IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.9402 of 2011

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Sulabh International Social Service Organization, through its General Secretary, Akhouri Prem Prakash, Sulabh Bhawan, Near Patliputra Colony, P.S.- Patliputra Colony, Distt.- Patna

.... Petitioner

Versus

1. Regional Provident Fund Commissioner, Bihar, R. Block, Road No. 6, P.S.- Secretariat, Patna-800013
2. Employees Provident Fund Organization, through the Central P.F. Commissioner, having its Head Officer at Bhavishya Nidhi Bhawan, 14-Bhikaji Cama Place, P.S.- R.K. Puram, New Delhi-110066

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Jayant Bhushan, Sr. Advocate
Mr. Syed Alamdar Hussain, Advocate
Mr. Shashi Bhusan Kumar, Advocate
Mr. Brajesh Kumar, Advocate

For the Respondent/s : Mr. Prashant Sinha, Advocate
Mr. Kumar Girindra Gaurav, Advocate

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

C.A.V. JUDGMENT

Date: 20-05-2016

Heard learned counsel for the petitioner and learned counsel appearing for the respondent.

1. By filing this writ application, petitioner seeks the following reliefs:

(i) Issuance of a writ, rule, order or direction in the nature of mandamus directing the Respondents not to enforce the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (in short 'the EPF & MP Act') against the petitioner.

(ii) Issuance of a writ, rule, order and direction in the nature of certiorari quashing the show-cause notice, dated 14.02.2011 and the order, dated 18.04.2011 & 16.05.2011, passed by the Respondent No. 1 under Section 7A of EPF & MP Act proposing to assess the amount payable towards provident fund as well as directing the petitioner to produce the relevant records.

(iii) Pass such further order/orders, as this Hon'ble Court deems fit and proper in the facts and circumstances of the case.

Case of the petitioner

2. The petitioner, namely, Sulabh International Social Service Organization is a Society registered under the Societies Registration Act, 1860 and consists of voluntary social workers, who have joined the organization as associate members to work for the purpose of improving the life of scavengers by relieving them from carrying the night soils on their head and to bring respect to their social life. It is a voluntary philanthropic organization, which is carrying out activities on 'no profit and no loss basis'. There is no master and servant relationship between the organization and its associate members, who are rendering voluntary social service. The associate members are free to render their social services as and when they so like and for such duration, as is convenient to them. The organization's role is limited to channeling and coordinating the activities of the associate members, to achieve its objective of liberation and welfare of scavengers from the demeaning practice of cleaning human excreta and to restore human dignity to fulfill the dream of the Father of Nation Mahatma Gandhi. The volunteers are not the employees of the organization and have not joined the organization for personal or monetary benefit. The petitioner is not an 'Industry' under Section 2(j) of the Industrial Disputes Act and hence, the provisions of Employees Provident Fund and Miscellaneous Provisions Act, 1952 (in short 'the EPF & MP Act') are not applicable, as it is a voluntary social organization. The organization is not an establishment and as such, many Labour Laws including the EPF & MP Act, would not be applicable to it.

3. On 15.06.1982, the State of Bihar made a reference under the Industrial Disputes Act on the representation of some persons claiming to be workmen of the Sulabh International. According to the petitioner, the Tribunal without appreciating the philanthropic nature of Sulabh International, held it to be an 'Industry' and passed award, for quantum of wages vide Award, dated 04.07.1988. The management of Sulabh challenged the aforesaid award before this Court by way of writ petition, bearing C.W.J.C. No. 3408 of 1989. After considering all the facts and circumstances, a Division Bench of this Court, vide order, dated 09.02.1990 held that Sulabh International is not an 'Industry' within the meaning of Section 2(j) of the Industrial Disputes Act and recorded a finding that the organization consists of voluntary workers, who impart vocational training on their own to jobless scavengers. The Division Bench further gave its findings that the said volunteers are paid small sums as their pocket expenses and are not being paid any wages. The order of the Division Bench, dated 09.02.1990, was challenged by the so-called workers' union namely, Bhartiya Sulabh Sauchaly Karmchari Sangh by way of Special Leave Petition, which was numbered as SLP (Civil) No. 2527 of 1991. The said SLP was dismissed as withdrawn vide order, dated 17.02.1994 of the Hon'ble Supreme Court. A review petition filed by the Workers' Union, being Review Petition (C) No. 491 of 1996, was also dismissed on merit. Copy of the judgment, dated 17.02.1994 and 20.03.1996 are annexed as Annexures P/2 and P/3.

4. This apart, time to time various other Courts and Forums, all over the country, have also held that Sulabh International is not an Industry or a Commercial Establishment or an Employer and therefore, provisions of Labour Laws are not applicable. Reference of such decisions can be found in para 14 of the writ application. Besides this, in light of the decisions of the Hon'ble Supreme Court and High Court, the State Governments and Departments have issued notifications and circulars to their Officers instructing them not to apply the provisions of Labour Laws to Sulabh International and to comply with the decisions of the Hon'ble Supreme Court and High Courts in letter and spirit. Some of the circulars are detailed in para 15 of the writ application.

