1) shall also apply to Central Government servants who are permitted to be absorbed in joint sector undertakings, wholly under the joint control of Central Government and State Governments/Union Territory Administrations or under the joint control of two or more State Governments/Union Territory Administrations.

(3) Where there is a pension scheme in a body controlled or financed by the Central Government in which a Government servant is absorbed, he shall be entitled to exercise option either to count the service rendered under the Central Government in that body for pension or to receive pro rata retirement benefits for the service rendered under the Central Government in accordance with the orders issued by the Central Government.

EXPLANATION. - Body means autonomous body or statutory body.

50. Retirement/Death Gratuity

(1)

(a)

A Government servant, who has completed five years' qualifying service and has become eligible for service gratuity or pension under Rule 49, shall, on his retirement, be granted 1[retirement gratuity] equal to one-fourth of his emoluments for each completed six monthly period of qualifying service, subject to a maximum of 16 1/2 times the emoluments.

83. Date from which pension becomes payable

(1) Except in the case of a Government servant to whom the provisions of Rule 37 apply and subject to the provisions of Rules 9 and 69 a pension other than family pension shall become payable from the date on which a Government servant ceases to be borne on the establishment.

(2) Pension including family pension shall be payable for the day on which its recipient dies.

It becomes clear that, in terms of the above Rules, all claims for pension shall be regulated as at the time of retirement of a Government servant and that no servant shall earn two pensions in the same service or post at the same time. The service rendered by a Government servant will not qualify for securing pension, unless his duties and pay are regulated by the Government and such a government servant is paid from the consolidated fund of India or a local fund administered by the government. Further, Rule 37 made it clear that a government servant who has been permitted to be absorbed in service of a wholly or substantially owned or government controlled corporation, shall be deemed to have retired from service from the date of his absorption in such a corporation. Such a person is liable to be granted retiring pension from the date on which he ceases to be a government servant. Similarly such a person is also liable to be granted 'retirement gratuity'. These Rules have left no doubt whatsoever that after a government servant is allowed to be absorbed in service of a government owned corporation he is treated to have retired from the service of the government and becomes entitled for payment of pension and gratuity, proportionately keeping in view the length of qualifying service rendered to

government.

Applying these principles, to the case on hand, it becomes clear that, the petitioner is treated to have retired from 'Defense service' w.e.f., 1.8.1976, the date on which he got absorbed in the service of MIDHANI and from that date, his salary and allowances are not liable to be charged to the consolidated fund of India. He earned a right for receiving 'retiring pension' and 'Death cum retirement gratuity' for the services rendered by him up to 1.8.1976. The pension became payable to him as, the same is recognised as 'deferred payment' for the past services rendered in the youthful years of an individual. It is not liable to be treated as an act of bounty but as a reward for the quality services rendered in the past.

Therefore, the writ petitioner has earned pension for the service rendered by him to Central Government between 6.11.1959, the date of his appointment upto 1.8.1976, the date of his absorption in MIDHANI. In other words, he is not being granted any pensionary benefits or service gratuity by the Central Government for the period of service beyond 1.8.1976. The right earned by him in the form of pension up to 1.8.1976 cannot disentitle him to earn pension or gratuity or provident fund for the service to be or rendered by him beyond 1.8.1976 to Midhani, which is an establishment covered by the sweep of the Act. Therefore, unless MIDHANI has a scheme under which it agreed to or bound to pay the writ petitioner provident fund and pension for the services rendered by the writ petitioner beyond 1.8.1976, the Central Provident Fund Commissioner could not have invoked the power available to him under sub-section (1-C) of Section 17. If MIDHANI does not pay any such benefits and in view of the fact that it is an establishment liable to be covered by the sweep of the Act, the employee cannot be denuded of his right to the benefits under the Act and any pension scheme evolved thereunder. Further, all other employees of Midhani are covered by the sweep of the act. For instance, an employee who joined the service of Midhani on or after 1.8.1976, gets covered by the sweep of the Act and becomes entitled for the benefits of EPS 1995. Whereas, the writ petitioner and other Central Government employees who got absorbed in Midhani are denied the said benefits. Hence, they are clearly discriminated, all due to the exemption order passed by the Central Provident Fund Commissioner. Therefore, fundamentally the exemption notification dated 30.9.1991 granted by the Central Provident Fund Commissioner in the case of the writ petitioner and similarly placed former central government employees absorbed in central public sector undertakings, is clearly unjust and went beyond the power traceable to sub-section (1-C) of Section 17 of the Act.

