Sandeep Dwellers Pvt. Ltd. vs Union Of India (Uoi) on 28 February, 2006

Equivalent citations: 2007 (3) BomCR 898

Author: D B.P.

Bench: D B.P.

JUDGMENT Dharmadhikaari B.P., J.

1. All these three writ petitions have been heard together as issues involved therein are same. Parties have treated Writ Petition 2593/ 1997 as main writ petition. This writ petition is filed by Builders Association of India, Mumbai with its 36 members as Petitioners against Union of India, the Central Provident Fund Commissioner and other officers under him for the writ of mandamus directing them not to enforce amended Para 26(2) of Provident Fund Scheme 1952 (referred to as 1952 scheme) framed under Employees Provident Funds & Misc. Provisions Act (referred to as PF Act) in so far as temporary and/or casual site-workers engaged in multi-tier system in business system of petitioners. Further relief sought is that such workers should not be required to become members of said 1952 scheme. An order dated 23/12/1994 passed by Joint Secretary of respondent No. 1 under Section 19-A of P.F. Act is also sought to be quashed and set aside. It appears that the members of petitioner association at Nagpur received communications issued by Assistant Provident Fund Commissioner that as per inspection report of Enforcement Officer it was found that the Petitioners have not extended PF benefits to casual/temporary employees and to the employees engaged by contractor and this was an offence. Reference was made to judgment of Honble Apex Court dated 17/4/1995 J.P. Tobacco Products etc. v. Union of India reported at 1995(II) C.L.R. 369 upholding the validity of amending provisions of para 26(2) of Provident Fund Scheme 1952 and they were called upon to submit supplementary returns. In some cases the notices were to pay specific amount on account of short payment. This Court admitted writ petition for final hearing on 29 August, 1998 and granted stay in favour of Petitioners. The final hearing was expedited, Writ petition 2047/1996 is filed by only one petitioner to set aside order dated 23rd December, 1994 passed by Joint Secretary and to restore earlier order dated 8/ 2/1994 passed by Legal Adviser under Section 19-A of P.F. Act. The further relief claimed is to restrain authorities of provident fund department from enforcing order of Central Government dated 23rd September, 1980 in respect of daily wage construction workers or purely casual and temporary construction workers. It appears that on 17/7/1996 the petitioner M/s. R.B. Constructions was summoned to attend inquiry under Section 7-A of PF Act and thereafter the petitioner approached this Court & this Court while issuing notice before admission granted an interim stay which continues to operate after the writ petition was admitted for early final hearing. Writ petition 1064/2001 is filed by Sandeep Dwellers Private Ltd in similar circumstances for similar reliefs. Proceedings under Section 7-A have already been held in this petition and petitioner has been called upon to pay amount of Rs. 2,57,500/ only as PF contribution for the period from November 98 to April 2000. In this matter also while issuing rule interim order protecting the petitioner has been passed.

2. Petitioners in all these 3 writ petitions are thus Builders engaged in construction activities of different types. They have some permanent staff and in relation to such staff they are paying P.F. contribution and dispute is about coverage of casual workers or site workers or temporary workers employed through contractors or otherwise. They claim that because of peculiar nature of their activity and work, they are required to engage contractors having specialisation in particular area and these contractors in turn engage their own subcontractors and the subcontractors may again engage further petty contractors or labour contractors for doing work at various stages.

Different contractor does the work of erecting a centering while other contractor will do the work of casting slab. The work of erecting walls may be done by third contractor while woodwork may be done by still different person/contractor. The plumbing, electrification, fixing of tiles, finishing, painting will each be done by still other contractors. According to petitioners the labour force working with each contractor is different and they work for very short period and after finishing one site they move to other site with their contractor or coming to them. Such casual or temporary or site-workers are not employed in their establishment and as such petitioners cannot be forced to cover them under PF Act as their employees. It is pointed out that under earlier paragraph 26 of 1952 scheme an employee who had put in particular length of service alone was required to be treated as covered under the scheme. Attention is invited to 1990 amendment to said paragraph 26 to show that such waiting period has been removed and from day one the employee is supposed to be covered under the scheme. Attempt of petitioners is to show that such employees cannot be treated "as employed" with them and therefore are not covered by definition of Employee under Section 2(f) of PF Act. Paragraph 26(2) as it originally stood read:

26 (2). After this paragraph comes into force in the factory or other establishment, every employee employed in or in connection with the work of the factory or establishment, other than an excluded employee, who has not become a member already, shall also be entitled and required to become a member from the beginning of the month following that in which he completes six months continuous service or has actually worked for not less than 60 days within the period of three months or less in that factory or other establishment or in any factory or establishment to which the Act applies under the same employer, or partly in one and partly in the other or has been declared permanent in any such factory or other establishment whichever is earliest.

On 16 January 1981 period of six months in above clause was substituted by "three months". By later notification dated 1/11/1990 this para is amended as under:

26 (2). After this paragraph comes 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 an excluded employee who has not become a member already, shall also be entitled and required to become a member of the fund from the date of joining the factory or establishment.

Honble Apex Court has in case between J.P. Tobacco Products etc. v. Union of India reported at 1995(II) C.L.R. 369 upheld the constitutional validity of this amendment. The controversy mentioned briefly above arises in this background.

3. I have heard Advocate V.R. Thakur for petitioners in W.P. 2593/1997 & W.P. 1064/ 2001, Advocate. D.C. Daga for petitioner in W.P. No. 2047/1996 and Advocate Sunderam for respondents in all matters.

A. Advocate Thakur pointed out that constitutional validity of amendment in Paragraph 26 of the scheme was challenged before Madhya Pradesh High Court and in ruling reported at 1995(II) C.L.R. 360 Khemchand Motilal Tobaco Products Ltd and Ors. v. Union of India the Division Bench upheld its validity. He further states that the aggrieved employers there challenged said Division Bench judgment before Honble Apex Court and in case between J.P. Tobacco Products etc. v. Union of India reported at 1995(II) C.L.R. 369, the Honble Apex Court upheld it. Thereafter on 22/6/1995 the provident fund department issued circular by placing reliance upon this Apex Court judgment and directed all its officers to take necessary action for implementing the amended paragraph which stood amended with effect from 19/10/1990. Accordingly by issuing notices to petitioners the respondents initiated action in the matter. He states that Section 19-A of PF Act permits Central Government to remove difficulties in implementation of the provisions of PF Act and to clarify the doubts in its implementation. In exercise of that powers delegated to him Legal Adviser of Central Government issued order on 8/2/ 1994 and clarified that the site 11 workers employed in building and construction industry must be covered by Section 2(f) of PF Act and further stated that if such workers are casual workers they would not be governed by PF Act. He further clarified that labourers who are not obliged to report for duty every day and can change their employer of their own choice and therefore there is no element of any permanency or semi permanency in their employment are not included and are not governed by PF Act. The said Legal Adviser has given various reasons in support of his order. This order has been reviewed by Joint Secretary to Government of India on 23/12/1994 and he has passed a detailed order but to the contrary holding that Legal Adviser has traveled beyond the issue of clarification sought by department and he observed that in the process Legal Adviser rendered the legal provisions of PF Act itself inapplicable. He held that Legal Adviser modified the policy or notification of Central Government and traveled beyond scope of Section 19-A of PF Act. He contends that the action against petitioners is initiated and undertaken in view of these directions. Advocate. Thakur has relied upon judgment of Delhi High Court reported at between Wire Netting Stores v. Regional Provident Fund Commissioner to contend that both the orders are quasi judicial in nature. He also points out Division Bench judgment of this Court reported at 1988(II) L.L.N. 657 paragraph 39 and 40 between Mandovi Pellets Ltd v. Union of India to show that the remedy under Section 19 A was held not to be alternate and efficacious remedy. He has also cited 1960(I) L.L.J. 301 of this High Court to explain the scope of power thereunder. He argues that there is no power to review in PF Act and hence the subsequent order dated 23/12/1994 is without jurisdiction. In support he places reliance upon judgment of Honble Apex Court reported at Dr. Smt. Kuntesh v. Management of Hindu Kanya Mahavidyalaya. He further states that reading of order Date 23/12/1994 demonstrates that it has been passed by Joint Secretary as if he's

sitting in appeal over the order of Legal Adviser. To show that such a course is not possible, he relies upon between Union of India v. Tarit Ranjan Das. He also invites attention to judgment of Honble Apex Court reported at 1997(II) L.L.J. 749 between K. Ajit Babu v. Union of India.

B. To point out that enquiry or remedy under Section 7-A of PF Act is rendered illusory he invites attention to Division Bench judgment reported at 2001(Supp.) Bom. C.R. (N.B.) 414 : 2001(3) Mh.L.J. 532 : 2001(8) L.J. Soft 11 between (Sunflag Iron and Steel Company Ltd. v. Additional Collector of Central Excise. He also invites attention to decision already taken on the issue by Employees Provident Fund Appellate Tribunal in case number ATA- (6) 98 to point out how leading judgment on the issue i.e. T.S. Hariharan's case by Honble Apex Court i.e. in case between (The Provident Fund Inspector,Guntur v. T.S. Hariharan has been held to have lost its value in it. He argues that the authorities issuing show cause notices to petitioners have no option but to follow the views expressed by Appellate Authority or by Joint Secretary as mentioned above. between Commissioner of Sales Stacks v. Indra Industries is cited to demonstrate that circulars issued by tax authorities and higher authorities in the department of respondents are binding on lower authorities and hence no fruitful purpose will be achieved by directing petitioners to cooperate in Section 7 A inquiry. He also states that reliance by present respondents upon the unreported judgment of Learned Single Judge of this Court delivered on 13th August 2004 in W.P. 2411/2000 in case between Michigan Engineering Private Ltd. v. Union of India is misconceived because the controversy has been considered in entirely different backdrop therein.

C. He invites attention to Section 2(f) of Provident Fund Act to show that there emphasis is on employment that too in or in connection with the work of establishment. By inviting the Court to consider judgment of Honble Apex Court reported in case between The Provident Fund Inspector, Guntur v. T.S. Hariharan (supra) he states that purpose of Act is to inculcate habit of saving in Employees and insistence therefore is upon some length/duration of service i.e. employment must be of permanent or semi permanent nature. He argues that if employee is to work for very brief period, the goal of cultivating the habit of saving cannot be achieved as thereafter the employee may work with some other contractor either in same town or the vicinity or even in different State. He may work with some private person for construction/maintenance etc. of immovable property of such private person and as he would not be employed in an industry in that event, he would not be subject to deduction of contribution towards provident fund. He argues that Provident Fund Act does not cover casual labour and according to him casual in this case means an employee not working for any particular duration but for brief period. He further argues that the issue is considered by Division Bench of Karnataka High Court reported at 1993 (II) C.L.R. 152 in case between Jyothi Home Industries v. Regional Provident Fund Commissioner while considering the paragraph 26(1)(a) of the 1952 scheme as amended by notification dated 19/10/1990 and states that the said paragraph is applicable only to such persons who are employed in regular course of business and it would not include persons employed for short period. He states that such person in order to be covered under Section 2(f) must be shown to have joined the service on regular basis in establishment of employer. The nature of employment and duration are important factors in this respect and not mere fact of his

employment. He also takes support of Division Bench judgment of Rajasthan High Court reported at 1993(I) C.L.R. 983 : 1993(I) L.L.N. 311 between Cotton Corporation v. Union of India which again holds that a casual employee is not covered by the paragraph 26 as amended. According to him these rulings which clinched the issue are being ignored deliberately only with a view to harass Petitioners. He states that that validity of amendment in paragraph 26 of the scheme was challenged before Madhya Pradesh High Court and in ruling reported at 1995(II) C.L.R. 360 Khemchand Motilal Tobaco Products Ltd. and Ors. v. Union of India and the Division Bench upheld the validity. He further states that the aggrieved employers therein challenged said Division Bench judgment before Honble Apex Court and in case between J.P. Tobacco Products etc. v. Union of India reported at 1995 (II) C.L.R. 369, the Honble Apex Court maintained it. No other issue or the issue examined in case of T.S. Hariharan (supra) has been considered either by Madhya Pradesh High Court or by Honble Apex Court in these rulings and effort of respondents to give go-bye to said judgment of Honble Apex Court in case of T.S. Hariharan (supra) or the judgment of High Courts in Jyothi Home Industries (supra) or in Cotton Corporation (supra) is arbitrary and constitutes a abuse of power. He also states that Madhya Pradesh High Court could not apply its mind in this respect because of failure of petitioners before it to produce appropriate data for consideration. He also argues that employees engaged by contractor under petitioners cannot be treated as "Employees" of petitioners and for that purpose relies upon Division Bench judgment of Orissa High Court reported at 1988 L.I.C. 690 between (Executive Engineer, National Highway Division v. Regional Provident Fund Commissioner. He states that the liability to pay their wages as also control upon them is that of contractor and the petitioners are only concerned with result.