5. Besides this, emphatic reliance has been placed upon judgment, dated 27.11.2003, passed by the Delhi High Court, in Cr. Misc. (Main) Petition Nos. 3822, 2933, 2934, 2935, 2936, 3820 and 3821 of 2002. While considering the issue of applicability of various labour laws to Sulabh International, the Delhi High Court has observed as follows:-

> *(a) That Sulabh International is not an Industry; and*
>
> *(b) That there is no employer-employee relationship between Sulabh International and the volunteers associated with it.*

6. The Government of NCT carried the matter in appeal before the Hon'ble Supreme Court. Out of these two issues, the first issue as to whether Sulabh International is an industry or not in view of its Voluntary Charitable nature discharging public utility service, has been referred by the Hon'ble Division Bench of the Supreme Court vide order, dated 23.02.2007, to a larger bench for consideration. The second issue in the Special Leave Petition, that there is no employer-employee relationship existing between Sulabh International and its volunteers, is still pending consideration. The Hon'ble Apex Court has not stayed the operation of judgment, dated 27.11.2003, of the Delhi High Court, and the judgment thus holds the field along with other judgment of Patna High Court and Hon'ble Apex Court.

Besides Delhi High Court, the High Court of Kerala vide its order, dated 19.05.2009, has also passed an interim order in favour of Sulabh, restraining the EPF Authorities from taking any steps in pursuance of the notices sent by them. Copies of the orders, dated 19.05.2009 & 18.06.2009 of Kerala High Court are annexed as Annexure-P/28.

7. It is further case of the petitioner that various organization and dignitaries all over the world, have lauded the activities of the Sulabh International for liberating and rehabilitating scavengers from demeaning practice of removing human excreta and carrying it on their heads. Some of such accolades, upholding the Authorities of Sulabh International as mentioned herein below:

Her Excellency, the former President of India, Smt. Pratibha Patil, while addressing the women scavengers rehabilitated by Sulabh at Nai Disha, Alawar, stated as follows:-

> *"I am very gald to know that this group of liberated women scavengers from Nai Disha, sent to the United Nations through the Sulabh International Social Welfare Organization on the invitation of UN-ESOSOC put up the programme 'Mission Sanitation' – a cultural programme there and our sister Usha Chaumar was crowned. This crown is not only for you all only but for all our sisters. It is a crown from the country and a crown for Mahatma Gandhi.*

I congratulate you for what you have achieved, which you richly deserve, for which there is no comparison. You have done such a great job and I would like to tell you that Dr. Bindeshwar Pathak has brought about a revolution, a very big revolution. Financial revolution can come about and can be brought about, but to bring a revolution in the mind set of people is a very big achieved, a very difficult job, which Dr. Pathak has brought about. He increased your self-respect, your self confidence and not only your self confidence but also showed to society what you are worth and what you can do. He has shown an example of this. And I wish that what he has shown, everyone sees. The whole country looks at it and every village looks at it and tries to do what he has done.

And I understand that Mahatma Gandhi, is seeing this from Heaven and would be having tears of joy in his eyes. I do not think any other programme in the country would give so much happiness to Mahatma Gandhi as this one."

8. At the launch of the International Year of Sanitation, his Royal Highness of the Prince of Orange of the Netherlands, Chair of the United Nations Secretary, General

Advisory Board, has observed as follows:-

> *"Sulabh International showed me a good example during my recent visit to New Delhi. This organization has proved how effective small-scale solutions can be and how they can be extended all over India within a short time span. Thousands of 'pay & use' public toilet-cum-bath complexes and more than a million pour-flush latrines in private houses have been built (and are maintained), and they are used by more than ten million people every day. By doing so, Sulabh has restored human dignity and a new future to thousands of 'untouchables'.*
>
> *In India I also saw the positive results of the Total Sanitation Campaign, a good example of social innovation implemented by the Indian government. This community-led approach works to end the practice of 'open defecation' in the community as a whole and to promote the use of latrines. Bangladesh and Ethiopia are now also implementing this comprehensive sanitation campaign that combines community pressure and government rewards."*

9. Our former President, His Excellency, Dr. A.P.J. Abdul Kalam in his book "Mission India" published in the year 2005, while appreciating the activities of Sulabh International, observed as follows:-

> *"One organization which works to improve the state of sanitation in the country of Sulabh, founded by Dr. Bindeshwar Pathak in 1970. Sulabh is the largest internationally recognized pan-Indian social service outfit with over 35,000 volunteers. It began through Pathak's desire to help scavengers – men and women who carry and dispose of human excreta. He developed a two-pit pour-flush toilet (known as the Sulabh Shauchalaya), which did not required scavenging to clean. Subsequently, Sulabh also started pay-and-use public toilets, popularly known as Sulabh Complexes, with bath, laundry and toilet facilities. These are used by about ten million people every day. Sulabh has also pioneered the production of bio-gas and bio-fertilizer from excreta-based plants."*

10. In his report about the Earth Summit, 2002 held at Johannesburg, the Darryl D'Monte, quoted as follows:-

> *"Perhaps the crowning success of the Summit was the recognition of sanitation as a major development goal. The Sulabh International Social Service Organization was very much in evidence. Sir Richard Jolly, who heads*

the Water Supply and Sanitation Collaborative Council, praised found Dr. Bindeshwar Pathak's achievements in dealing with the unmentionable over three decades. Sulabh has set up 1 million household toilets, 4000 community blocks and freed 240 towns from the scourge of scavenging."