The Central Provident Fund Commissioner has been constituted under Section 5D of the Act and assigned the fundamental duty to secure the implementation of the provisions and schemes envisaged under the Act by every employer. Therefore, he ought to have been satisfied that cases like that of the writ petitioner are exactly covered by one scheme or the other which not only provided for payment of provident fund but also pension by the Public Sector Undertakings like MIDHANI. In the absence thereof, he could not have granted the exemption under sub-section (1-C) of Section 17.

In the instant case, the Central Provident Fund Commissioner kept on granting exemptions invoking the power under sub-section (1-C) of Section 17 in favour of all such class of employees who were absorbed in various public sector undertakings like MIDHANI, BHEL, HAL etc. The essential reasoning, behind such exemptions, proceeded on the premise that such central government employees who have rendered the necessary qualifying length of service in the central government, have earned the right to be paid monthly pension/family pension in terms of CCS (Pension) Rules. The fallacy behind this premise is two fold: (1) The central government employees will be paid pension and service gratuity proportionate to the length of service put in by them. Even for earning the benefit of pension, an employee has got to necessarily render certain minimum length of service to the central government, which is called the

qualifying length of service. Until and unless the qualifying length of service is put in, the basic right to earn pension would not accrue to them. (The qualifying length of service is 10 years.) In other words, the service rendered by this class of employees to the central government prior to their absorption in public sector undertakings would earn them pension provided they have put in the requisite minimum qualifying length of service and proportionately for the period of service rendered by them.

(2) Further, the Central Government does not pay pension for the service rendered by such employees to the new employer, from the date of their absorption. After all, when once the relationship of master and servant gets terminated, no further obligations can be fastened on to the central government in that regard. The services rendered by a pensioner to yet another employer is not a matter of concern for the government, for it to sanction any other benefits for such service, except making a contribution of 1.16 per cent of pay in terms of Para 3(2) of EPS, 1995 which the government does irrespective of the fact, whether he is a former servant or not.

The fact that there are no such benefits put in place by MIDHANI or by any other public sector undertaking is discernible from the very fact that the former Central Civil Services employees upon their absorption into MIDHANI and other similar public sector undertakings became members of the provident fund and the pension scheme evolved by the Act till the Central Provident Fund Commissioner granted exemption invoking sub-section (1-C) of Section 17. If there are any other schemes put in place by MIDHANI and other similarly situated public sector undertakings providing for payment of provident fund and family pension to its employees, the necessity for persons like the writ petitioner to become members and contribute to the Provident Fund or the pension scheme under this Act would not have normally arisen at all. The finding of fact, now recorded by the Central Provident Fund Commissioner, pursuant to the directions of this court, is that there are no such benefits extended by MIDHANI and the employees of Midhani are members of EPF Scheme and EFPS, 1971. Therefore, the very exercise of power carried out by the Central Provident Fund Commissioner invoking the pension under sub-section (1-C) of Section 17 of the Act is wholly unjust. I therefore hold that the exercise of power by the Central Provident Fund Commissioner invoking sub-section (1-C) of Section 17 of the Act and notifying the exemption in respect of such of the former employees of the central government who got absorbed in various public sector undertakings on the premises that they are granted benefits of CCS (Pension) Rules, 1971, is clearly illegal and unjust.

But, for the exemption notification, the writ petitioner would have continued to be a member of the provident fund and the EFPS, 1971. If he had continued to be so, till his date of retirement viz., 1.8.1994, the benefit of exercising an option to become a member under EPS would have accrued to him in terms of paragraphs 6 and 7 of EPS, 1995. Therefore, the 2nd question framed is liable to be answered by holding that the notification issued by the Central Provident Fund Commissioner invoking the provision under sub-section (1-C) of Section 17 being illegal and unjust, consequently the writ petitioner and similarly situated former central government employees who stood absorbed in various public sector undertakings would have continued to be the members of EFPS, 1971 till their ultimate retirement from the service of such public sector undertakings. If the date of retirement of such employees has fallen between 1.4.1993 to 15.11.1995, then they had a right to opt to become the members of Employees Pension Scheme, 1995 under Para 7 thereof, subject of course to their complying with the requirements of depositing the amount of past contribution in terms of paragraph 17. Clearly, all such employees are liable to be treated and deemed to have continued to be the members of EFPS, 1971 till their respective dates of retirements and they would have continued to contribute to EFPS, 1971 and if their dates of retirement from such public sector undertakings has fallen between 1.4.1993 to 15.11.1995, they would have earned a right to opt for EPS, 1995 as well.

