

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment Reserved on: October 08, 2015

Judgment Delivered on: October 16, 2015

+

LPA 727/2014

M/S SDB INFRASTRUCTURE PVT. LTD.

(FORMERLY SOMDATT

BUILDERS PVT. LTD.) & ORS.

.....Appellants

Represented by: Mr.Rakesh Tiku, Sr.Advocate
instructed by Mr.Jeevesh Nagrath and
Mr.Rajeshwar K.Gupta, Advocates

versus

UNION OF INDIA & ORS.

..... Respondents

Represented by: Mr.Jasmeet Singh, Advocate with
Ms.Ashta Sharma, Advocate for R-1
Mr.R.C.Chawla, Advocate for Central
PF Commissioner

LPA 728/2014

BUILDERS ASSOCIATION OF INDIA & ORS.Appellants

Represented by: Mr.Rakesh Tiku, Sr.Advocate
instructed by Mr.Jeevesh Nagrath and
Mr.Rajeshwar K.Gupta, Advocates

versus

UNION OF INDIA & ORS.

..... Respondents

Represented by: Mr.Ruchir Mishra, Advocate for R-1
Mr.R.C.Chawla, Advocate for Central
PF Commissioner

LPA 729/2014

M/S SDB INFRASTRUCTURE PVT. LTD.
(FORMERLY SOMDATT
BUILDERS PVT. LTD.) & ORS.

.....Appellants

Represented by: Mr.Rakesh Tiku, Sr.Advocate
instructed by Mr.Jeevesh Nagrath and
Mr.Rajeshwar K.Gupta, Advocates

versus

UNION OF INDIA & ORS.

..... Respondents

Represented by: Mr.Jasmeet Singh, Advocate with
Ms.Ashta Sharma, Advocate for R-1
Mr.R.C.Chawla, Advocate for Central
PF Commissioner

LPA 730/2014

SKYLINE ENGINEERING CONTRACTS
(INDIA) PVT. LTD.

.....Appellant

Represented by: Mr.Rakesh Tiku, Sr.Advocate
instructed by Mr.Jeevesh Nagrath and
Mr.Rajeshwar K.Gupta, Advocates

versus

UNION OF INDIA & ORS.

..... Respondents

Represented by: Mr.Jasmeet Singh, Advocate with
Ms.Ashta Sharma, Advocate for R-1
Mr.R.C.Chawla, Advocate for Central
PF Commissioner

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. By a notification dated September 17, 1964 establishments of Engineers, Engineering Contractor which were not exclusively engaged in building and construction activity were brought within the purview of the Employees Provident Fund and (Miscellaneous) Provisions Act, 1952. By a subsequent notification dated September 23, 1980, the building and construction establishments were also brought within the purview of the Act with effect from October 31, 1980. By a notification dated November 01, 1990, Para 26(2) of the Provident Fund (Miscellaneous) Provisions Scheme, 1952 was amended. The amendment reads as under:-

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

2. A writ petition was filed in this Court which was registered as W.P.(C) No.792/1991 : Pyare Lal Hari Singh vs. Union of India & Ors. Vires of para 26(2) of the Scheme was challenged and amongst others, one ground of challenge was that the scheme as amended by para 26(2) was unworkable. The unworkability of the scheme was predicated on the ground that in the construction activity many workers work for one or two months with an employer and then move on to another. The query was posed :

how would portability of the workman be accounted for when the benefit of the amount deposited by the employer in the fund would be required to be paid to the workman? An ancillary issue concerning Scheme 2(f) of the Employees Provident Fund and (Miscellaneous) Provisions Act, 1952 was also raised.

3. The Division Bench of this Court before which the writ petition was listed took note of the fact that the scheme as amended would not entail any benefit to the workman who would work for a few days at one place under one employer and then move on to another and thereafter another followed by another and so on, because there was no mechanism to track the workman and additionally the workman would have no logistics to withdraw the money lying in the fund in his name. On November 27, 1991 an order was passed which brings out an attempt made to resolve the issue with reference to the suggestion by the Employees Provident Fund Commissioner that a pass-book could be issued in the name of the employee in which the amount credit in his name in the fund by the employer could be entered by the employer and withdrawal could be permitted from any place. The order reads:-

“27/11/1991

Present:- Counsel for the Petitioner.

C.W.P. No.792/91

Additional affidavit has been filed but in our opinion the problem is not resolved. Merely having a pass-book will not serve any useful purpose because in the very nature of things a migrant labourer goes from the place to the other and there

is no solution as to how and from where the migrant labourer would be able to withdraw the money due to him. These and other related problems should be considered and a more detailed and an effective proposal for a scheme should be presented to the Court on the next date of hearing.