11. Petitioner laments that inspite of being engaged in such philanthropic activities, the EPF organization are becoming an impediment in carrying its social service activities by issuing notices and making demand time and again. One such show-cause notice issued by the Regional Provident Fund Commissioner, Patna regarding the applicability of the EPF & MP Act and the proposal to hold the inquiry to determine the amount payable by it is, dated 14.02.2011. A copy of notice is contained in Annexure-P/31 (Page 186 to 188). The notice was followed by two orders namely, order dated 18.04.2011 and 16.05.2011, directing the petitioner to produce the relevant documents. All these notices and orders issued under Section 7-A of the EPF & MP Act, are in challenge in this writ application.

12. Being aggrieved by the actions of the respondents, the petitioner moved this Court by way of filing the instant writ application, being C.W.J.C. No. 9402 of 2011. The petitioner sought direction to the respondents not to enforce the provisions of EPF & MP Act, 1952 and to set aside the notice, dated 14.02.2011 and orders, dated 18.04.2011 and 16.05.2011, passed by the Regional Provident Fund Commissioner (Respondent No.1). After hearing the parties, learned single judge, on consideration of materials on record, observed that the issue whether the petitioner is doing public service on the basis of no profit no loss, is under consideration before the Hon'ble Apex Court in SLP No. 1693 of 2006, having been referred to a larger bench. Learned Judge, as such, vide order, dated 13.06.2011, while staying the operation of the impugned orders, dated 18.04.2011 and 16.05.2011, directed the matter to be listed before appropriate bench after the decision of the Hon'ble Apex Court in SLP No. 1693 of 2006. The EPF carried the matter in Appeal before the Division Bench, which was numbered as LPA No. 1163 of 2011. The Division Bench, while setting aside, the order of the learned Single Judge, observed as follows:-

> *"We agree with the learned Advocate Mr. Prashant Sinha appearing for the appellant. The matter at issue pending before the Hon'ble Supreme Court is whether or not the petitioner - `a no profit no loss' organization rendering public utility service can be said to be an `industry' within the meaning of the Industrial Disputes Act, 1947. In our view, even in case the petitioner is not an `industry'; the petitioner would still be governed by the 1952 Act, if it is an establishment employing 20 or more persons. The impugned action of the Commissioner is*

a mere process of enquiry; whether or not the petitioner is governed by the 1952 Act, and if yes, whether or not the petitioner has complied with the provisions of the 1952 Act and the Schemes made thereunder.

Ordinarily, no Court in exercise of power of judicial review conferred by Article 226 of the Constitution would interfere with such enquiry process. In the present case also no stay would have been granted but for the pending proceedings before the Hon'ble Supreme Court. As we have held heretofore, the matter at issue pending before the Hon'ble Supreme Court <u>is totally different and has no relevance or bearing upon the enquiry in respect of the applicability of the 1952 Act."</u>

Note:- Underlining is mine for emphasis

13. The petitioner being aggrieved by the order of the Division Bench, challenged the same before the Hon'ble Apex Court vide SLP No. 28722 of 2011. The Hon'ble Apex Court, remitted the matter to this Court for expeditious disposal with direction that the interim orders passed on 15.01.2014 and 28.11.2014 would continue.

Having traversed the aforesaid journey, the matter is before this Court for consideration.

14. In nutshell, therefore, the argument advanced on behalf of the petitioner is that it is a Charitable and Voluntary Social Service Organization and not an 'industry'. The Organization is run by 'volunteers' who offer voluntary service and there does not exist any master and servant relationship between the said volunteers and the petitioner organization. Since an existence of master and servant relationship, is a *sine qua non* for application of the provisions of 'the EPF & MP Act' therefore, in absence of the same, provisions of the said Act are not attracted qua the petitioner and hence, the enquiry initiated under Section 7A of 'the EPF & MP Act' is illegal and fit to be quashed/ set aside.

