

(2022) 05 DEL CK 0219

In the Delhi High Court

Case No : Civil Writ Petition No.) 4083 Of 2015

Central Board Of Trustees (EPFO)

APPELLANT

Vs

M/S Era Infra Engineering Ltd.

RESPONDENT

Date of Decision : 31-05-2022

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2(f), 6, 7A, 7B, 7O, 7I, 8A
Evidence Act, 1872 — Section 106
Insolvency And Bankruptcy Code, 2016 — Section 7
Employees State Insurance Act, 1948 — Section 40, 41, 41(1), 44, 44(2), 44(3), 45, 45A
Private Security Agency (Regulation) Act, 2005 — Section 2(g)
EmployeesState Insurance (General) Regulations

Citation : (2022) 05 DEL CK 0219

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Rajesh Kumar, Puneet Yadav, Jayant Mehta, Ajay Bhargava, Wamika Trehan, Milind Sharma, Smiti Verma

Final Decision : Disposed Of

Judgement

V. Kameswar Rao, J

1. This petition has been filed with the following prayers:-

"a. setting aside the impugned order dated 27th November 2014 passed by Shri R.L. Koli, Ld. Presiding Officer Employees Provident Fund Appellate Tribunal, New Delhi, in Appeal i.e. ATA No. 927 (4)2014 "M/s Era Infra Engineering Ltd. V/s RPFC Delhi.

b. Pass any further order/relief as this Hon'ble Court deem fit and proper in favour of the petitioner and against the respondents in the present facts and circumstances of the case."

2. The challenge in the instant petition is to an order dated November 27, 2014

passed by the learned Employees Provident Fund Appellate Tribunal (the 'Tribunal', hereinafter) whereby it quashed/set aside the order dated August 29, 2014 passed by the Regional Provident Fund Commissioner ('RPFC', for short and 'Adjudicating Authority', hereinafter) under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ('EPF Act', hereinafter), whereby the respondent No.1 herein was directed to deposit an amount of ₹ 108,67,37,263/- towards Provident Fund ('PF', for short) contribution.

3. The respondent company is an Establishment covered under the provisions of the EPF Act, and has been allotted the code number DL/15284, and has 14 other sub-codes, for administrative purposes. The petitioner (hereinafter referred to as the 'Department') received a letter dated March 09, 2011 and an inspection report of the sub-regional office, Varanasi from the office of the ACC (DL & UK) regarding evasion of dues in compliance of the provisions of EPF Act by contractors of the respondent Establishment. In the report received from the Sub-Regional Office, Varanasi, it was stated that 48 workers working for the Establishment at D-Plant Anpara, Sonbhadra site were not receiving PF benefits, along with a list of such employees, duly signed by the Time Keeper. Accordingly, an inspection squad headed by an Assistant Provident Fund Commissioner was constituted by the Department to verify and ensure compliance by the Establishment. Based on their inspection of the records produced by the Establishment, the squad reported that PF benefits had not been extended by the Establishment to all eligible employees. Thereafter, the Establishment was directed by the squad to enroll all these employees since the date of their joining and report compliance to RPFC-Delhi. However the Establishment failed to do so. Thereafter, another letter, received from the Sub-Regional Office, Varanasi, along with the report of the inspection squad, stated that there was evasion of PF dues in respect of 487 employees, working in different projects/ sites of the Establishment.

4. Subsequently, a notice under Section 7A of the EPF Act was issued to the Establishment for the period from April 2008 to March 2012 vide summons dated December 03, 2012, with a direction to appear before the Adjudicating Authority on December 17, 2012 along with documents required for consideration such as attendance registers, membership eligibility registers, cash book/ ledger and vouchers, payment registers/pay bills, and any other documents necessary for ascertaining attendance, payments etc. The Establishment filed its reply dated September 13, 2013 to the notice issued under Section 7A of the EPF Act and to the inspection report dated June 21, 2013, denying the allegations levelled by the Department. The Department then filed a deposition report dated July 09, 2014 with summarised information on the sub-contractors who were separately covered and not covered under the EPF Act. In the report, it was specifically stated that the books of accounts and balance sheet of the respondent were being maintained centrally in the corporate office for all projects. The Establishment has engaged a large number of contractors for different projects all over India, of which, only 8% to 10% were independently covered under the

Act whereas the remaining were not covered and no PF code/number was provided by the Establishment. As such, under the EPF Act, the Establishment is wholly liable for the PF dues on the wage / labour component paid by the Establishment to its sub-contractors, who were not covered under the Act. Further, it was also stated that liabilities of the amount paid as labour component to other contractors covered independently also arises as the principal employer failed to seek compliance from the sub-contractors in respect of all eligible contractual employees. The respondent Establishment filed its reply dated July 23, 2014 to the said deposition report, raising an objection that the soft data provided by the Establishment was not verified. After providing an opportunity to the parties and considering the documents, pleadings and demands propounded by them, the RPFC, i.e., the Adjudicating Authority under Section 7A of the EPF Act, held that the Establishment is liable to pay the PF and allied dues in respect of the employees who were employed in or in connection with the work of the Establishment and got their wages directly or indirectly from the employer. The Adjudicating Authority vide order dated August 29, 2014 determined an amount of ₹108,67,37,263/- (Rupees one hundred eight crore sixty seven lakh thirty seven thousand two hundred sixty three) as due from the respondent herein, on account of PF, Pension Fund and Insurance Fund for the period between April 2008 and March 2012 and the order was forwarded to the respondent Establishment vide covering letter dated September 01, 2014, with a direction to comply with the same.

5. Aggrieved by the said order of August 29, 2014, the respondent Establishment, on September 17, 2014 filed a statutory appeal bearing ATA No. 927 (4) 2014 under Section 7-I of the EPF Act before the Tribunal, along with an application seeking waiver of the requirement under Section 7-O, i.e., for depositing 75% of the amount determined by the Adjudicating Authority with the Tribunal. The learned Tribunal heard and allowed the application on September 26, 2014, and fixed the appeal for hearing on October 27, 2014. Subsequently, the matter was fixed for hearing again on November 17, 2014 for filing reply to the appeal. The Counsel for the Department appeared and sought four weeks' time to file reply to the appeal on the ground that the records of the matter are voluminous and as the stakes involved in the matter are high, it requires to be perused in detail and therefore requires some consultation with various officials to draft the reply. However, the matter was adjourned for final hearing on November 26, 2014.

6. On November 26, 2014, the counsel for the Department appeared before the Tribunal and submitted an application seeking adjournment for filing reply with a prayer to grant four weeks time to file the reply to the appeal, but the learned Presiding Officer reserved the matter for Orders without hearing the counsel of the Department and deciding his application. Thereafter, the impugned order was passed. It is the case of the petitioner that the order was passed by the Tribunal ignoring the object of the EPF Act, based on incorrect facts, without application of mind and without giving an opportunity to the Department to file its reply.

Therefore, according to the petitioner / Department, the order is arbitrary, illegal and bad in the eyes of the law.

7. Mr. Rajesh Kumar, learned counsel appearing for the petitioner has submitted that the impugned order is in contravention of the principles of natural justice and the doctrine of audi alteram partem. The doctrine has three basic essentials; firstly, a person against whom an order is required to be passed must be granted an opportunity of being heard; secondly, the concerned authority should provide a fair and transparent procedure, and thirdly, the authority concerned must apply its mind and dispose the matter by a reasoned or speaking order. The impugned order is devoid of all of these essentials.

8. That apart, according to him, the Tribunal has failed to appreciate the provision envisaged in paragraph 30(3) of the Employees Provident Fund Scheme, 1952 ('EPF Scheme', hereinafter) which reads as below:-

"It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges."

9. He stated that therefore the respondent, being the principal employer, was under a duty to pay not only the contribution payable by it, but also that of the employees employed by or through a contractor. The Tribunal also failed to appreciate that in case a contractor does not pay or cause to be paid, the contribution in respect of the employees employed by him, the onus to prove that either he was not liable to pay or that such employees were excluded, lies upon the principal employer, i.e. the respondent herein, which it failed to do.

10. He has stated that the Tribunal has also failed to take into consideration the provisions contained in paragraph 36-B of the EPF Scheme, which states as under:-

"Every contractor shall, within seven days of the close of every month, submit to the principal employer a statement showing the recoveries of contributions in respect of employees employed by or through him and shall also furnish to him such information as the principal employer is required to furnish under the provisions of the Scheme to the Commissioner."

11. In case any of the contractors or sub-contractors were not co-operating, it was the duty of the principal employer to report such non-cooperation or to take action against such contractor/sub-contractor. In any case, there is no averment in the pleadings of the respondent that there was any such non-cooperation.

12. It is his submission that the respondent Establishment had failed to co-operate with the proceedings under Section 7A of the EPF Act. The Establishment has not fulfilled the obligation cast on them to provide all materials/documents including the names of the workmen/employees, the wages/salary drawn by them and any other relevant material which may have constituted part of the

head wages and benefits, not only with respect to the respondent's own employees, but also that of the employees of the contractors/sub-contractors. The employer cannot escape this obligation merely by providing a list of contractors. The Tribunal has given no findings on these issues.

13. Mr. Kumar has also contended that the Adjudicating Authority was constrained to assess the liability of the Establishment based on the documents submitted by the Establishment as the Establishment failed to satisfy the obligation to identify the employees themselves and report the same to the Department. He stated that this obligation is on the Establishment themselves and not on the Department. In this regard, he has relied upon the Judgments of this Court in *Saraswati Construction Company v. Central Board of Trustees*, bearing W.P.(C) No. 5625/2007 decided on April 19, 2010 and of the Supreme Court in *SK Nasiruddin Beedi Merchant Ltd. v. Central Provident Fund Commissioner and Anr.*, 2001 (2) SCC 612, wherein it has been held that the Establishment would furnish the names of workers to the PF Commissioner and thereafter, the PF Commissioner would verify these names and calculate the liabilities on the basis of such verification. As the Establishment failed to provide the requisite information, the Adjudicating Authority diligently analysed all the relevant documents and information available on record and found that there was an effort on part of the Establishment to mislead the Department, and therefore they were liable to pay PF contributions on the wages paid to the employees as per their own balance sheet. In this regard, reference is made to a Judgment of the Supreme Court in the case of *Panther Security Service Private Limited v. EPFO and Anr.*, 2021 (1) SCC 193. Even as per Section 106 of the Indian Evidence Act, 1872, where any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The onus to seek exclusion of employees, if any, was on the Establishment. To buttress his argument, he has relied upon the decision of this Court in *Micro Devices Inc. v. Infocom Digital Systems (P) Ltd., Co. Pet.* 147/1996 decided on March 9, 2018, and also on the Judgment of the Supreme Court in the case of *Regional Director, ESIC v. Kerala State Drugs and Pharmaceuticals Ltd. and Ors.*, 1995 Supp. (3) SCC 148, wherein the Apex Court held as under:-

".....as regards the finding that the workmen were unidentifiable, what is forgotten is that under the act, once an Establishment comes to be covered by the Act, the employer becomes liable to pay the contribution in respect of the employees in his employment directly or indirectly. The contribution which had become payable for the relevant period has to be paid even if the employees concerned are no longer in employment. Whether the employees are unidentifiable today or not is, therefore, irrelevant so long as the contribution was liable to be paid on their behalf, when they were in employment".