Adjourned to 20th January, 1992. Interim orders to continue.

A copy of the order be given dasti to counsel for the respondents.”

4. Another affidavit was filed thereafter by the Provident Fund Commissioner setting forth the proposals by the authorities to put in place a working mechanism for the employee to avail the benefit of the amount credited in his name in the fund by different employers under whom the workman worked from time to time. Reflecting thereon, on May 19, 1992, the Division Bench passed another order which reads as under:-

“19-5-1992

*Present:- Mr.Rajiv Nayar, Advocate,
Mr.R.K.Kapur, Advocate,
Mr.Kuldip Pabley, counsel in items 24, 25, 43, 84.
Mr.M.R.Chawla, Advocate for the Petitioners
Mr.S.Mukherjee, Advocate
Mr.K.C.Sharma, Advocate
Mr.R.C.Chawla, Advocate for the Respondents.*

C.W.P. NO.792/91

Mr.Mukherjee states that an affidavit has been filed gibing proposed revised accounting procedure in respect of workers engaged in building and construction industry. The said additional affidavit is, however, not on nor record but during

the course of hearing a copy of the same was made available to us.

We have perused the proposed scheme and we have our apprehensions about the same only with regard to one aspect viz., whether it will be easy or convenient for the workers to be able to realize the amounts due to them. The proposal, as envisaged, contemplates about 64 Centres in all the whole of India come using the Headquarters, the Regional Offices and the Sub-Regional offices which are supposed to cater to lakhs of villages in which the labour force may be residing. Considering the size of India, the workmen in order to claim a refund, or their legal heirs in order to realize the money on the death of a workman, may have to travel hundreds of miles only for the purpose of putting in an application and then waiting for getting the money due to them. The scheme should be so formulated so as to make it easy and convenient for the persons entitled to receive the money to do so without much difficulty. Where aware of the fact that according to the Provident Fund Rules money is not payable to an employee merely at his request. The Provident Fund is like retirement benefit of in any case is a benefit which is available towards the end of one's serving years. But during the period when one is working loans can be taken or withdrawal made under certain circumstances. It is possible that if easy withdrawal of money is allowed this object may be frustrated but, on the other hand, if realization of money is inconvenient then the result would be that large sums of money would continue to remain with the Provident Fund Commissioner without the workmen getting benefit thereof. As at present there are about 37 crores of rupees lying with the Provident Fund Commissioner which are unclaimed. This amount will multiply many fold if it is un-economic or impractical for workers to realize small amounts of money which may be individually due to the under the revised Provident fund Scheme. Therefore, every effect should be made to see that the scheme is made workable and it will be a lesser evil if the workers obtain their money before it would ordinarily

be due to them rather than the workmen losing the money in toto.

One of the suggestions which as been mooted during the course of discussion is that into the main computer data should be fed in, indicating the name and nominees of every worker. If during a particular period of time say six months or one year or more, no contribution into that account has been made, a red flat should be raised which will warn the Provident Fund authorities to ascertain from the account holder as to why no contribution is being made. If no reply is received which is satisfactory then, possibly, after sometime, the Provident Fund authorities should on their own refund or pay to the account holder or his nominee the amount standing to his credit in that account on the presumption that the amount has become due to the employee. This will be on the basis that as and when a worker, who is a member of the Provident Fund account decides to resign or retire or cease working, he comes, entitled to the refund of the money. When no contribution is made to an account of the worker for a length of time it can safely be presumed that the said worker has stopped working and is, therefore, entitled to the refund of money. In this way all moneys will be paid to the workmen.

Another suggestion which has been made is that money should be paid with the assistances to stamps being affixed on the pass-book to be maintained by the worker. Suggestions to this effect have already been made by the Managements of different concerns.

Another suggestion is also that electronic teller cards should be issued to the workmen which will keep a complete record off all the transactions and will take the place of a pass-book.

All the aforesaid suggestions should again be examined by the Board and a detailed scheme be made available to the Court on 8th July, 1992 for final disposal.

Copy of the order be given dasti to counsel for the parties.”

5. During the pendency of the writ petition before the Division Bench of this Court, the vires of the amendment to the scheme was upheld by the Supreme Court, when the decision dated August 31, 1994 passed by the High Court of Madhya Pradesh at Jabalpur in Misc.Petitions No.438/1991, 478/1991 and 482/1991 was upheld by the Supreme Court in Petition(s) for Special Leave to Appeal (Civil) No.21149/1994, 21762/1994 and 6475/1995, lead matter being J.P.Tobacco Product etc. vs. UOI & Ors.

