

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

RESERVED ON: 22.06.2022
DELIVERED ON: 14.07.2022

CORAM:

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

F.M.A. NO. 1760 OF 2019

WITH

I.A. NO. CAN 1 OF 2018 (OLD CAN 10311 OF 2018)

**CENTRAL PROVIDENT FUND COMMISSIONER, EMPLOYEES
PROVIDENT FUND ORGANISATION & OTHERS
VERSUS**

KOLKATA MUNICIPAL CORPORATION & OTHERS

AND

F.M.A. NO. 1761 OF 2019

**THE KOLKATA MUNICIPAL CORPORATION & OTHERS
VERSUS**

THE UNION OF INDIA & OTHERS.

Appearance:-

Mr. S.C. Prasad

Mr. Nikhil Kumar Gupta

**.....for the Appellants.
(in FMA 1760 of 2019)**

Mr. Ashok Kumar Banerjee, Senior Advocate

Mr. Alok Kumar Ghosh

Ms. Tanushree Dasgupta

.....for the KMC.

Mr. N.L. Singhania,

Ms. Ankita Chowdhury

.....for the Union of India.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. These intra-Court appeals are directed against the order dated 18th May, 2018 in WP No. 197 (W) of 2016. The said writ petition was filed by the Kolkata Municipal Corporation (KMC) challenging the notification issued by the Ministry of Labour and Employment dated 8th January, 2011 in exercise of powers conferred under Clause (b) of Sub-Section (3) of Section 1 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1962 (the EPF Act) thereby, the Central Government specified that the Municipal Councils and Municipal Corporations constituted under Sub-Clauses (b) and (c) of Clause 1 of Article 243Q of the Constitution of India where 20 or more persons are employed to be a class of establishments to which the EPF Act will apply with effect from the date of publication of the notification in the Official Gazette.

2. The KMC contended that the notification cannot be made applicable to them in view of Section 16 of the EPF Act which stipulates that the EPF Act not to apply to certain establishments. Further, in terms of Section 14(1) of the Kolkata Municipal Corporation Act, 1980 (KMC Act) the officers of the Corporation have been enumerated and KMC maintain a schedule of posts which includes the designation and number of posts under each designation constituting the establishment of the Corporation. It was further contended that the KMC has its own General Provident Fund Regulation applicable to the Officers and employees of the establishment and therefore, the provisions of the EPF Act and the scheme framed thereunder are inapplicable. Further, due to growth in the population resulting in greater demand in providing civic services to the public, KMC is required to utilize the services of persons on contingent/ casual/ temporary/ piece rate/ daily rate/ contract by or through the contractors or sub-contractors who are engaged to provide appropriate civic services in the interest of general public. Those contingents/ casual workers are not covered under the establishment of KMC and are paid as per the terms and conditions of their engagements. Further, it was contended that if the EPF Organization sees to proceed to apply the provisions of the EPF Act, it is to be applied to the security agencies who had supplied such employees and at this distance of time an enquiry cannot be conducted for the period from August, 2011 to November, 2014 in respect of those persons who are engaged through contractors, more particularly when KMC does not maintain or preserve any records relating to the engagements of such persons for several years. The Joint Municipal Commissioner by letter dated 25th April, 2016 addressed the Central Provident Fund Commissioner

as well as the Ministry of Labour and Employment requesting them to grant exemption from the operation of the EPF Act. This request was rejected by an order dated 12th August, 2016. It is an admitted position that KMC did not challenge the order rejecting the exemption and it is their plea that they are not estopped from questioning the notification dated 8th January, 2011 though they have not specifically made a challenge to the order rejecting their plea for exemption. The EPF Organization commenced an enquiry by initiating proceedings under Section 7A of the EPF Act and directed the authorities of KMC to comply with the provisions of the Act with effect from the date of the notification dated 8th January, 2011.

3. The EPF organization contested the writ petition by contending that KMC being the principal employer are required to extend the benefits of the EPF Scheme to the employees of the establishments and having committed default, the action initiated under the EPF Act was fully justified. Further, it was contended that on and after publication of the notification dated 8th January, 2011 it is not open to KMC to contend that the EPF Act is not applicable to them.

4. KMC filed an affidavit-in-reply reiterating the stand as to the applicability of the EPF Act to their organization. The Union of India in their written notes of submission pointed out the purpose of issuing the notification dated 8th January, 2011 was with a view to bring the employees of the Corporations within the ambit of the EPF Act and it is applicable to KMC as well. Further it was pointed out that the request made by KMC for exemption was rejected and no appeal was preferred against the said order and therefore, KMC is estopped from challenging the notification dated 8th January, 2011.