D. By pointing out the nature of work which is given to contractors by petitioners or to the site-workers, he states that such work is of limited duration. It may be of erecting centring for a casting slab, painting, tiles fitting, electrification, plumbing etc. These works are not available continuously, do not last long and require specialised labour. The labour doing it move from site to site after completion of work at one site and also go to other States/districts for such works. They earn daily and are not bound to anybody. They change their contractor/paymaster as per their convenience & hence are not in employment of petitioners in relation to or in connection with the work of Petitioners, petitioners are not responsible for paying their salary. In view of this peculiar position, according to him the benefit of Scheme cannot be extended to such freelance employees and if the contractor who brings them would attempt to deduct P.F. Contribution from their wages, they would oppose it and change the contractor. According to him, Crores of rupees are lying idle with P.F. department as department did not and could not identify such beneficiaries. The amount cannot be demanded by department if beneficiaries are not identifiable. He invites attention to order dated 5/2/1991 passed by Honble Apex Court in writ petition (Civil) No. 1212 of 1989 between A.I. Construction workers union v. Union of India and states that the Honble Apex Court also wanted P.F. department to propose appropriate scheme to protect the deductions made for such migratory site-workers but no such scheme was ever placed by department before either the Honble Apex Court or any High Court. He also invites attention to proceedings of 134th meeting of Central Board of Trustees {CBT} of Provident Fund department in which the issue of various cases pending in various High Courts about the

amendment to paragraph 26 was considered vide item No. 7. He states that Trustees themselves found that though amendment is found to be valid, the delivery system of service is found to be inadequate. He states that the Trustees therefore felt that scheme as per amended para 26 should be applied to Employees other than peripatetic Employees until new work procedure is evolved. He points out that Trustees also expressed that casual or temporary Employees who were not employed for 30 days in 45 days would not be eligible to become member of provident fund. In this background he invites attention to determination of said question about casual employee as decided by Employees Provident Fund Appellate Tribunal in case number ATA - 9 (6) 98 between Forest Development Corporation of Maharashtra v. Regional Provident Fund Commissioner . He states that Appellate Authority has held in it that T.S. Hariharans judgment (supra) has lost its value after amendment to para 26 of P.F. scheme. He also points out order dated 23/3/2005 passed by Appellate Tribunal in appeal ATA number 966(12) 2004 between BSNL v. Assistant Regional Provident Fund Commissioner, Udaipur which holds that purpose of Act is not to collect money and declares that amount cannot be assessed or recovered before the workers/beneficiaries are identified. He also points out similar view taken by Honble Apex Court in judgment between Food Corporation of India v. Provident Fund Commissioner reported at in this respect.

E. By placing reliance upon last judgment he also contents that burden to identify workers is upon department and the Commissioner has to exercise his powers for that purpose. He states that the Commissioner has been given powers under Section 7-A(2) for smoothly conducting the inquiry and in case of Sandip Dwellers in W.P. 1164/ 2001 the department failed to exercise those powers though said petitioner requested for calling of witnesses/records from contractors. There has been therefore a failure to exercise the jurisdiction in the matter.

F. He places reliance upon between S.K. Nasiruddin Beedi Merchants v. Central Provident Fund Commissioner particularly paragraph 6 to state that inquiry into the status of employee as to casual or otherwise or into fact whether he has joined the establishment of employer cannot be undertaken under Section 7-A and it has to be undertaken only under Section 19-A. He invites attention judgment of Rajasthan High Court in case between Cotton Corporation v. Union of India, (supra) concluding portion of paragraph 12 to support this.

G. He invites attention to test laid down by Honble Apex Court to find out whether particular person is employee or is not employee and relies upon between Ramsingh v. Union of India particularly paragraphs 15 and 16. He points out how the judgment of Honble Apex Court in case between P.M. Patel v. Union of India is considered by other judgments of High Courts. He further argues that wage actually paid for number of days worked is not relevant to find out whether particular employee is excluded employee or not and wage which could have been earned by him by working for a month in the establishment is relevant for this purpose. He invites attention to the chart filed along with writ petition 1064/2001 of Sandeep Dwellers to Show that most of the persons shown as employed therein have worked on an average for 15 to 20 days in the year and have not joined the establishment as required by paragraph 26(2) of 1952 scheme. He further states that there has to be a dividing line

somewhere so as to identify the ultimate beneficiary with particular contractor in view of multi-tier system prevalent in the construction business.

H. He argues that there cannot be any retrospective recovery because the department itself was not certain about the legal provisions and because it is difficult to establish identity of beneficiaries and to recover their share of contribution. He states that even petitioners cannot trace out such site workers or workers under contractors. Division Bench judgment of Karnataka High Court reported at 1993(II) C.L.R. 152 in case between Jyothi Homelndustries v. Regional Provident Fund Commissioner, wherein in paragraph 17.4 it is observed that it is open to Court to give effect to this Scheme from a latter date in order to see that no hardship is caused to either of the parties, has been relied upon in this respect.

4. Advocate. D.C. Daga for petitioner in W.P. 2047/1996 has adopted the arguments of Advocate Thakur.

4.A At the outset Advocate for respondents had raised a preliminary objection contending that the inquiry under Section 7-A of P.F. Act has not been held and if petitioners in Writ Petition 2593/1997 or 2047/1996 dispute any of the facts in impugned communications even today, the department is ready and willing to conduct such inquiry. He states that as these facts were not in dispute the Competent Authority has, in some cases, passed appropriate orders in accordance with law calculating the amount of evaded contribution.

B. He has thereafter taken the point of Section 19-A to state that it was added in 1953 and was deleted by amending Act 33/ 1998 with effect from 1/7/1997 and the power thereunder was given to Government by adding Sections 20 and 22 of P.F. Act. Thereafter he has made reference to various judgments to demonstrate that it is only for department to move under the Section 19-A and the private parties like petitioners could not have moved the authority seeking any clarification. He relies upon the judgment 1965(I) L.L.J. 32 of Mysore High Court between Wadi Capstone Marketing Co. (Private) Ltd v. Regional Provident Fund Commissioner 1965(II) L.L.J. 704 between Rashtriya Mill Mazdoor Sangha v. Union of India by Rajasthan High Court 1966(I) L.L.J. 334 of Andhra Pradesh High Court between Nazeena Traders (Private) Ltd. v. Regional Provident Fund Commissioner and of Bombay High Court in case between Nagpur Glass Works v. Regional Provident Fund Commissioner reported at 1960(I) L.L.J. 301. He contends that order passed by Legal Adviser on 8/2/1994 at the instance of petitioners is therefore without jurisdiction and as the order dated 23/12/1994 is passed at the instance of department, it holds good. He maintains that the judgment of Honble Apex Court in case of T.S. Hariharan is still good law and the petitioners have not permitted department to verify the facts of their respective cases to ascertain its application. He also invites attention to judgment of Honble Apex Court reported at 2005(10) SCALE 101 between State of Orissa v. Gopinath Dash to point out that this Court has got very limited powers to review said order.

C. About the Casual labour or site-workers or Peripatetic workers, he states that tests evolved through various judgments shall be applied and if there are any departmental orders or circulars to the contrary, a quasi judicial authority functioning under Section 7-A will

definitely overlook such departmental orders/circulars etc. He states that it is not the length of employment but its nature which is important under Section 2(f) of P.F. Act to find out whether any particular employee of this type is covered under the Act. He points out that said definition does not prescribe for any further classification of employee into various categories like permanent, temporary, daily wager or casual etc. He invites attention to paragraph 26-B of 1952 scheme to contend that it prescribes for resolution of doubts in this respect and if petitioners raise any doubt about any particular Employee, the Commissioner is duty bound under Section 7-A to decide it. He invites attention to judgment of Honble Apex Court in case reported at in case between P.M. Patel and Sons v. Union of India to show that if test applied therein to find out whether home- worker rolling bee dies is an employee is extended to the case of Petitioners, site-workers with them are covered. He argues that it is necessary to apply said test and if necessary to hold inquiry into case of each individual employed to find out his status. He also relies upon Division Bench judgment of Madhya Pradesh High Court reported at 1995(II) C.L.R. 360. Khemchand Motilal Tobaco v. Union of India (supra) to point out that the case of present petitioners is not better than that of petitioners before the Madhya Pradesh High Court and these petitioners have also not produced relevant material and their case is also based upon only apprehensions and hypothecation and petitioners have approached this Court directly without disputing facts mentioned in the notice. He also states that M.P. High Court also found that the issue raised was not sufficient to arrest further implementation of Act and grievance made by petitioners is covered by said judgment. He also invites attention to judgment of Honble Full Bench of Punjab and Haryana High Court reported at 1980 L.I.C. 1064 Employs State Insurance Corporation v. Oswal Woollen Mills Ltd to state that interpretation of phrase "employee" by said judgment squarely applies even in the facts of present case.

D. He invites attention to unreported order of Karnataka High Court dt. 29/5/2000 in Writ Petition 6543/1996 H.G. Shirke Construction v. Union of India in which present petitioner Builders Association of India was petitioner number 2 to show that while considering challenge to amended paragraph 26 (2), said High Court permitted Section 7-A inquiry to proceed. He also invites attention to similar Orders 6/5/98 in writ petition 6542/1996 between Bhandari Builders Pvt. Ltd. v. Union of India in which said association was petitioner number 3. He states that Aurangabad Bench of this Court has in writ Petition number 1079/ 2003 found that petition directly filed was premature and invites attention to its order dated 11 June 2003 in this respect. He further states that even Bombay Bench has permitted inquiry under Section 7-A to proceed in writ petition 2411 of 2000 filed by Michigan Engineers Private Ltd. (supra). He contents that Writ Petition 2593/1997 & 2047/1996 are therefore premature and states that it does not challenge any order but only challenges the communications. According to him if any dispute is raised by these petitioners inquiry as required by Section 7-A of P.F. Act will be held.

E. He further maintains that as the present petitioners did not raise appropriate dispute by denying the facts gathered in spot inspection by Provident Fund Inspector, there was no question of holding any inquiry in detail. He points out how in W.P. 1164/2001 the authority has been careful in choosing to rely upon report of Inspector only after satisfying itself that its contents match with the records produced by employer. He states that when records

produced by employer are accepted there is no question of any deviation from principles of natural justice or from the procedure to be followed in inquiry under Section 7-A. The burden initially according to him was upon department which it discharged by producing & proving the record of inspection and said burden thereafter shifted on shoulders of Petitioners. He states that on the basis of records made available by Sandeep Dwellers in relation to all 5 contractors, calculations were made for period for which records were not made available. He further argues that the employees shown as excluded employees by this company are in fact not so excluded because they have not earned salary in excess of Rs. 5000/ from employer Sandeep Dwellers. He argues that the quasi judicial authorities are aware about the law in relation to identification of workers and all requirements in this respect would be fulfilled before effecting recovery. He states that no directions in relation to any procedure to be followed by such quasi judicial authority in Section 7-A enquiry are required from this Court. He also invites attention of Court to prayer clauses in this respect as contained in the writ petition and states that such exercise of power by this Court would be premature. He further stated that respondents are ready to reconsider everything again if petitioners are ready to cooperate. In the alternative he further argues that remedy of filing appeal under Section 71 is available to petitioner.