14. That apart, he would submit that the Adjudicating Authority had given detailed and considered findings on the two issues raised by the Department, the first issue being that the labour component in the payments made to the

contractors is very low, as their works are highly mechanised and technique oriented. The Adjudicating Authority held that the same is misplaced and uncalled for as the Establishment has explicitly given the labour component out of the total payments made to the contractors, and that the Department has also calculated the dues on such labour component only. Further the Adjudicating Authority found that there is no dispute between the two parties regarding the amount of labour payments. The Establishment had also admitted that the data provided by them during the proceedings held on July 28, 2014, is correct. As regards the second issue raised by the Establishment, i.e., they had no control over the work of the contractual labourers and there was no employer-employee relationship between them, the Adjudicating Authority, after referring to Sections 2(f), 6 and 8A of the EPF Act and paragraphs 26(2), 30 and 36B of the EPF Scheme, has held as under:-

"As per the aforementioned provisions, it is evident that any employee employed in or in connection with the work of the Establishment shall be an employee of the Establishment. In the present case the employees who were engaged through the Contractors were working in connection with the work of the Establishment. The Contractors were merely working for the Establishment as per the specifications prescribed by the Establishment and acting-as agent/mediators of the respondent Establishment. The Establishment's main activity is development and constructions which is done by it through its contractors and Sub-contractors. So all those Contractors and Sub-contractors become the agents of the Establishment and all labour employed through them are employees of the Establishment. The Contractors are merely the intermediaries between the Establishment and the employees whereas the work of these employees is the main activity of the Establishment for which it exists. Hence there is no doubt that these employees are the employees of the Establishment within the meaning of Section 2(f) of the Act. Hence the Establishment is liable for the payments of EPF dues in r/o such employees. In most of the cases are not even independently covered so there is no chance that such labour could have been extended the EPF benefits through those Contractors. Regarding few Contractors who are independently covered the Establishment could not produce any evidence to show their compliance. Hence being the Principal Employer it is absolutely the responsibility of the Establishment to ensure payment of EPF dues of such labourers engaged through those covered Contractors. The provisions referred above provide beyond doubt that Principal Employer is duty bound to ensure compliance before releasing any payments to the Contractors. The Act provides that the Principal Employers must ensure execution of legal provisions in true spirit."

15. He has also argued that if the Tribunal was of the opinion that the Adjudicating Authority did not exercise its powers properly to collect evidence before passing the final order, then it could have called for records of the Adjudicating Authority or could have directed the parties before it to lead additional evidence or to file affidavits in respect of their records, or it could have

remanded the matter back to the Adjudicating Authority with a direction to conduct proper adjudication of the matter. He has referred to the Judgment of the Supreme Court in the case of Rushi Guman Singh v. State of Orissa and Ors., 2013 (11) SCC 266 to contend that a court of law does not ordinarily substitute its own views on the evidence, unless some error of law or principle is found.

16. Mr. Kumar has also contended that the Tribunal, on November 17, 2014, refused to give four weeks time to file reply and fixed the matter for November 26, 2014, on which day it reserved the matter for order without hearing the submission of the counsel for the Department. Finally on November 27, 2014 the matter was decided and on the same day and sent the order to the Department with a direction to comply with the same.

17. According to Mr. Kumar, the judgments relied upon by the Tribunal in its order would not be applicable in the factual matrix of the instant case. He has placed reliance on the judgments of the Supreme Court in the case of Ambica Quarry Works. v. State of Gujarat, 1987 (1) SCC 213 and Bhavnagar University v. Palitana Sugar Mills, (2003) 3 SCC 111 to contend that ratio of any judgment must be understood in the background of the facts of the case.

18. He also stated that in Assistant PF Commissioner, Nasik v. M/s Padmashri Dr. Vithalrao Vikhe Patil, WPC No. 1296/2010, the High Court of Bombay held that the Appellate Tribunal cannot let the Establishment free from its statutory obligation by quashing and setting aside the order passed by the Adjudicating Authority under 7A of the EPF Act. That apart, in OG Bajaj Construction v. Assistant Provident Fund Commissioner, Nagpur, bearing LPA No. 134/2020, the High Court of Bombay prescribed the following guidelines while deciding an application filed under Section 7-O of the EPF Act:-

i. The order challenged under appeal is patently illegal or without jurisdiction.

ii. No liability whatsoever is attracted.

iii. Even if the liability is attracted, on facts the appellant has no capacity or resource and liquidity of paying the dues so claimed.

Further he has relied upon paragraphs 17 and 19 of the Judgment of the Division Bench of the High Court of Gujarat in the case of Employees Provident Fund Organisation v. Rollwell Forge Ltd., LPA No. 12/2010, to contend that an appeal cannot be entertained by the Tribunal unless Section 7-O of the EPF Act has been complied with and 75% of the amount determined by the Adjudicating Authority under Section 7A of the EPF Act has been deposited.

19. Mr. Kumar has submitted that the respondent Establishment being the principal employer, the contract labourers would fall within the scope of Section 2(f) of the EPF Act and provisions of the EPF Act should be construed to their benefit, by referring to the Judgment of the Supreme Court in Officer-in-Charge, Sub-Regional Provident Fund Office & Anr. v. Godavari Garments Ltd., 2019 (8) SCC 149. That apart, he has submitted that the Supreme Court in the case of

Regional Provident Fund Commissioner v. The Hooghly Mills Company Limited and Ors., 2012 (2) SCC 489 has held that the EPF Act is a social welfare legislation, and as such, in case of any doubt, the statute should be read as a whole considering its design, purpose and the remedy which it seeks to achieve, and the same should be resolved in favour of the class of persons for whose benefit it is enacted. The Supreme Court in the case of Regional Provident Fund Commissioner v. Shibu Metal Workers, 1964-65 (27) FJR 491, and the High Court of Bombay in State v. Giridharilal Bajaj, 1962 II LLJ 46 have held that in construing the material provisions of the Act, if two views are possible, Courts should favour the view which helps achieve the object of the statute. He has placed reliance on the decision of this Court in Builders Association of India v. Union of India, WP(C) 3588/2002 dated August 28, 2014 to contend that even casual labourers/construction workers are eligible for PF benefits.

20. Mr. Kumar has relied upon the Judgment of the Supreme Court in the case of ESIC v. Harrison Malayalam Pvt. Ltd., AIR 1993 SC 2655, to contend that the Establishment has only itself to blame if it failed to get the details of the workmen employed by the contractors, and if the Establishment has failed in its obligation, it cannot be heard to say that the workers are unidentifiable.

21. A counter affidavit has been filed on behalf of the respondent Establishment, wherein it is stated that no default can be found on the reasoning adopted by the Tribunal and as such, the petition needs to be dismissed on that ground alone.

22. At this juncture, I may note that during the course of the present proceedings, a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 filed by a financial creditor of the respondent Establishment was admitted by the Principal Bench of the National Company Law Tribunal vide order dated May 8, 2018, and an Interim Resolution Professional was appointed. In view of this fact, this Court had, vide order dated December 11, 2019 allowed the Interim Resolution Professional to be impleaded as respondent No. 2 in the present petition.

23. Mr. Jayant Mehta, learned Senior Counsel appearing for the respondent No. 2 has, at the outset, stated that the petition suffers from the vice of unexplained delay of more than five months, and in the absence of any explanation to such delay, the extra ordinary writ jurisdiction of this Court cannot be invoked by the petitioner.

24. He has submitted that the Adjudicating Authority while passing the order dated August 29, 2021 under Section 7A had not followed the mandatory procedure for such adjudication and had ignored the report of the squad, which had reported that the Establishment availed the services of various contractors/sub-contractors. No effort was made by the Adjudicating Authority to identify and examine such contractors/sub-contractors and it proceeded to calculate the arrears of PF for the period from April 2008 to March 2012 merely on the basis of the balance sheet of the Establishment, depicting the expenses incurred on

salary/wages. No enquiry/adjudication was made on whether the said salary/wages were paid directly to the workmen/employees or through the contractors/sub-contractors. In the absence of such adjudication, the Tribunal was justified in law to have nullified the order of the RPFC.

25. Mr. Mehta has contested the submission of Mr. Kumar that the impugned order was passed without affording opportunity to the Department to file reply to the appeal. He stated that in appellate proceedings, no written statement/reply is required to be filed and the proceedings are always conducted on the basis of the facts and pleadings/documents available before the Adjudicating Authority whose order is in appeal.

26. It is also submitted that no questions of law arise in the present case, and the questions raised by the petitioner in the petition do not arise out of the order passed by the Tribunal. Insofar as the reproduction of the statutory provisions is concerned, he says there is no dispute with respect to the same, however, to invoke the said provisions, it must be shown that the provisions of the Act are attracted to an Establishment. In the absence of any such adjudication by the Adjudicating Authority, the order requiring the respondent to pay PF to the tune of ₹108,67,37,263/- was wholly unsustainable and has been rightly quashed by the Tribunal.

27. The question that needed adjudication by the Adjudicating Authority was not as to whether the contractors/sub-contractors are separately covered under the Act or not, but whether the work had been outsourced to the contractors/sub-contractors against a lump sum payment and therefore, such out-sourced work carried out by such contractors/sub-contractors would be calculable in the accounts of the respondent. Once it was found as a matter of fact that the respondent Establishment was making payments to the contractors/sub-contractors, then as to whether the said contractors/sub-contractors were covered under the EPF Act and/or had obtained PF code or not would not be an issue relevant. The respondent Establishment could not be held liable for any such expenditure.

28. He would submit that the Adjudicating Authority proceeded in a mechanical manner without applying its mind and without holding a reasonable enquiry as mandated by the EPF Act and proceeded to conclude that the respondent Establishment was liable to pay ₹108 crore approximately, without identifying the beneficiaries. The Adjudicating Authority also did not call upon the contractors/sub-contractors to put forth their assertions or records, though the details of such contractors/sub-contractors were duly provided. The Adjudicating Authority affixed the liability by applying the levy of PF by taking the "Labour Charge" depicted in the balance sheet as the basis for assessment, which is wholly in contravention of the scheme and mandate of the EPF Act.

29. As regards the submission of by Mr. Kumar that the petitioner was not given time to file reply to the appeal, Mr. Mehta would reiterate the contention that

there is no requirement of filing written statement/reply in appellate proceedings. That apart, he has stated that from September 26, 2014 to November 26, 2014, i.e., for two months, the petitioner did not bother to file its objection/reply to the appeal despite repeated opportunities granted by the Tribunal. The petitioner Department deliberately delayed the matter and on every date in between this period had sought time to submit its objections without any cogent reason. Furthermore, the so called voluminous records annexed with the appeal before the Tribunal were mostly the documents of petitioner's hearings etc. The same did not involve any 'studying' as contended by the petitioner. The applications seeking adjournment by the petitioner were filed with mala fide in order to delay the matter and frustrate the case of the respondent. Moreover as evident from the impugned order, the petitioner's counsel addressed his arguments in detail and he was heard accordingly. His submissions have been recorded and dealt with in the impugned order. According to Mr. Mehta, the petitioner is essentially seeking a re-hearing of the issues already heard and decided by the Tribunal. In any case, no new facts could be entertained in an appeal by the Tribunal and as such, there was no requirement of filing reply. He also states that the Department cannot raise the plea of non-grant of hearing, as the presence of the counsel for the Department is duly marked in the impugned order. Therefore, the Tribunal was justified in hearing the appeal and deciding it.

30. Insofar as the submission of Mr. Kumar on the application under Section 7-O is concerned, Mr. Mehta stated that the Tribunal had heard and considered in detail the arguments of the counsel for the petitioner Department before allowing the application and waiving off the condition of pre-deposit. The settled law and facts of the case have also been duly dealt with. Reference in this regard is made to Judgments of this Court in Regional Provident Fund Commissioner v. Ahluwalia Contracts (India) Limited, W.P.(C) 887/2013 decided on August 27, 2019 and Riding Consultants Engineers India Limited v. RPFC W.P.(C) 1882/2021 decided on July 13, 2021.

31. It is submitted that paragraphs 30(3) and 36B of the EPF Scheme would apply to the respondent only if it is classified as principal employer. There is no finding of the Adjudicating Authority classifying the respondent as principal employer viz-a-viz the workers deployed by the sub-contractor on his own. In the absence of any such finding, no liability could be fastened upon the respondent Establishment.