6. On May 02, 1995 the attention of the Division Bench of this Court was drawn to the said decision of the Supreme Court in J.P.Tobacco's case (supra), whereupon the Division Bench of this Court passed an order as under: -

“Our attention has been drawn to a decision of the Supreme Court in J.P.Tobacco vs. Union of India & Others in SLP(C) No.21752/94 & 5475/95 dated 17.4.95. Mr.Mukherjee says that this judgment will fully cover the issues involved in the present petitions as well. It is however, controverted by Mr.Jaitley who says that the Supreme Court considered only 4 points in the SLPs which were against the judgment of the Madhya Pradesh High Court and he says that there is a 5th ground which is yet to be considered. He formulated this ground as:-

“If a casual worker for a very brief period works in an establishments will he be covered under the definition of the word ‘employee’ under the Employees Provident Fund and Miscellaneous Provisions Act, 1952?”

Mr.Jaitley further says that three High Courts namely – Rajasthan, Orissa and Karnataka, have upheld the provisions

of the Act but read down the provision holding that casual labourer is not an employee under the Act. Mr.Mukherjee however, submits that 5th point will in fact be squarely covered under point No.3 of the aforesaid judgment of the Supreme Court. Mr.Jaitley submits that as far as casual workers are concerned he need not deposit the amount of provident fund, if any, deducted from their wages, but as far as regular employees are concerned the amount deducted from their wage is being paid. In view of the decision of the Supreme Court however, we will vacate the interim order granted earlier. We however, direct that on respondents 1 & 2 complying with modified scheme the petitioner shall deduct the provident fund and deposit the same with the respondents 1 & 2 in respect of casual worker also.”

7. From a perusal of the order dated May 02, 1995 it is apparent that the writ petitioner of WP(C) No.792/1991 persisted with the argument that the scheme was unworkable on the ground which was formulated in the order in the following words : *If a casual worker for a very brief period works in an establishment will he be covered under the definition of the word “employee” under the Employees Provident Fund and Miscellaneous Provisions Act, 1952?*

8. The writ petition was disposed of by the Division Bench on September 09, 1996. The order reads as under:-

“In this batch of writ petitions, the issues which survive for determination have been incorporated in the order dated 2 May 1995 in CWP No.792/91. That order refers to decision of the Supreme Court in J.P.Tobacco vs. Union of India & Ors. in SLP(C) No.21752/94 and 5475/95, dated 17th April, 1995. It also records the submissions of Mr.Mukherjee that the Supreme Court judgment will fully cover the issues involved in the present petitions as well. The submission of learned Counsel for the petitioners have also been recorded to the effect that the

point which is yet to be considered by this Court is as under:

“If a casual worker for a very brief period works in an establishment will he be covered under the definition of the word “employee” under the Employees Provident Fund and Miscellaneous Provisions Act, 1952?”

After we had heard learned Counsel for the parties for some time. Mr.Mukherjee submitted that amended Scheme which is in question in these petitions would be applicable to an employee within the meaning of Section 2(f) of the aforesaid Act. Learned Counsel for the parties also drew our attention to the decision of the Supreme Court in The Regional Provident Fund Commissioner Vs. T.S.Hari Haran 1971 (2) SCC 68. The question whether a person is or is not an employee within the meaning of Section 2(f) would depend upon facts and circumstances of each case. In this view, the point noticed hereinbefore also does not require any determination in these proceedings. If a person is not an employee within the meaning of the Act, the Scheme impugned in the writ petitions would not be applicable to him. We may notice the contention of Mr. Mukherjee that the Act and, therefore, the scheme would not apply to those employees who are casual employees within the meaning of interpretation of the expression employee as per Hari Haran’s case (Supra) so long as the ratio of the said decision holds the field and also the submission that whether a person is a casual employee or not would depend upon facts and circumstances of each case.

Mr.Nayar appearing for the Petitioners brought to our notice additional affidavit filed on behalf of respondent by Shri R.C.Jain, Regional Provident Fund Commissioner, New Delhi, dated 26 November, 1991, inter alia, stating that a pass-book system has been introduced w.e.f. 1 November 1991. The order dated 2 May 1995 directs that on respondents 1 and 2 in respect of casual workers also. It is admitted that reference to

the modified procedure as mentioned in the aforesaid affidavit dated 26 November, 1991. On objection being raised by Mr. Nayar that modified procedure as stated in the affidavit dated 26 November, 1991 has not been introduced, Mr. Mukherjee explained that the same was introduced w.e.f. November 1991 as stated in the affidavit. We only record this submission as it is not necessary to say anything more on this aspect in view of what has been stated by Mr. Mukherjee.