F. In relation to the proceedings of CBT meeting he states that meeting has not taken any particular decision but only various options are discussed and in any case such proceedings cannot defeat the substantive provisions of P.F. Act. He invites attention to paragraph 30 of 1952 Scheme to show the obligation cast upon employer and also to paragraph 36-B to show the duty of subcontractor. The Actis therefore workable in relation to even site workers and according to him in any case, such impossibility cannot be presumed and cannot be used to defeat the provisions of Act. He relies upon the judgment of Hon'ble Apex Court reported at between The Martine Burn Ltd. v. The Corporation of Calcutta particularly paragraph 14 to support this. He also invites attention to judgment of Hon Apex Court reported at between Ramsingh v. Union of India to demonstrate how in relationship in such circumstances is to be ascertained.

5. Advocate Sunderam for respondent department has contended that under Section 7-A of P.F. Act the petitioners have got alternate and efficacious remedy and respondents are only conducting inquiry to find out whether their establishment can be covered under said Act. He has relied upon the judgment of learned Single Judge of this Court in writ petition 2411 of 2000 in case between Michigan Engineers Private Limited v. Union of India decided at Bombay on 13/ 8/2004. There also inquiry under Section 7-A was commenced and Michigan Engineers approached High Court seeking a writ of mandamus for not enforcing the provisions of paragraph 26(2) of 1952 scheme qua temporary and/or casual site-workers in its multi-tier system and other consequential reliefs. The changes brought about in paragraph 26 from time to time as also the above-mentioned judgment in case of T.S. Hariharan are considered and there the learned Single Judge found that the proceedings under Section 7-A were not without jurisdiction. It was further found that only an inquiry was being conducted and as such it would not be proper for High Court to pre-empt the issue at that stage. Advocate Thakur for petitioners however contended that this Court has not considered effect of orders under Section 19-A of P.F. Act, tests laid down by Hon Apex Court to find

out coverage of employees and also the view expressed by Appellate Tribunal that above-mentioned case of T.S. Hariharan has lost its value in view of amended Paragraph 26. According to him Authority conducting inquiry under Section 7-A is not free to take any other view of the matter because of finding reached by Appellate Authority. In this respect it can be noted that though this view expressed by Appellate Authority in case number ATA-9 (6) 98 in case between Forest Development Corporation of Maharashtra v. Regional Provident Fund Commissioner . Maharashtra and Goa was not pointed out to this Court in above case of Michigan Engineers, the very same controversy in relation to coverage of casual Employees under contractor was being considered by this Court also and after noticing the judgment of Hon Apex Court in case of T.S. Hariharan (supra) in the light of challenge to amended para 26(2) of the scheme and also definition of employee as contained in Section 2(f) of P.F. Act, this Court has found as under:

7. The Supreme Court has, therefore held that the word "employment" must be construed as employment in the regular course of business of the establishment. An employment for short period on account of passing necessity or a temporary emergency beyond the control of the Company would not be included. However, what is material is that each case would require the determination of its own facts and ultimately a factual determination has to be made based upon the facts & circumstances of the case applicable to each establishment.

This conclusion is reached after considering the following observations of Hon Apex Court in paragraph 9 case of T.S. Hariharan (supra).

9. Considering the language of Section 1(3)(b) in the light of the foregoing discussion it appears to us that employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the establishment and which does not reflect its business prosperity or its financial capacity and stability from which it can reasonably be concluded that the establishment can in the normal way bear the burden of contribution towards the provident fund under the Act would not be covered by this definition. The word "employment" must, therefore, be construed as employment in the regular course of business of the establishment; such employment obviously would not include employment of a few persons for a short period on account of some passing necessity or some temporary emergency beyond the control of the company. This must necessarily require determination of the question in each case on its own peculiar facts. The approach pointed out by us must be kept in view when determining the question of employment in a given case.

In view of the arguments of petitioners mentioned above it would also be appropriate to reproduce paragraph 8 of the judgment of learned Single Judge which reads as under:

8. In the present case, a proceedings under Section 7-A has been commenced on 5th October 2000. The establishment of the Petitioner was repeatedly directed to file a statement showing month wise details of the payments to employees employed by it at various sites during 1997-98 and 1998-99. Similarly, information was also sought in respect of employees employed by various contractors. Since the Area Enforcement Officer failed to produce the

information, consolidated information was asked to be furnished. The Petitioner has moved the Court at this stage when proceeding under Section 7-A of the Act are pending. This is not a case where it can even remotely be contended that the proceeding is without jurisdiction. Plainly it cannot be held that proceeding is without jurisdiction. The Provident Fund Commissioner is clearly within his jurisdiction to initiate an inquiry. Ultimately, it is for the petitioner to establish before the Adjudicating Officer the defence which is sought to be urged. The Supreme Court held in Andhra University v. Regional Provident Fund Commissioner that E.P.F. Act is a beneficent piece of social welfare legislation aimed at promoting and securing the well-being of employees and the Court will not adopt a narrow interpretation which will have the effect of defeating the very object and purpose of the Act. Yet, the very consequence of entertaining the petition when the summons under Section 7-A of the Act has been issued to the Petitioner to appear & the inquire would be to defeat the implementation of the provisions of the Act. I am of the view that it would neither be appropriate nor proper for the Court to entertain the petition at this stage. The Petitioner would be at liberty to urge all appropriate contentions before the authority conducting the proceedings under Section 7-A and to espouse such remedies as are available in law if an adverse order is passed. The law has been laid down by the Supreme Court, as clearly noted above, and the question as to whether a particular employee does or does not fall within the coverage of the Act and the Scheme is for the authority to determine on the facts of the case having regard to the law which has been laid, down. An anticipatory restraint upon the, authority exercising its statutory functions is not warranted.

Thus, this view of High Court leaves no manner of doubt that the tests laid down by Hon Apex Court in case of T.S. Hariharan (supra) are held to be applicable/valid in spite of amendment to paragraph 26 of the Scheme in 1990 and the observations of Appellate Tribunal/authority in case number ATA-9 (6) 98 (supra) are not correct. Respondents have also stated that the tests laid down by Hon Apex Court in case of T.S. Hariharan (supra) are still binding. The apprehensions expressed by petitioners therefore cannot be reason to hold that present petitioners will not have fair hearing under Section 7-Aproceedings in the matter. Reasons put forth by learned Counsel for petitioners to distinguish this view of learned Single Judge are also without any merit.

6. It is now necessary to consider argument that such an issue cannot be gone into in an inquiry under Section 7-A and it must be done under Section 19-A of P.F. Act. The judgments relied upon are: - Division Bench judgment of Rajasthan High Court reported at 1993(I) C.L.R. 983 : 1993(I) L.L.N. 311 between Cotton Corporation v. Union of India paragraph 12 and 13. And judgment of Apex Court between S.K. Nasiruddin Beedi Merchants v. Central Provident Fund Commissioner. So far as Apex Court judgment is concerned, it is apparent that the line "The applicability of the Act to any class of employees is not determined or decided by any proceeding under Section 7-A of the Act but under the provisions of the Act itself." cannot be torn from the earlier part and latter part of paragraph 6 of judgment. The argument before Hon Apex Court was in relation to the alleged anamolous position in which employer was placed because he could not and did not effect deduction from the employees wages and he was asked to make payment of that contribution also. The Hon Apex Court has found that argument is not "well founded" and observed that

P.F. Act applies of its own and not as a consequence of inquiry under Section 7-A thereof. This Court in the unreported judgment mentioned above (Michigan Engineers) has also found that the issue can be gone into in an inquiry under Section 7-A Following observations of Division Bench judgment to of Rajasthan High Court (supra) are relied upon by Petitioners:

12.... But the question as to whether the employee is a casual or not will again be the question of fact and this will depend upon each case. Section 19-A lays down that such question can be determined by the Central Government. Therefore, we hold that the scheme is not ultra vires of the Act but it will not be applicable to casual employees and where in a particular case an employee is casual or not which is essentially a question of fact that can only be clarified by Central Government, under Section 19-A of the Act of 1952.

In paragraph 13 said Division Bench has also expressed necessity of laying down parameters to find out whether particular employee is casual labour or not and further held that till clarification is issued by Central Government, aggrieved party can approach Central Government under Section 19 A for its determination. However, in view of the discussion on scope of said Section 19-A being taken up little later, it is not necessary to deal with it anymore here. The powers under Section 19 A are not meant for application and use for resolving individual grievances. Hon Apex Court has not held that inquiry to find out whether particular employee is covered under the definition Section 2(f) or not cannot be held under Section 7-A of P.F. Act in case of S.K. Nasiruddin Beedi Merchants (supra).

7-A The next reason put forth by learned Counsel for Petitioner to contend that remedy under Section 7-A of P.F. Act would be illusionary is the order passed by Joint Secretary under Section 19-A thereof on 23/12/ 1994. This order in fact substituted earlier similar order passed on 8/2/1994 passed by Legal Adviser. Perusal of first order i.e. one dated 8/2/1994 reveals that in it M/s. Builders Association of India is shown as petitioner while Central Provident Fund Commissioner is shown as opposite party (respondent No. 1) and All India Construction Workers Union as respondent No. 2. It appears that a petition was filed under Section 19-A of P.F. Act for removal of difficulty regarding giving effect to provisions of the Act in relation to casual/temporary workers employed on works site of the establishments engaged in building construction activity. The Legal Adviser observed that there must be an element or existence of relationship of employer and employee between principal employer and employee. He has made reference to judgment of Hon Apex Court in case of P.M. Patel and sons reported at and also to its judgment in case of Mangalore Ganesh Beedi Works v. Union of India and after considering the judgments, the stand of employers that "workers at site" are casual workers is considered in the light of definition of term "employee" and provisions of paragraph 26. The finding thereafter has been given that casual workers of the nature described in paragraph 13 are not contemplated to be included in P.F. Act. He has drawn support from judgment of Orissa High Court in case between Executive Engineer National Highway Division v. Regional Provident Fund Commissioner 1988 L.I.C. 690 (supra) and also judgment of Karnataka High Court in Jyothi Home Industries v. RPFC at 1993(II) L.L.N. 146 (supra). The Joint Secretary to the Government of India has by later order dated 23/ 12/1994 reconsidered the entire issue in Review after hearing afresh

Advocates for both sides. He rejected the argument that there is no power to review in view of language of Section 19-A observing that difficulties and doubts may crop up at any time and such powers were therefore inherent. He further held that in view of difficulties pointed out subsequently by implementing authorities, such review could have been taken up even otherwise. He found that establishments like that of petitioners were a claiming immunity and preventing Regional Provident Fund Commissioners from making inquiries. He thereafter considered the definition of employee and held that the Legal Adviser has by observation that element of permanency or semi permanency is essential for coverage in the Act has gone beyond the issue of clarification and has rendered legal provision itself inapplicable. According to him main consideration was whether there existed any nexus between employment & the business of establishment and not the period of engagement or its nomenclature. He has thereafter relied upon a ruling to state that result flowing from statutory provision is never evil and interpretation which extends the coverage is to be preferred. He found that order of Legal Adviser was contrary to the notification and introduced nonexistent concepts like categorisation of workers which resulted in throwing large section of construction workers outside the pale of P.F. Act. He held that Legal Adviser could not have modified the policy of Central Government in exercise of such powers. The apprehension of petitioners is that in view of this order under Section 19-A of P.F. Act issued by higher authority like Joint Secretary to Government of India, the fate of their challenges in Section 7-Aproceedings stood eclipsed & concluded.