32. Once the RPFC took the head "Labour Charges" as the benchmark for computing the dues without requiring the contractors/sub-contractors to disclose the names of the employees /labourers/workers, then the respondent cannot be held liable for any default attributed to such contractors/sub-contractors. The Tribunal has clearly held that the RPFC has not made any attempt to identify the workers by calling upon the contractors/sub-contractors to disclose their names. The power vested in the Commissioner to summon such contractors/sub-contractors was not exercised by him for reasons best known to him, despite

date, facts and figures being provided by the respondent. He stated that once it is conceded by the Department that the respondent had outsourced the work by appointing contractors/sub-contractors, no liability to provide the list of employees engaged by such contractors/sub-contractors could be fastened on the respondent. The respondent had duly disclosed the names and details of the contractor/sub-contractors and thereafter it was incumbent on the Adjudicating Authority to ensure the presence and attendance of such contractors/sub-contractors. He vehemently denied the submission of Mr. Kumar that the respondent refused to provide information. The report of the inspection squad, records of the Adjudicating Authority and also that of the Tribunal would demonstrate that there was no non-disclosure on part of the respondent Establishment.

33. That apart, Mr. Mehta submitted that the presumptive assessment made by the Adjudicating Authority by taking the head "Labour charges" as the basis for levying PF defies all rationale. The contractors/sub-contractors were not labour contractors but were independent contractors carrying out /executing outsourced work of their client. They were not under the direct control and supervision of the respondent Establishment, but were required for their obligation under the sub-contracting agreement. He states that even assuming that the labour component corresponds to the salary/wages of the workers, the same would not ipso facto bring the said component within the purview of the EPF Act, inasmuch as, for doing so, the Department would have to ascertain the number of workers corresponding to the labour component amount. Not having done so, the Department cannot arbitrarily seek to take the labour competent (which even otherwise is erroneous) for purposes of calculating alleged PF dues. To buttress his arguments, Mr. Mehta has referred to the Judgment of the High Court of Andhra Pradesh in *Karachi Bakery v. Regional PF Commissioner*, W.A. NO. 218/1986, decided on March 29, 1990.

34. Insofar as the reliance placed by Mr. Kumar on *Regional Provident Fund Commissioner v. The Hooghly Mills Company Limited and Ors.* (supra) is concerned, Mr. Mehta would state that the same is distinguishable on facts. There is no doubt that the EPF Act is a beneficial legislation. However, the interpretation of the Act must sail for the benefit of the employee(s) in whose benefit it is enacted. In the present case, as the beneficiaries are not identifiable, no purpose would be achieved by framing the assessment. In this regard, he has placed reliance on the Judgment of the High Court at Patna, titled *Assistant Provident Fund Commissioner v. Nand Lal and Company*, 2016 (3) PLJR 373.

35. Mr. Kumar, in rejoinder submissions has stated that the EPF Act is a legislation for providing social security to employees working in any Establishment engaging 20 or more persons on any day. It provides for compulsory deductions of PF from employees and a contribution from the employer which is deposited in the workers account in the office of the PF Organisation. PF and other contributions have to be deposited by the employer

by the 15th day of the following month in which the employee has worked in the Establishment and the dues become payable to him, because the worker has already performed the employment up to the last day of the previous month. The contributions have to be deposited by the employer/Establishment only after the beneficiary worker has already worked and thus earned this amount in terms of the contract of employment and the provisions of the Act. He states that as such, an effort by the employer to deny employees the legitimate dues which they have rightly earned in terms of the provisions of the EPF Act needs to be looked upon with suspicion, whatever the reason given by such employer/Establishment.

36. It is also stated that every employee employed in or in connection with the work of a factory or other Establishment to which the PF Scheme applies, other than an excluded employee shall be entitled to and required to become a member of the Fund from the day the Act came into existence, and such employee is a subscriber to PF maintained in respect of the factory or other Establishment, or in respect to any other factory or Establishment under the same employer.

37. Written submissions have been filed on behalf of the petitioner, wherein, apart from reiterating the contentions already set forth in the petition and rejoinder, it is submitted that the order under Section 7A of the EPF Act was passed considering the provisions of 2(f), 6 and 8A of EPF Act, and further paragraphs 26(2), 30 and 36(B) of the EPF Scheme. It is not disputed by the respondent that huge amounts were paid to the contractors towards labour component. About 8 to 10 percent of the contractors were covered under the EPF Act and rest of them were not covered as no PF code was provided qua those contractors. Hence, there was no evidence of deposit of PF qua the non-registered contractors. Therefore, it can be assumed that qua 90% of the contractors, no PF was paid by the respondent. The respondent has not produced any evidence to show that the PF had been paid even qua the registered contractors.

38. The Tribunal has set aside the order dated August 29, 2014 mainly on the ground that the alleged contractual employees are not identifiable. According to Mr. Kumar, the aforesaid ground is against the spirit and mandate of the judgments of the Supreme Court in the cases of Regional Director, ESIC v. Kerala State Drugs and Pharmaceuticals Ltd. & Ors. (supra); ESIC v. Harrison Malayalam Pvt. Ltd. (supra) and also the decision of this Court in Micro Devices Inc. (supra). He has also contended that the onus to requisition the documents lie on the respondent/Establishment. In this regard, he has relied upon Saraswati Construction Company (supra) wherein this Court has dealt the effect of two judgments namely Himachal Pradesh State Forest Corporation v. Regional Provident Fund Commissioner, 2008 (3) SCC 247 and Food Corporation of India v. Provident Fund Commissioner, 1990 (1) SCC 68, and in paragraph 11 of the judgment, held as under:-

"If any Establishment and employer is not covered under the said Act then it is

employer to place a sufficient cogent and convincing material before the designated authority in any enquiry under section 7A so as to satisfy the authority with regard to the nonapplicability of the Act and on failure to place any such material, the onus cannot be shifted on the EPF authorities to prove the applicability of the Act....”

Further reliance is placed on case of Gopi Chand and Ors. v. Employees State Insurance Corp., FAO 568/2003 wherein this Court has held that when the facts with regard to the employment of the employees are within the knowledge of the respondent/Establishment themselves, the burden of proving the fact that they in fact employed less employees, than the number covered under the Act, would be cast on them. That apart, it is his contention that none of the judgments relied upon by Mr. Mehta considers the effect of paragraph 30 and 36B of the EPF Scheme. He seeks prayers as made in the petition.

39. Written submissions have also been filed on behalf of the respondent No. 2, reiterating the contentions set forth in the counter affidavit. That apart, it is the contention of Mr. Mehta that the Adjudicating Authority while calculating the liability of the respondent Establishment just took a line from the balance sheet of the Establishment without even trying to ascertain whether it was liable to pay PF for all the workers of the contractors/sub-contractors. Even the report of the Enforcement Officer was not taken into account wherein he had noted that compliance and investigation reports have to be called upon from the regional PF offices to actually ascertain whether the respondent Establishment was liable to pay. He says the respondent Establishment cannot be made liable for all the workers of the contractors/sub-contractors without any investigation in that regard taking place.

40. Further, it is submitted that in the Judgment of the High Court of Patna titled Bharat Sanchar Nigam Ltd. v. Union of India, 2015 SCC OnLine Pat 248 it was observed by the Court that the Establishment therein had failed to provide the record seeking compliance for the contractors, but went on to hold that the Commissioner under Section 7A of the EPF Act was mandated to do a proper enquiry as per the statutory powers given in the relevant section, in which he failed. Mr. Mehta would state that the Adjudicating Authority, which has powers akin to that of a civil court under the Code of Civil Procedure, 1908, to collect relevant information, enforce attendance of a person to examine on oath, discovery and production of documents, has failed to exercise such power and passed an order based on the balance sheet without even ascertaining the beneficiaries for whom the demand was made vide the order. In this regard, he has referred to the decision of the Supreme Court in Food Corporation of India (supra), reiterated in Bharat Heavy Electricals Ltd. v. Employees State Insurance Corporation, 2008 (3) SCC 247 and a Judgment of this Court in Central Board of Trustees v. Standing Conference of Public Enterprises, 2019 LLR 346.

41. That apart, according to him the Supreme Court in the case of Himachal Pradesh State Forest Corporation (supra) has clearly held that the amounts due

from the Corporation will be determined only with respect to those employees who are identifiable and whose entitlement can be proved on the evidence. In the absence of the proper ascertainability of employees who are allegedly entitled to the dues, the Commissioner cannot unjustly enrich himself at the cost of the Establishment. It is the submission of Mr. Mehta that Courts have clearly elucidated upon the powers of the Commissioner in various judgments including Employees' Provident Fund Organisation v. D.A.V. Nandraj Public School, (2019) 2 CLR 1018; and M/s Bata India Limited v. Union of India, MANU/WB/2774/2019. He stated that all the judgments cited by the petitioner including Saraswati Construction Company (supra), Gopi Chand and Ors. (supra), etc. merely deals with cases wherein the applicability of the EPF Act had to be established. In the present case, the question is entirely different. The respondent Establishment never challenged the applicability of EPF Act, but has challenged the ruling that all the contractors and sub-contractors are the responsibility of the respondent Establishment without even ascertaining the same vide powers given under Section 7A of the EPF Act. He seeks dismissal of the writ petition.

ANALYSIS AND CONCLUSION

42. Having heard the learned counsel for the parties and perused the record, the issue which arises for consideration is whether the Tribunal was justified in setting aside the order dated November 27, 2014 of the Adjudicating Authority under Section 7A of the Act.

43. The Tribunal has set aside the order of the Appellate Authority on the ground that it suffers from serious infirmities, inasmuch as the Commissioner, without identifying the beneficiaries i.e., the workers by calling upon the employer / contractor to provide details of the workers could not have determined the PF dues payable under the Act. At the outset, I intend to deal with the submission of Mr. Kumar that the Tribunal has not given the petitioner a reasonable opportunity for contesting the appeal filed by the respondent, inasmuch as even the right to file a reply to the appeal was curtailed. The record of the Tribunal, which was summoned by this Court has been perused. It is seen that the appeal was listed on September 26, 2014. While deciding the application under Section 7-O, the Tribunal granted time and posted the matter on October 27, 2014. On that day, more time was sought by the counsel for the petitioner for filing reply. The request was allowed and the appeal was listed on November 17, 2014. On November 17, 2014, Tribunal granted four weeks time to the petitioner to file a reply and initially posted the matter on April 10, 2015, but later, the Tribunal striking out the date of April 10, 2015 made the date as November 26, 2014. In other words, it effectively adjourned the appeal by a period of nine days from November 17, 2014 which has the effect of the petitioner having nine days of time to file a reply unlike four weeks granted in the order itself.

44. It is the case of the petitioner that on November 26, 2014, an application for adjournment and for filing reply was made at 10 a.m. The Tribunal without deciding the application and hearing the counsel for the petitioner reserved the

matter for orders, which it pronounced on the very next day i.e., November 27, 2014. It is not known whether the change of date of hearing from April 10, 2015 to November 26, 2014 was after informing the counsel for the petitioner. The change of date has resulted in denial of time of four weeks to the petitioner to file a reply to the appeal. Surely the proceedings of November 17, 2014 and November 26, 2014 do not inspire the confidence in the manner in which the same were conducted by the Tribunal. I agree with the submission made by Mr. Kumar that the Tribunal has not given a proper opportunity to the petitioner to contest the appeal.

45. Before I come to the merit of the issue, which arises for consideration, it is necessary for this Court to sum up the submissions made by Mr.Mehta. The same are the following:-

(i) That the petition suffers from vice of unexplained delay of 5 months and as such, the petition should be dismissed;

(ii) No effort was made by the Adjudicating Authority to identify and examine such contractors / sub-contractors and proceed to calculate the arrears of PF for the period April 2008 to March 2012 merely on the basis of balance sheet of the establishment depicting the expenses incurred on salary / wages. No inquiry / adjudication was made whether the salary / wages were paid directly to the workmen / employees or through contractors / sub-contractors.