Accordingly, this and the connected writ petitions are disposed of in the above terms no costs. ”

9. Five writ petitions were thereafter filed, two in the year 2002, one each in the year 2005, 2006 and 2009. All of them have been dismissed by a singular order dated August 28, 2014 which has been impugned by the four appellants of the above captioned appeals, and for record we may note that LPA No.727/2014 concerns WP(C) 7253/2002 and other co-petitioners. LPA No.728/2014 concerns WP(C) No.3588/2002. LPA No.729/2014 concerns WP(C) No.12-13/2006 and LPA No.730/2014 concerns WP(C) No.8956-57/2005. The fifth writ petitioner who had filed WP(C) No.9500/2009 has not challenged the decision. Thus as against the five writ petitions decided by the learned Single Judge we are dealing with only four appeals.

10. Of the various prayers made in the writ petition, as conceded to by the learned counsel for the appellant only two prayers were pressed, and since learned counsel for the parties agreed during hearing of the appeals that for purposes of adjudication of the four appeals the two prayers which were pressed in WP(C) 3588/2002 may be taken note of because the two prayers best bring out the nature of relief sought for by the appellants, we note the

two prayers, being (e) and (f). They read as under:-

“(e) Issue a writ in the nature of mandamus, directing the Respondent to evolve modified Scheme & create mechanism for its implementation, as directed by this Hon’ble Court, in Pyare Lal Hari Singh and till such modification and consequent implementation, not to force the Petitioners to cover casual/labour/site worker under the provisions of Provident Fund Act or Provident Fund Scheme and not to levy and/or realize and/or require payment of Provident Fund Contribution from the Petitioners for such Site workers engaged by the sub contractor’s of the Petitioner.

(f) Quash the order dated 23rd December, 1994 passed by the Respondent No.5 whereby the order passed by the Respondent No.4 dated 8th February, 1994 was set aside by the Respondent No.5.”

11. From the perusal of the orders passed by the Division Bench of this Court in WP(C) 792/1991 which we have noted in paragraphs 3, 4, 6 and 8 above it is apparent that the question which was being considered by the Division Bench was if a casual worker worked for a brief period in an establishment would he be covered under the definition of the word ‘employee’ under the Act, an issue which was ultimately not argued and left to be decided on case to case basis keeping in view the law declared by the Supreme Court in T.S.Hari Haran’s case (supra). The second issue i.e. the workability of the scheme with reference to withdrawal of money from any place by the workman; the Court was endeavouring to formulate a workable scheme. In this regard it needs to be noted that an affidavit was filed by Mr.K.C.Jain, Regional Provident Fund Commissioner, New Delhi, dated November 26, 1991, wherein he has stated that that the passbook

system has been introduced with effect from November 01, 1991. The said fact was also reiterated by the counsel appearing for the RPFC. A revised accounting procedure was formulated which inter-alia stipulated as under:-

“Every establishment covered under the scheduled head “building and construction industry” would be issued a block of 1000 or so permanent number indicating the permanent number that would be allotted to the workers as soon as the establishment employ a worker who are peripatetic in nature, the permanent number would be given by the establishment itself. Further, the establishment would also issue a passbook to the employee giving complete details as provided for in the passbook.

The employer would intimate the service office of the details of the number issued to the worker, serial number of the passbook issued in the special format that would be designed. (The number issued to the peripatetic member would be the permanent number assigned to him for all times to come until taxes his retirement).

The office would feed in to the computer the details as received in the return. Copy of the data received would be made in the floppy and sent to a Central Accounting Unit which will be functioning either in the Central Office or in any office designated by the Central Office.

Every employer after furnishing the return regarding the commencement of employment of a person for and after the issue of a permanent number would be required to furnish a monthly return. This monthly return would indicate the name of the establishment and code number given to them. Further, the return will also contain the permanent number of each of the employee engaged by them during the month and the details of wages paid, employer and employees’ share paid etc. This will be a consolidated return for the E.P.F., F.P.F. and E.D.L.I. Schemes. The return would be so designed that it facilitate easy

data input in computer. (Alongwith the above return the employer would also be required to make separate payment alongwith a specifically designed challan form to distinguish that dues are in respect of peripatetic employee). The employer would also be required to furnish monthly return along the copy of the challan and the certificate that the amount has been fully paid. He will also make suitable entries in the passbook of the employee.”

