

**(2002) 03 CAL CK 0006**

**In the Calcutta High Court**

**Case No :** Writ Petition No. 4312 of 1993 and G.A. No. 3489 of 2000

Krishna Kumar Agarwala and Others

APPELLANT

Vs

Kelvin Jute Company Limited Workers Provident Fund Trust  
and Others

RESPONDENT

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**Date of Decision :** 15-03-2002

**Acts Referred:**

Constitution of India, 1950 — Article 12

Contract Act, 1872 — Section 41

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 14B, 17, 17(1A)

**Citation :** (2003) 1 LLJ 564

**Hon'ble Judges :** D.K. Seth, J

**Bench :** Single Bench

**Advocate :** S. Pal and Sen Gupta, for the Appellant; Anindya Mitra and Anil Gupta, for the Respondent

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## **Judgement**

D.K. Seth, J.

The Facts

1. Kelvin Jute Mills Company Limited had two units viz. Kelvin Jute Mills and Kelvin Broadloom Division. Hooghly Mills Company Limited took over Kelvin Broadloom Division. Kelvin Broadloom Division is known as Waverly Jute Mills Company. Thus, the two units of Kelvin Jute Mills Co. Ltd., (hereinafter referred to as Kelvin) became separated from each other w.e.f. June 30, 1986, the date when Hooghly Mills Company Limited (hereinafter referred to as Hooghly Mills) took over Kelvin Broadloom Division known as Waverly Jute Mills Company, (hereinafter referred to as Waverly). The provident fund account of Kelvin, prior to transfer of Waverly, was a fund exempted u/s 17 of the Employees' Provident Funds And Miscellaneous Provisions Act, 1952, (hereinafter referred to as the 1952 Act). The said fund was managed by Kelvin Jute Mill Co. Ltd." Workers Provident Fund Trust, (hereinafter referred to as Kelvin Trust). The said fund

consisted of the provident fund account of all the workers employed under Kelvin in its both the units viz. Kelvin and Waverly, respectively. After Waverly was taken over by Hooghly Mills, as exempted fund of the workers, including those who came along with the transfer of the transferred unit, was formed. This is known as Waverly Jute Mills Workers Provident Fund Trust, (hereinafter referred to as Waverly Trust). In terms of the condition of transfer, certain amount of provident fund arrear dues, in respect of the workers of the Waverly unit, was paid by Hooghly Mills to the Waverly Trust. The Provident Fund (PF for short) account of the workers of the Waverly unit, as maintained by Kelvin Trust, remained with Kelvin Trust. On September 1, 1988 the Regional Provident Fund Commissioner, (hereinafter referred to as RPFC) requested Kelvin Trust to transfer the PF accumulation in respect of employees of the Broadloom Division to Waverly Trust (Annexure-A). But the said fund was not transferred. By a letter dated November 15, 1989, the RPFC asked Kelvin Trust to explain why PF accumulation of the employees of Waverly was not transferred to Waverly Trust (Annexure-B). On April 1, 1991, Kelvin Trust was again asked by the RPFC to take immediate steps for transfer of the PF accumulation in respect of employees of Waverly, who were members of Kelvin Trust to Waverly Trust (Annexure-E). On July 5, 1991 the RPFC requested Chairman, Kelvin Trust to attend a meeting on July 24, 1991 to discuss transfer of PF (Annexure-F). On August 1, 1991, RPFC further requested Chairman, Kelvin Trust to take immediate steps to transfer the PF accumulation of the members of Waverly on the basis of discussion held (Annexure-G), He further requested to complete the transfer within one month and had convened a meeting on September 9, 1991 for reviewing the progress. Kelvin Trust did not attend the said meeting. On October 3, 1991 the RPFC requested Kelvin Trust to take steps for the transfer within a fortnight, failing which legal action would be initiated (Annexure-I). On January 1, 1992 the RPFC again asked Kelvin Trust to transfer the fund (Annexure-L). By a letter dated May 5, 1992, the RPFC informed Waverly Trust that the PF Authorities were taking steps to secure transfer of the fund by initiating action as contemplated under the provisions of PF Act (Annexure-Q). On March 24, 1993 the Kelvin Trust requested the Waverly Trust to accept the sum of Rs. 2,00,98,363.02 being the transfer of PF accumulation from Kelvin Trust to Waverly Trust as on June 30, 1986 (Annexure-R). On April 5, 1993 the RPFC informed Kelvin Trust that the ground for delaying transfer on account of sickness of Kelvin unit was untenable, therefore, the entire amount was to be transferred within 15 days, failing which suitable action would be initiated (Annexure-S). On June 15, 1993 the RPFC informed Kelvin Trust that the subscribers are suffering on account of pendency of transfer of fund (Annexure-X). In the circumstances, the Waverly Trust represented by the petitioner, as President, moved this writ petition and obtained an interim order of status quo on December 3, 1993. This order was directed to continue till disposal of the application, by an order dated December 8, 1993. Sometime in 1994, the Kelvin Trust filed an application for vacating the interim order. The Kelvin Trust also filed an application for modification of the interim order. The said application was rejected on March 3, 1995. On January 24, 2000