(iii) No question of law arises in the present case, for which adjudication is required by this Court.

(iv) In order to invoke the provisions of the Act, it must be shown that the same are attracted to an establishment and in the absence of such adjudication, the Tribunal has rightly set aside the order of the Adjudicating Authority.

(v) The question that needs to be adjudicated by the Adjudicating Authority was not as to whether the contractor / sub-contractors are separately covered under the Act or not but whether the work had been outsourced to the contractor / sub-contractors against a lump sum payment, and therefore, such outsourced work carried out by contractors / sub-contractors would be calculable in the accounts of the respondent. In other words, the contractors / sub-contractors were not labour contractors, but independent contractors, carrying out / executing outsource work of their client.

(vi) The Adjudicating Authority affixed the liability by applying the levy of PF by taking the labour charges depicted in the balance sheet, as the basis for assessment, which is wholly in contravention of the Scheme and mandate of the Act.

(vii) Paragraphs 30(3) and 36B of the EPF Scheme would apply to the respondent only if it is classified as principal employer.

(viii) The Adjudicating Authority while calculating the liability of the respondent

establishment itself pick a line from the balance sheet of the establishment without even trying to ascertain, whether it was liable to pay PF to all the workers or the contactor / sub-contractors.

46. Having noted the broad submissions made by the Sr. Counsel for the respondent, at the outset, I intend to deal with the submission made by Mr.Mehta, that the petition is hit by delay and laches having been filed after five months of the impugned order dated November 27, 2014 without any explanation. The plea is unsustainable for more than one reason; (i) Five months is not an inordinate, much less, a delay; (ii) The petition is filed by the EPFO through the Assistant Provident Fund Commissioner (Legal) and surely on receipt of the copy of the impugned judgment, the same must have been examined / discussed at different levels before a decision is taken to file the petition. Thereafter, by appointing a Counsel who would have prepared the petition, which was vetted before the same was filed; (iii) The period of five months has not caused any prejudice to the respondent; (iv) The petition having been entertained and pleadings filed by the parties and the counsel having made detailed and lengthy submissions, the plea to dismiss the petition on delay and laches is not appealing.

47. One of the submissions of Mr. Mehta was that when the work has been outsourced to a contactor against a lump sum payment, then such work is not calculable in the accounts of the respondent. In substance, the plea of Mr. Mehta is that, given the nature of contract of the respondent with the contractor / sub-contractors, the respondent had no control over the work of the contracting workers and they are not employees of the establishment for the purpose of the EPF Act. Suffice to state, the above plea was raised by the respondent before the Adjudicating Authority, who rejected the same by holding in paragraphs 9 and 10 as under:-

"9. The appellant is not responsible for the PF liability in respect of workers engaged through outsourcing agencies, the contractors and sub contractors. The appellant has asserted that the appellant company during the process of executing the project outsources some of the specialized jobs, like electrification, plumbing, interior decoration, painting, earth work excavation, civil and structural works and all other incidental and ancillary works relating to the projects from other Contractors/Sub-contractors/agencies/petty contractor/other Vendors. Such contractors etc. are engaged to deliver the complete the works assigned to them, as per specification and requirement, without involving the appellant. The appellant do not have any control over workmen engaged by the Contractors/sub-contractors etc., therefore, it cannot be said that there exists any master servant relationship between the appellant and the workmen of the contractors/Sub-Contractor. It is noted that the Ld. Commissioner had not called any the Contractors/Sub-contractors to ascertain the status of the workers. Therefore, merely on the ground that the workers have been deployed by the contractors to discharge the work assigned by the appellant cannot be said that

such workers are entitled to raise their legal right to claim provident fund against the appellant who is stranger to them. It is noted that the appellant had engage contractors for doing particular works and said contractor may further himself engage sub-contractors and divide the work and responsibility amongst them. These sub-contractors may then engage labour contractors or petty contractors who may ultimately control the labour. It is also seen that the appellant company is 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 contractor and with each separate establishment or each contractor. The Hon'ble High Court of Bombay in the case of M/s. Sandeep dwellers Pvt. Ltd. Vs. UOI [2007 (1) LLJ 518] had pleased to examined the similar situation regarding engagement of workers by the contractors for the construction company. The Hon'ble High Court observed: 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 appellant 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 the 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 appellant 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 appellant 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 has 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? Taking note of all these questions the Hon'ble High Court of Bombay held that in the absence of actual data on record in this respect, it would not be appropriate for this Court to pronounce on such issues. In this case, Ld. Commissioner has not impleaded the Contractors /sub-contractors to ascertain the actual beneficiaries and employees of the appellant. The contractors and sub contractors are necessary party for identification of beneficiaries and the determination of dues etc..

10. In the impugned Order, the Ld. Commissioner had recorded that it is the sole responsibility of the establishment to provide relevant and sufficient data to help to identify the rightful beneficiaries. The Ld. Counsel for the respondent also supports the said findings of the Ld. Commissioner by putting reliance on the cases of M/s. S.K. Nasiruddin Beedi Merchant Ltd. and Harrison Malayalam Pvt. Ltd. In the instant case, the appellant establishment has produced all the records. The Ld. Commissioner has however not called the contractors/sub-contractors etc. to find out actual number of employees engaged by such contractors in connection with the work of the appellant. In this context, it is relevant to refer the decision of the Hon'ble Supreme Court of India in the case of FCI Vs. The PF Commissioner [1990 (60) FLR 15 SC] wherein it was held that:-

"The question, in our opinion, is not whether one has failed to produce evidence. The question is whether the commissioner who is the statutory authority has exercised powers vested in him to collect the relevant evidence before determining the amount payable under the said Act.

It is of importance to remember that the Commissioner while conducting an inquiry under Section (7A) has the same powers as are vested in a Court under the Code of Civil Procedure for trying a suit.

xxxx xxxx xxxx"

48. I note even the Tribunal has accepted the above finding / conclusion of the Adjudicating Authority by stating in paragraph 12 of the impugned order as under:-

"12. The learned counsel for the respondents cited the case of Builders Association of India v. Union of India (supra), and contended, that the site workers comes within the definition of employees as defined under Section 2(f) of the Act. This issue is not in controversy. The casual workers are employees within the within the meaning of the Act and the employer / builders are under legal obligation to remit the dues in respect of them".

49. I agree with the above conclusion of the Adjudicating Authority and the Tribunal. The respondent establishment has not challenged the conclusion of the Tribunal insofar as the liability of the respondent, being a principal employer to remit the PF dues of the workers of the contractor / sub-contractors.

50. Though, I must state that during the arguments, Mr. Mehta had relied upon the judgment in the case of Karachi Bakery (supra) of the High Court of Andhra Pradesh to contend that the provisions of the Act are not applicable to the facts of this case, I have seen the judgment. In the said judgment, the Court was concerned with the facts wherein the appellant Karachi Bakery, being in wholesale and retail business was asked by a notice to comply with the provisions of the Act. In the reply, the appellant contended, the employees of Devandas Bakery and Ram Bakery who supplied bakery products cannot be treated as the employees of the appellant for the purpose of the Act, which plea

was not accepted by the learned Singled Judge. But on an appeal, the Division Bench by referring to the definition of the employees under Section 2(f) of the EPF Act has accepted and then held that the contract for purposes of Section 2(f) between the establishment and the contractor must be a contract by which a contractor agrees and brings labour to be employed by the establishment. The contractor for purposes of Section 2(f) is purely a labour contractor and not an independent contractor who contracts to deliver a finished product to the establishment and who, for purposes of manufacture of such a finished product, engages labour for his own purposes.

51. The above conclusion of the Division Bench must be construed in the facts of that case and have no applicability to the facts in this case, inasmuch as it is not denied that the work undertaken by the contractor / sub-contractor was of construction on the site of the establishment. Rather, I find, the case is covered by the judgment of the Supreme Court in the case of *P.M.Patel & Sons v. Union of India and Ors*, 1987 AIR 447, wherein the Court was dealing with home workers who produce beedis at home and held they were employees of the establishment. It was observed that the definition of the word 'employees' is wide as defined in Section 2(f) of the Act. A home worker is involved in an activity connected with the work of factory, engaged in the task of rolling beedis. The words 'in connection with' cannot be confined to work performed in the factory itself as part of the total process of the manufacture. On facts, it was noticed that the workers received raw materials from the factory, rolled beedis at home and delivered them to the manufacturer subject to the right of rejection by the manufacturer and this is evidence of requisite degree of control and supervision for treating the manufacturer as the employer. Mr. Kumar is justified in relying upon the judgment in the case of *Officer-in-Charge, Sub-Regional Provident Fund Office and Anr.* (supra) wherein the Supreme Court has held that women workers employed for wages in connection with the work of the respondent company are employees under Section 2(f), and it being an inclusive definition, includes workers who are engaged either directly or indirectly in connection with the work of the establishment and are paid. There is no dispute that the workers of the contractors/sub-contractors have worked for the respondent organisation, though indirectly, but in connection with the work of the establishment.

52. That apart, I state that the Tribunal has not allowed the appeal on the ground that the provisions of the Act are not attracted but it allowed the appeal on the ground of violation of principles of natural justice, inasmuch as the assessment of dues is made on the basis of figures given in the balance sheet without calling the contractors / sub-contractors and identifying the beneficiaries.

53. Mr. Kumar is also justified in relying upon the Judgment in the case of *SK Nasiruddin Beedi Merchant Ltd.* (supra), wherein the Supreme Court has held that the definition of employee under Section 2(f) is an inclusive definition and includes workers who are engaged either directly or indirectly in connection with

the work of the establishment and are paid wages. He is also justified in relying upon the Judgment of the Supreme Court in *Regional Provident Fund Commissioner v. The Hooghly Mills Company Limited and Ors.* (supra) wherein it held that EPF Act is a social welfare legislation and in case of any doubt, the statute should be read as a whole considering its design and purpose and the remedy it seeks to achieve and should be resolved in favour of the class of persons for whose benefit it is enacted.

54. Having said that, the issue that arises is whether the Adjudicating Authority could have determined the PF dues with regard to the workers of the contractor / sub-contractor of the respondent without seeking their presence and identifying the beneficiaries i.e., the workers.

55. In this regard, the plea of Mr. Kumar are the following:-

(i) The Adjudicating Authority was constrained to assess the liability of the respondent based on the documents submitted by it as the respondent had failed to satisfy the obligation to identify the employees themselves, which was on the respondent and not on the Department;

(ii) The Adjudicating Authority diligently analysed all the relevant documents and information available on record as submitted by the respondent;

(iii) The respondent was required to have the knowledge and hence, the burden of identifying the fact was upon the respondent;

(iv) Whether the employees are unidentifiable today or not is irrelevant, so long as the contribution was liable to be made on their behalf when they were in employment;

(v) It was the obligation of the respondent to get the details of the workmen employed by the Contractors and if the establishment has failed in its obligation, it cannot be heard to say that they are unidentifiable.

56. On the other hand, the submission of Mr. Mehta was that the Adjudicating Authority did not issue notice to the Contractors / Sub-Contractors even though the respondent had requested the Adjudicating Authority in that regard so as to ensure that such Contractors / Sub-Contractors duly provide the information and identity of the workers. According to him, for the Adjudicating Authority to fix the liability upon the respondent by taking labour charges depicted in the balance sheet is wholly in contravention of the EPF Act.

57. I may, at this stage state that both the counsel have relied upon the judgments of the Supreme Court, this Court and other High Courts in support of their respective submissions, that there is no requirement to identify the beneficiaries. At the same time, the reliance placed by Mr. Kumar on paragraphs 30(3) and 36B of the EPF Scheme is required to be considered.