12. An interim order passed on November 29, 2003 would throw light on the prima-facie opinion formed by the learned Single Judge in the writ petitions concerning which we are dealing in appeals concerning the workability of the scheme and facility to the workmen to avail the benefit thereof. The order reads as under:-

“It has been argued before me by the counsel for the petitioner that necessary infrastructure for disbursement of provident fund under the scheme has not yet been created by the number has been assigned. On the other hand, counsel for respondent Nos. 2 and 3 stays that the pass book and assignment of ten digit number will not be possible on physical verification or the petitioner providing the requisite information as to how many casual/temporary workers are engaged in the construction industry. Mr.Chawla says that as that part has not been done by the petitioner, no blanket stay can be created in favour of the petitioner. I find force in the argument of counsel for the respondent Nos. 2 & 3. Let petitioner supply all the relevant information with regard to casual/temporary workers to the respondents within three weeks. Thereafter, respondents will verify the same.

It has also been contended by Mr.Chawla that petitioners are not participating the proceedings before the Regional Provident Fund Commissioner. Mr.Sanghi counsel for the petitioner says that the petitioner undertake to participate in the proceedings before the Regional Provident Fund Commissioner. No

coercive steps be taken till such time the verification is done by respondents.”

13. For reasons we need note. The writ petitions continued to languish and on July 25, 2013, an additional affidavit was filed by the respondents wherein the following stand was taken to bring home the point that the respondents had put into place a mechanism to ensure that the workmen would be able to harvest the benefit of the scheme keeping in view the portability of the workmen. Relevant part of the affidavit reads as under:-

“The Department continued to address the cause in order to improve upon the existing procedure.

The Para 40A of the EPF Scheme regarding Supply of Pass Book to the members was introduced vide G.R.S 341 dated 9th July, 1992 (w.e.f. 25th July, 1992), however the preparatory action was taken well before the insertion of the said Para and initially in the 125th CBT meeting held on 07/12/1990, the Central Board of Trustees, EPF (in short CBT) approved introduction of Pass Books to subscribers in the unorganized sector especially to the migrants workers on experimental basis. Prototype Pass Books prepared were circulated among the CBT members as also among the representative of the Builder Association of India. It was decided that the Pass Book will be supplied to each employer in this industry in respect of both the existing as well as future members for this purpose. A procedure was also approved and spade work to this effect was started. Copy of the circular dated 06/09/91 is enclosed and marked as Annexure A (Colly).

Subsequently revised accounting procedure in respect of the employees engaged in Buildings and construction industry was also framed and placed before the Central Board of Trustees, with whom the Funds are vested, in the 129th meeting held on 06.03.92. The Central Board of Trustees approved the draft

formulation and accorded its approval in principal.

The Hon'ble High Court would appreciate that the following steps were also taken by Respondent Department in the form of a series of executive instructions to all the field offices located in the country issued by the Head Office of the Answering Respondents from time to time.

The brief contents of the instructions are stated as under and copies have also been annexed for perusal of the Hon'ble High Court:-

(i) The EPFO Head Office issued directions and exhaustive guidelines to all the field offices to issue Pass Books to establishments engaged in building & construction. A system was also devised to keep proper accounts of the Pass Books by each office.

(ii) The office of RPFC, Delhi provided Pass Books to the employers of unorganized sector and wherever the employers demanded, the same were provided. Copies of two forwarding letters of Regional Provident Fund Commissioner, Delhi dated 13.01.1997 addressed to 23 establishments and letter dated 24.01.1997 addressed to 29 establishments engaged in building & construction vide which Pass Books were initially sent is enclosed as Annexure-B (Colly) as testimony. Also a photocopy of the sample Pass Book is enclosed as Annexure-C (Colly).

(iii) Further circulars were issued to by the Head Office to all the field offices regarding implementation of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 to the worker engaged in Building and construction. A copy of the circular dated 21.10.98 and 12.11.98 is enclosed as Annexure-D (Colly). The EPF members were free to submit any type of claims under the EPF Act at any of the field offices for settlement and a mechanism to this effect was framed in the field offices.