the RPFC wrote a letter to Waverly Trust that it was meeting PF dues of different members including the PF accumulation prior to June 30, 1986 of the Kelvin Trust though the said amount was not actually transferred to Waverly Trust. Therefore, Waverly Trust was directed to pay only to the extent of the PF accumulation credited in the respective account of the employees. On September 15, 2000 this matter was directed to be heard and payment was directed to be made strictly in terms of Annexure-F to the application dated January 24, 2000.

2. Initially, the other Trustees of the Waverly Trust had made certain allegations against the petitioner. However, subsequently they had applied for being added as petitioner in the writ petition. Mr. Sengupta, counsel for the petitioner, did not oppose the same. Therefore, they were added as petitioners in the writ petition, despite objection raised by Mr. Mitra. Various affidavits, supplementary affidavits and documents were filed and produced before the Court from time to time by the respective parties.

The question to be determined:

3. The bone of contention that requires determination in the present case is:

Whether the Kelvin Trust is liable to transfer to the Waverly Trust the PF accumulation for the period till June 30, 1986 of the employees of Broadloom Division, who were transferred to Waverly along with the transfer of the unit and had become members of the Waverly Trust.

Submission on behalf of the Petitioners:

4. Mr. Sengupta had made elaborate submission on this question relying upon various provisions of the Act and Scheme and had also pointed out to various annexures and documents on record. He contended that the Kelvin Trust cannot withhold the amount transferable to Waverly Trust, particularly, when they had admitted the amount transferable. By reason of such admission, the Kelvin Trust is estopped from resisting or opposing the transfer. The details of his submission would be dealt with at appropriate stage as would be necessary for determining the real question at issue in this petition.

Submission on behalf of the Respondents:

5. Mr. Mitra appearing on behalf of Kelvin Trust had argued that the writ petition is not maintainable for the reasons viz. (a) the writ petitioner has no locus standi since he is not a person aggrieved. A writ petition can be maintained by a person aggrieved having legal right; (b) the transferee Waverly Trust is not the beneficiary and as such it cannot claim any legal right; (c) when the beneficiary viz.: members of the fund is being paid by the employer then the trustees of Waverly Trust cannot raise any claim and when such members i.e., the beneficiary is not coming, the trustee of the Trust cannot claim locus standi; (d) the provident fund authorities have no jurisdiction to direct transfer; (e) in fact, nothing is due to be transferred, since Waverly Trust got the entire fund due to the workers of Waverly as on June 30, 1986, by reason of the fact that the

transferee Hooghly Mills had paid the entire amount; (f) therefore, it being a money claim by or on behalf of the transferee Hooghly Mills, it can be recovered by a civil suit and not through writ jurisdiction; (g) the trustees of the Kelvin Trust is not a state within the meaning of Article 12 of the Constitution and being a private Trust, writ is not maintainable against it; (h) if, in fact, the amount which has already been paid by the Hooghly Mills, is being sought to be reimbursed by the Waverly Trust to Hooghly Mills after obtaining transfer of the amount from Kelvin Trust, it is not for the benefit of the workers but for the benefit of the transferee Hooghly Mills and as such it cannot be recovered through writ proceedings.