58. Mr. Kumar, in support of his submission has relied upon the judgments *Regional Director, ESIC v. Kerala State Drugs and Pharmaceuticals Ltd. & Ors.*

(supra). There, the Supreme Court was concerned with facts that large number of employees were engaged by the respondent Kerala State Drugs and Pharmaceuticals Ltd. through its Contractor for constructing Vitamin A plant of the respondent-company. After the construction of the plant, the contractor and his employees were no longer connected with the respondents. It is thereafter that the ESI Corporation raised a demand on the respondent company for contribution in respect of the said employees towards insurance. Both the Insurance Court and the High Court held that since the contribution was demanded in respect of the employees who had since long ceased to be the employees working on the premises, no such contribution was leviable from the respondent company. To arrive at this conclusion, the Court gave two reasons. The first one was that since the employee in respect of whom contribution was asked had ceased to work in the premises of the respondent company, there is no benefit which will now accrue to them by such contribution, and second, the workmen are unidentifiable. The conclusion of the Authorities below was negated by the Supreme Court by stating that such a conclusion is contrary to the object of the Employees' State Insurance Act, 1948 ('ESI Act', hereinafter) and the purpose of insurance scheme under it. The Supreme Court held that the contribution is levied on the employer in respect of the employees engaged by him directly or through another agency. It is for the benefit of all workmen in general who are covered by the ESI Act. The contribution is irrespective of the fact whether the employees get or do not get the said benefit. It further held there is no quid pro quo between the persons insured and the benefit available under the Act. On the plea that the workmen were unidentifiable, the Supreme Court held what is forgotten is that under the Act, once an establishment comes to be covered by the Act, the employer becomes liable to pay the contribution in respect of the employees directly or indirectly. The contribution which had become payable for the relevant period has to be paid even if the employees concerned are no longer in employment. Whether the employees are unidentifiable today or not is, therefore, irrelevant so long as the contribution was liable to be paid on their behalf, when they were in employment.

59. Similarly, Mr. Kumar had also relied upon the case of ESIC v. Harrison Malayalam Pvt. Ltd. (supra), wherein the Supreme Court had considered a similar issue i.e., whether the employees of contractor engaged by respondent company to execute certain contract were covered by the ESI Act, and whether, contribution was payable although contract was completed much prior to demand for contribution made by the Corporation. In that case as well, both the Authorities i.e., the Insurance Court and the High Court held against the Corporation on the ground that workers in respect of which contribution is demanded were casual employees of the Contractor and since contract was over long ago, they are not identifiable. The Supreme Court rejected the plea by stating that it was the duty of the respondent Company to get necessary details of workmen employed by the Contractor on the commencement of the Contract since the primary responsibility of payment of the contribution is on the principal

employer. On the admitted fact that the respondent Company had engaged the contractor to execute the work, it was also the duty of the respondent Company to get the temporary identity certificates issued to the workmen as per the provisions of Regulations 12, 14 and 15 of the Employees' State Insurance (General) Regulations, 1950 and to pay the contribution as required by Section 40 of the ESI Act. Since the respondent Company failed in its obligation, it cannot be heard to say that the workers are unidentifiable. It was within the exclusive knowledge of the respondent Company as to how many workers were employed by its contractor. If the respondent Company failed to get the details of the workmen employed by the contractor, it has only itself to thank for its default. Since the workmen in fact were engaged by the contractor to execute the work in question and the respondent Company had failed to pay the contribution, the Corporation was entitled to demand the contribution, although both the contribution period and the corresponding benefit period had expired.

60. The Supreme Court also held, the Scheme under the ESI Act for insuring the workmen for conferring on them benefits in case of accident, disablement, sickness, maternity etc is distinct from the contract of insurance in general. Under the ESI Act, the scheme is more akin to group insurance. The contribution paid entitles the workman / insured to the benefit under the Act. However, he does not get any part of the contribution back if during the benefit period, he does not qualify for any of the benefits. The contribution made by him and by his employer is credited to the insurance fund created under the ESI Act and it becomes available for others or for himself, during other benefit period, if he continues in employment. What is more, there is no relation between contribution made and the benefit availed of. The contribution is uniform for all workmen and is a percentage of the wages earned by them. It has no relation to the risks against which the workman stands statutorily insured. It is for this reason that the ESI Act envisages automatic obligation to pay the contribution once the factory or the establishment is covered by the Act, and the obligation to pay the contribution commences from the date of the application of the Act to such factory or establishment. The obligation ceases only when the Act ceased to apply to the factory / establishment. The obligation to make contribution does not depend upon whether the particular employee or employees cease to be employed after the contribution period and the benefit period expire.

61. Mr. Kumar had also referred to the judgment of this Court in *Saraswati Constructions* (supra). In the said case, this Court was concerned with the facts, wherein on March 9, 1989, two members squad of enforcement officers visited the petitioner firm and submitted their inquiry report and on September 23, 1992, the respondent Department initiated inquiry under Section 7A of the EPF Act. On November 12, 1999, the Regional Provident Fund Commissioner, Delhi upheld the coverage recommended by the squad of the enforcement officers. Thereafter, the petitioner filed a review petition and the Regional Provident Fund Commissioner on May 14, 1992 passed an order against the petitioner. Consequently, the petitioner filed an appeal before the Appellate Tribunal, which

vide order dated January 13, 2006 dismissed the same. The counsel for the petitioner in that case had argued that the Act itself is not applicable as at no point of time, the petitioner establishment had employed 20 employees. That apart, it was also the case of the petitioner, in that case the onus to prove the existence of 20 or more employees was on the respondent, but since the respondent failed to discharge the said onus, the Tribunal ought to have drawn an adverse inference against the department. In the judgment reliance was also placed by the counsel for the petitioner on the Judgments of the Supreme Court in the cases of Himachal Pradesh State Forest Corporation (supra) and Food Corporation of India (supra).

62. On the other hand, the case of the EPFO Authority was, the fact that the employment of more than 20 employees was admitted by the petitioner itself, inasmuch as it had employed 10 regular employees and 30 employees on daily wage through contractors and that the same being an admitted position, the petitioner cannot take a contrary stand before the court and it was also stated that the petitioner had failed to produce the relevant record comprising of balance sheet / wage register / accounts book etc. and therefore the Commissioner had rightly confirmed the petitioner establishment to be under the umbrella of Section 7A of the Act. This Court was of the view that it would be manifest that if an employer has employed certain employees through a contractor or in connection with the work of establishment, then the strength of such employees shall also be taken into consideration to see whether by counting such a strength the establishment employs 20 or more persons for the applicability of the provisions of the said Act.

63. In the inspection report dated March 9, 1989, the strength of the petitioner establishment therein, in the year 1988-89 from August to March is shown, as the permanent employees were between 9 – 10 and daily wage employees were shown from 25 – 40. The Court also observed that the report of the Inspector should have been more clear, specific and categorical to show the exact strength of employees possibly with their names and their salaries etc. But in any event of the matter, the petitioner was given enough opportunity to rebut the said inspection report, but the petitioner failed to adduce any evidence despite a number of opportunities preceding the stage of Section 7A of the Act. Even in the proceedings under Section 7A and even at the stage of the review, the Court was of the view that once the petitioner has failed to substitute its case by means of any supporting documentary evidence, then no fault can be found with the finding of the fact as arrived at by the Regional Provident Fund Commissioner by passing orders under Sections 7A and 7B of the Act. The Court did not accept the plea of the petitioner that the onus was on the respondent / department to prove that the petitioner had deployed 20 or more workers at the relevant time of the inspection because the entire documentary evidence remained in the control, power and possession of the establishment. Therefore, it was for the petitioner establishment to have placed sufficient, cogent and documentary evidence so as to rebut the said inspection report and despite numerous opportunities granted

to the petitioner at every stage of the proceedings, the petitioner failed to produce any such evidence. This Court had also referred to the Judgment of the Maharashtra State Cooperative Bank Ltd. v. Provident Fund Commissioner, (2019) 10 SCC 123 to show that it was a beneficial legislation. The Court was also of the view that it is a settled legal position that if the establishment or the employer is not covered under the Act, then it is for the employer to place sufficient / cogent and convincing material before the designated authority in an inquiry under Section 7A so as to satisfy the Authority with regard to the non-applicability of the Act and on failure to place any such material, the onus cannot be shifted on the authority to prove the applicability of the Act, who under no circumstances can be in possession of any records evidencing the extent of strength of employees in any particular establishment. The Court had also referred to Himachal Pradesh State Forest Corporation (supra) as relied on by the counsel for the petitioner to distinguish the same on facts, inasmuch in the said case, the employer itself admitted its liability under the Act and since due to a delay of 16 years, the employer was not in possession of the records. The Court granted the benefits only with respect to those employees who are identifiable and whose entitlement was proved on evidence.

64. I must state here, though the counsel for the petitioner had referred to the Judgment of the Supreme Court in Food Corporation of India (supra) of which I have also made a reference above, but the same was not considered by the Court while giving its finding.

65. Mr. Kumar had also referred to the Judgment in the case of Micro Devices Inc. (supra) which is a Company Petition decided on March 9, 2018, wherein a Coordinate Bench of this Court was concerned with an application filed by Syndicate Bank for a direction to the Official Liquidator ('OL', for short) to release an amount of ₹51,18,100/- to the applicant bank instead of releasing the same to the Employees Provident Fund as was sought to be done by the OL. The bank has claimed the amount being a secured creditor. The assets that were mortgaged to the bank were sold and some amount remained payable to the respondent Bank. Hence the application was filed.

66. When the OL invited claims, the EPFO had claimed an amount of ₹63,66,970/-. The OL had taken a stand that based on the adjudication carried out by the statutory authority under Section 7A of the EPF Act, the said claim was allowed for ₹51,18,100/-. It was the stand of the OL that they have accepted the claim of the EPFO based on statutory orders of the quasi-judicial authority, namely Commissioner of Provident Fund. The Court had also relied upon the Judgment in the case of Regional Director, ESIC v. Kerala State Drugs and Pharmaceuticals Limited and Ors. (supra), wherein the Supreme Court held, even if the employees who would be the beneficiaries of the amount are not identifiable, the amount needs to be paid to the EPFO Authorities.

67. On the other hand, Mr. Mehta had relied upon the judgment in the case of Food Corporation of India (supra), wherein the facts which arose for

consideration were that the Food Corporation of India, having depots located at various places in Rajasthan for handling, storing and transporting foodgrains and other articles, appointed contractors for execution of such works and the contractors in turn engaged some workers. In respect of such workers, the Provident Fund Commissioner called upon the Corporation to deposit contribution payable under the EPF Act and the Scheme framed thereunder. When there was non-compliance, the Commissioner made an order under Section 7A of the Act determining the amount payable by the Corporation. Being aggrieved by the determination, the Corporation approached the High Court. The High Court dismissed the petition. The grievance of the Corporation before the Supreme Court was, it was denied reasonable opportunity to produce material in proof of identification of the workers in respect of whom the contribution was payable. It was urged that the contractors are in possession of the relevant lists and the Commissioner has neither given notice to contractors nor made them parties to the proceedings despite repeated requests made by the Corporation. The case set up by the workmen was that under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970, the Corporation being the principal employer has to maintain list of workers; that it has failed to produce such list and, therefore, it cannot throw the burden on the contractors to prove the case. The Supreme Court was of the view that the total amount ordered to be payable comes to about ₹22,48,000/- in respect of the employees of depots namely Udaipur, Jaipur, Ajmer, Badmer and Sawai Madhopur. The Court held that it is indeed a large amount, for the determination of which the Commissioner has only depended upon the lists furnished by the workers' union. It is no doubt true that the employer and contractors are both liable to maintain registers in respect of the workers employed. But the Corporation seems to have some problems in collating the lists of all workers engaged in depots scattered at different places. It had requested the Commissioner to summon the contractors to produce the respective lists of workers engaged by them. The Commissioner did not summon the Contractors or the lists maintained by them. The Supreme Court was of the view that the question is not whether one has failed to produce evidence, but whether the Commissioner who is the statutory authority has exercised powers vested in him to collect the relevant evidence before determining the amount payable under the said Act. The Supreme Court referred to Section 7A of the Act and was of the view that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring discovery and production of documents. The said power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. The Supreme Court was of the view that it is the legal duty of the Commissioner, non-adherence of which would be a failure to exercise the jurisdiction, particularly when a party to the proceedings requests for summoning evidence from a particular person.