12) As has been submitted above, these measures were subject to the prevailing circumstances. The respondent department also introduced computerization for maintenance of PF accounts of the PF members from the year 1990 onwards in an incremental manner. Till the computerization was achieved fully, the Department, evolved mechanism of settling the claims of worker specially the mobile workers to accept and process the claims in any of the offices throughout India and to get the same settled expeditiously from the concerned office so much so as to received claims during office hours as well as during the holidays also as can be seen from the enclosed circulars. Also exhaustive guidelines were issued for improving the working of the offices and expeditious settlement of P.F. claims vide circular dated 11.06.02 issued to the field offices by the Central Provident Fund Commissioner. Copy enclosed as marked as Annexure-E (Colly). Some of them are as details below:

(i) The directions provide for organizing of Bhavishya Nidhi Adalats or Shikayat Niwaran Manch on 10th of every month,

(ii) Opening of Facilitation Centre,

(iii) Installation of computer terminals at Public Relation Officer's office.

(iv) Receiving of claims even on holidays and beyond working hours.

(v) Acceptance of claims pertaining to jurisdiction of other Regional Provident Fund Commissioner etc.

13) Many of the employers/employees similarly placed have abundantly made use of these mechanisms. It is for the petitioner to state why they could not make use of this facility evolved by the Organization. The fact that the petitioner has not taken note of this facility speaks of the scant interest being

taken in respect of their workers. It is to be inferred that by such action the petitioner wanted to avoid the legal responsibility cast on them for ensuring compliance in respect of the workers engaged by them.

14) That the delivery of benefits under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and schemes framed there under is dependent upon a number of statutory duties and responsibilities cast upon the employer which includes payment of monthly contributions and submission of statutory monthly and annual returns, for all eligible workers of the establishment. Only after receipt of statutory remittance and returns the P.F. amount of each employee of the establishment is updated and issued."

14. Vide impugned order dated August 28, 2014 the writ petitions have been dismissed by the learned Single Judge principally on the ground that the vires of the amended scheme had already been upheld by the Supreme Court and that statutory provisions cannot be nullified on the ground of procedural deficiency. The learned Single Judge has held that a taxing statute has to be interpreted in light of the law declared by the Supreme Court in the decision reported as 48 STC 466 Associated Cement Company Ltd. Vs. CTO. The learned Single Judge has, in para 50 of the impugned decision opined as under:-

"Further, I note, it is a facility to be made available to a worker to withdraw the amount from any place of his convenience. Denial of such facility to worker cannot be a grievance of the employer/petitioners. In fact while upholding the vires of para 26(2) the High Court of Madhya Pradesh had rejected the contention of the employer, that the provision is impracticable and unworkable. The provisions of the Scheme of the PF is designed to induce thrift so that the employee may lay by from his present earning a portion for his old age. As the workman

cannot be expected to spare very much, regard being had to the gap between what he earns and what he must spend, the employer is expected to make a contribution [Ref.Burhanpur Tapti Mills Ltd. vs. Burhanpur Tapti Mills Mazdoor Sangh, 1965 1 LLJ 453 (S.C.3J)]. The objection of the Act/Scheme cannot be defeated only on the ground that the facility of withdrawing the money has not been evolved.”

15. Lest there be any confusion, we record that during hearing of the appeals no argument was advanced on the issue as to which kind of employees would be within the meaning of Section 2(f) of the Employees Provident Fund and (Miscellaneous) Provisions Act, 1952, for the reason said aspect would require a challenge to such orders passed by the authorities under the Act in respect whereof the grievance raised is that the persons with respect to whom provident fund contribution has been directed to be made is not an employee. The contention advanced was that till a centralized accounting workable system was put into place the scheme as modified could not be enforced in view of the law declared by this Court in WP(C) No.792/1991 Pyare Lal Hari Singh vs. Union of India & Ors. Learned Senior counsel for the appellants argued that the order dated May 02, 1995 passed by the Division Bench in said writ petition had issued a direction that on the respondents No.1 and 2 therein complying with the modified scheme the liability of the writ petitioner to deduct the provident fund and deposit the same with respondent No.1 and 2 shall commence. Learned Senior counsel argued that till said mandamus issued by the Division Bench was complied with by respondents No.1 and 2, no liability could be fastened upon the appellants or its members to obey the mandate of paragraph 26(2) of the scheme as amended. Picking on para 50 of the