5. The learned Writ Court after considering the submissions on either side by the impugned order held that the notification dated 8th January, 2011 is not application to the KMC and consequently all steps taken by the EPF authorities were declared to be not sustainable in law and accordingly were set aside. Dealing with the argument on behalf of the KMC with regard to the effect of Article 243Q of the Constitution the learned Writ Court held that Part IX A of the Constitution was inserted by the 74th Amendment with effect from 1st June, 1993 and KMC has been in existence long before as it was initially constituted by the Act of 1889 followed by Act of 1923, subsequently by Act of 1951 and presently by Act of 1980. Thus it was opined that by whichever Act KMC might have been constituted undoubtedly preceded the insertion of Article 243Q of the Constitution and therefore, KMC cannot be stated to have been constituted by or under the amended provisions of the Constitution of India. The EPF Organizations and KMC being aggrieved by the order passed in the writ petition have preferred these two appeals, MAT No. 1207 of 2018 by the EPF Organization and FMA No. 1760 of 2019 by the KMC. The appeals were heard on various dates for a considerable length of time and by order dated 16.03.2022 four issues were framed for consideration, namely,

- (i) *Whether Section 16(1) of the EPF Act could be applicable to KMC?*
- (ii) *Whether Section 1(3) (b) of the EPF Act overrides Section 16 of the Act?*
- (iii) *What is the effect of the amendment to the Constitution of India by insertion of Article 243Q with effect from 1993 on KMC which was constituted much prior to the Constitutional Amendment?*

(iv) *Whether the KMC is estopped from challenging the notification dated 8th January, 2011 after having applied for exemption from the provisions of the EPF Act which application stood rejected?*

6. We have elaborately heard Mr. S.C. Prasad, learned Standing Counsel for the EPF Organization, Mr. Ashok Kr. Banerjee, learned Senior Advocate for KMC and Mr. N.L. Singhania, learned Advocate for the Union of India and perused the written notes of arguments submitted on behalf of the Union of India.

7. We first take up for consideration Issue No. (iii) which is as follows:

(iii) What is the effect of the amendment to the Constitution of India by insertion of Article 243Q with effect from 1993 on KMC which was constituted much prior to the Constitutional Amendment?

8. Article 243P to Article 243ZG of the Constitution was inserted by the 74th Amendment Act, 1992 with effect from 1st June, 1993. Article 243P defines committee, District, Metropolitan area, Municipal area, Municipality, Panchayat and population. Municipality has been defined in Clause (c) of Article 243P to mean an institution of self-Government constituted under Article 243Q. Article 243Q deals with constitution of municipalities and reads as follows:

Article 243 Q of the Constitution of India, (Constitution of Municipalities):

(1) There shall be constituted in every state,-

(a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area;

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area,

in accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the governor may, having regard to the size of the area and the municipal services being provided by and industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

9. In terms of Clause 1(c) of Article 243 Q there shall be constituted in every State a Municipal Corporation for a larger urban area in accordance with the provisions of Part IX A of the Constitution. Proviso states that a municipality under Clause (c) constituted in such urban area or part thereof as the Governor may, having regarded to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment and that area and such other factors as he may deem fit, by public notification, specified to be an industrial township. Admittedly, KMC is a large urban area which falls within the ambit of Article 243 Q (1) (c). Article 243R deals with the composition of municipalities. Article 243 S speaks of constitution and composition of ward, committees etc. Article 243 T provides for reservation of seats in every municipality for Schedule Casts and Schedule Tribes. Article 243U speaks of duration of municipalities etc. Article 243 V deals with disqualification of membership. Article 243 W deals with the power, authority and responsibilities of municipalities etc. Article 243 X deals with the power to impose taxes by and funds of the municipalities. Article 243 ZF deals with contention of existing laws of municipalities. It states notwithstanding anything in Part IX A of the Constitution, in provision of any law relating to municipalities in force in the year immediately before the

commencement of the Constitution 74th Amendment Act, 1992 which is inconsistent with the provisions of Part IX A, shall continue to be in force until amended or repealed by a competent legislature or by a competent authority or until the expiration of one year from such commencement, whichever is earlier. Proviso states that all the municipalities existing immediately before such commencement shall continue till the expiration of their duration unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State, or in the case of a State having a Legislative Council, by each House of the Legislature of that State.