68. Mr. Mehta has also relied upon the judgment in the case of Bharat Heavy Electricals Ltd. (supra). In the said judgment, the facts which arose for consideration was that the appellant used to engage contractors for various purposes. It received a notice on or about September 03, 1992 purported to have been issued under Section 45A of the ESI Act on the premise that they had not deposited the ESI contribution for the period July 19, 1981 to September 30, 1991. In response to the notice issued by the respondents, the appellant stated that the workmen concerned had been engaged by the contractors who would be in possession of the relevant records to show as to whether or not any contribution was payable or whether the Act was applicable in respect of the workmen concerned. A list of contractors along with their addresses who were involved during the period in question was annexed to the said notice. A prayer was made before the Authority to implead the said contractors as parties in the said proceedings under Section 45A of the ESI Act as immediate employers.

69. Vide letter dated March 08, 1993 the said prayer was rejected by the Competent Authority wherein it was stated that engaging the contractors for Bharat Heavy Electricals Ltd. ('BHEL', for short) works is an internal affair of the factory and the Corporation is not preventing the appellant in any manner in bringing along with it those contractors to explain the nature of expenditure incurred by the appellant through the contractors. It was stated by the Authority that it may recover the ESI contribution along with employers share from its contractors under Section 40 and 41 of the ESI Act. As per Section 41(1) of the ESI Act, the principal employer can recover the contributions from the immediate employer even as deduction from any amount payable by them under any contract or even as a debt payable by the contractors. So, it is not necessary for the Corporation to implead the contractors to enable BHEL to invoke its right of recovery.

70. A writ petition was preferred before the Madras High Court wherein a decision of the Court in the case of Madras Gymkhana, Madras v. Employees' State Insurance Corporation 1990 (2) Labour Law Notes 777 was relied upon. The learned Single Judge, referred the matter to the Division Bench by stating as under:-

"In view of the judgment of the Hon'ble Supreme Court of India referred to above, namely, MANU/SC/0422/1993 : (1994)ILL J12SC and the other judgment namely, MANU/SC/0184/1989 : (1990)1SCC68 , I am of the respectful opinion that the judgment of this Court reported in 1990-2 L.L.N pg.777 does not appear to have decided the issue correctly and, therefore, it definitely calls for a reconsideration by a larger Bench. The Registry is, therefore, directed to place this order of reference, my judgment containing reasons and the material papers before My Lord the Hon'ble Chief Justice for referring the issue involved in this case for consideration by a larger Bench."

71. The Division Bench of the Madras High Court overlooking the said decision in Madras Gymkhana, Madras (supra) has stated as under:-

"The scheme of the ESI Act does not envisage separate and independent determination of contribution payable by the principal employer and the immediate employer in respect of employees directly employed by the principal employer and the contract employees respectively. When once the authority is satisfied that persons were employed by or through an immediate on the premises of the factory or establishment or under the supervision of the principal employer and if for any reason the principal employer fails to submit, furnish or maintain the records and registers in accordance with the provisions of Sec.44, the Corporation is within their powers to determine the contribution payable in respect of contract employees against the principal employer without looking for the immediate employer. As already stated, in an enquiry under Section 45-A of the ESI Act all that is required is the authority must give a reasonable opportunity of being heard to the employer concerned. That has been complied with by the respondent in the present case by issuing the show cause notice dated 3.9.1991, wherein the Corporation has also afforded a personal hearing to the petitioner. The decisions relied on by the petitioner, viz. Food Corporation of India, Ashok Leyland Limited and Chennai Petroleum Corporation Ltd., cited supra, are of no assistance to them."

72. The submission on behalf of BHEL was that the High Court committed serious error in passing the impugned judgment insofar as it failed to construe the provisions of the Act in their proper perspective. On the other hand, the counsel appearing for the respondent ESI Corporation supported the impugned judgment.

73. I may state here that the Supreme Court considered various provisions of the ESI Act. It also considered the judgment in the cases of Food Corporation of India (supra) (on which reliance was placed by Mr. Mehta) and ESIC v. Harrison Malayalam Pvt. Ltd. (supra) (on which reliance was placed by Mr. Kumar). The Court in paragraphs 20 to 27 held as under:-

"20. We, with respect to the learned Judges, fail to notice any significant difference in the purport and object of both the provisions. The purport and object of both the statutes, for all intent and purport, in our opinion, is the same. In the proceedings initiated under Section 45A of the Act, an immediate employer or principal employer may also show that they are not liable to deposit any contribution on behalf of the employees as the establishment in question did not come within the purview thereof. The purpose of the proceedings, both under the Act as also the Employees Provident Fund Act, is to determine the amount due from any employer in respect of the employees under the statutory schemes. Both the Acts envisage compliance of principles of natural justice. The proviso appended to Section 45A of the Act provides for a statutory mandate of giving a reasonable opportunity of being heard.

21. The quantum of amount due has to be determined in respect of all contract workers engaged by the contractors. The principal employer would be entitled to recover the contributions from the contractor; they being the immediate employers. Whereas under the Provident Fund Act, the principal employer is

statutorily liable in terms of the provisions of the Act to comply with the provisions therein; in terms of the Act, the principal employer is entitled to recover the amount of contribution payable by the immediate employer for them.

22. Section 45A of the Act enables the appropriate authority to recover such dues both from the principal as also the immediate employer. It provides for an opportunity of hearing to both of them.

23. Apart from Section 41(1A), Regulation 32 of the Employees' States Insurance (General) Regulations, 1950 mandates an immediate employers to maintain registers in the prescribed form(s). An order passed under Section 45A of the Act has a serious civil and/or financial consequence as the amount so determined is liable to be recovered as arrears of land revenue. Section 44 of the Act, not only mandates the principal employer, but also the immediate employer to file its reports and maintain registers. Under Sub-section (2) of Section 44, when such reports are not submitted either by the principal employer or by the immediate employers, the Corporation may require the person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the Corporation to decide whether the factory or establishment is a factory or establishment to which this Act applies. Subsection (3) of Section 44 of the Act enjoins upon the principal as also the immediate employers to maintain registers or records as may be required by regulations. Section 45 also empowers the Inspector of Corporation to require an immediate or principal employer to furnish to him such information as he may consider necessary in regard to the compliance of the provisions of the Act by them. The Act, therefore, recognizes the existence of an immediate employer.

24. We may also notice that in terms of the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 and the Rules framed thereunder, a contractor is required to maintain a register of the workmen employed by him. The contractor is also required to issue an employment card to the said workers. Muster rolls, wages registers and other records in respect of each worker engaged by the contractor are also required to be maintained.

25. Reliance has been placed by the Division Bench as also by Mr. Francis on Employees' State Insurance Corporation v. Harrison Malayalam Pvt. Ltd. MANU/SC/0422/1993: (1994)ILL J12SC . Unfortunately, therein attention of this Court was not drawn to the case of Food Corporation of India (supra). Even otherwise, the said decision has no application to the fact of the present case. The question therein which arose for consideration was as to whether the employees of the contractor who were casual employees were identifiable or not. It is in that context, this Court opined:

Under the Act, the scheme is more akin to group insurance. The contribution paid entitles the workman insured to the benefit under the Act. However, he does not get any part of the contribution back if during the benefit period, he does not qualify for any of the benefits. The contribution made by him and by his

employer is credited to the insurance fund created under the Act and it becomes available for others or for himself, during other benefit periods, if he continues in employment. What is more, there is no relation between contribution made and the benefit availed of. The contribution is uniform for all workmen and is a percentage of the wages earned by them. It has no relation to the risks against which the workman stands statutorily insured. It is for this reason that the Act envisages automatic obligation to pay the contribution once the factory or the establishment is covered by the Act, and the obligation to pay the contribution commences from the date of the application of the Act to such factory or establishment. The obligation ceases only when the Act ceases to apply to the factory/establishment. The obligation to make contribution does not depend upon whether the particular employee or employees cease to be employee/employees after the contribution period and the benefit period expire.

26. In that case, it was not disputed that the Act applied to casual workmen. Here, however,

the applicability of the Act itself is in question. In proceedings under Section 45A, not only the applicability of the Act but also the quantum thereof which may be held to be payable may be the subject matter of determination.

27. Reliance has also been placed on a decision of this Court in Employees' State Insurance Corporation v. Harrison's Malayalam Ltd. (2nd case) MANU/SC/1655/1998: (1999)ILL J284SC, wherein this Court referring to the first case opined that the liability of the employer to contribute arose from the very first day of employment. There is no dispute with regard to the aforementioned proposition of law but the dispute being both in regard to the applicability as also the quantum, in our opinion, the respondent authority had the requisite jurisdiction to implead the third party or summon them before it to produce all relevant documents.

*** **

(emphasis supplied)

74. The Supreme Court in the above Judgment has stated that the purport of both the Acts is the same. The purpose of the proceedings under both the Acts is to determine the amount due from the employer in respect of the employees under the statutory schemes. Both the Acts envisage compliance of principles of natural justice. The Court held, under the ESI Act (as under paragraphs 30 (3) and 36-B of the EPF Scheme), the provisions mandate the principal employer / immediate employer to file reports and maintain registers. The Court also noted the Inspector of Corporations to require principal employer to furnish him such information as he may consider necessary in regard to compliance of the provisions of the Act by them. The Court also noticed the provision of Contract Labour (Regulation and Abolition) Act, 1970. It distinguished two Judgments between the same parties that the issue was with regard to applicability of Act there was no requirement to implead third party but where the issue is with

regard to quantum (as in this case) then the third party (the contractors) need to be impleaded / summoned to produce all the documents.

75. That apart, in paragraphs 29 and 30, the Supreme Court held that the determination of the exact liability on the part of the contractors is necessary keeping in view the fact that they or some of them may not be under the control of the principal employer having regard to the fact that the contract has come to an end. The Supreme Court also held that the determining authority did not give an opportunity of hearing to the petitioner in regard to the names and other particulars of the contractors. It had accordingly directed the Authority to implead the Contractors as parties and / or summon them for producing necessary record for that purpose. The said paragraphs are reproduced as under:

-

"29. Determination of the exact liability on the part of the contractors is necessary keeping in view the fact that they or some of them may not be under the control of the principal employer having regard to the fact that the contract has come to an end. It will bear repetition to state that the principal employers have a statutory right to recover the dues from the contractors/immediate employers.

30. It appears that the determining authority did not give an opportunity of hearing to the petitioner in regard to the names and other particulars of the contractors. The impugned judgment, therefore, cannot be sustained. It is set aside accordingly. The appeal is allowed and the matter is remitted to ESI Corporation/determination authority for considering the matter afresh. The authority shall either implead the contractors as parties and/or summon them for producing necessary records for the said purpose. In the facts and circumstances of the case, there shall be no order as to costs."