6. While elaborating the ground contained in Clause (d) above with regard to the jurisdiction of the PF Authority, Mr. Mitra elaborated as hereafter:

(1) The 1952 Act does not confer any jurisdiction on the RPFC to direct transfer from one fund to the other; (2) there is no complaint by any member of Waverly Trust to RPFC of any short fall in payment of provident fund dues, therefore, RPFC cannot assume jurisdiction; (3) the RPFC cannot give any direction to an exempted PF Trust, having regard to the provisions of Sections 8, 15(2), 17(5) of the 1952 Act; (4) the RPFC cannot take steps against anyone other than the employer referred to in Sections 17A and 17B of the 1952 Act; (5) Section 17A does not apply in a case covered u/s 17-H; (6) the Hooghly Mills, to whom the amount would be reimbursed, and who is claiming the amount incurred, has not come forward to make any claim; (7) in any event, if such claim is made, the same would definitely be barred by limitation. He referred to the decision in Sampat Singh and Others Vs. State of Haryana and Others, of the supplementary affidavit.

7. The RPFC has no jurisdiction to give any direction to Kelvin Trust. Inasmuch as the alleged liability of the trustees of the Kelvin Trust towards the Waverly Trust is not a statutory liability. It is a civil dispute. Writ petition, therefore, is an abuse of process of law. In support, he relied on Secretary Secretary, Parnasree Club Vs. State of West Bengal and Others, . It is simply a case of recovery of money in respect of which the petitioner cannot claim any legal right.

8. Mr. Mitra had relied on Section 17(3)(c) inserted in October 1988 and Section 17A, Section 14(2-A), Section 14A. Section 14AC of the 1952 Act. According to him, the liability is that of the employer and not of the trustees. The consequence of non-compliance is provided in Section 17(4) and (5), which are penal consequences for offences. Writ Court cannot decide offence or deal with such offence. It is only the Magistrate of the competent Court, who can deal with the same. He also relied on the objects and reasons for the amendment of Clause (viii). The question of transfer would be governed by the principle of ability to transfer. The Waverly Trust has not produced its Balance Sheet. Unless the said amount is shown in the Balance Sheet, corresponding with the liability of Kelvin Trust, no claim could be made. Non-production of such Balance Sheet by the Waverly Trust would lead the Writ Court to draw an adverse inference.

9. Mr. Mitra contended further that though the amount is shown in the Balance Sheet of Kelvin Trust, but, in fact, there is no fund, inasmuch as the fund has been utilized for payment of provident fund dues of the Kelvin workers, towards whom the Kelvin Trust has a primary liability. If the amount is transferred, it will affect the workers of Kelvin, who are not parties to the proceedings. As such, their right cannot be affected. Therefore, no order can be passed in this petition.

10. There is no legal right available to Waverly Trust to claim the amount from Kelvin Trust after having received the amount from the transferee Hooghly Mills, in view of Section 41 of the Contract Act. In support of this contention Mr. Mitra relied on *Textiles and Yarn (P) Ltd. Vs. Indian National Steamship Co. Ltd.*, and *Kapur Chand Godha Vs. Mir Nawab Himayatalikhan Azamjah*, . There is nothing to show on what account the Hooghly Mills had paid the amount to Waverly Trust. According to him, it was one of the conditions and terms of the transfer. Since the Hooghly Mills, though a party, is not coming forward to disclose the same an adverse inference is to be drawn against it.

11. He then contends that unless there is a legal right writ petition cannot be maintained, relying on *Mani Subrat Jain and Others Vs. State of Haryana and Others*, . In case it is a payment made by Hooghly Mills u/s 17B, then also no legal right is available to the Waverly Trust. In support of this contention, he relied *Union of India (UOI) Vs. Ghaus Mohammad*, . In this case also similar facts are involved, which require a determination and as such the ratio of the above case applies in this case. He then contends that the writ petitioner, as one of the trustee of the Waverly Trust, was not authorized to file the writ petition, in view of the fact that the authority of the Petitioner has since been questioned by the other three trustees, who had filed affidavit-in-opposition wherein such objection has been ventilated. The writ petition, having been filed with an oblique motive, cannot be maintained. He relied on *Sampat Singh (supra)*.

Submission on behalf of the RPFC:

12. Mr. Anil Gupta, appearing on behalf of the Provident Fund Authority relied on Section 17(1-A) of the 1952 Act and had contended that in view of the provisions contained in the Provident Fund Act, Kelvin Trust is liable to transfer the amount, unless it is already paid by Hooghly Mills.