B. Petitioners have placed reliance upon Division Bench judgment of this Court reported at 2001(Supp.) Bom. C.R. (N.B.) 414 : 2001(3) Mh.L.J. 532 : 2001(8) L.J. Soft 11 between Sunflag Iron and Steel Company Ltd. v. Additional Collector of Central Excise. In that case, Assessee/Petitioner had approached this Court directly and Revenue took objection by pointing out that alternate remedy of appeal under Section 35 of Central Excises & Salt Act (1 of 1944) was available. The petitioners contended that though the penultimate authority on facts and law functioning under the Act i.e. CEGAT had taken contrary view, the Revenue was blindly following the circulars and guidelines of CBEC by ignoring the judgments of CEGAT. The Division Bench found that orders impugned before it demonstrated the same attitude and therefore found that petitioner Assessee had no chance to persuade the departmental authorities to take contrary view. The following observations in paragraphs 12 and 13 are important:

12. By its judicial hierarchy, the judgment of the CEGAT binds the Revenue Officers. By virtue of Section 37-B of the Act, administratively issued Circulars/Orders and Trade notices equally bind the Revenue Officers. In such a situation, assuming there is a conflict between a Circular, order or trade notice issued under Section 37-B of the Act and a binding judgment of the CEGAT, we have no hesitation in holding that it would be the judgment of the CEGAT which ought to be followed by the Revenue Officers. The Supreme Court in a recent judgment in Government of Andhra Pradesh and Ors. v. A.P. Jaiswal and Ors. 2001 A.I.R. S.C.W. 101 had occasion to consider the application of the principle of stare decisis to judgments of Tribunals. Observes the Supreme Court (Vide paragraph 24):

24. Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the Courts have evolved the rule of precedents, principle of stare decisis etc. These rules and principles are based on public policy and if these are not followed by Courts then there will be chaos in the administration of justice, which we see in plenty in this case. This Court in the case of S.I. Rooplal v. Lt. Governor through Chief Secretary, Delhi , held thus at pages 24-25 of A.I.R. S.C.W.:

At the outset, we must express-our serious dissatisfaction in regard to the manner in which a Co-ordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Co-ordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the tribunal was of the opinion that the earlier view taken by the Co-ordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the later Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every Presiding Officer of a Judicial Forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate Court is bound by the enunciation of law made by the Superior Courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to larger Bench if it disagrees with the earlier pronouncement.

The reason for saying so is quite obvious. The Circulars/orders or trade notices are not binding on the assesses at all and their efficacy and legality is always open for challenge at the instance of them. As far as the judgments rendered by the CEGAT are concerned, they are equally binding on the assesses as well as the Department. In a contest, therefore, the Circulars/guidelines/orders or trade notices issued under Section 37-B must necessarily yield. Thus, we hold that all Officers functioning under the Act are bound by the judgments rendered by the CEGAT as long as such judgments are not stayed or reversed by a superior forum i.e. the High Court or the Supreme Court. We also hold that if at all there is a situation of conflict between a Circular/ guideline/ order or trade notice issued under Section 3 7-Bof the Act and a binding judgment of the CEGAT, it is the binding judgment of the CEGAT which has to be followed by authorities under the Act. The observations of Division Bench of this Court in the case of Yashwant Sdhakari Sakhar Karkhana Ltd. v. Union of India and Ors. fully support the view which we are inclined to take. It is an elementary proposition that an administrative circular is sued by an authority however high, can never override a binding judgment of judicial or quasi judicial authority. This is the quintessence of rule of law.

13. In the facts and circumstances of the case, therefore, we are inclined to agree with the contentions of Mr. Thakur that driving the petitioners to the appellate authorities would be of no use. Faced with the circulars/guidelines/ orders or trade notices under Section 37-B of the Act, which have already taken a view in the matter, the assessee would have little chance to persuade the departmental authorities to take a contrary view. Mr. Thakur is right when he contends that there is no equally efficacious alternate remedy. Hence, we are of the view that these writ petitions need to be entertained.

It is no doubt true that judgment of Hon Apex Court in between Commissioner of Sales Tax v. Indra Industries reveals that circulars and interpretations issued by tax authorities and higher authorities in the department of respondents are binding on lower authorities/taxing authority. However, it also shows that such circulars are not binding on taxing authority or the Courts. It is therefore apparent that the same are also not binding on quasi judicial authority which has to decide the controversy after considering both sides. Moreover, here, Counsel for respondents fairly stated that the authorities acting under Section 7-A discharge quasi judicial functions and the authorities are aware of the requirements of law in the matter. He further states that Section 19-A already stands deleted and thereafter only Section 7-A has been added to P.F. Act. According to him, apprehensions expressed by petitioners are misconceived and without any merit. He states that orders past under Section 19-A are administrative in the nature and can by no stretch of imagination supersede any judicial verdict or determination on the point.

C. It is therefore necessary to consider purpose of Section 19-A and effect of order issued under it. It is to be noted that the earlier order dated 8/2/1994 of Legal Adviser is in favour of case advanced by petitioners while the latter order dated 23/12/ 1994 militates with their stand. Said Section 19-A of P.F. Act reads:

19-A. Power to remove difficulties: - If any difficulty arises in giving effect to the provisions of this Act, and in particular, if any doubt arises as to:

(i) Whether an establishment which is a factory is engaged in any industry specified in schedule I:

(ii) Whether any particular establishment is an establishment falling within the class of establishments to which this Act applies by virtue of notification under Clause (b) of Sub-section (3) of Section 1:

(iii) the number of persons employed in an establishment;

(iv) the number of years which have elapsed from the date on which an establishment has been set up; or

(v) whether the total quantum of benefits to which an employee is entitled has been reduced by the employer.

The Central Government may, by order make such provision or give such direction, not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for the removal of the doubt or difficulty; and the order of the Central Government, in such cases, shall be final.

In Union of India v. Ogale Glass Works Ltd. the Hon Apex Court has considered whether such power under Section 19-A of P.F. Act can be exercised after judicial pronouncement on the issue and in paragraph 44 it is answered as under:

44. The matter may be considered from another point of view also. It is the case of the respondent that there has been a direction given by the Central Government under Section 19-A by letters dated August 19, 1959 and September 21,1959. The matters referred to in these letters have already been referred to by us. The judgment of the Bombay High Court was given on March 7, 1957, if so, after the decision given by the High Court interpreting the Act in a particular manner, we fail to see how an occasion will arise for the Central Government giving a direction under Section 19-A on the ground that a difficulty has arisen in giving effect to the provisions of the Act and that doubt has arisen regarding the matters mentioned in Clauses, (i) to (v). After a decision has been given by a Court on a particular aspect relating to the Act and the scheme, in our opinion, there is no question of any difficult arising in giving effect to the provisions of the Act or to any doubt arising in respect of the matters mentioned in Clauses, (i) to (v). The question whether an establishment, like that of the respondent relating to the glass works coming under Clause (2) of Section 19-A was subject of a judicial adjudication and therefore Section 19-A could not have come into play for the Central Government to give any direction. The Central Government and all other authorities were bound to give effect to the decision of the Bombay High Court so long as it held the field. Even according to the respondent as is seen by its letter dated December 10, 1957 Addressed to the Regional Provident Fund Com-missioner, when the Act and the Scheme were applied in 1952 to all the employees of the respondent, the later raised an objection that the Act and the Scheme will apply only to employees engaged in the manufacture of Hurricane Lanterns and non pressure Stoves. The said letter also refers to the fact that the Regional Provident Fund Commissioner, Bombay, by his reply dated March 31, 1953 rejected the said objection and held that the whole of the establishment of the respondent was covered by the Act and. the Scheme. There is no controversy that the respondent has been ever since making contributions in respect of all the employees and had raised no dispute at. all till after the judgment of the Bombay High Court. The proper stage when a doubt might have arisen for the Central Government to exercise Us jurisdiction under Section 19-A was when the respondent raised an objection early in 1953 regarding non-applicability of the Act to all its employees, and when that objection was rejected on March 31, 1953. If the matter had been pursued further and the Central Government moved and a direction was given by the Central Government then it could be said that the Central Government has given a. direction under Section 19-A The position before us is entirely different. After the decision of the Bombay High Court there is no warrant for assuming that there was still a difficulty or doubt in respect of which the Central Government had to give a direction under Section 19-A Considering the matter from this aspect also it follows that there could not have been a direction issued by the Central Government under Section 19-

A when the letter of August 19, 1959 was sent by the Central Provident Fund Commissioner to the Regional Provident Fund Commissioner.

In the facts of present case contention is the Hon Apex Court interpreted the definition of employee in Section 2(f) of P.F. Act in judgment reported at in case between The Provident Fund Inspector, Guntur v. T.S. Hariharan. The said judgment does not consider provisions of paragraph 26 and conclusions reached therein are independent of said paragraph. The test laid down therein by Hon Apex Court did not fall for consideration of Division Bench of Madhya Pradesh High Court in ruling reported at 1995(II) C.L.R. 360 Khemchand Motilal Tobaco Products Ltd and Ors. v. Union of India where the Division Bench upheld the validity amended paragraph 26. Aggrieved employers therein had challenged said Division Bench judgment before Hon Apex Court and in case between J.P. Tobacco Products etc. v. Union of India reported at 1995(II) C.L.R. 369, the Hon Apex Court maintained it. No other issue or the issues raised in case of T.S. Hariharan [supra] are considered either by Madhya Pradesh High Court or by Hon Apex Court in these rulings. Therefore there was no justification either for Legal Adviser or for Joint Secretary to pass any orders under Section 19-A of P.F. Act. Even if it is presumed that 1990 amendment to paragraph 26 making P.F. Act applicable to all employees employed in any establishment right from date of joining had called for exercise of power under Section 19-A, now the matter is being examined by quasi judicial authority under Section 7-A of P.F. Act. Hence none of these orders issued under Section 19-A have got any relevance in such examination and the apprehension of petitioners that quasi judicial authorities will also blindly follow the later order of Joint Secretary is therefore misconceived. The rulings i.e. Dr. Smt. Kuntesh v. Management of Hindu Kanya Mahavidyalaya on the point of power to review, between.Union of India v. Tarit Ronjan Dasabout the scope of review & 1997(II) L.L.J. 749 between K. Ajit Babu v. Union of India to point of difference between review & Appeal powers relied upon by Advocate Thakur are therefore not required to be looked into.

D. Advocate Sunderam for department has contended that power under Section 19-A is administrative power and his further contention is after its repeal in 1988, said power is reposed in Sections 20 and 22 of P.F. Act. He has cited various rulings to contend that only P.F. Department can approach authority under Section 19-A to seek guidance or clarification. The contractor or builder or their association could not have moved any application under said provision and hence order dated 8/2/1994 passed by Legal Adviser is without jurisdiction and the order passed by Joint Secretary on 23/12/ 1994 alone is valid administrative order in the field. In view of this controversy between parties it has become necessary to find out the exact nature and scope of this provision in P.F. Act.

The judgment 1965(I) L.L.J. 32 of Division Bench Mysore High Court between Wadi Capstone Marketing Co (Private) Ltd. v. Regional Provident Fund Commissioner holds that the machinery provided under Section 19-A is for benefit of those who have to give effect to the provisions of the Act and it is not open to factory or establishment or anyone connected there with to approach Central Government calling upon them to make a provision or to pass any order in that regard. Various cases taking similar view have been appreciated and decision of Madras High Court in East India Industries v. Regional Provident Fund

Commissioner reported at 1964 I L.L.J. 706 taking a view to the contrary has not been endorsed. 1965(II) L.L.J. 704 between Rashtriya Mill Mazdoor Sangha v. Union of Indiaby Division Bench of Rajasthan High Court also holds that provision of Section 19-A was adjunct only to the administrative machinery provided by the P.F. Act for enforcing the several provisions thereof & was designated to cloth the Central Government with power of issuing directions of general nature or to make provisions which may be of general nature and it was never the intention to deal with any individual controversy between the parties. Such individuals were left to pursue the ordinary remedies under the law. Advocate. Sunderam has contended that order passed by Legal Adviser on 8/2/1994 at the instance of petitioners is therefore without jurisdiction and as the order dated 23/12/1994 is passed at the instance of Department, it holds good. Both these High Courts have held that said provision did not contemplate any inquiry by Central Government and parties affected were not required to be heard and nor it was necessary to render any decision. It was not a judicial or quasi judicial order. The finality contemplated by Section 19-A was interpreted to mean finality as regards the view of the department and it was declared that said view/finality was not made binding on the opposite party. Such order or direction given by Central Government was held not to bind the persons not parties before Central Government and it was open to such person to challenge its legality or correctness. If this interpretation about the purpose of Section 19-A or its scope is accepted to be correct and the arguments advanced by respondents before this Court are accepted, it will only mean that in quasi judicial inquiry under Section 7-A of P.F. Act none of these orders i.e. order dated 8/2/ 1994 on 23/12/1994 have got any sanctity or relevance.