76. Mr. Mehta had also relied upon the judgment in the case of Himachal Pradesh State Forest Corporation (*supra*) (which is a Judgment of the Supreme Court of the year 2008), wherein the Supreme Court has held that the amount due from Himachal Pradesh State Forest Corporation is to be determined only with respect to those employees, who are identifiable and whose entitlement could be produced on evidence. In paragraph 5, the Supreme Court has held as under:-

"5. We have heard the learned counsel for the parties and gone through the record. We do appreciate that the inaction on the part of the Commissioner to initiate proceedings within a reasonable time, has to be deplored. However, as the Corporation has itself submitted that it was covered under the Act and in view of the limited relief granted by the authorities below and by the High Court, we are disinclined to interfere with the matter at this stage. We accordingly dismiss the appeals but reiterate the recommendation that the amounts due from the Corporation will be determined only with respect to those employees who are identifiable and whose entitlement can be proved on the evidence and that in the event the record is not available with the Corporation (at this belated

stage), it would not be obliged to explain its loss, or that any adverse inference be drawn on this score. With this very small modification, we dismiss the appeals.”

77. In so far as the reliance placed by Mr. Kumar on the Judgment of *Saraswati Construction (supra)* is concerned, the said judgment is distinguishable inasmuch as the Coordinate Bench of this Court in the said case was primarily concerned with the stand of the petitioner therein that it having engaged less than 20 workers does not come under the EPF Act. The Court noted the fact that a report has been filed by the enforcement officers wherein it was held that the petitioner had engaged 9 - 10 permanent employees and 25 - 40 casual employees. It was under these circumstances that the applicability of the Act was upheld. The issue was whether both permanent and casual employees of the principal employer would fall within the definition of ‘employee’ under Section 2(f) of the Act. The Court had held that when the employer himself was having custody of records / register etc. there was no reason for such an employer not to produce the record and to prove that it has employed less than 20 workers. It was under these circumstances, the conclusion of the Coordinate Bench of this Court has to be understood. In fact, the reliance placed on the *Himachal Pradesh State Forest Corporation (supra)* was held to be not applicable and the Court has also said that in that case, due to delay of 16 years, the employer was not in possession of the records for producing the same. The Court directed the benefits only with respect to those employees who are identifiable and whose entitlement was provided on evidence. I find that though reference has been made to the Judgment in the case of *Food Corporation of India (supra)*, but the same has not been considered by the Coordinate Bench of this Court in *Saraswati Construction (supra)*. I have already referred and considered the Judgment in *Food Corporation of India (supra)* in the above paragraphs, as followed by the Supreme Court subsequently in the case of *Bharat Heavy Electricals Ltd. (supra)* and the conclusion therein, and the position of law that has been culled out from the Judgment.

78. In so far as the Judgment in the case of *Micro Devices Inc. (supra)* is concerned, the Coordinate Bench of this Court was concerned with an application filed by the Bank as a secured creditor as against the claim of the Employees’ Provident Fund Authority. The OL had accepted the determination of the dues by the EPFO Authority under Section 7A. No doubt, the Coordinate Bench of this Court had negated the plea of the Bank that the employees are not identifiable by relying upon the Judgment of the Supreme Court in *Regional Director, ESIC v. Kerala State Drugs and Pharmaceuticals Ltd. and Ors. (supra)* wherein the Court had held that it is not necessary to identify the employees, but that was in the context of provisions of the ESI Act wherein the contribution is levied on the employer in respect of the employees engaged by him directly or through another agency, is for the benefit of all workmen in general who are covered by the Act. The contribution is irrespective of whether the employees get or do not get the said benefit. In this regard paragraph 3 of the Judgment is reproduced

here:-

"3. There is thus no quid pro quo between the persons insured and the benefit available under the Act. As regards the finding that the workmen were unidentifiable, what is forgotten is that under the Act, once an establishment comes to be covered by the Act, the employer becomes liable to pay the contribution in respect of the employees in his employment directly or indirectly. The contribution which had become payable for the relevant period has to be paid even if the employees concerned are no longer in employment. Whether the employees are unidentifiable today or not is, therefore, irrelevant so long as the contribution was liable to be paid on their behalf, when they were in employment."

(emphasis supplied)

79. But the case in hand, as it relates to PF, the position is different as the contribution(s) are made in favour of the employee concerned. In that sense, identity of the employee has to be established. So, the judgment relied upon by Mr. Kumar in the case of Kerala State Drugs and Pharmaceuticals Ltd. (supra) as relied upon by the Co-ordinate Bench is clearly distinguishable. Further, I have referred to the Judgment in the case of Himachal Pradesh State Forest Corporation (supra), in paragraph 76 above which concerns the EPF Act.

80. The plea of Mr. Kumar by relying upon paragraphs 30(3) and 36B of the EPF Scheme is that, there is an obligation on the part of the employer to possess the record of the contractors and the employees engaged by it. Paragraph 30(3) and 36B of the Scheme reads as under:-

"(3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.

xxxx xxxx xxxx

36-B. Duties of contractors

Every contractor shall, within seven days of the close of every month, submit to the principal employer a statement showing the recoveries of contributions in respect of employees employed by or through him and shall also furnish to him such information as the principal employer is required to furnish under the provisions of the Scheme to the Commissioner."

This issue has been considered and answered by the Supreme Court in Bharat Heavy Electricals Ltd. (supra) at paragraph 23 which I reproduce again as under. The said judgment, though in the context of provisions of the ESI Act, shall have applicability to the submission made by Mr. Kumar.

"23. Apart from Section 41(1A), Regulation 32 of the Employees' States Insurance (General) Regulations, 1950 mandates an immediate employers to

maintain registers in the prescribed form(s). An order passed under Section 45A of the Act has a serious civil and/or financial consequence as the amount so determined is liable to be recovered as arrears of land revenue. Section 44 of the Act, not only mandates the principal employer, but also the immediate employer to file its reports and maintain registers. Under Sub-section (2) of Section 44, when such reports are not submitted either by the principal employer or by the immediate employers, the Corporation may require the person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the Corporation to decide whether the factory or establishment is a factory or establishment to which this Act applies. Subsection (3) of Section 44 of the Act enjoins upon the principal as also the immediate employers to maintain registers or records as may be required by regulations. Section 45 also empowers the Inspector of Corporation to require an immediate or principal employer to furnish to him such information as he may consider necessary in regard to the compliance of the provisions of the Act by them. The Act, therefore, recognizes the existence of an immediate employer.

81. As is clear from the above narration, the Court had noted a similar provision under the ESI Act, i.e., Section 45, which empowers Inspector of Corporation to require an immediate or principal employer to furnish him such information as he may consider necessary in regard to the compliance of the provisions of the ESI Act by them. Similarly, sub-section 3 of Section 44 of the ESI Act enjoins upon the principal as also the immediate employer to maintain register or records as may be required under the Regulations. Section 44 of the ESI Act mandates not only the principal employer, but also the immediate employer to file its report and maintain Registers. While referring to these provisions, the Supreme Court still held, when the issue is with regard to quantum, then the third party needs to be impleaded to produce all the documents. If that be so, no doubt the reliance placed by Mr. Kumar on paragraphs 30 (3) and 36B of the Act may be appealing on a first blush, but in view of the conclusion of the Supreme Court, that still the third party needs to be impleaded / summoned to produce all the documents, it was required that the contractors / sub-contractors should have been called by the Adjudicating Authority before determining the dues.

82. Mr. Mehta is justified in relying upon the Judgment of this Court in *Central Board of Trustees v. Standing Conference of Public Enterprises* (supra) dealing with a similar issue, wherein a Co-ordinate Bench of this Court in paragraphs 16 to 18 has held as under:-

"16. Thus, the question would not only be as to whether the principal employer produces relevant material but it would also be whether the provident fund commissioner who is the statutory authority, has exercised the powers vested in him to collect the relevant evidence before determining the payable amount.

17. I have also considered the decisions relied on by the learned counsel for the petitioner and found that the said decisions merely reiterate the settled legal position that the principal employer is responsible for the deposit of the provident

fund dues of employees engaged through contractors also, the said decisions also reiterate that if a statute casts any duty upon any person, the said person alone is responsible to discharge the same and in the event of any failure to do so, he cannot take advantage of his own wrong. These decisions, however, do not deal with the issue arising in the present petition which pertains to the scope of the statutory enquiry, required to be conducted before passing an assessment order. On the other hand, the decision relied upon by Mr. Rai, learned senior counsel for the respondent, deals with exactly the same question as arising in the present case wherein while dealing with a somewhat similar fact situation, the Supreme Court in Food Corporation of India (Supra) held as under:-

"We have carefully perused the Commissioner's order and also the order of the High Court. The total amount ordered to be payable comes to about Rs.22,48,000.00 in respect of the employees of depots namely: Udaipur, Jaipur, Ajmer, Badmer and Sawai Madhopur. The Commissioner has also directed the Divisional Officer, Jaipur to deposit the Provident Fund Contribution i.e., Rs.18,72,194.00 to the Fund being maintained by the trustees of the establishment. It is indeed a large amount for the determination of which the Commissioner has only depended upon the lists furnished by the workers Union. It is no doubt true that the employer and contractors are both liable to maintain registers in respect of the workers employed. But the Corporation seems to have some problems in collating the lists of all workers engaged in depots scattered at different places. It has requested the Commissioner to summon the contractors to produce the respective lists of workers engaged by them. The Commissioner did not summon the Contractors nor the lists maintained by them. He has stated that the Corporation has failed to produce the evidence."

After noticing the facts as above, the Hon'ble Supreme Court held as under:-

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

18. In the light of the aforesaid decision of the Supreme Court in Food Corporation of India (Supra), that there can be no doubt about the fact that it was incumbent upon the petitioner while making an inquiry in accordance with Section 7A of the Act to take all possible steps as set out in the Act to make a correct and proper assessment of the dues. It needs no reiteration that while making such an inquiry, the Commissioner has ample powers not only to summon any witness but also has powers to enforce the attendance of any

person or summon him on oath. In these circumstances, once the tribunal found that the petitioner, had not taken adequate steps to summon all the contractors, by enforcing their attendance and that too in a case where the petitioner had initiated proceedings after an inordinate delay of twelve years, which in itself would have made it very difficult for the respondent to obtain information from its erstwhile contractors as also the fact that the assessment order itself is made on the basis of ad hoc calculations, I find absolutely no infirmity in the order of the tribunal directing the petitioner to summon all the contractors and then carry out the requisite assessment."

(emphasis supplied)

83. A similar issue arose before the Patna High Court in the case of Bharat Sanchar Nigam Ltd. (supra), wherein the Court has stated as under:-

".....The discharge of obligation cast upon the Regional Provident Fund Commissioner and other statutory authorities for determination of money due from the employers under Section 7A of the Act is not a mechanical function rather it is a discharge of an obligation which is quasi judicial in nature. In fact Sub-section (2) of Section 7A vests all powers in such statutory authority as are vested in a Civil Court while trying a suit for enforcing attendance of any person; requiring discovery and production of documents; of receiving evidence on affidavit; or issuing commission for examination of witnesses. With such vast power conferred upon the authorities under Section 7A of the Act for determination of the amount due from the employer, a plain reading of the order impugned reflects an abdication of responsibility by the Regional Provident Fund Commissioner. By simply submitting that the petitioner did not cooperate in the proceedings nor presented the supportive documents, was not the end of the responsibility of the Regional Provident Fund Commissioner who had all powers to proceed therefrom and adjudicate upon the matter after seeking information from the contractors. The Regional Provident Fund Commissioner has completely failed to discharge his duty rather has taken the shortest possible route for arriving at a conclusion which is not expected of a statutory authority while performing adjudicatory quasi judicial function.

A contribution under the act is always relatable to a workman and is not a determination in vacuum. A quantification of liability on the basis of payment made to the contractor which is inclusive of goods and service does not end the responsibility of the Regional Provident Fund Commissioner and until such time that such determination is attached to an individual workman, the order would not withstand the test. This exercise in the present case is completely lacking. The issue is not whether the petitioner has discharged his obligation in submitting the required papers, the issue posed before this Court is whether the determination of the money due is in consonance with the Act and whether the Commissioner has satisfied himself as to the liability so created. Being a beneficial legislation not only the quantification is a necessary factor rather the order also has to accompany the identification of the beneficiary for whom a

quantification has been made.