Reply on behalf of the Petitioner:

13. Mr. Samraditya Pal appeared on behalf of the other trustees, transposed in the category of the petitioners. He was assisted by Mr. Sengupta for the petitioner. In reply, on behalf of the petitioners, he contended that the liability flows from Section 17(1-A)(b)(d)(iv) and Section 17(1-8) of the 1952 Act. He pointed out that it is a statutory liability. In support he relied on *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, . He had also explained that Section 41 of the Contract Act has no manner of application in the present case. He had pointed out that the amount has never been paid by Hooghly Mills to Waverly

Trust. It was only a particular amount that was deposited in terms of the agreement for transfer, in the fund, which does not cover the liability of Kelvin Trust in respect of provident fund accumulation for the employees of Waverly unit till June 30, 1986. In any event, it was not a promise. It was a statutory obligation. Unless there is a relation of promisor and promisee Section 41 cannot be attracted. In the present case, there was no such relation. He distinguished the decision in Textile and Yarn (supra) and Lala Kapur Chand (supra). On the other hand, he relied on Moni Subrat Jain (supra) to support his contention. He relied on Union of India v. Ghaus Mohammad (supra). According to him, the decision in Sampat Singh (supra) is not applicable in the facts and circumstances of the case.

14. He distinguished the decision in Shri Alagappa Spinning Mills, Madurai v. Regional Commissioner, Employees Provident Fund, Madras 1986 Lab IC 458 , as being related to Court sale. It was not a transfer between two trustees. On the other hand, in support, he relied on Bhagirath Kanoria and Others Vs. State of M. P., ; Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, : Lakhi Ram Vs. State of Haryana and Others, ; Sm. Nihar Kumari Debi and Others Vs. Commissioner of Police, ; B.R. Ramabhadriah Vs. Secretary, Food and Agriculture Department, Andhra Pradesh and others, .

Additional submission on behalf of the Respondents:

15. Mr. Mitra was granted leave to distinguish the decision cited by Mr. Pal. He distinguished the decision in V.R. Rudani (supra), Bhagirath Kanoria (supra). He contended that the delay has not been properly explained. The Court can mould the prayer but cannot substitute it. The Commissioner has no jurisdiction to take penal action and that too against a Trust. There was no prayer for transfer to the Kelvin Trust.

16. I have heard the respective counsel for the parties, who continued their address for days together. It may be noted that the respective counsel made erudite arguments. More erudite the argument more the confusion.

Maintainability:

17. Let us deal first with the question of maintainability of the writ petition. One of the grounds that was taken was with regard to the authority of the petitioner. But, subsequently the remaining three trustees who were respondents in the writ petition, having sought for transposition, have been so transposed in the category of the petitioners. All the trustees having joined as petitioner, this question is no more germane to the issue.

18. With regard to the question of locus standi of the petitioners on the ground that they are not persons aggrieved. It appears that the said contention is devoid of merit. The individual member workman or workmen, may have right as against the Trust and could have complained to the Provident Fund Commissioner and may approach the Court on account of his or their claim. But that will not

preclude the Trustees in the facts and circumstances of the case, to approach the Court. Inasmuch as the Trustees of the fund, though a private trust, are discharging statutory liability in respect of statutory fund, since exempted but recognised by the statute. It is the responsibility of the Trustees to discharge their statutory liability in respect of the fund, exempted u/s 17 of the 1952 Act according to the scheme approved. The accumulation of the provident fund dues of each individual member till June 30, 1986, was, admittedly, maintained by Kelvin Trust. With the transfer of the members of Kelvin Trust to Waverly Trust, such accumulation is liable to be transferred to the Waverly Trust from the Kelvin Trust. Therefore, as trustees of the Waverly Trust, the petitioners, have every right to demand such transfer, without which they are unable to discharge their statutory liability viz.: to pay the dues payable to the members of the Waverly Trust. That apart, the letter dated January 24, 2000 though issued during the pendency of the writ petition, yet it related to the position as it stood before the writ petition was moved. As such, in the facts and circumstances of the case, the petitioners are persons aggrieved.