Case of the Respondents

15. In the year 1989, the EPFO started the process of coverage of the Petitioner Organization under the EPF & MP Act. A squad of Enforcement Officers visited the establishment and directed to produce the records, but no records were produced. The petitioner instead of producing the records, wrote a letter to the Enforcement Officer, Mrs. S. Jha on 12.04.1989 stating therein that the Act is not applicable to it. Relying upon this very letter and without any inspection of records, the E.O. vide letter, dated 13.04.1989, submitted a faulty report. A copy of letter, dated 13.04.1989 is annexed as Annexure-1 at page 488 to the supplementary counter affidavit filed on behalf of the respondents. On 17.04.1989, another E.O. visited the establishment for verification of the record with prior notice to the petitioner. This time again, the records were not produced on the plea that the records are with the Chairman and the Vice Chairman. Thereafter, the Assistant Provident Fund Commissioner vide his letter, dated 31.05.1989 directed the petitioner to produce the records on 21.06.1989, in response to which, the petitioner replied vide its letter, dated 19.06.1989 that the Chairman is out of station and requested for fixing of another date in the third week of August, 1989. Other efforts to solicit records from the establishment also failed, the APFC vide his letter, dated 08.11.1989, again directed the office bearer of the establishment to produce the records. It was further made clear in the letter that non-production of the records would be construed as deliberate and willful denial to provide information and the matter could be finalized exparte as per information available in the office. In the meanwhile, the office of the respondents received a letter, dated 25.10.1989, from the Bhartiya Sulabh Shauchalay Karmchari Sangh. A list of employees was also provided and a request was made for coverage of the establishment.

16. As the petitioner did not co-operate, the CPFC constituted a Central Inspection Squad to inspect the records of the petitioner, which too failed in its efforts to persuade the petitioner to produce the same. The petitioner started sending representations to the various authorities of the EPFO and Ministry of Labour, Govt. of India. The Head Office of the EPFO also examined the matter and communicated to the Secretary, Ministry of Labour vide its letter no. 2488, dated 14.01.2002 that the Act is applicable upon the petitioner. Subsequently, vide letter, dated 17.01.2002, the Head Office of the EPFO again communicated to all the Regional Provident Fund Commissioner holding that the Act is applicable upon the petitioner. This letter was issued after examination of the judgment passed by this Hon'ble Court in C.W.J.C. No. 3408/1989 and it was observed that the said judgment is not applicable in the facts of the case. According to the respondents, non-production of the records before the Authorities leads to a valid presumption under Section 114, illustration (g) of the Indian Evidence Act, 1872, which stipulates that the evidence, which could be and is not produced would, if produced be unfavorable to the persons, who withhold it.

17. The respondents next submit that the writ application is not maintainable because the authorities have only issued a notice under Section 7A of the EPF & MP Act. If the petitioner is raising the issue of applicability, it can be decided by the Authority under Section 7A, itself, as provided in Section 7A of the Act. Thus, the petitioner has got alternative and efficacious remedy of raising the issue of applicability before the 7A Authority, which can be decided by the 7A Authority upon production of records by petitioner and also by the conducting a quasi judicial proceeding as provided under the Act. The petitioner does not want to produce its records with the authorities because it is afraid that production of records would demolish the claims made by the it. Thus, the petitioner may not be allowed to take the shield of Art. 226 of the Constitution of India for evading, the due course of law.

18. The respondents next submit that the judgment with regard to the Industrial Disputes Act cannot be applied in the present case which is related to the EPF & MP Act. The Industrial Disputes Act has been legislated for providing a dispute resolution mechanism between the management and the employee, while EPF & MP Act has been legislated for providing social security to the workers after their retirement. Thus, any order with regard to the Industrial Disputes Act cannot be applied with respect to EPF & MP Act. The respondents next submit that there are evidences of employees working in the petitioner's organization for wages. In support of their submissions, the respondents have referred to Annexure-G at page 482-83, which is a letter of the petitioner organization, dated 08.03.1980, whereby certain employees were transferred, which demonstrate that these persons are not volunteers and rather, they are working under the administrative control of the management. The respondents next submit that Hon'ble Madras High Court in its judgment passed in Writ Appeal No. 2234 of 2000, has clearly laid down that the petitioner organization is not a voluntary non-profit organization, rather, it is working with profit motive, which the petitioner has not challenged before the Hon'ble Supreme Court.

19. Thus, in brief, the case of the respondents is that the applicability of the provisions of 'the EPF & MP Act' is not limited only to an 'industry', rather, it is applicable to other establishments as well, which are not an 'industry', but employing twenty or more persons. Further that the question, as to whether there exists an employer-employee relationship between the petitioner and the so called volunteers, could only be decided on the basis of evidence and relevant materials, for which purpose the Section 7A enquiry has been initiated, and thus the said issue cannot be decided in a writ jurisdiction. It is therefore contended that the writ application filed by the petitioner is misconceived, premature and fit to be dismissed.