At this stage, it is appropriate to point out one other aspect of the matter. When the Karnataka High Court held in its judgment rendered on 21.4.2006 in WA No. 4673 of 2004 (S) that the order granting exemption as illegal, the said judgment has been implemented granting the option to the appellant in that case (Sri D.Gopalan) who got absorbed in BHEL, a public sector undertaking, to be covered by EPS, 1995 benefits, without litigating any further. When the petitioner herein sought for the same benefit, the respondents have pointed out that the Karnataka High Court, unfortunately noticed the provision contained in the amended Section 17(1-C) of the Act and sub-para (3) of para 1 of EFPS, 1971, whereas at the time the exemption was granted in favour of the appellant (Sri D.Gopalan), the provisions stood differently and hence the petitioner cannot rely upon the said judgment. It is true that by an amending Act 25 of 1996, the provision contained in sub-section (1-C) of Section 17 of the EPF Act has been amended, w.e.f., 16.11.1995, to the following effect :

17(1-C) The appropriate Government may, by notification in the Official Gazette, and subject to the condition on the pattern of investment of pension fund and such other conditions as may be specified therein, exempt any establishment or class of establishments from the operation of the Pension Scheme if the employees of such establishment or class of establishments are either members of any other pension scheme or propose to be members of such pension scheme, where the pensionary benefits are at par or more favourable than the Pension Scheme under this Act."

It is also true that this is the provision that is noticed by the Division Bench of Karnataka High Court in its judgment. It is equally true that, like in the present case, the appellant before the Karnataka High Court was also granted exemption by the Central Provident Fund Commissioner, much prior to this amended provision became operative. But, however, if the attention of the Karnataka High Court was properly drawn to the provision of sub-section (1-C) of Section 17 of the Act, as it stood prior to its amendment in 1995, I have no doubt that the Karnataka High Court would have still reached the same conclusion to which they reached holding the exemption granted by the Central Provident Fund Commissioner as illegal. It is, in fact, the process of reasoning which is so vital for concluding an issue and that process would not have changed its course.

CONCLUSION:

When a social piece of legislation is intended to confer benefits, as part of the obligations enshrined in Part IV of our Constitution, no attempt should be made to deny such benefits. A piece of legislation made for furthering the constitutional obligations thrust by Part IV of the Constitution on the State should not be allowed to be frustrated by actions of any agency, nor the passage of time should be a factor to defeat the benefits of a legislation which advances the policy and purposes enshrined in Part IV of the Constitution. Passage of time should not normally be a hindrance for enforcing the constitutional guarantees or benefits. Passage of time, however, long it might be, should not come in the way for, securing justice to all, which is the very primary objective and motto of the constitutional courts. Delay or laches, are normally taken a serious note when 3rd party interests or conflicting rights creep in. In the process of balancing the competing rights between the State and the fundamental rights of the citizens, courts, seldom seek to non suit the claims of the citizens only due to delay in approaching the court. It is also now recognised that when a class interest is frustrated by a public authority, the entire class of citizens need not be forced to seek individual reliefs by approaching the constitutional courts. Avoiding expensive litigation and avoiding multiplicity of proceedings is one of the mottos pursued vigorously by the constitutional courts in India now. Further, pensioners form into a single class by themselves. They are vulnerable due to constraints, both physical and resource wise. Therefore, I prefer to direct the judicial discretion available under Article 226 in their favour, instead of disallowing the claim for better

pensionary benefits. I therefore have no hesitation to direct the Central Provident Fund Commissioner, the respondent No.2 herein to forthwith extend the benefits of Family Pension Scheme, 1995 to all such former central government employees who got absorbed in one public sector undertaking or the other, like the writ petitioner in whose favour, a series of notifications exempting them from the provisions of the Act have been issued by the Central Provident Fund Commissioner invoking the power under sub-section (1- C) of Section 17 of the Act and to extend them the benefit of the Family Pension Scheme, 1995 in case their respective dates of retirement in the public sector undertakings in which they got absorbed has fallen between 1.4.1993 to 15.11.1995, without all such employees requiring to invoke the jurisdiction of the High Court. The Central Provident Fund Commissioner will accomplish this task and extend the option to those employees to be covered by Family Pension Scheme, 1995 in accordance with the terms contained in the scheme within a maximum period of six months from today.

The writ petition stands accordingly allowed. But, however, without costs.