Advocate. Thakur has relied upon judgment of Delhi High Court reported at between Wire Netting Stores v. Regional Provident Fund Commissioner. In said judgment in paragraph 18 it is observed that Section 19-A confers on Central Government administrative power and also a quasi judicial power. In paragraph 19 administrative power has been stated to be analogous to rule making power or the power to make subordinate legislation. In paragraph 21 it is noted that Section 19-A unlike Section 7-A does not expressly require the Central Government to give a hearing before deciding the representation made to it by private parties. This is stated to be on account of dual nature of function of Central Government under it. However it is further stated that Courts have always read requirement of hearing in construing a statute giving either quasi judicial or administrative power to the Government. At the end of paragraph 24 it is also held that Civil Courts, High Courts and Supreme Court would always have jurisdiction to hold an order of Central Government under Section 19-A as ultravires the P.F. Act. Division Bench judgment of this Court reported at 1988(II) L.L.N. 657 paragraphs 39 and 40 between Mandovi Pellets Ltd. v. Union of India has been relied upon to show that the remedy under Section 19-A was held not to be alternate and efficacious remedy. There in paragraph argument was advanced by workers union that observations contained in earlier judgment of this Court to the effect that only authorities could move under Section 19-A and private party could not were obiter. The Division Bench did not decide that controversy and proceeded by presuming that even if a private party was held competent to move, still Central Government had discretion either to give or to refrain from giving any direction and hence such remedy in the facts & circumstances before it was held not to be efficacious remedy available to petitioners before it. He has also cited 1960(I)

L.L.J. 301 of this High Court between Nagpur Glass Works v. Regional Provident Fund Commissioner. The Division Bench there has found that it was not open to factory or establishment to approach Central Government and the difficulty experienced must be of general character and must arise in giving effect to the provisions of Act. It is not possible to sustain arguments of Advocate Thakur that in view of these authorities both orders under Section 19-A of P.F. Act in these petitions must be treated as quasi judicial orders. In view of the rulings being considered below, it is not necessary to linger on this controversy any more.

E. Similar provisions occurring in other enactments have been considered by Hon Apex Court and it would be beneficial to make reference to view of Apex Court at this stage.

Hon Apex Court has considered somewhat similar provision of Section 33 of U.P. Secondary Education Services Commission and Selection Board Act (5 of 1982) in Prabhat Kumar Sharma v. State of U.P. Section 33 of that Act empowers the State Government to issue by notification a order for removal of difficulties in implementation of, and to give effect to the Act by way of modification, addition or omission, as it may be deemed necessary or expedient. In exercise of this power, the first 1981 order came to be made and relevant observations of Hon Apex Court in relation thereto which clarified the scope of power are as under:

7.... The removal of difficulties envisaged under Section 33 was effective not only during the period when the Commission was not constituted but also even thereafter as is evident from second paragraph of the preamble to the First 1981 Order which reads as under:

And whereas the establishment of the Commission and the Selection Boards is likely to take some time and even after the establishment of the said Commission and Boards, it is not possible to make selection of the teachers for the first few months.

8. In the Delhi Laws Act, 1912, The Ajmer Merwara (Extension of Laws) Act, 1947 And The Part C States (Laws) Act, 1950, 1951 S.C.R. 747 At 846 : A.I.R. 1951 S.C. 332 at p. 359-60 this Court had dealt with the power of modification and held thus:

I will now deal with the power of modification which depends on the meaning of the words "with such modifications as it think fit". These are not unfamiliar words and they are often used by careful draftsmen to enable laws which are applicable to one place or object to be so adapted as to apply to another. The power of introducing necessary restrictions and modifications is incidental to the power to apply or adapt the law, and in the context in which the provision as to modification occurs, it cannot bear the sinister sense attributed to it. The modifications are to be made within the framework of the Act and then cannot be such as to affect its identity or structure or the essential purpose to be served by, it. The power to modify certainly involves a discretion to make suitable changes, but it would be useless to give an authority the power to adapt a law without giving it the power to make suitable changes.

9. At page 849 (of S.C.R.) : (atp.360 of AIR), this Court had further held thus:

Similar instances may be multiplied, but that will serve no useful purpose. The main justification for a provision empowering modifications to be made, is said to be that, but for it, the Bills would take longer to be made ready, and the operation of important and wholesome measures would be delayed, and that once the Act became operative, any defect in its provisions cannot be removed until amendment legislation is passed. It is also pointed out that the power to modify within certain circum- scribed limits does not go as far as many other powers which are vested by the legislature in high officials and public bodies through whom it decides to act in certain matters'.

10. In Mahadeva Upendra Sinai v. Union of India this Court had held thus:

To keep pace with the rapidly increasing responsibilities of a Welfare democratic State, the legislature has to turn out a plethora of hurried legislation, the volume of which is often matched with its complexity. Under conditions of extreme, pressure, with heavy demands on the time of the legislature and the endurance and skill of the draftsman it is well nigh impossible to foresee all the circumstances to deal with which a statute is enacted or to anticipate all the difficulties that might arise in its working due to peculiar local conditions or even a local law. This is particularly true when Parliament undertakes legislation which gives a new dimension to socio-economic activities of the State or extends the existing Indian Laws to new territories or areas freshly merged in the Union of India. In order to obviate the necessity of approaching the legislature for removal of every difficulty, howsoever trivial encountered in the enforcement of a statute by going through the time consuming a mandatory process, the legislature sometimes thinks it expedient to invest the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance.

It is thus obvious that wide power given by Section 33 has been treated as available only for making minor adoptions or peripheral adjustments in the statute, for making its implementation effective, without touching its substance. Scope of power under Section 19-A of P.F. Act is not different.

Reference in this respect can also be made to Full Bench judgment of Patna High Court reported atKrishnadeo Misra v. State. The Full Bench there considered provisions of Section 8 of Bihar on-Government Elementary Schools (Taking Over of Control) Act (30 of 1976) which reads as under:

8. If any difficulty arises in giving effect to the provisions of this Act, the State Government may take such action or pass such order as appears to it necessary for the purposes of removing the difficulty.

The observations of Hon Full Bench about the scope of this power are important and the Full Bench observes:

10. It was common ground before us that despite the passage of eleven years since the enforcement of the Act and, perhaps, even more since the preceding Ordinance, as yet no

statutory rules whatsoever have been framed under the express power conferred therefore by Section 7 of the Act. On the other hand, there is no dispute that there is a plethora of circulars and notifications purporting to have been issued under Section 8 of the Act providing for the removal of difficulties.

11. It is in the aforesaid context that one has to analyse the import and scope of the provisions of the afore-quoted Section 8. It is somewhat manifest that this provision is typical of the residuary power that the Legislature may sometime think necessary to vest in the Government whilst enacting a new statute which might present some unforeseen difficulties in its actual and practical application. As is evident from its plain language, the power vested in the Government to take action or pass orders is only for removing difficulties in giving effect to the provisions of the statute. It is only in such an eventuality that Section 8 is to be invoked and either necessary action may be taken or requisite orders passed. However, the scope and the role of such a provision which is not uncommon for the initial implementation of a new statute is too well known to require an exhaustive elaboration. Plainly enough, such a provision is not to be made into a cloak or a camouflage for colourable exercise of power for making statutory rules which flows from an altogether different section and for which altogether different procedure is prescribed, Section 8, therefore, cannot masquerade as a rule making power under the Act nor as the fountainhead of binding statutory instructions. Since it appears to me that the scope and import of a provision for removing difficulties in giving effect to an Act had been authoritatively elaborated by their Lordships in the following terms in the binding precedent of Madeva Upendra Sinai v. Union of India , it is unnecessary to dilate on the matter any further:

For a proper appreciation of the points involved, it is necessary to have a general idea of the nature and purpose of a "removal of difficulty clause" and the power conferred by it on the Government. (Note: - The Full Bench hereafter cites the portion from judgment of Hon Apex Court already reproduced above and hence its reiteration is avoided. The remaining portion drawn from judgment is reproduced after this note.) That is why the "removal of difficulty clause" once frowned upon and nicknamed as Henry VIII Clause in scornful commemoration of the absolutist ways in which that English King got the "difficulties" in enforcing his autocratic will removed through the instrumentality of a servile Parliament, now finds acceptance as a practical necessity in several Indian statutes of post independence era.

12. It would be manifest from the above that the very purpose and scope of provision like Section 8 is to remove difficulties when encountered in the enforcement of the Act and to obviate the time consuming amendatory process which may become necessary for its actual working. It is certainly not the fountainhead for the framing, issuance and enforcement of statutory rules for which the express power has been conferred by an altogether different Section 7 and the procedure for the valid enactment of such rules. As has been picturesquely noticed by their Lordships above, a provision of the nature of Section 8 was in fact named as the Henry VIII clause and I am compelled to comment that herein the respondent State has been using it in an identically arbitrary and absolutist fashion. The notifications purporting to issue under Section 8 are indeed very far from removing any difficulty in the enforcement of the Act...

The power under Section 19-A therefore could have been exercised by Central Government whenever any difficulty as contemplated therein was placed before it. It is also apparent that such power was not one time power so as to exhaust itself after it was exercised. A further corrective step could always have been taken after noticing lacunae in earlier exercise of said power and the concept of review or hearing known to any ad judicatory machinery therefore were foreign to it. In view of the above ruling of Hon Apex Court and of Full Bench of Patna High Court, it is difficult to read said power as quasi judicial also though it cannot be said that it would have been inappropriate for Central Government to consult affected interests while removing the difficulties or doubts. The restrictions sought to be imposed on such power by invoking analogy of review jurisdiction is therefore misconceived. Judgment of Hon Apex Court reported at 2005 (10) SCALE 101 between State of Orissa v. Gopinath Dash cited by respondents in relation to restrictions on powers of judicial review therefore need not be gone into in present facts. The petitioners rulings i.e. Dr. Smt. Kuntesh v. Management of Hindu Kanya Mahavidyalaya on the point of power to review, between Union of India v. Tarit Ranjan Das about the scope of review & 1997(II) L.L.J. 749 between K. Ajit Babu v. Union of India to point of difference between review & Appeal powers relied upon by Advocate Thakur are also not relevant, Section 19-Ais substituted by Sections 20, 21 and 22 vide Amending Act 33 of 1988 with effect from 1/7/1997. By Section 20 Central Government has been authorised to give such directions to the Central Board as it may think fit for efficient administration of Act and obligation has been cast upon Central Board to comply with it. Section 21 authorises Central Government to make rules by notification in Official Gazette to carry out the provisions of Act. Section 22 permits Central Government by order published in Official Gazette to make provision not inconsistent with Act as appears to it to be necessary or expedient for removal of difficulty if any such difficulty arises in giving effect to the provisions of Act as amended in 1988. But by a proviso an embargo has been placed on said power and it cannot be exercised after expiry of period of three years from the date on which 1988 Amendment Act received the ascent of president. Sub-section (2) thereof also requires such orders to be laid before each House of Parliament as soon as possible after it is made. These developments also reveal that the power under Section 19-A was not a quasi judicial power amenable to restrictions sought to be placed upon it by petitioners and demonstrate that the arguments of present petitioners about both these orders are totally misconceived and no right ever accrued in their favour because of any of these orders and no right available to them is being violated or was violated because of subsequent order dated 23/12/1994.