19. The ground that the transferee is not the beneficiary is also untenable, in view of the fact that as such Trustees of the Waverly Trust, the petitioners are responsible for the purpose of administering the fund and discharging their statutory liability. The question that the beneficiary is paid by the employer, therefore, the Trustees could not claim transfer, is also equally untenable. Inasmuch as, there is nothing to show that the entire amount was paid, It might be an inept drafting; but still then the statement made in Para-6 of the writ petition on which Mr. Mitra had relied upon, does not bear out the meaning as was sought to be imputed by Mr. Mitra. Relying on the statement, Mr. Mitra sought to contend that Hooghly Mills Company had deposited the entire amount. In order to appreciate the said question, it would be beneficial to quote para-6 as here after:

"6. Petitioner states that the dues in respect of provident fund arrears liability taken by Hooghly Mills Ltd. till June 29, 1986 has already been deposited by the Hooghly Mills Company Limited with the new Provident Fund Trust."

The above statement refers to Provident fund arrears liability till June 29, 1986, as was taken by Hooghly Mills Company Limited, was paid by Hooghly Mills to Waverly Trust In case it is contended that this was made in terms of the agreement of transfer of the unit, it was equally open to Mr. Mitra to produce a copy of the agreement and show conclusively that the entire liability was taken by Hooghly Mills. He never proposed or attempted to do so. Therefore, the Court is left to interpret the statements made in Para-6 and infer the meaning out of it. The reference has been made to arrears liability of provident fund. The arrear liability means an amount not deposited in the fund. In other words, an amount due, but not paid is an arrear. Once the amount is deposited in the fund, it is neither an arrear nor a liability. As soon as the amount is deposited, the liability is discharged. It is no more in arrear. The reference to provident fund arrear

means provident fund liability unpaid in Kelvin Trust. The agreement was admittedly between Kelvin and Hooghly Mills. Admittedly it was not between Kelvin Trust and Waverly Trust. Inasmuch as at the time of transfer Waverly Trust was not formed or created. It was established afterwards. There could not be any agreement between Kelvin Trust and Hooghly Mills. In fact, it was the arrear liability of Kelvin payable to the Kelvin Trust, which was taken by Hooghly Mills. It was this arrear that was paid to the Waverly Trust when it was established or created. This paragraph does not mean that the entire liability of the Kelvin Trust i.e., in respect of the amount of PF accumulation in Kelvin Trust, relating to the members transferred to Waverly, was taken by Hooghly Mills and was paid to Waverly Trust. Until it is conclusively shown to the Court, it cannot arrive at such a conclusion at which Mr. Mitra was driving at, having regard to the statement made in para-6 referred to above. Thus, it is not a claim by the transferee. Neither it is a money claim by, nor a reimbursement to be made to Hooghly Mills. Neither it can be said that it would be paid to the transferee and will not enure to the benefit of the members of the Waverly Trust. Admittedly, this amount was shown in the Balance Sheet of Kelvin Trust to be due to Waverly Trust. As such the grounds taken by Mr. Mitra, as referred to hereinbefore, in Clauses (b), (c), (e), (f) and (h) of para 5 above cannot be sustained and are being answered against Mr. Mitra's contention,

Private Trust?:

20. Now let us examine the ground that the Kelvin Trust is a private trust and not a state within of meaning of Article 12 of the Constitution of India and as such writ is not maintainable. In the writ petition, prayer was made for directing the RPFC to take legal steps or penal action against Trustees of the Kelvin Trust for realization of PF accumulation of Waverly. Thus, even if it is accepted that the Trustees of Kelvin Trust are not "state" within the meaning of Article 12 of the Constitution of India, yet the writ petition could be maintained against the RPFC, a statutory authority, having statutory duty and public function to discharge in respect of the provident fund including exempted fund.