impugned decision, learned Senior counsel argued that the provident fund of employees required to be deducted by the employer and deposited with the Provident Fund Commissioner was not a tax nor was it a fee or a levy and thus it was urged that reliance upon the decision in Associated Cement's case by the learned Single Judge was misconceived. Referring to the decision reported as (2015) 1 SCC 142 Delhi Gymkhana Club Ltd. vs. ESIC the learned Senior counsel urged that as per said decision the Employees State Insurance Act was held to be a beneficial legislation and thus a duty was cast on the Courts not to countenance any subterfuge which would defeat the provisions of the social legislations and Courts must even, if necessary, strain the language of the Act in order to achieve the purpose which the legislator had in placing the legislation on the statute book. With reference to the decision reported as (1985) 2 SCC 68 Gasket Radiators Pvt.Ltd.vs. ESIC & Ors. learned Senior Counsel argued that the Supreme Court categorically held that contributions to provident fund or payment of other benefits to workers are not and cannot be levelled as taxes or fees because they are neither taxes nor fees. Learned Senior counsel argued that an earlier decision on the subject would operate as *res-judicata* between the parties as held by the Supreme Court in the decision reported as AIR 1961 SC 1457 Daryao Singh & Ors. Vs.State of U.P & Ors. Relying upon the decision of the Supreme Court reported as 2011 (3) SCC 573 RVF RIG. Corporation vs. Commissioner of Customs (Imports), learned Senior counsel urged that as held therein the nature of mandamus is to remedy defects of justice and a writ of mandamus is issued to the end that justice may be done. Learned Senior counsel urged that where a public authority

fails to exercise or wrongly exercises a discretion conferred upon it by a statute or a rule or a policy decision, a Court exercising power under Article 226 of the Constitution of India has to step in and pass such directions against the public authority as would be necessary to compel the performance of the obligation. Learned Senior counsel urged that to said effect is a decision of this Court reported as 2003 (69) DRJ 530 Daya Dua & Ors. vs. Official Liquidator & Ors. With reference to the decision of the Supreme Court reported as (2008) 5 SCC 756 H.P.Forest State Corporation vs. RPFC learned Senior counsel urged that the direction issued by the Supreme Court would apply i.e. would require to be issued in the instant case as per para 5 of the decision, which is as follows: *'We accordingly dismissed the appeals but reiterate the recommendations that the amounts due from the corporation will be determined only with respect to those employees who are identifiable and whose entitlement can be proved on the evidence and that in the event the record is not available with the corporation at this belated stage, it would not be obliged to explain its loss.'* With reference to another decision of the Supreme Court reported as (1990) 1 SCC 68 FCI vs. PF Commissioner & Ors. learned Senior counsel urged that unless a beneficiary is identified the employer cannot be fastened with any liability. Lastly, learned Senior counsel referred to an order dated August 21, 2015 passed by the Supreme Court in WP(C) 318/2006 National Campaign Committee C.L.Labour vs. UOI & Ors., wherein expressing anguish at the cess collected under the Building and Other Constructions Workers Welfare Cess Tax, 1996 not being utilized, the Supreme Court had observed : *'If the State Government/Union Territories and the Central*

Government are not in a position to utilise ₹27000 crores, it would be perhaps more appropriate not to collect this money since it is not being utilized for the benefit of the persons for whom it is collected, but for other purposes.'

16. The reference by the learned Single Judge to the decision of the Supreme Court in Associated Cement's case (supra) was avoidable, because concededly the Employees Provident Fund and (Miscellaneous) Provisions Act, 1952 is neither a taxing statute nor does it levy a fee or a cess. The collection under the Act is akin to such collections which have to be made by employers concerning other funds for the benefit of the workmen. The principle of law declared by the Supreme Court in Gasket Radiator's case (supra) is without any cavil and thus we hold that reliance by the learned Single Judge on the decision in Associated Cement's case (supra) is misplaced. But in our opinion it would make no difference to the final view taken by the learned Single Judge because reference to said decision stands in isolation and probably to deal with the distinction between a statutory provision in a statute which creates the liability i.e. charges and other provisions which deal with the collection of the money.

17. There would thus be two limbs of the argument of learned Senior counsel for the appellants which need to be dealt with. The first would be whether there was any mandamus issued by the Division Bench in Pyare Lal Hari Singh's case (supra) requiring respondents No.1 and 2 to comply with the same as a condition precedent for liability casts upon the employers to deduct provident fund and deposit the same with the Provident Fund Commissioner in terms of para 26(2) of the Scheme as modified on

November 01, 1990 and if yes whether the decision of the Division Bench would be *res-judicata*. The second would be whether the law declared by the Supreme Court in H.P.Forest State's case and FCI's case (supra) would be applicable.

18. There cannot be a quarrel with the propositions that an earlier decision on the same subject matter or a matter in issue which was directly and substantially similar would operate as *res-judicata* in a subsequent litigation between the same parties or their predecessor-in-interest. Thus, with respect to the first contention advanced we only have to determine whether in Pyare Lal Hari Singh's case any mandamus was issued by the Division Bench as claimed by the appellants.