10. Article 243ZF assumes significance to consider the correctness of the finding of the learned Writ Court that the amendment brought out by Constitution 74th Amendment Act, 1992 would not apply to KMC as it was constituted much prior to the coming into force of the Amendment Act. We find from the impugned order that the effect of Article 243 ZF has not been taken note of. As noted Article 243 ZF commences with a non-obstante clause, and states that notwithstanding anything in Part IX any provision of law relating to municipalities in force in the State immediately before the commencement of the Constitution 74th Amendment Act, 1992 which is inconsistent with the provision of Part IX A of the Constitution can remain in force until amended or replaced or till the expiration of one year from such commencement whichever is earlier. Admittedly, the period of one year after coming into force of the Constitutional Amendment Act, 1992 is over and consequently, all the provisions commencing from Article 243 B as enumerated in Part IX A would apply with full force to KMC. Therefore, the finding rendered by the learned Writ Court in this regard is not sustainable.

Therefore, it will be too late in the day for KMC to contend that no notification could have been issued under Article 243 Q (1), (b), (c) of the Constitution which would bind them. Therefore, the impugned notification does not suffer from any incompetence so as to cover the Municipal Corporations. The question would therefore be as to whether Courts has the power to declare the Act of legislature to be invalid. In **Government of Andhra Pradesh & Ors. Versus Smt. P. Laxmi Devi** ¹ the Hon'ble Supreme Court answered such question in the affirmative by observing that the Courts have power to declare the Act of legislature to be invalid and the reasoning for this view can be derived from theory in jurisprudence of imminent juries Kelsen (*The pure theory of law*). It was pointed out that according to Kelsen, in every country there is a hierarchy of legal norms, headed by what he calls as "grand norm" (the basic norm). If a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer, the former will prevail. It was pointed out that in India grand norm is the Indian Constitution and the hierarchy is (i) the Constitution of India, (ii) statutory law, which may be either law made by Parliament or by the State Legislature; (iii) delegated legislation, which may be in the form of rules made under the statute, regulation made under the statute etc; (iv) purely executive orders not made under any statute. It was further pointed out that if a law (norm) in a higher layer in the above hierarchy clashes with the law in a lower layer, the former will prevail. Thus, it was held that the constitutional provision will prevail over all other laws, whether in a statute or in delegated legislation or in an executive order. This is so because the Constitution is the highest law of the land and no law

¹ (2008) 4 SCC 720

which is in conflict with it can survive and the law made by the legislature is in the second layer of the hierarchy obviously it will be invalid if it is in conflict with a provision in the Constitution except the Directive Principles which, by Article 37, have been expressly made non-enforceable. In the light of the above decision, the Amendment brought to the Constitution by insertion of Part IX A being a constitutional provision will prevail over other laws and therefore, it will prevail over the provisions of the KMC Act. Therefore, the answer to the above question is that the amendment to the Constitution of India by insertion of Article 243Q will apply with full force to the KMC.

11. The next question is question No. (i) which is :

(i) Whether Section 16(1) of the EPF Act could be applicable to KMC?

12. It is the argument of Mr. Prasad that the EPF Act guarantees social security to the working class, it is a social welfare legislation and widest possible interpretation should be given to consider the purpose of the enactment. It is submitted that the casual employee employed by KMC in the regular course of their activities would be entitled to the benefits under the EPF Act and the scheme framed thereunder. To support such argument, reliance was placed on the decision of the Hon'ble Supreme Court in ***Regional Provident Fund Commissioner, Andhra Pradesh Versus T.S. Hariharan*** ². It is further submitted that this legal principle has been