21. That apart, admittedly, though the Trust is in respect of PF exempted u/s 17 of the 1952 Act, the liability of the Trustees are governed by the scheme approved by the authority under the 1952 Act and are also governed by the provisions of the 1952 Act. Every action discharged by the trustees of an exempted PF are controlled and governed by the provisions of the approved scheme and the statute. Their liability is statutory liability. The discharge of their function is a public function. It is in nature a dealing with a section of the public, being members of the fund. Unless the exemption was granted, the fund would have been governed by the scheme framed under the 1952 Act. But for the exemption, the fund is governed by the scheme approved by the PF Authority. Thus, the discharge of the function of the Trustees is related to a statutory fund governed by a scheme approved by the statute. As such, the liability discharged is, purely, a statutory liability. Any infraction thereof is amenable to the provision

contained in the 1952 Act. Thus, the Trustees, for the purpose of discharge of their liability in respect of PF as instrumentality and agency of the state, are state within the meaning of Article 12 of the Constitution of India, on the principle laid down in *Anadi Mukta Sadguru SMVS Trust (supra)*. As such, writ is very much maintainable as against the trustees.

Has RPFC Jurisdiction to transfer?:

22. Now let us examine the contention of Mr. Mitra that the RPFC has no jurisdiction to direct transfer. This contention has since been elaborated by him as noted hereinbefore. The Commissioner of Provident Fund includes RPFC as defined in Clause 2(d) of the EPF Scheme 1952. The Commissioner is appointed u/s 5-D of the 1952 Act. Section 5-D empowers Central Board constituted by the Central Government u/s 5-A, to appoint RPFC. The scheme of 1952 Act and the scheme framed thereunder provides various powers to the RPFC, who is responsible for the proper implementation of the scheme, object, purpose of the Act and the Scheme. Overall authority for enforcing the statute is vested in the RPFC. As such it is very difficult to accept the proposition that the RPFC has no jurisdiction to direct transfer of the PF accumulation from one fund to the other in terms of the statutory provisions of the Act. If there is any such violation, it is open to the RPFC to take appropriate steps, as are permitted under the Act. We will examine in detail the steps that could be taken by the Commissioner on the basis of the power conferred upon it, particularly, in respect of an exempted fund, at a later stage. But, at this stage, it appears that the writ is very much maintainable as against the Provident Fund Commissioner, even in respect of an exempted fund.

23. The ground that no complaint has been made by any of the members of Waverly Fund and, therefore, the Provident Fund Commissioner cannot assume jurisdiction, is also equally untenable. If a Trust discharges its statutory liability and pays the members and no grievance is raised by any such member, then if there is any infraction with regard to the compliance of any statutory provision by any person having statutory liability, writ can be maintained by a person, connected with and interested in the discharge of function by such Trust, aggrieved, even though he may not be a member of the fund. In this case, the Waverly Trust is finding it difficult to pay its members, because of non-transfer of the past accumulation of its members lying with the Kelvin Trust. In that event, it has every right to approach the RPFC to secure transfer. Having regard to the provisions of the 1952 Act and the Scheme, it cannot be said that the RPFC would be an idle onlooker and powerless to secure transfer or direct transfer of such PF accumulation from one fund to the other, when the facts are brought before it. The Waverly Trust has a legal right to secure transfer of the past PF accumulation of its members from Kelvin Trust, in respect of which they have been appointed Trustees and in respect of which they are supposed to exercise their control and discharge their obligation and liability statutorily imposed. As such on complaint by the Waverly Trust the RPFC has every jurisdiction to issue

appropriate direction to Kelvin Trust or to Waverly Trust, even though the fund were exempted. Having regard to the discussion we will be making afterwards, by reason of various provisions contained in the 1952 Act and the Scheme, even with regard to the exempted fund, the RPFC has every authority to issue appropriate direction to the Trustees of such fund, inasmuch as a fund is exempted by the PF Authority, on certain conditions, in view of Section 17. As such it has every control over such exempted fund, even though the various provisions of the Act and the scheme, which are applicable to a fund not exempted, may not be applicable to an exempted fund. But, within the restricted sphere of control, the RPFC has every right to exercise its jurisdiction to regulate the activities of the exempted fund and look after the administration of such fund, if there is any infraction, in respect of the administration of such fund or in the discharge of any liability under the provisions of the 1952 Act.

24. The ground that the RPFC cannot take steps against anyone other than the employer, is also not tenable, in view of the discussion, which will be made at a later stage, having regard to the various provisions of the Act. Since the RPFC has certain responsibility with regard to the administration of the fund, it is also empowered to take steps against the Trustees of the exempted Fund, who are equally responsible in the administration of the PF, when it relates to the discharge of certain liability governed by the statute.