The Supreme Court in case of F.C.I. (supra) while referring to the provisions of Section 7A of the Act and discussing the powers vested in Commissioner while conducting an enquiry, has discussed the responsibility attached to such adjudication in paragraph-9 of the judgment which runs as follows:

“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 the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. 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 issue that a quantification has to be on the basis of materials on record and only upon identification of the workman entitled to such benefit is no more *res integra* and stands settled by a number of judgments and reference in this regard is made to some of the judgments reported in 1997 (1) PLJR 403 (K.G. Majithia v. Union); (1998) 6 SCC 436 (Food Corporation of India v. Union of India); (2000) 9 SCC 540 (Ramala Sahkari Chini Mills Ltd. v. Employees' Provident Fund Tribunal). The list continues but the legal position so settled yet has evaded the statutory authorities.

It is rather unfortunate that despite the legal position as regarding the manner of discharge of the quasi judicial adjudicatory powers vested in a statutory authority under Section 7A of the act stands settled long back, yet its appreciation is found wanting in the orders so passed.”

(emphasis supplied)

84. In another case before the Patna High Court titled Assistant Provident Fund Commissioner v. Nand Lal and Company (supra) wherein the para 4, the Patna High Court has held as under:-

“4 . We are of the view that the assessment under Section 7A of the Act should not be confused with an assessment of tax. The assessing authority has made an assessment as if he is a taxing authority, and realizing tax from a taxpayer. Unfortunately, these are provident fund dues which are to accrue to an individual and not a tax, and, not an amount payable to the Provident Fund Commissioner. Unless the nature of employment and the names of employees are identified with certainty, the assessment cannot be said to be in accordance with law. The Apex Court has clearly held so. We have, therefore, no reason to interfere in the order of the appellate authority or the learned Single Judge. This appeal is, accordingly, dismissed.”

85. Similarly, in the case of M/s Bata India Limited (supra), the Calcutta High Court in paragraph 17 of the Judgment, has held as under:-

"17. It is now well settled by the Hon'ble Supreme Court that Provident Fund is not a tax. It is an amount collectable to the benefit of an individual identified employee as a social welfare measure. The amount can be either temporary or for a long term period. It is the obligation of the Provident Fund Commissioner in the event he alleges default by an employer, to identify the employee/beneficiary concerned, the amount of wages payable, the contract if any between the employer and the concerned beneficiary and the period for which the amount is in fact payable."

(emphasis supplied)

86. In the case in hand, I have seen the reply dated July 23, 2014 filed by the respondent to the report submitted by the departmental representative wherein the respondent has stated as under:-

"i) That the contractors and sub-contractors are carrying-out highly mechanized work and technologically advanced work through latest machineries. Labour component is involved in the least. Summoning of records of the contractor and sub-contractor is imperative for the just and fair inquiry and for determination of PF dues in respect of those employees who are actually entitled and are/were required to be enrolled members of the Fund.

j) That in order to decide the liability of payment of PF dues, if any, in respect of payments made to the contractors and sub-contractors, it is respectfully submitted that for the purpose of legal objectivity and interest of justice, all the contractors and sub-contractors may be summoned with record and examined in evidence to determine the issue whether any liability can be determined as proposed by the Enforcement Officer. The contractors and sub-contractors are the custodian of the records maintained by them in respect of their respective independent establishments. The request is being as per law settled by the Hon'ble Supreme Court in the matter of Food Corporation of India V. Union of India reported as AIR 1998 sc 2841 whereby it is held that 'Employer- employee relationship cannot be inferred in the absence of any material or record.' The contractors or sub-contractors are to be summoned with record because the primary liability is to be discharged by the Contractor or the sub-contractor as the case may be."

87. I find, even in the appeal, the main ground on which the order of the Adjudicating Authority was challenged was that the notice to the contractors was not issued and the beneficiaries were not identified. No doubt, the Appellate Authority has set aside the order of the Adjudicating Authority, but it clearly erred in not remanding the matter back to the Adjudicating Authority for re-determination by issuing notice to the contractors for enabling them to produce relevant record. This I say so, in view of the judgment relied upon by Mr. Kumar in the case of Assistant PF Commissioner, Nasik (supra) wherein the High Court

of Bombay has held as under:

"7. Prima facie, I am of the opinion that the reasons for which the Appellate Authority has reversed the order of the Assistant Provident Fund Commissioner, Nashik, do not seem to be sustainable. The E.P.F. Act provides a specific scheme for levying damages with the ceiling of maximum of 100% damages to be levied. In the instant case the damages were Rs.91,41,712/and in its appellate jurisdiction, the Appellate Tribunal, by quashing and setting aside the impugned order, has let respondent no.1 free of all damages concluding that no damages could have been levied on respondent No.1. I am thus of the view that the said conclusion is wholly unsustainable and while admitting this petition, the impugned order deserves to be stayed with a direction to respondent No.1 to deposit an amount of 50% of the damages levied, within a period of six weeks from today."

88. In fact, this is the case of the petitioner, as contended by Mr. Kumar, more particularly in Ground 'Q' of the Writ Petition, wherein it stated as under:-

"Q. Because if the Tribunal finds that the 7A authority has not exercised its jurisdiction (powers) properly to collect evidence before passing the final order then the tribunal could have call for records of the 7A authority for verification of the same or he could have direct the parties before the appellate court to led additional evidence or to file affidavit in respect of their respective records OR he could have remanded back the matter to the inquiry officer with a direction to proper adjudication of the matter. It is a matter of surprise that in one hand tribunal observed that 7A authority has not done its duty on the other hand passed the impugned order even without giving an opportunity to the department to file it's reply to the appeal."

89. It is noted, in his order under Section 7A of the EPF Act, the Adjudicating Authority, has stated "The establishment submitted list of sub-contractors along with the amount paid to them as labour component for each financial year, but could not provide their related record for verification under the pretext that the same is being maintained by the respective contractors and is lying in different site offices all over India."

90. Suffice to state, in view of the judgments of the Supreme Court of which a reference has been made above, it is clear that the Commissioner, in discharge of his powers under Section 7A, is required to comply with the principles of natural justice by issuing notice to the contractors and also identifying the beneficiaries. I quash the impugned order of the Tribunal dated November 27, 2014, so also of the Adjudicating Authority dated August 29, 2014 and remand the matter back to the Adjudicating Authority under Section 7A of the EPF Act. The Authority shall consider the matter afresh by impleading / summoning the contractors / sub-contractors for producing necessary records/documents and thereafter proceed in accordance with law, for determining the dues.

91. I must also state here that Mr. Kumar had relied upon the judgment of a Co-

ordinate Bench of this Court in Gopi Chand (supra) wherein the Court was concerned with the facts where appellants submitted before the ESIC Court that appellant No.1 carries on the business of cement siding at Shakur Basti, New Delhi and owns a truck bearing registration No. DL H 2255. The appellant No.1 also stated he has a cabin bearing No.10 allotted to him at Bari Lane, Shakur Basti Railway Siding, Delhi. It was also stated that the appellant No. 1 had five sons i.e. appellant Nos. 2 to 6, who had also their Independent transport business. The appellant further stated that all the appellants are income tax assesseees having their own individual income tax account numbers and are carrying on business in their own name and maintaining books of accounts separately. It was further stated that they are all independent business persons/units carrying on their own business in their own name and neither supervision nor control of the business units of the appellants is in one hand. As the ESI Corporation has clubbed the businesses of all the appellants and presumed it to be a single unit, the appellant assailed the order of the Corporation before ESIC Court contesting the coverage under the ESI Act. The Corporation filed a written statement to the petition filed by the appellants before the ESIC Court stating that a survey of the appellants' business was conducted on May 03, 1993 and 52 persons were found working with them. Hence, it was stated that all the appellants are carrying on their business together and the supervision and control of the businesses is one single unit. The ESIC Court held that the appellants have been rightly clubbed together and are consequently covered under the ESI Act. The Co-ordinate Bench of this Court has upheld the order of the ESIC Court, as it was safe to presume that since all the appellants were operating from same cabin and had six trucks in all the survey reports, indicating that the contention that together they were employing 52 employees appear to be correct and could not be disbelieved. Suffice to state that the said judgment has no applicability to the issue which arises for consideration in this case, as that was not a case of the employees having been engaged through contractors, as is the case in hand. Mr. Kumar had also relied upon the judgment in the case of Panther Security Service Private Limited (supra). I have seen the judgment. The facts clearly demonstrate that in the said case, the Supreme Court was concerned with the issue that appellant who is registered under the Private Security Agency (Regulation) Act, 2005 ('Act of 2005', for short) was held liable to comply with the provisions of the EPF Act and was directed to deposit statutory dues. The plea of the appellant was that it merely facilitated in providing chowkidars to its clients and had only five persons on its rolls, therefore, the Act is not applicable. The Supreme Court by referring to the Act of 2005 which defined private security agency under Section 2(g), held that as the appellant is an organisation engaged in the business of providing security services including training to private security guards, it was required to have a license. It also held that the appellant was also providing specialised services. The contention of the appellant that it was merely providing chowkidars was rejected. The appellant never made available the statutory registers under the Act of 2005 to the authorities under the EPF Act. The Court also observed that it has withheld

relevant papers. During the course of inquiry, the appellant's balance sheet for the years 2003-04, 2004-05, 2005-06 and 2006-07 was seized, showing payment of wages running into lakhs which lead to the irresistible conclusion that appellant has more than 20 employees on its rolls and hence, the Supreme Court upheld the applicability of the EPF Act on the appellant. The reference by the Supreme Court on the balance sheet seized during inquiries was only to ascertain whether in fact 20 or more employees are working and not for any other purpose. This judgment of the Supreme Court is clearly distinguishable, more so, keeping in view fact the issue which arises for consideration in this petition. Mr. Kumar has also referred to the judgment in the case of OG Bajaj Construction (supra) and Employees Provident Fund Organisation v. Rollwell Forge Ltd. (supra), with regard to the power of the Tribunal to entertain appeals while considering the application under 7-O of the Act.

92. In view of my aforesaid conclusion, these judgments have no relevance to the issue which falls for consideration. He has also relied upon the judgments in the cases of Ambica Quarry Works (supra) and Bhavnagar University (supra) to contend that the ratio of any judgment is to be understood in the facts of the case. There cannot be any dispute to the said proposition of law. Submissions have been made by Mr. Kumar with regard to the manner in which the Tribunal has decided the application under Section 7-O of the EPF Act, granting complete waiver to the respondent from making pre-deposit for hearing of the appeal. He has also referred to the judgments in the cases of Regional Provident Fund Commissioner v. Shibu Metal Workers (supra) and State v. Giridharilal Bajaj (supra) to say that when two views are possible, it is appropriate to tilt in favour of the view which is beneficial to the workers, more so when the Act is a beneficial legislation. In view of my conclusion above, need is not felt to deal with the same.

93. Mr. Kumar and Mr. Mehta have also referred to the following judgments for the propositions as shown below.

- i. Rushi Guman Singh v. State of Orissa and Ors. (supra), to say Courts are not to substitute its views on evidence unless an error of law or principle is found.
- ii. Regional Provident Fund Commissioner v. Ahluwalia Contracts (India) Limited (supra) and Riding Consultants Engineers India Limited (supra), to say a waiver of the 75% pre-deposit can be allowed by the Tribunal.
- iii. Employees' Provident Fund Organisation v. D.A.V. Nandraj Public School (supra), to demonstrate the power of the Commissioner to prefer writ petition against the order of the Tribunal.

The above propositions do not arise for consideration in this petition.

94. The petition is disposed of in terms of the above but with no order as to costs.

95. The original record of the EPF Appellate Tribunal shall be sent back forthwith.