² 1971 (2) SCC 68

followed in ***P.M. Patel and Sons Versus Union of India*** ³ and ***Officer in Charge, Sub Regional Provident Fund Commissioner Versus Godavari Garments Limited*** ⁴ wherein seasonal employees working from their homes were held to be employees of the establishment. Further it is submitted that the Hon'ble Supreme Court in ***Pawan Hans Limited and Others Versus Aviation Karamchhari Sanghatana and Others***⁵ held that the management of the *Pawan Hans Limited* did not qualify the test laid down under Section 16 (1) (b) of the EPF Act because its provident fund rules did not provide for social security to its contractual employees who had been working for *Pawan Hans* for several years. It is submitted that KMC to be qualified for exclusion under clause (b) and clause (c) of Section 16 (1) of the EPF Act should have provided social security in respect of all their employees namely regular, contractual, casual, etc. This is so because the EPF Act entitles all the employees engaged directly or by through contractors of an establishment to be covered under it to social security. It is further contended that KMC employees are large in number they may be casual/contingent, are not extended the benefit of the Provident Fund or pension as envisaged under the EPF Act. It is further submitted that it is immaterial for the purpose of exclusion under Section 16 (1) of the EPF Act that regular employees are getting the benefit of Provident Fund and pension under the KMC Act in accordance with the scheme of rules framed by them. It is submitted that the exclusion clause in Section 16 (1) of the EPF Act is to be read with a larger perspective bearing in mind the intention of the Parliament. Therefore, it is

³ (1986) 1 SCC 32

⁴ (2019) 8 SCC 149

⁵ (2020) 13 SCC 506

contended that the EPF Act is applicable to KMC as they do not qualify for exclusion under Clause (b) and (c) of Section 16 (1) as many of its employees are not getting any social security benefits.

13. Mr. Banerjee, learned Senior Advocate, for KMC would submit that the Municipal Corporation is an establishment belonging to and under the control of the Government of West Bengal and the employees of KMC have been granted Provident Fund in terms of the scheme prepared by the KMC and KMC being the establishment set up under the state Act and whose employees are to be paid are being extended the benefit of provident fund in terms of the Rule/Scheme framed by the KMC, in terms of Section 16(1) the provisions of the EPF Act will not apply to KMC.

14. As noted above, the learned Single Bench was of the view that the notification impugned in the writ petition uses the expression “constituted” under sub clause (b) and (c) of clause (1) under Article 245 and Article 243 Q of Constitution of India and KMC has not been “constituted” under the constitutional provision as KMC came into existence much prior to the insertion of Part (IX) A to the Constitution. The learned Writ Court also opined that KMC cannot contend that Section 16 (1) (c) of the EPF Act would apply as it is not an establishment which is “set up” under any seminal, provincial or state law though “constituted” by the said Act namely the KMC Act. Thus, the learned Writ Court was of the view that KMC was not “set up” under the said Act to seek umbrage under clause (c) of Section 16 (1) of the EPF Act. Thus, it has to be seen as to whether there is any distinction or

difference between the words “set up” and “constituted”. *Oxford Lexico* while giving synonyms for the word “constituted” states it to be *established, set up, created, to be placed, start, begin, originate, form, organise, develop*. The synonyms for “set up” are *established, start, begin, create, instituted*. Therefore, the words occurring in under Section 16 (1) (c) of the EPF Act namely “set up” and “constituted” occurring in the notification dated 08.01.2011 are no different from each other. Therefore, the words “constituted” occurring in the notification dated 08.01.2011 and the words “set up” occurring in Section 16 (1) (c) of the EPF Act convey the same meaning as they are synonyms. Therefore, we do not agree with the findings of the learned Writ Court that KMC does not fulfil the first requirement in clause (c) of Section 16 (1) of the EPF Act. Reverting back to the contention of Mr. Banerjee, who had referred to various provisions of the KMC Act namely Section 14 (2), Section 25 (4), (5) Section 26, 27 A, 49, 80, 113, 114, 130, 136, 148, 160, 162, 165 (b) and 169. It is seen that by virtue of these provisions that the Government exercises control over the Municipal Corporation. The powers are in the nature of superintendence, management with power to direct, restrict and to regulate. At this juncture, it will be beneficial to refer to the decision relied on by the Mr. Banerjee in the case of ***Regional Provident Fund Commissioner Versus Sanatan Dharam Girls Secondary School & Others***⁶. In the said case, non-governmental institutions filed writ petitions challenging the circular issued by the Government of Rajasthan directing the non-governmental educational institutions who employ 20 or more persons to comply with the provisions of the EPF Act. The EPF organization also filed

⁶ (2007) 1 SCC 268

two writ petitions. The writ petitions filed by the educational institutions were allowed holding that the State Act would override the provisions of the EPF Act and the educational institutions would fall under the exception under the amended Section 16 (1) (b) of the EPF Act. The writ petitions filed by the EPF organization were dismissed. The EPF organization challenged the order before the Division Bench which was dismissed. Against the said order, Provident Fund Organization filed appeal before the Hon'ble Supreme Court. One of the questions which arose for consideration was whether those educational institutions fall under Section 16 (1) (b) of the EPF Act. While answering such questions, the Hon'ble Supreme Court held as follows:

29. In respect to the contention of the respondent that the establishment belonging to or under the control of the Central Government or a State Government, it was submitted that the establishments must either be (a) belonging to, or (b) under the control of the Central Government or the State Government. In our view, the two words used in the said section have different connotations. The words "belonging to" signify ownership i.e. the Government-owned institutions would be covered under the said part and the words "under the control of" signify control other than ownership since ownership has already been covered under the words "belonging to". It must also be noted that the two words are separated by the word "OR" and therefore these two words refer to two mutually exclusive categories of institutions. While the institutions "belonging" to the Central or the State Government would imply the control of the State but the privately-owned institutions can be "under the control of" the Government in various ways.

32. *In our view, the State Act is a complete code in itself with regard to the educational institutions and the State Government exercises substantive control over the institutions even though the institutions are not “owned” by it. The word “control” has not been defined under the EPF Act, 1952.*

33. *However, this Court in Shamrao Cithal Coop. Bank Ltd. V. Kasargod Pandhuranga Mallya⁷, SCC at p. 604, para 6 has cited with approval the meaning of the word “control” as it appears at p. 442 of Words & Phrases, Vol. 9, Permanent Edition as under:*

“The word ‘control’ is synonymous with superintendence, management or authority to direct, restrict or regulate”.

34. *In State of Mysore v. Allum Karibasappa⁸, SCC at p. 501, para 16 this Court defined the word “control” as under:*

“The word ‘control’ suggests check, restraint or influence. Control is intended to regulate and hold in check and restrain from action”.

35. *We further observe that the State Government has the power of superintendence or the authority to direct, restrict or regulate the working of the educational institutions. It was, therefore submitted that the institutions had satisfied both Conditions (1) and (2) mentioned above and as such they would fall within the exception contained under Section 16 (1) (b) of the EPF Act, 1952.*

15. We are of the view that the decision in *Sanathan Dharam Girls Secondary School* will apply to the case on hand as the only distinction being that in

⁷ (1972) 4 SCC 600

⁸ (1974) 2 SCC 498

those cases, the parties were aided non-governmental institutions and before us, it is the Municipal Corporation. The words “belonging to” was held to be signify the ownership and the words “under the control of” signify control other than ownership since ownership has already been covered by the words “belonging to”. Further the Hon’ble Supreme Court noted the words “belonging to” and under the control “of” are separated by the word “or” and therefore the two words refer to two mutually exclusive categories of institutions, while the submissions would be institutions belonging to the Central or the State Government and the latter would be applied to the control of the state over privately owned institutions. Further the Hon’ble Supreme Court noted that the EPF Act does not define the word “control” and to ascertain the meaning of the said word decisions of the Hon’ble Supreme Court were referred to wherein it was held that the word “control” is synonymous with superintendence, management or authority to direct, restrict or regulate. Further it was held that control is intended to regulate and hold in check and restrain from action as could be seen from the various provisions of the KMC Act. As pointed out by Mr. Banerjee, there is deep pervasive control of the State Government over the Municipal Corporation. Therefore, we can safely hold that KMC would be an establishment under the control of the State Government.

16. Mr. Banerjee placed heavy reliance on the decision of the Hon’ble Supreme Court in ***Yeshwant Gramin Sikhshan Sanstha Versus Assistant***

Provident Fund Commissioner and Others ⁹ to buttress the submission that KMC Act is a complete code in itself and in the said case, it was held that merely because the appellant therein had engaged 16 part-time employees working with the permission and approval of the concerned State Government, the exemption granted to them under Section 16 (1) of the Act will not cease to exist. Mr. Prasad also relied on the same decision by referring to the other paragraphs more particularly paragraph 30 of the judgment submitting that twin conditions are to be satisfied by establishment concerned seeking exemption from the provisions of the EPF Act. As observed, KMC is under the control of Government of West Bengal and admittedly the employees and officers of the KMC are entitled to the benefits of the Provident Fund scheme which is in place in terms of rules/scheme framed by KMC. Mr. Prasad does not dispute this factual position and the contention is that the EPF organisation is concerned with the casual and contractual employees for whom no social security is being provided by KMC. To strengthen the submissions, reliance was placed on the decision in *Pawan Hans Limited*. In the said case, it was held that the company (*Pawan Hans*) does not satisfy the second test as contractual workers were not getting benefits of the contributory fund under the regulations framed by the company, *Pawan Hans* or under any scheme or any rule framed by the Central Government or the State Government. This led to the decision that exemption under Section 16 of the EPF Act would not be applicable to the company, *Pawan Hans*. The Hon'ble Supreme Court took note of the facts of the said case as placed by employees union, found that though the appointment letters referred to them