20. In support of the argument that the petitioner is a voluntary organization and no master and servant relationship exists, the petitioner has relied upon an unreported judgment of a Division Bench of this Hon'ble Court, delivered on 09.02.1990 in C.W.J.C. No. 3408 of 1989 and upheld till the Hon'ble Apex Court, which broadly holds the petitioner to be not an 'industry' within the meaning of Section 2(j) of the Industrial Disputes Act, 1947 (in short 'the I.D. Act'). The petitioner also relies upon a decision of Delhi High Court in Cri. Misc. Petition No. 382 of 2002, wherein relying upon the above judgment of the Hon'ble Patna High Court holding the petitioner to be not an 'industry', the prosecution launched against the petitioner under Contract Labour Act, Minimum Wages Act and Equal Remuneration Act was quashed. This decision of the Delhi High Court was challenged before the Hon'ble Supreme Court in SLP No. 1693 of 2006, wherein the question whether a public utility service, allegedly carried on by a society on 'no profit no loss basis', would be an 'industry' within the meaning as defined under 'the I.D. Act' was referred to a larger Bench in view of the case already pending consideration before a seven Judge Bench of the Hon'ble Supreme Court, having been referred to it by a five Judge Bench in State of U.P. vs. Jay Bir Singh (reported in **JT 2005 (v) SC 170**); petitioner also relies on another decision given by the High Court of Gujarat in Cri. Misc. Application No. 428 of 2000 in which the Gujarat High Court relying upon the aforesaid two decisions of Patna High Court and Delhi High Court quashed the criminal prosecution which had been initiated against the petitioner for allegedly violating the provisions of the Contract Labour Act.

21. In support of its argument, the Counsel for the respondent relied upon a judgment of the Madras High Court delivered in Writ Appeal No. 2234 of 2000 and allied cases, wherein the Madras High Court in para 27 made the following observations against the petitioner:

> *"……… this court is unable to accept the plea of Sulabh International that it is a 'no loss no gain' service but definitely it is a 'much gain and no loss' business that the conducted by Sulabh International using the public money. The objects and reasons relied on by Sulabh International seem to be made only for propagation but not for practice."*

Further, in para 28 the Madras High Court observes:

> *"………. Whatever be the name, the fact lies that Sulabh International has engaged some people to maintain the P.Cs. and they are being paid some amounts for their services/ duties. When Sulabh International was minting money, under the clothe of the 'service' and 'no loss no gain' that too by making use of public money through the Corporation it cannot be said to be the 'service' in its true sense that is being rendered by them, but only a business under the name of 'service' that is being conducted by them. Therefore, it should have adopted a fair policy of making regular, uninterrupted payment to the poor illiterate labourers and exploiting them under the name of 'service' as if it is voluntary service is nothing but an effort to colour the sky………"*

Finally, in the said judgment, the Madras High Court in para 37(viii) directed Sulabh International to pay the wages to such employees from 28.02.2006 with arrears, till they handover possession of the public conveniences to the Commissioner, Corporation of Chennai, within four weeks.

22. The learned Counsel for the respondents Mr. Prashant Sinha has particularly laid emphasis on the observationcum-findings given by the Madras High Court to submit (a) that the petitioner in the garb of being Charitable and Voluntary Service organization is actually doing business and (b) that in the name of volunteers, it is actually engaging workers/ employees to whom it is obliged to pay wages.

23. The Counsel for the petitioner, during the course of argument, informed this court that the aforesaid judgment of the Madras High Court was completely extraneous to the issue involved and the said decision was subject matter of pending SLP (C) No. 19071 of 2011 and allied matters, wherein the Hon'ble Supreme Court by an interim order passed on 11.07.2011, has been pleased to stay the operation of the decision of Madras High Court. Upon this information being given to this Court, the learned Counsel appearing for the respondent in his argument has apprised this court that against the aforesaid decision of the Madras High Court, three SLPs were filed, the first SLP being 19071 of 2011 filed by Government of Tamilnadu, second being 19072 of 2011 again filed by Government of Tamilnadu and the third being SLP No. 19076 of 2011 which has been filed by the Chennai Municipal Corporation. The Counsel for the respondent therefore contended that the petitioner never challenged the decision passed by the Madras High Court and as such the order and the observations contained therein have become final as far as the petitioner is concerned. The Counsel for the petitioner did not controvert this factual position given by the respondents.

24. Before I elaborately deal with the submissions of the parties, it would be apt to notice some of the relevant provisions of the EPF & MP Act.

25. The Employees Provident Fund and Miscellaneous Provisions of Act, 1952, is a benevolent legislation enacted for the purpose for providing social security to the poor workers during the evening of their life when they are not in a position to earn their livelihood. Three schemes have been framed under the Employees Provident Fund and Miscellaneous Provisions Act, 1952, firstly, Employees Provident Fund Scheme, 1952, which provides for the benefit of Provident Fund to the poor workers; secondly, Employees Pension Scheme, 1995, which provides for payment of pension to the workers after their retirement and thirdly, the Employees Deposit Linked Insurance Scheme, 1976, which provides for insurance benefit to the dependents of the workers dying in harness. For all these three benefits, the employer is required to deduct certain percentage from the wages of the employees and after adding its own contribution, he is required to deposit the contribution with the EPFO. The EPF and MP Act is a complete code in itself in as much as Section-1(3) provides that subject to the provisions contained in Section 16, the Act applies to (a) every establishment, which is a factory engaged in any industry specified in Schedule-1 and in which 20 or more persons are employed and (b) to any other establishment employing 20 or more persons or class of such establishment, which the Central Government may by Notification in the official gazette specify in this behalf. Thus, the applicability of the Act is not limited only to an industry rather it is applicable to any other establishment employing 20 or more persons, which is not an industry. Section 16(1) of the Act clearly stipulates as to where the Act will not apply. The exclusions are provided in Section 16(1) (a), (b) and (c). The Act does not provide any exclusion to any NGO, working on no profit no loss basis.