8A. Petitioners state that they engage contractors for doing particular works and said contractor may further himself engage subcontractors and divide the work and responsibility amongst them. These subcontractors may then engage Labour contractors or petty contractors who may ultimately control the labour. It is also argued that petitioners are only interested in result and they do not supervise the labour of such contractors. It is to be noted that any dispute as to this type of arrangement or engagement is basically a question of fact answer to which will differ from work/project to work/project with any single petitioner and with each separate establishment or each Petitioner. Whether there is always such multi-tier system, whether such worker or labour is to be treated as casual or if he has worked on the site for brief time, can he be on account of very limited or small duration of his employment

be held not entitled to coverage of P.F. Act? Whether the work done by him is regular work of establishment of Petitioner or in connection with it? Can it be understood as casual work in normal Labour Law parlance or it is to be regarded as casual because it lasts for very short period or is it one of the various works of temporary nature which are continuously available or after brief intervals or in rotation with same employer at different sites or whether such labour performed the other work that became available or was generated at same site after his job was finished are all mixed questions of facts and law which can be appreciated only after evidence is made available on record. Whether such employee/labour can be treated as "not employed" with petitioner because of his extremely brief engagement for doing the regular work of establishment of petitioner? Can he be treated as "employed" with contractor to whom petitioners entrusted their work or part of work? Whether Petitioner or such contractor or builder is certain of receiving new work or order and has plan to have certain minimum number of labour required by him in future for such work at site for sufficiently long time? Whether records with such builder or contractor reveal that he always have under him work sufficient to employ particular number of permanent employees & in fact retain them? Whether engagement of permanent work force for actually doing manual work at site is a practice unknown in the business of Petitioners? Whether Provident fund authorities by attempting to cover such site-workers are trying to introduce system of working unknown to the line of business? In the absence of actual data on record in this respect, it would not be appropriate for this Court to pronounce on such issues. Judgment of Hon Apex Court in T.S. Hariharan's case (supra) support the stand that the question can be looked into only after the facts are settled. Division Bench judgment of Karnataka High Court in case of Jyothi Home Industries in paragraph 16.2 declares that such question is to be determined with reference to the facts and circumstances of each case. Observations of Division Bench of Rajasthan High Court in ease of Cotton Corporation (supra) in concluding portion of paragraph 12 of judgment also lays down same proposition. Same conclusion also emerges from perusal of paragraph 19 of Division Bench judgment of Orissa High Court in case between Executive Engineer, National Highway Division (supra). Hon Apex Court in case reported at in case between P.M. Patel & Sons v. Union of India has found that employees rolling bee dies at their own residence were doing work of the establishment of manufacturing bee dies and were therefore covered under P.F. Act. This is also followed in case reported at between S.K. Nasiruddin Beedi Merchants v. Central Provident Fund Commissioner which is cited by both the parties. Division Bench judgment of Madhya Pradesh High Court reported at 1995(II) C.L.R. 360 Khemchand Motilal Tobaco v. Union of India (supra) also finds in paragraph 12 and paragraph 17 of its judgment that petitioners before it did not produce any material to demonstrate that workers work only for brief period and therefore cannot be treated as employees for the purposes of P.F. Act. Andhra Pradesh High Court has in judgment delivered before amendment between Nazeena Traders (private) Ltd v. Regional Provident Fund Commissioner (supra) relied upon by Advocate Sunderam observed that employee has to put in continuous service for requisite period to satisfy the ingredients of definition and if on a special occasion or for a special work some extra hands are engaged for a few days, they could not become employees within the mischief of Section 1(3) of P.F. Act. It is thus essentially a question of fact which turns upon appreciation of evidence and nature of employment of each employee may vary from process to process under same employer and under different employers. The judgment of learned Single Judge of this Court in writ

petition 2411 of 2000 in case between Michigan Engineers Private Limited v. Union of India (supra) decided at Bombay on 13/8/2004 also takes same view. The question has to be left for determination by competent authority in inquiry. The learned Counsel for department has fairly stated that even the impugned order passed the matter of Sandeep Dwellers such employees who worked for extremely small period of two or three days and were found not covered by the definition, have been excluded. In present case, petitioners and respondents have not laid any evidence so far. The issue of facts can be decided after giving due opportunity to parties in Section 7-A proceedings. Para 26-B of 1952 Scheme which provides for resolution of doubts lays down that if any question arises whether an employee is entitled or required to become or continue as a member, or as regards the date from which he is so entitled or required to become a member, the decision there on of the Regional Commissioner shall be final. It also states that no decision in this respect shall be given unless both the employer and the employee have been heard.

B. The purpose of the Act does not seem to be to impose some levy upon employer or employees. It is not in the nature of tax but as has been held in case of T.S. Hariharan (supra) and various other judgments including that of Appellate Tribunal the purpose is to develop habit of saving in such employees. Identification of employee is therefore held to be must before effecting such recovery. It is the part of wages earned by such employees which is being deducted by the P.F. department and ultimately it is to be returned back to him. If his identity is not known, the amount cannot definitely be returned to him and as such there is no point in effecting deduction from employer on account of such unknown worker. Habit of saving cannot be developed unless and until the wages are earned continuously and consistently. The following observations of Hon Apex Court in case between The Provident Fund Inspedor v. T.S. Hariharan reported at assume importance here:

4. The Act was brought on the statute book for providing for the institution of provident fund for the employees in factories and other establishments. The basic purpose of providing for provident funds appears to be to make provision for the future of the industrial worker after his retirement or for his dependents in case of his early death. To achieve this ultimate object the Act is designed to cultivate among the workers a spirit of saving something regularly, and also to encourage stabilisation of a steady labour force in the industrial centres. This Act has since its initial enactment been amended several times to extend its scope for the benefit of industrial workers. We are, however,...

In this judgment the Hon Apex Court has also considered meaning to be given to word "employment" and discussion as contained in paragraph 7 to 9 is important.

7. Section 16 which has already been set out in extenso seems to us to throw considerable light on the point raised. It may be recalled that this section excludes from the applicability of the Act establishments belonging to the Government and to local authorities and infant establishments. It is therefore, obvious that this Act is intended to apply only where an establishment has attained sufficient financial stability and is prosperous enough to be able to afford regular contribution provided by the Act. Contribution by the employer is an essential part of the statutory scheme for effectuating the object of inducing the workmen to save

something regularly. The establishment, therefore, must posses stable financial capacity to bear the burden of regular contribution to the Fund under the Act. In this connection it may be recalled that by virtue of Section 1(5) an establishment to which the Act is applied continues to be governed by the Act notwithstanding that the number of persons employed by it at any time falls below the required number. This liability to be governed by the Act ceases only if the terms of the Proviso to Section 1(5) are complied with. The financial capacity of the establishment to bear the burden must, therefore, have some semblance of a reasonably long term stability. In other words, the employment of requisite number of persons must be dictated by the normal regular requirement of the establishment reflecting its financial capacity and stability. It, therefore, follows from this that the number of persons to be considered to have been employed by an establishment for the purpose of this Act has to be determined by taking into account the general requirements of the establishment for its regular work which should also have a commercial nexus with its general financial capacity and stability. This seems to us to be the correct approach under the statutory scheme.

8. To accede to the appellant's argument would lead to some startling consequences. By way of illustration, if for the purpose of extinguishing accidental fire an establishment is compelled to employ a few persons for about a couple of hours, even then, however weak and unstable its general financial capacity, the establishment would be covered by the Act and would have to contribute towards the provident fund for the benefit of its regular employees, of course, excluding those whose services were utilised for a short while for extinguishing the fire. In this illustration we are assuming that the employees would have no objection to being governed by the Act. This in our opinion, could never have been the intention of the legislature. Similarly, we find it difficult to impute to the legislature an intention to exclude from the application of the Act an establishment which regularly employs for its general business the required number of persons for a major part of the year, say, for 360 days every year, merely because the employment of the required number does not extend to full one year. Both the extreme views, the one canvassed on behalf of the appellant and the other postulated in the observation of the High Court that the required number of persons must continuously work in the establishment for one year, do not conform, to the scheme and object of the Act and are, therefore, unacceptable.

9. Considering the language of section l(3)(b) in the light of the foregoing discussion it appears to us that employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the establishment and which does not reflect its business prosperity or its financial capacity and stability from which it can reasonably be concluded that the establishment can in the normal way bear the burden of contribution towards the provident fund under the Act would not be covered by this definition. The word "employment" must, therefore, be construed as employment in the regular course of business of the establishment; such employment obviously would not include employment of a few persons for a short period on account of some passing necessity or some temporary emergency beyond the control of the company. This must necessarily require determination of the question in each case on its own peculiar facts. The approach pointed out by us must be kept in view when determining the question of employment in a given case.

Division Bench judgment of Rajasthan High Court reported at 1993(I) C.L.R. 983 : 1993(I) L.L.N. 311 between Cotton Corporation v. Union of India (supra) also considers the question whether a casual worker employed in a connection with the work of a factory or any other establishment becomes a member of Provident Fund. In paragraph 9 of this judgment, the Division Bench makes reference to decision of Delhi High Court reported at 1986 L.I.C. 1402 between Eastern Arts Corporation v. S.P. Mehrotra and in it was held that a driver engaged in leave vacancy of regular worker by the establishment was not covered. In paragraph 12 after making reference to judgment of Hon Apex Court in case between P.M. Patel and Sons v. Union of India (supra), the Division Bench observed:

12..."In that context their Lordships of the Supreme Court observed that since he is employed in activities of manufacturing of beedies, therefore, he will be treated to be an employee of the factory and will be covered by the Scheme. But the question before us is that whether such a casual labour/employee whose services are being engaged for certain job can be given the benefit of the scheme or not. In this connection, their Lordships of the Supreme Court in the case of T.S. Hariharan (supra) clearly laid down that such casual labour/employee will not be covered. As mentioned above, the Hon Supreme Court in the aforesaid case has struck a mean that the question as to whether an employee is casual or permanent shall be dependent on the facts & circumstances of each case. But the Hon Supreme Court has laid down that in order to determine as to whether an employee is casual or not one has to see the duration during which the employee has remained in service. In this connection, the Hon Supreme Court has illustrated the situation by referring to an illustration that, suppose certain fire took place in the establishment and the establishment as to engage certain employees for extinguishing the accidental fire for couple of hours. The Hon Supreme Court observed that the scheme of the Act did not contemplate that such persons should also be covered by the provisions of the Act. At the same time the Hon Supreme Court has further observed that, suppose an establishment which regularly employees for its general business the required number of persons for a major part of the year, to say for 360 days every year, merely because the employment of the required number does not extend to full one year. Therefore the Apex Court did not propose to lay down such a sweeping proposition as both the extreme views do not conform to the object of the Act. Therefore the issue is that so far is casual labour are concerned, they are not governed by the provisions of the Act. If they are not covered by the Act, therefore, likewise they are not covered by the scheme as well. The scheme of 1990 does not specify as to whether it will exclude the casual employs or not. Therefore, the expression "employee" occurring in the scheme has to be read in the context of the main Act and the interpretation of the expression "employee" given by Hon Supreme Court in case of T.S. Hariharan (supra). Therefore, Clause 2(ii) of the Scheme of 1990 should be construed to mean that employee here should be taken to be an employee employed in the establishment other than those who are excluded in connection with the establishment should, not be a casual, labour/employee. But the question as to whether the employee is a casual or not will again be the question of fact and this will depend, upon each case.