⁹ (2017) 5 SCC 579

as contractual employees they are not engaged through any contractors and they were being paid wages directly by the company, *Pawan Hans*, which was established by producing pay slips and there were 250 such contractual employees who received wages directly from the company and therefore it was held they are eligible to be included under the Provident Fund Trust Regulations framed by the company. Further the Hon'ble Supreme Court on facts noted that such of those employees have been in continuous employment for a long period of time and their work was very perennial and continuous in nature and therefore held that the employment cannot be termed to be "contractual" in nature. While on this issue, the definition of employees as defined under Section 2 (f) of the EPF Act was taken note of and held to be very widely couched to include any person engaged directly or indirectly in connection with the work of an establishment and is being paid wages. Ultimately it was held that by extending the benefits retrospectively to such of those employees as ordered by the High Court would create an imbalance and direction was issued to provide the benefits of the provident fund from the date when the writ petitions were filed.

17. There cannot be any quarrel with regard to the scope of the definition of employees as defined in Section 2 (f) of the EPF Act. It is undoubtedly very widely couched to mean any person who is employed for wages in any kind of work, manual or otherwise in or in connection with the work of an establishment and who gets the wages directly or indirectly from the employer and includes any person employed by or through the contractors in or in connection with the work of the establishment; engaged as an apprentice not

being apprentice engaged under the apprenticeship Act, 1961 or under the standing order of the establishment.

18. In our considered view, the decision in *Pawan Hans* cannot be *ipso facto* applied to the case on hand. We say so because no enquiry had been conducted to establish that such of those employees who in the opinion of the EPF Organisation are to be extended the benefits of the scheme as applicable to the regular employees. There has been no adjudication on the said aspect. The EPF Organisation merely states that the KMC employs large work force for various activities and such work force are engaged on casual basis or they are contingent workers or through the contractors, therefore to be covered under the EPF Act. Unfortunately, the scheme of the EPF Act does not provide for such a sweeping inference. Facts need to be adjudicated to arrive at a conclusion as to the applicability of the EPF Act. We find no such exercise is shown to have been done by the EPF organization. The distinguishing feature in *Pawan Hans* is that it was established in the said case that 250 employees though were referred to as contractual employees in their appointment letters the wages were paid directly by *Pawan Hans*. Furthermore there was a clear factual finding that those 250 employees were continuously engaged and the nature of work assigned to them was perennial. Therefore, the Hon'ble Supreme Court held that such of those employees though termed as contractual employees would fall within the definition of employees under Section 2 (f) of the EPF Act. To say the least, the EPF Organisation did not adjudicate upon such issue while seeking to direct KMC to extend the benefits of the provident fund scheme to those contingent, casual, temporary,

employees or those who were engaged through the contractors which remain to be an unidentified lot. Therefore, the EPF Organisation cannot be permitted to make a sweeping statement without adjudicating the facts and issues more particularly when the period for which proceedings under Section 7 A of the Act was initiated was from August 2011 to November 2014. There, it appears to be nothing on record to show that the contractors engaged by the KMC were put on notice and without any adjudication of the said issue, the finding could not have been arrived at by the EPF Organisation that the KMC is liable to extend the benefit of the EPF scheme to such employees. The EPF Organisation appears to have proceeded in a generalised manner which is impermissible as KMC is entitled to an opportunity to establish that such of those persons who are engaged on casual basis or on contingent basis through contractors would not fall within the definition of employee as defined under Section 2 (f) of the Act. Had adjudication being done on the said aspect as was done in the case of *Pawan Hans*, the situation would have been otherwise. Therefore, we are of the clear view that the entire proceeding initiated by the EPF Organisation was thoroughly flawed. Therefore, we hold on the given facts and circumstances Section 16 (1) of the Act would apply to KMC.