26. On careful consideration of the arguments advanced by both the sides and the judgments relied upon by them, it is manifest that the petitioner has mainly relied upon the unreported judgment of this Hon'ble Court delivered on 09.02.1990 in C.W.J.C. No. 3408 of 1989, as the other decisions of the Delhi High Court and Gujarat High Court have merely placed reliance on the Patna High Court judgment and therefore, the decision of this Hon'ble Court on which extensive reliance has been placed needs to be examined in detail and then it shall be seen as to whether the findings given therein have any impact on the present matter.

27. On careful examination of the judgment of this Hon'ble Court delivered in C.W.J.C. No. 3408 of 1989, I find that the issue as to whether Sulabh International qualifies as an 'industry' within the meaning as defined under Section 2(j) of 'the I.D. Act' or not, has been decided in favour of the petitioner by holding that it is not an 'industry', as because at that point of time there was no adequate evidence on record to hold otherwise, (meaning thereby that it is not a conclusive finding for all times to come). It necessarily implies that if in future sufficient evidence is brought on record to establish that it is an 'industry' within the meaning as defined under Section 2(j) of 'the I.D. Act', then it can be held so. At various places in the said judgment it has been clearly observed that that it is because of lack of cogent and relevant materials on record that the court was holding it to be not an 'industry'. Therefore, this judgment cannot be used as an authority for contending that the petitioner is not an 'industry' within the meaning as defined under 'the I.D. Act' for all times to come and that this issue cannot be revisited or enquired into even if there are sufficient materials to prove/ establish otherwise. On careful examination of the said decision, I also do not find that in the said decision it has anywhere been held or decided that the so called volunteers do not qualify as 'workman' within the meaning as defined under Section 2(s) of 'the I.D. Act' and that there does not exist any employer-workman relationship between the petitioner and the so called volunteers. This judgment, therefore, also cannot be cited as an authority for contending that there does not exist any master and servant relationship or employer-employee relationship between the petitioner and the so called volunteers. However, I am conscious of the fact that against the decision of the Delhi High court (supra), in SLP (Cri.) No. 1693 of 2006, the Hon'ble Apex Court on the issue as to *whether a public* *utility service, allegedly carried on by a society on no profit no loss basis, would be an 'industry' within the meaning of the provisions of 'the I.D. Act',* has referred the matter to a larger Bench in view of pending decision before a seven Judge Bench which is still to be decided. Therefore, the larger question as to whether an organization like- Sulabh International which claims to be a Charitable and Voluntary Social Service Organization run with the help of volunteers, can qualify as an 'industry' within the meaning as defined under 'the I.D. Act' is under consideration before the Hon'ble Supreme Court. In such view of the matter, it would not be fair and proper to assume that it is an 'industry' and the respondent authorities also cannot be allowed to enquire into this aspect of the matter till such time the larger Bench of Hon'ble Supreme Court decides the pending issue.

28. Even assuming that an unit/establishment/ organization is not an 'industry' within the meaning as defined under Section 2(j) of 'the I.D. Act', the question is whether that is sufficient to hold that the provisions of 'the EPF & MP Act' would not apply to it? The answer has to be in negative for the reason that the provisions of 'the EPF & MP Act' even apply to such establishments which are not 'industries'. For this purpose Section 1(3) (a) and (b) of 'the EPF & MP Act' are quoted herein below for needful:

> *"1. (1) This Act may be called the Employees Provident Funds and Miscellaneous Provisions Act, 1952.*

(2) xxx
(3) Subject to the provisions contained in section 16, it applies –

(a) to every establishment which is a factory engaged in any 'industry' specified in Schedule I and in which twenty or more persons are employed; and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify, in this behalf..

Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification.
(4) xxx
(5) xxx."

From the aforesaid provision, it is manifest that even other establishments employing twenty or more persons which are not 'industries' can come within the purview of 'the EPF & MP Act'. Therefore, the mere contention that since the petitioner is not an 'industry' and therefore the provisions of 'the EPF & MP Act' would not apply to it, is not correct and has to be rejected. However, it will have to be established by the respondent authorities that the petitioner belongs to such class of establishment which the Central Government by notification in the official gazette has so specified as per the strict requirement of Section 1(3)(b) of 'the EPF & MP Act' and further that they are engaging twenty or more persons who qualify as 'employees' within the meaning as defined under Section 2(f) of 'the EPF & MP Act'.

29. The question as to whether there exists or does not exist employer-employee relationship between the petitioner and the so called volunteers, is a question of fact which can only be decided on the basis of relevant materials and cogent evidence?