Division Bench of Karnataka High Court reported at 1993(II) C.L.R. 152 in case between Jyothi Home Industries v. Regional Provident Fund Commissioner (supra) has also

considered similar issue. Its attention has also been invited to above-mentioned Division Bench judgment of Rajasthan High Court. Paragraph 5 this judgment shows that the grievance of Appellant before Karnataka High Court was that casual employee employed for a day or two or for a few days in month cannot be brought under the Scheme and attempt to cover him by notification dated 19/10/1990 is beyond the scope of Act. The argument of the department that any person employed irrespective of the nature of employment or duration of the employment, as long as he is employed in a factory or other establishment must be treated as covered by the Scheme has not been accepted (end of paragraph 13 of the report). In paragraph 14 object of the scheme as pointed out by Hon Apex Court in case of T.S. Hariharan has been extracted and thereafter The Division Bench observes as under:

15. Thus, if the object of the Act is to be served, it cannot be made applicable to casual workers who are employed for a day or two or a few more days and thereafter leave the establishment and go somewhere else. After leaving the establishment, they may or may not join another establishment which is covered under the Scheme. Therefore it would not be possible to ensure that such employees are benefited by the scheme.

15.1. Consequently, it follows that in order to serve the basic object of the Act, it is necessary to ensure that it covers employees who are employed regularly in or in connection with the work of establishment and it is only such employees who can be persuaded to cultivate the habit of saving. A person who is employed for a day or two or for certain period not in connection with the regular work of the establishment may not be interested in saving for his future nor can he be expected to take the benefit of the Provident Fund Scheme. The contention that such criteria should be applied only in order to find out whether an establishment or factory is covered by the Act and the scheme and not for the purpose of determining whether an employee of covered establishment is eligible for admission to the membership of the Provident fund scheme cannot be accepted.

16.2. We have already pointed out that it is not every type of employment that attracts the proving of the Act, as contained in Sub-section (3) of Section 1 of the Act. It is the employment in the regular course of business of establishment alone which attracts the provisions of the Act. The duration is not material, but it is the nature of employment which is material in order to attract the provisions of the Act. As long as employment is for purpose of regular course of business, in other words it is in or in connection with the business of factory or establishment it would attract the provisions of Act and the Scheme. If the employment is not in or in connection with the regular business of the factory or establishment it would not attract the provisions of the Act and in such an event, the duration would not be relevant. However we must add here that as and when such question arises it has to be determined with reference to the facts and circumstances of each case. It has to be determined as to whether the employment is in or in connection with regular business of the establishment or not.

When the Hon Apex Court delivered judgment in case of T.S. Hariharan (supra) it has considered provisions of Section 16 of P.F. Act and perusal of paragraph 7 reveals that the exemption provided to infant establishments thereby has weighed considerably with Hon

Apex Court in recording the findings and it has been held that P.F. Act is meant to apply to establishments which are financially sound and prosperous. The said exemption in Section 16 to infant establishments has been taken away in 1997 and present Section 16 only exempts establishments of co-operative societies in certain contingencies and establishments belonging to or under control of Central Government or State Government also in certain contingencies. Provisions of Section 1(3)(b) were also looked into by Hon. Apex Court in this background. This judgment of Hon Apex Court is dated 1/4/1971. At that time after Section 1(5) a proviso was in existence and said proviso prescribed that if for continuous period of not less than one year the number of persons employed in covered establishment had been less than 15, the employer thereof could stop giving effect to provisions of P.F. Act and any scheme framed thereunder with effect from beginning of the month following the expiry of said period of one year. This proviso has been deleted by amending Act 16 of 1971 with effect from 23/4/1971. The Hon Apex Court has extracted entire Section 1 with this proviso in paragraph 4 of its judgment. While taking illustrations in paragraph 8, Hon Apex Court has deliberately mentioned work of extinguishing accidental fire because it cannot be the regular work or work generally connected with such regular work of any normal establishment. The said illustration coupled with observations in paragraph 9 clearly reveal that if a person is employed on account of some emergency or for very short period because of some abnormal contingency which is not the regular feature of business of the establishment, such person is not covered by said provision. Employment of few persons for short period on account of some passing necessity or some temporary emergency beyond the control of the employer is therefore not covered. The Hon Apex Court has further clarified that employment of such persons in such contingencies may not reflect on business prosperity of establishment or its financial capacity and stability so as to conclude reasonably that it can in normal way bear the burden of contribution towards provident fund. But then Hon Apex Court itself states that it is a question to be decided on peculiar facts of each case. The Hon Apex Court considers the situation to find out applicability of the P.F. Act to an establishment for the first time and the question whether person joining an establishment already covered tinder P.F. Act is an employee under Section 2(f) is not looked into in it. The ability of such establishment sought to be covered to bear additional burden of provident fund has been examined in the light of its financial stability, and continuation of particular number of workers for sufficiently long time has been used as an indicator thereof. Such continuation will not be relevant when question whether particular person is or is not an "employee" is being examined in respect of an already covered establishment i.e. the one to which P.F. Act already applies. It is therefore not possible to hold that merely because a person has worked with petitioner's establishment for short period, such person should be treated as casual & hence not covered under Section 2(f) even though he has performed the work of regular nature undertaken by his establishment or has done work in connection with such regular work.

C. Another question is whether site workers & contractor's worker can be treated as covered under P.F. Act. Division Bench of Orissa High Court in case between Executive Engineer National Highway Division v. Original Provident Fund Commissioner i.e. 1988 L.I.C. 690 considers the question whether labour working under Contractor can be treated as employees under Section 2(f) of P.F. Act. Both the Hon judges constituting Division Bench have

delivered separate but concurring judgments. However it is to be noticed that here the Works Department of Orissa Government has been held to be not an "industry" under Section 2(j) of Industrial Disputes Act after applying the principles laid down by Hon Apex Court in i.e. (Bangalore Water Supply and Sewerage Board v. A. Rajappa. In paragraph 12 of the report it is also found that contractor had not employed employees on behalf of State for execution of work as an agent and agency, if in existence, was only to the limited extent of production of desired result entrusted to such contractor on payment of money. It has been therefore held that there cannot be any element of existence of relationship of employer and employee between the Government on one hand and the employees employed by such contractor on the other. Discussion by other Hon judge in this respect in paragraph 19 also reveals similar application of mind and result. The Hon judge has observed that provisions of Act and The Scheme do not appear to be workable in relation to petitioner as the very purpose of getting the work executed through the agency of contractor by the State or other bodies is to avoid the day to day complications or botherations of finding out labours, materials and time for day-to-day supervision. However, this Hon Judge has expressed his unwillingness to enter into detail discussion in relation to Section 2(j) aspect of the matter. The discussion itself shows that it is basically the question of arrangement or contract between principal employer and such contractor and there cannot be any definite finding recorded without having the facts on record. Both the learned Counsel have relied upon various judgments of Hon Apex Court to point out the tests evolved to find out the relationship of employer and employee. Some of the cases are already referred to above in the judgment. But in view of resent judgments mentioned below, I find it unnecessary to comment in more detail on this issue. Said judgments are Hon Apex Court reported at between Workmen of Nilgiri Cooperative Marketing Society v. State of Tamil Nadu and between Ramsingh v. Union of India It is not necessary to refer to them at length because necessary facts in present case are yet to crystalise.

The first judgment i.e. in case of Nilgiri Cooperative Marketing Society considers the entire case law in the point and the tests evolved are mentioned from paragraph 34 onwards. In paragraph 35 it is observed:

35. In a given case it may not be possible to infer that a relationship of employer and employee has come into being only because some persons had been more or less continuously working in a particular premises inasmuch as even in relation thereto the actual nature of work done by them coupled with other circumstances would have a role to play.

Observations in paragraphs 37 and 38 are also important and they read:

37. The control test and the organization test, therefore, are not the only factors which can be said to decisive. With a view of elicit the answer, the Court is required to consider several factors which would have a bearing on the result: (a) who is appointing authority; (b) who is the pay master; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job, e.g. whether, it is professional or skilled work; (g) nature of establishment; (h) the right to reject.

38. With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests where-for it may be necessary to examine as to whether the workman concerned was fully integrated into the employer's concern meaning thereby independent of the concern although attached therewith to some extent.

In latter judgment i.e. Ramsingh v. Union of India (supra) the important observations are in paragraphs 15 and 16:

15. In determining the relationship of employer and employee, no doubt 'control' is one of the important tests but is not to be taken as the sole test. In determining the relationship of employer and employee all other relevant/acts and circumstances are required to be considered including the terms and conditions of the contract. It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole 'test of control'. An integrated approach is needed. 'Integration' test is one of the relevant tests. It is applied by examination whether the person was fully integrated into the employer's concern or remained apart from and independent of it. The other factors which may be relevant are - who has the power to select and dismiss, to pay remuneration, deduct insurance contributions, organise the work, supply tools and materials and what are the 'mutual obligations' between them (See Industrial Law - Third Edition by IT. Smith and JC Wood - at pages 8 to 10).

16. Normally, the relationship of employer and employee does not exist between an employer and Contractor and servant of an independent Contractor. Where, however, an employer retains or assumes control over the means and method by which the work of a Contractor is to be done it may be said that the relationship between employer and the employee exists between him and the servants of such a Contractor. In such a situation the mere fact of formal employment by an independent Contractor will not relieve the master of liability where the servant is, in fact, in his employment. In that event, it may be held that an independent Contractor is created or is operating as a subterfuge and the employee will be regarded as the servant of the principal employer. Where a particular relationship between employer and employee is genuine or a camouflage through the mode of Contractor is essentially a question of fact to be determined on the basis of features of relationship, the written terms of employment, if any, and the actual nature of the employment. The actual nature of relationship concerning a particular employment being essentially a question of fact, it has to be raised and proved before an industrial adjudicator. Conclusion Nos. 5 and 6 of the Constitution Bench decision of this Court in Steel Authority of India (supra) are decisive for purposes of this case which read asunder :

What is the regular work of the establishment of petitioner will therefore be required to be ascertained first and thereafter how he is parting away with it in favour of any contractor and how he is placed in relation to proposed beneficiary under the scheme i.e. employee will be required to be verified. What is exact role played by such intermediaries will also be important. This will require verification of written contracts if any, other documents in relation to payments, receipts etc. maintained by petitioner, his contractor, sub-contractors,

petty contractors. Therefore this again is a question which will have to be answered after scrutinising the records and evidence made available in an inquiry under Section 7-A of P.F. Act. There cannot be any panacea applicable in this respect.