19. In paragraphs 3, 4, 6 and 8 above we have noted the contents of the orders dated November 27, 1991, May 19, 1992, May 02, 1995 and September 09, 1996 passed by the Division Bench of this Court. The first two orders simply reveal that the Division Bench noted a problem in the working of the scheme because of migrant labour going from place to place and therefore the need to have a system under which the migrant labour could withdraw the money lying to the credit of the labour with the Provident Fund Commissioner. The relevant part of the order dated May 02, 1995 which could possibly be of any help to the appellants reads : *We however, direct that on respondents 1 & 2 complying with modified scheme the petitioner shall deduct the provident fund and deposit the same with the respondents 1 & 2 in respect of casual worker also.* We note that vide order dated September 09, 1996 the writ petition was disposed of, we note that the Division Bench did not continue the interim order or its observations made

in the order dated May 02, 1995 and did not issue any mandamus. The Division Bench terminated the proceedings reads : *The order dated 2 May 1995 directs that on respondents 1 and 2 in respect of casual workers also. It is admitted that reference to the modified procedure as mentioned in the aforesaid affidavit dated 26 November, 1991. On objection being raised by Mr.Nayar that modified procedure as stated in the affidavit dated 26 November, 1991 has not been introduced, Mr.Mukherjee explained that the same was introduced w.e.f. November 1991 as stated in the affidavit. We only record this submission as it is not necessary to say anything more on this aspect in view of what has been stated by Mr.Mukherjee.* The Division Bench disposed of the writ petition simply noting the two rival contentions. The one by the petitioner that modified procedure as mentioned in the affidavit dated May 26, 1991 had not been introduced with its rebuttal by the respondents that the same had been introduced.

20. There being no mandamus issued by the Division Bench the question of the decision of the Division Bench operating as *res-judicata* does not arise. The surviving issue which the Division Bench was considering with reference to its order dated May 02, 1995 was not decided by the Division Bench when the writ petition was disposed of on September 09, 1996. The Division Bench deemed it proper to dispose of the petition after simply recording the two rival stands. The Division Bench did not return any finding that the existing mechanism was defective and till the defect was rectified the modified scheme could not be enforced.

21. With reference to the second limb of the argument that in view of the decisions of the Supreme Court in H.P.Forest State's and FCI's case and the

observations made in the order dated August 21, 2015 by the Supreme Court in National Campaign Committee C.L.Labour's case (supra), there cannot be any cavil with the proposition that unless a beneficiary is identified the employer cannot be fastened with any liability. But that hardly takes the case of the appellants any further because the identification of the beneficiary would require the appellants to produce their records with the Commissioner Provident Fund for determining as to which employee connected with the work of construction activity would be liable to be made a member of the fund by the employer. If it is the case of the employer that in view of the decision pronounced by the Supreme Court in T.S.Hari Haran's case which was noted by the Division Bench of this Court in its order dated September 09, 1996 disposing of the writ petition filed by Pyare Lal Hari Singh, a casual worker could not be an employee in respect of whom it has to deposit the necessary provident fund with the Regional Provident Fund Commissioner, the record would have to be produced and scrutinized by the Regional Provident Fund Commissioner; and if the employer is aggrieved by the view taken the order passed can be challenged before the Appellate Authority, and should the grievance subsist by way of a writ petition.

22. Before concluding we would note that the learned Single Judge has rightly observed that the liability of the employer to make a deduction from the wage payable to an employee and with a matching contribution deposit the amount with the Provident Fund Commissioner is unconnected with how the employee can receive the benefit of the fund. The issue of portability of workmen and how could a workman withdraw money lying to his credit in

the fund did trouble the Division Bench of this Court because of the logistics problem which a workman could face. But that was dehors the liability of the employer to do the needful by complying with the employer's obligation as per the amended scheme. The scheme has been upheld by the Supreme Court. The anguish expressed by the Supreme Court regarding construction workers' cess not being properly utilized and its observations in the order dated August 21, 2015 in WP(C) No.318/2006 are not by way of declaration of any law. Thus, the argument by learned Senior counsel for the appellants that unless the respondents could show that they had a mechanism as per which the workmen whose job was portable could avail the benefit of the money lying to their credit all over India, no liability could be fastened upon the appellants or its members has no legs to stand on with reference to the observations of the Supreme Court in the order dated August 21, 2015.

23. The appeals are accordingly dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

OCTOBER 16, 2015
skb