19. The next question, [(ii)], is whether Section 1 (3) (b) of the EPF Act can over ride Section 16 of the said Act. Section 1 (3) (b) of the Act states that subject to the provision contained in Section 16, the Act applies to any establishment which employs 20 or more persons or class of such establishments which the Central Government may by notification in the

official gazette specify in this behalf. The provisions of the EPF Act are extended to such establishments which employ 20 or more persons, subject to the provisions contained in Section 16 of the Act. Section 16, in our opinion, is a stand alone provision, it is not a provision for granting exemption under the provisions of the EPF Act as contained in Section 17 which gives power to exempt the provisions of the EPF Act to the appropriate Government. This is so because Section 16 deals with certain establishments to which the Act will not apply. Therefore, it would be incorrect to state that Section 1 (3) (b) would over ride Section 16 of the EPF Act as Section 16 operates in a different field which provides for contingencies and cases where the Act will not apply to certain establishments. This question is answered accordingly.

20. The last question, [(iv)], is whether the KMC estopped from challenging the notification dated 08.01.2011 after having applied for exemption from the provisions of the EPF Act which application stood rejected. Firstly, there cannot be no estoppel against statute. On a perusal of the representation given by the KMC to the Ministry of Labour and Employment and the EPF Organisation, it cannot be stated that there is any admission made by them stating that the provisions of the EPF Act would apply to the persons whose services have been utilised on contingent/casual/temporary /piece rate/daily rate/contracts by or through contractors/ sub-contractors or that any other persons either seasonally or perennially were engaged. KMC stated in the representation dated 02.09.2013 that they were compelled to do so in the public interest. As mentioned earlier, no adjudication has been done by the EPF Organisation either to identify such section of persons, whose services

were availed on or casual basis or through the contractors. Therefore, by making a generalised statement, the EPF Organisation is not justified in compelling KMC to extend the benefit of the scheme formulated under the KMC Act for their officers and employees to such “persons” who remain to be unidentified. Therefore, there can be no estoppel on the part of KMC in questioning the notification issued by the Government of India pursuant to the amendment made to the Constitution of India. The said question is accordingly answered.

21. In the preceding paragraphs, we have held that the EPF organization committed an error in not adjudicating into facts, the “employees” whom they seek to cover under the EPF Act remain an unidentified lot, their conclusion was on the basis that several casual/ contingent employees were engaged by KMC, those employees would fall within the definition of employee under Section 2(f) of the EPF Act. KMC contended that “they” are not their employees, they have engaged contractors in order to maintain civic amenities. The contractors have not been put on notice, they were not heard, there is no discussion as to how the EPF organisation comes to the conclusion that those employees are the direct employees of KMC. There is no allegation that any unfair labour practice was adopted by KMC. Thus, unless a full fledged enquiry is conducted the correct factual position cannot be ascertained. As we have held against the EPF organisation on this aspect on a technical ground, it would not auger well to pass an order of perpetual injunction against the EPF organisation as ordered by the learned Writ Court. This finding/ conclusion of the learned Writ Court, is therefore to be set aside,

and accordingly set aside. Consequently liberty is granted to the EPF organisation to proceed in accordance with law.

22. In the result, it is held that:

- (i) Section 16(1) of the EPF Act stands attracted to the Kolkata Municipal Corporation as the Kolkata Municipal Corporation Act, 1980, provides for a scheme of provident fund to its officers and employees under Section 14(1) of the Kolkata Municipal Corporation Act, 1980.
- (ii) Section 1(3)(b) of the Employees Provident Fund and Miscellaneous Provisions Act, 1962, (EPF Act) does not override Section 16 of the EPF Act, as it is a standalone provision commencing with a non-obstacle clause.
- (iii) The Constitution 74th Amendment Act, 1992 shall override the provisions of the Kolkata Municipal Corporation Act, 1980 and Chapter IX of the Constitution of India (as amended) shall apply to the Kolkata Municipal Corporation.
- (iv) Kolkata Municipal Corporation is not estopped from challenging the notification dated 8th January, 2011 issued by the Government of India merely on the ground that their plea of exemption from the provisions of EPF Act was rejected and not challenged independently.
- (v) As we have faulted the procedure adopted by the EPF Organization in enforcing the provisions of the EPF Act on technical grounds, liberty is

granted to the EPF Organization to proceed in accordance with law, consequently the perpetual injunction granted by the learned Writ Court is set aside.

(vi) The appeals in FMA 1760/2019 and FMA 1761/2019 are allowed to the extent indicated.

(vii) No Costs.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A.-PRAMITA/SACHIN)