The emphasis according to petitioners is not only on the nature of work but also about joining the establishment of employer which is or which can be covered under P.F. Act. The employee must be shown to be performing the regular work in or in connection with the establishment of employer. However, according to them, that alone has not been, held to be enough and such worker must be shown to have joined such establishment at least for some period & in that case only he can be covered under the 1952 Scheme" from the date of joining". Here it is not in dispute that establishments of the petitioners are already covered under P.F. Act. Question is whether a worker whether on site or otherwise, of petitioner employed directly or indirectly briefly can be treated as part of establishment of petitioner or can he be treated as part of establishment of a contractor who deputes him to said site and if he cannot be associated either with petitioner or such contractor, whether he is to be ignored even though he has performed work of regular nature of establishment of petitioner. This can be found out by applying "control test" or "integration test" as has been laid down by Hon Apex Court in judgments in case of Nilgiri Cooperative Society (supra) or in case of Ramsingh (supra). It cannot be ruled out that there may be contractors undertaking only specialised jobs like electrification, plumbing, interior decoration etc. and these contractors may simultaneously work on different sites of more than one establishment like that of present petitioners and depute their skilled labour to such sites & rotate them depending upon need. Here, the tests mentioned by Hon Apex Court above will have to be invoked to find out whether there is employer-employee relationship between petitioner and such worker/employee. But when such employee who frequently changes his employer/contractor and therefore, either himself does not accept an obligation or on whom there is no obligation to report for duty every day, if he can be identified & reached, benefit of coverage can be extended to him. Considering human tendency, it is not possible to presume that any worker would generally not like stability or continuity of work. But still if there exist such worker, in absence of proper scheme under P.F. Act to keep his track, it is difficult to establish his identity and to deliver the benefit to him. But then the provisions of Section 2(f) are very clear in this respect and the moment ingredients thereof are satisfied, the worker becomes employee employed for wages in establishment of petitioner and insistence upon some continuity is therefore unwarranted. Therefore, there need not be lasting bond or relationship of employer and employee between parties casting obligation upon employee to report for duty as per directions of his employer on next day. By performing work which is of regular nature and of establishment of any of the Petitioners, or other work work in connection with such regular work which is routinely available with petitioner, an employee who has so worked even for a single day can be said to have joined his employment and establishment. For said definition-clause "joining" is not a question of intention to be examined in the light of material on record. There may be some difficulty in establishing employee's identity or in making benefits reach to him but that cannot halt the implementation of P.F. Act. Unless and until the P.F. department makes provision like his enrollment with some central board and puts obligation upon all contractors and employers to provide work only to such registered workers, such situation cannot be taken care of. Preparation of any scheme in this respect

may be very difficult on account of the very nature of working of system as it is mostly illiterate villagers who come to towns & cities in search of such manual work. Any person ready and willing to work offers himself for such manual work and is hired by needy person or contractor 6b this part of activity of making the work available to employee is neither organised nor regulated by any law. If condition of registration of workers is imposed, a new migrant to city or needy labour may find it difficult to earn livelihood. Not only this, any worker may later work at house of any person for the repairs etc. for doing private work and get paid directly through house owner. In that event he will not be working in any establishment & hence not covered by P.F. Act. The options investigated into by 134 CBT meeting of respondents also assert necessity of taking appropriate steps in this direction. Hence, there is emphasis on identity of worker in cases where evasion of P.F. deduction is detected and past arrears are required to be worked out and recovered. While investigating and examining records of contractors or builders or subcontractors or of petty contractors engaged by Petitioners, the P.F. department in process of identifying the workers may be in position to link a particular worker to any one of them because of continuation of such worker under him for some time. Such worker, if facts support, may then be treated as employee of that establishment (other than that of petitioner) by examining the situation in the light of "integration test" and "control test" on various other factors as laid down by Hon Apex Court. Then if other conditions are satisfied, such employee may be entitled to coverage from date of joining that establishment. Such particular contractors or builders or subcontractors or of petty contractors in that event can be made accountable for deductions of such employee/worker or site worker depending upon the agreement between them 8b Petitioner. Even if this little stability or saving becomes possible for such freelance worker/employee, that will also farther the cause of P.F. Act.

D. Petitioners have also invited attention to paragraph 80 of 1952 Scheme to show that the coverage from "date of joining" is not introduced in it and the old position is retained. Attention in this respect is also invited to paragraph 81 and substituted paragraph 26(3) thereunder to show that it also retains requirement of some earlier continuation of such employee before qualifying him for coverage. They also invited attention to paragraph 16 of Employee's Pension Scheme 1995 to show that at least one month's contribution must be paid for becoming eligible to claim pension. Respondent department has invited attention to circular to show that payment of even contribution of one day in the month is sufficient to enable claimant to claim pension under 1995 scheme. However validity of amendment to paragraph 26 is not questioned by petitioners and no arguments in this respect on the point of validity thereof on account of alleged discrimination have been advanced before this Court. The question of constitutionality of said amendment to paragraph 26 is already settled by Hon Apex Court. Hence it is not necessary to consider said arguments in these petitions.

9. Next question is about identifying the beneficiary employee. In 1989(II) L.L.N. 987, a case between Food Corporation of India and Provident Fund Commissioner, Hon Apex Court has considered this issue. It appears that the grievance of Food Corporation of India was that it was denied reasonable opportunity to produce material in proof of identification of workers in respect of whom contribution was payable. It contended that contractors engaged by it were in possession of relevant lists and Commissioner did not issue notices to

contractors nor made them parties to proceedings in spite of requests by it. The workers union contended that Corporation being principal employer was also duty bound to maintain list and it failed to produce the same. The Hon Apex Court observed that question before it was not whether one failed to produce the evidence but question was whether Commissioner, a statutory authority, exercised powers vested in him to collect the evidence before determining the amount payable under P.F. Act. Observations in paragraph 9 are important and after noticing provisions of Section 7-A in earlier paragraph, Hon Court says:

9. It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has power requiring the discovery and production of documents. The power was given to 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. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person.

The Appellate Tribunal at New Delhi in appeal ATA No. 966 (12) 2004 between B.S.N.L. v. Assistant Regional Provident Fund Commissioner, Udaipur vide its order dated 23rd March 2005 held that the purpose of Act is not to collect the money and to keep it in the coffers of Government and workers have to be identified first before the amount is assessed and recovered. The act of determining dues by taking hypothetical percentage of total contract value towards the wages and recovering the same from Employer would not otherwise help the workers who remain unidentified. The Appellate Authority has relied upon above-mentioned Apex Court judgment in support.

It is apparent that as yet no inquiry under Section 7-A of P.F. Act has been held in two of these matters and grievance in this respect is therefore premature. Further the learned Counsel for Provident Fund Authorities has in unequivocal terms stated that the quasi judicial authority will complete all necessary formalities including job of establishing identity of beneficiaries before proceeding further to effect recovery. In matter of Sandeep Dwellers, readiness to hold fresh inquiry is already expressed. The discussion made above and readiness of respondents to identify beneficiaries shows that the arguments of petitioners that scheme is not meant for site-workers or casual or contract workers and it does not have any procedure for its implementation qua such workers are therefore only hypothetical and liable to be rejected.

10. Petitioners Sandeep Dwellers in writ petition 1064/2001 have got a different grievance to make in addition to the above issues. After receipt of summons under Section 7-A defences on the line mentioned above have been raised by petitioners in their reply. It appears that there inquiry under Section 7-A of P.F. Act is already complete and the dues of provident fund from 5 contractors for the period from 11/1998 to 4/ 2000 have been worked out at Rs. 2,57,500/ only (i.e. Rs. Two Lakh Fifty seven thousand Five hundred only) and about dues of escaped assessment on account of non production of records or otherwise it is mentioned that

the same would be determined under Section 7(C) of P.F. Act. These five contractors are Khemlal Chawan, Baburao Urkude, Sharad Karwade, Kuber Chawan & Jafar Ali. Petitioner state that it could produce records only from last 3 contractors for the period from April 99 to March 2000 while the first 2 contractors could not be contacted and their records could not be produced. Request was made to Assistant Provident Fund Commissioner to issue summons to these remaining contractors but said request was not entertained and burden in the matter was wrongly placed on shoulder of petitioner. It is further stated that amounts shown as expenses on account of wages have been straightway accepted as wages paid to employees/Labour and contribution has been worked out accordingly without going into the issue of coverage of its recipients or issue whether entire expenditure under that head is of wages only. The report of Enforcement Officer on the basis of available record has been extended even to the period for which records were not available. As per judgments delivered by Hon Apex Court as also by Appellate Authority, the employees who are to receive benefit of such contribution have not been identified before effecting deduction or recovery from employer. It is contended that there is total non application of mind to these aspects by Assistant Provident Fund Commissioner and the order is vitiated. Attention has been invited to judgment of Division Bench of this Court reported at 2004 B.C.I. (O.O.C.J.) 1 : 2004 (2) Mh.L.J. 164 between BASF India Limited v. M. Gurusamy to point out how expression "in connection with the work of establishment" is required to be examined. Also in addition to other judgments mentioned above, judgment of Hon Apex Court reported at between Workmen of Nilgiri Cooperative Marketing Society v. State of Tamil Nadu (supra), particularly discussion contained in paragraphs 47, 62, 63 are pointed out to show that burden to show employer-employee relationship was upon respondent department and discussion of precedents in paragraphs 71 to 94 is also pressed into service to point out relevant tests in this respect. In this respect attention is invited to judgments reported at Food Corporation of lndia v. Provident Fund Commissioner reported at (supra) And ATA-747 (8)/2001 Navbharat Fuse Co. v. Assistant Provident Fund Commissioner, Raipur decided on 12/4/2005. In latter judgment, the Appellate Authority has found that recovery for casual workers has been ordered without their being cogent evidence on record and therefore has remanded the matter back for fresh inquiry under Section 7-A In 1989(II) L.L.N. 987 (supra) powers of Commissioner to collect evidence in such inquiry are commented upon by Hon Apex Court and it is observed that these powers are given to determine actual concrete difference in payment of contribution and other dues by identifying the workmen. Hon Apex Court has further observed that the Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion and it is his legal duty. However it appears that the present petitioners did not dispute the facts gathered in spot inspection by Provident fund Inspector, and as such there was no occasion to hold proper inquiry under Section 7-A of P.F. Act. The authority has compared the report of Inspector with the records produced by employer. Undisputed records produced by employer are accepted and hence there is no question of any deviation from principles of natural justice or from the procedure to be followed in inquiry under Section 7-A The burden initially was upon department which it discharged by producing the record of inspection, and showing it to be correct. Burden thereafter shifted to Petitioners. On the basis of records made available by Sandeep Dwellers in relation to all 5 contractors, calculations were made on average basis also for period, for which records were not made available. However steps taken by authority

in relation to identification of workers are not apparent and all requirements in this respect are to be fulfilled before effecting recovery. Expenditure shown as wages in balance sheet has been acted upon without verifying the actual part thereof appropriated towards payment of wages by Employer. The quantification of amount without identifying beneficiaries or any attempt to recover it is therefore unsustainable. Respondents state that no directions in relation to any procedure to be followed by such quasi judicial authority are required from this Court and procedure as settled through various judicial pronouncements will be followed. It is to be kept in mind that the purpose of such inquiry is twofold. The employees joining the establishment under scrutiny in future will definitely be benefited. However finding out quantum of evaded contribution amount and its recovery has to be for workers who are identified and to whom P.F. department can deliver their due savings. Inquiry therefore has to be to ascertain and identify such workers whose legal rights have been defeated & powers are to be used for this purpose. In the background of arguments advanced, I find it wholly unnecessary to issue any direction at least at this stage when respondents have shown readiness and willingness to follow proper procedure. The petitioners will be present before respondent authority and they can always point out their grievance or need in relation to process/procedure adopted in such enquiry. The argument about "excluded employee" or effect of ceiling on their salary can also be gone into in such inquiry. Clause 2(f)(ii) of 1952 Scheme which defines excluded employee clearly states that the pay required to be considered is a monthly pay and it also defines pay to include basic wages with dearness allowance, retaining allowance and cash value for concessions. If employee has worked for period of less than one month in any establishment, arithmetically his pay for one month can easily be calculated and taken into account. The impugned order under Section 7-A dt. 5/3/2001 at Annex. "S" is quashed & set aside. In view of the lacuna found and observations made above, it cannot be said that remedy of filing appeal under Section 7I is bar to the exercise of writ jurisdiction by this Court. It cannot be forgotten that this objection is being raised at the stage a final hearing and after about four years of admission of writ petition.

11. Petitioners have attempted to demonstrate that as beneficiaries are unknown and the department itself had doubts, recovery from any earlier date for which no deduction has been made should not be allowed. The law in the point is already discussed above. The beneficiaries must be known and the amount of deductions cannot be permitted to lie idle with the department. Hence while finding out whether employees are covered under the Scheme/Act or not, this issue can be conveniently gone into by authority under Section 7-A of P.F. Act and it can choose to give effect to its order from any appropriate date as per evidence on record.

12. The writ petitions are therefore partially allowed. The impugned order under Section 7-A dt. 5/3/2001 at Annex. "S" in W.P. 1164/ 2001 is quashed & set aside. Demands, if any, served upon petitioners in other petitions are also quashed. Petitioners to file appropriate replies/amendments to their reply if already filed, if necessary in response to notices issued by Regional Provident Fund Commissioner and said authority to proceed further to hold inquiry & investigate as per provisions of Section 7-A of P.F. Act. The said inquiries shall be conducted and completed as early as possible & in any case within period of six months from

the date of communication of these orders to respondents. Rule made absolute accordingly. No costs.