30. It is thus not a pure question of law but a mixed question of law and fact. The petitioner has failed to show any decision of any court which had decided this issue in its favour. As I have observed earlier, the decision of this court delivered in C.W.J.C. No.3408 of 1989, has not decided this issue. In any case, I am compelled to observe that any inference drawn from the decision of this court passed in C.W.J.C. No. 3408 of 1989 to buttress the argument that there does not exist employer-employee relationship between the petitioner and the so called volunteers would also not be proper in view of the fact that the said judgment was delivered in the context of a subject matter arising under 'the I.D. Act' and not under 'the EPF & MP Act'.

The definition of 'workman' given under 'the I.D. Act' and the definition of 'employee' given in 'the EPF & MP Act' are not the same. The definition of 'employee' given under Section 2(f) of 'the EPF & MP Act' is much wider than the definition of 'workman' given under 'the I.D. Act'. As such, it would not be appropriate for the petitioner to place any kind of reliance on the decision of this court delivered in the context of the provisions of 'the I.D. Act' for lending support to his argument that there does not exist employer-employee relationship between the petitioner and its 'volunteers' in the context of the provisions contained in 'the EPF & MP Act'.

Since this issue can only be decided on the basis of cogent evidence and relevant materials, therefore, this court would also refrain from endeavouring to decide this question of fact in writ jurisdiction. The petitioner would be required to establish on the basis of materials and cogent evidence that its 'volunteers', who the petitioner claims to be rendering voluntary service without being paid wages, do not qualify as 'employee' within the meaning as defined under Section 2(f) of 'the EPF & MP Act'. It is true that even if under Section 1(3)(b) of 'the EPF & MP Act', the petitioner is found to be a notified establishment, still the provisions of 'the EPF & MP Act' on that basis alone cannot be extended/ applied on it, until and unless on the basis of cogent evidence, it is held that the petitioner is also engaging twenty or more persons who qualify as 'employees' within the meaning as defined under Section 2(f) of 'the EPF & MP Act'. Both the conditions have therefore to be met with, in order to apply the provisions of 'the EPF & MP Act' on the petitioner.

31. The apprehension of the petitioner that the respondent authorities have initiated Section 7A proceeding for determination of provident fund dues assuming that the provisions of the Act already apply to the petitioner, does not appear to be correct and is misplaced. Section 7A of 'the EPF & MP Act' is although captioned as 'determination of moneys due from employers' but Sub-section (a) clearly provides that in a case where a dispute arises regarding the applicability of the Act to an establishment, then the said dispute has to be first decided. The outcome of the decision will determine the future course of action.

32. In view of this express provision of law, I have no hesitation in holding that the respondent authorities discharging quasi judicial power under Section 7A of 'the EPF & MP Act' are under obligation to first decide the dispute of applicability. If the dispute regarding applicability is decided against the employer then the authority has to proceed for assessment of provident fund dues. If the decision is in favour Employer, the proceeding would close.

33. Although the judgment of the Madras High Court is against the petitioner, which it has also not challenged before the Hon'ble Apex Court, but it would not be fair to rely on the observations made in the said decision to decide the present issue against the petitioner for the reason that the observations given therein cannot be said to be a *ratio decendi* for the purpose of deciding the issues involved in the present case, which exclusively relates to 'the EPF & MP Act'. The issues involved in the present case, were not the issues before the Madras High Court. The observations and findings of the Madras High Court have therefore to be confined to the factual backdrop of the said case.

34. During the course of argument, an attempt was also made by the petitioner to rely upon Section 16 of 'the EPF & MP Act', which has explained and excluded certain establishments from the provisions of the Act. This attempt on the part of the petitioner is totally ill-conceived for the reason that under Section 16 of 'the EPF & MP Act' there is no automatic exemption granted to such establishments or NGOs, who claim to be Charitable and Voluntary Social Service Organizations working on 'no profit no loss basis'. Sub-section (2) of Section 16, however, thus empower the Central Government to exempt an establishment, either prospectively or retrospectively, from the operation of the Act for such period as may be specified in the notification. The petitioner has not produced any such notification of the Central Government exempting it from the operation of 'the EPF & MP Act' and therefore petitioner's reliance on Section 16, is manifestly misplaced and of no avail to the petitioner.

35. In light of the facts and circumstances stated above, I am of the view that interfering in the enquiry initiated by the respondent authorities purportedly exercising power under

Section 7A of 'the EPF & MP Act' at this stage would not be proper, particularly in view of the fact that it is a fact finding enquiry and there is also a remedy of statutory appeal against the final order passed under Section 7A of 'the EPF & MP Act'. The petitioner does not stand prejudiced in any manner by the holding of such an enquiry under Section 7A of 'the EPF & MP Act', as it can assert, plead, prove and demonstrate on the basis of relevant materials and cogent evidences as to how 'the EPF & MP Act' would not apply to it and further as to how 'volunteers' who are working for the petitioner do not qualify as 'employees' within the meaning as defined under Section 2(f) of the said Act. It goes without saying that while conducting the quasi judicial enquiry, the respondent authorities are bound to give full opportunity to the petitioner to establish its case and also to the representative of the Provident Fund Department, and therefore, the authority is expected to pass a final order on all the issues raised before him by giving proper and sound reasoning.

36. Under the aforesaid circumstances, I dispose of the present writ application with a direction to the respondent authorities to decide the following issues:

a) Given the nature of its organization and the work being rendered by the petitioner, whether, as per the requirement of Section 1(3)(b) of 'the EPF & MP Act', there exist a notification issued by the Central Government specifying the applicability of said Act on such kind of establishment? and,

b) Whether the volunteers rendering service for the petitioner as claimed by them can be said to be persons employed for wages, qualifying as 'employees' within the meaning as defined under Section 2(f) of 'the EPF & MP Act'? If yes, whether the petitioner at any point of time employed twenty or more such employees?

While deciding the aforesaid issues, the respondent authorities will give full opportunity of hearing to the petitioner as well as to the Department's Representative. Both parties would be entitled to adduce oral and documentary evidences in support of their respective cases and they would also be entitled to cross-examine each other's witnesses, if they so require. After considering all the materials and evidences which shall come on record during the course of the enquiry, the respondent authorities shall pass appropriate order giving sound reasonings for each of the conclusions reached at [*reliance placed on a decision of this court reported in **1997 (1) PLJR 403***]. Only after deciding the aforesaid issues in accordance with law, the respondent authorities would decide upon the further course of action.

37. It is considered appropriate to observe that in case the respondent authorities come a the conclusion that the provisions of 'the EPF & MP Act' are applicable on the petitioner, then they shall proceed to assess the dues in accordance with law which would necessarily require them not only to assess the provident fund dues but also to identify the beneficiaries. The onus to identify the beneficiaries would be on the respondent authorities in accordance with the law settled by the Hon'ble Supreme Court years ago, in the case of **Food Corporation of India Vr. Provident Fund Commission and others,** reported in **(1990) 1 SCC 68,** wherein in para 9 it has been held as follows:

> *"It will be seen from the above provisions that the Commissioner is authorized to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen ……..".*
>
> [Emphasis supplied]

38. The Hon'ble Apex Court has reiterated the said principles in its later judgment rendered in case of ***1997(1) PLJR 403 (K.G. Majithia vs. Union)***; ***(1998) 6 SCC 436 (Food***

Corporation of India vs. Union of India & ors.); (2000)9 SCC 540 (Ramala Sahkari Chini Mills Ltd. vs. Employees' Provident Fund Tribunal & ors).

This Court applying the said principle observed as follows in case **Assistant Provident Fund Commissioner, Bhagalpur Vrs. M/s. K.C. Indane**, reported in **2012 (1) PLJR 374**:-

> *"As the petitioner had failed to establish that the respondent establishment did have twenty employees on their rolls nor any supportive documents were filed in this regard, hence, the learned Tribunal while examining the respective claims, has allowed the appeal <u>for want of the identification of the twenty employees</u> and for want of authentic documents supporting the claim of the department that the respondent establishment had twenty employees working under them. I find no infirmity in the order passed by the Tribunal.*
>
> *The writ petition is dismissed."*
>
> [Emphasis supplied]

Again, in the case of **Shiva Agro Industries Private Limited Vrs. Employees Provident Fund Organization**, reported in **2012 (1) PLJR 491**, this court has observed as follows:-

> *"...... In view of the complete absence of details of the workmen said to be working in the establishment of the petitioner, the order cannot be sustained simply on the basis of the numerical strength shown in the enquiry report................"*
>
> [Emphasis supplied]

In **M/s. Roxy Cinema Vs. the State of Bihar and another**, reported in **2013 (2) PLJR 931**, this Court has observed as follows:-

> *"...... <u>In absence of the identified workmen or employees,</u> who are entitled to such benefit, a liability cannot be saddled upon an establishment in the name of compliance or enforcement of law. No collection can be made by the provident fund authorities for faceless, nameless or non-identifiable workmen on mere head count or herd count. The court is reinforced in this opinion by having a look at the statement of objects and reasons ...."*
>
> [Emphasis supplied]

39. Since the matter has remained pending for long and also the fact that the Hon'ble Apex Court desires expeditious disposal, therefore, the respondent authorities are directed to conclude the enquiry under Section 7A of the EPF & MP Act on priority basis.

40. Before parting with the judgment, I am tempted to acknowledge and appreciate the good work being done by the petitioner in the field of social engineering particularly by liberating and rehabilitating scavengers from demeaning practice of removing human excreta by their hands and in improving sanitation standards. Even the Hon'ble Apex Court has lauded their efforts vide Annexure-P/50 and P/51 by asking National Legal Services Authority (NALSA) to enquire from Sulabh about its willingness to make arrangements for supply of food to the destitute women, which is an acknowledgement of its humane existence for the benefit of the needy and downtrodden.

41. With the aforesaid observations and directions, this writ application is disposed of.

(Samarendra Pratap Singh, J)

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