25. That Hooghly Mills is not making any claim and that, if it makes, the same would be barred by limitation, is wholly irrelevant, for our present purpose, since Hooghly Mills has not made any claim. That apart, we have already discussed that the claim made by Waverly Fund is not for the purpose or reimbursement, but for its own fund. As such there is no scope for dealing with the same, so far as the question of maintainability is concerned.

26. It is contended that the writ petition cannot be maintained on the basis of the prayers made. The reliefs, as asked for, cannot be granted. In the present case, the prayers may not have been couched in proper form, But, the Court is empowered to mould the prayer without substituting it. How far the prayers can be moulded or how far moulding would amount to substitution of the prayers, as contended by Mr. Mitra. would be considered at a later stage.

27. How far Section 17-B can be attracted in this case, is a question on merit, requires examination. But, it does not add to the ground of maintainability.

28. Therefore, the grounds of maintainability, as raised, cannot be sustained. For the reason discussed above, in my view, this writ petition is maintainable.

Object and purpose of the 1952 Act:

29. Before we proceed further, we may remind ourselves about the gravity of the task ahead. In order to appreciate the situation, we may refer to the purpose and object of the 1952 Act. While dealing with the case, we should continuously remind ourselves the backdrop in which the questions are to be considered.

30. The Employees' Provident Funds and Miscellaneous Provisions Act, (Act XIX of 1952) is a piece of Social Security enactment. Freedom from want and security against economic fear is one of the fundamental needs of our country. The Constitution guarantees to all people of India, inter alia, social and economic justice, but this had yet to be secured by peaceful social and legislative steps. As has been aptly said:

"It is the function of an ideal welfare State to give to every citizen the opportunity of earning his living and freedom from fear, fear especially of economic ruin which can involve physical and even moral ruin."

31. The Constitution lays down the objectives, which the Union and State Governments have to keep in view, in the administration of the country and take the legislative steps desirable to lay the foundations of the social security against certain risks, to which its members are exposed. These risks are essentially contingencies against which the individual of small means cannot effectively provide by his own ability or foresight alone or even in private combination with his fellows. In a modern State it is of utmost importance to eradicate poverty, unemployment and disease. As a matter of fact, security of employment, security of income, and security against ill-health can only be assured through a system of social assistance schemes.

32. The above propositions would be apparent from the excerpts from the Statement of objects and reasons of the 1952 Act:

"The question of making some provision for the future of the industrial worker after he retires or for his dependents in case of his early death, has been under consideration for some years. The ideal way would have been provisions through old age and survivors' pensions as has been done in the industrially advanced countries. But in the prevailing conditions in India, the institution of a pension scheme cannot be visualized in the near future. Another alternative may be for provision of gratuities after a prescribed period of service. The main defect of a gratuity scheme, however, is that the amount paid to a worker or his dependents would be small, as the worker would not himself be making any contribution to the fund. Taking into account the various difficulties, financial and administrative, the most appropriate course appears to be the institution compulsorily of contributory provident funds in which both the worker and the employer would contribute. Apart from other advantages, there is the obvious one of cultivating among the workers a spirit of saving something regularly. The institution of a provident fund of this type would also encourage the stabilization of a steady labour force in industrial centres.

Most of the details relating to the Fund will be settled in accordance with a scheme, which, in the interest of uniformity, will be framed by the Central Government. The administration will, to a large extent, be decentralised in regard to undertakings falling within the sphere of State Governments.

Where provident funds offering equal or more advantageous terms are operating

efficiently, provision has been made for them to continue subject to certain safeguards in the interest of the workers."

Provision as it stood before Amendment Act 33 of 1988:

33. A point has been urged that the alleged liability of Kelvin, if there be any, arose on March 31, 1986. Therefore, the liability would be governed under the 1952 Act, as it stood, prior to its amendment by Act 33 of 1988. Under the provisions of the said Act, the Kelvin was not liable to transfer any amount.

34. In order to appreciate this question, we may trace the legislative history and the position in Law, so far as the liability of Kelvin is concerned, under the 1952 Act, before it was amended by Act 33 of 1988.

35. The liability of an exempted fund as on the date of transfer used to be governed by the 1952 Act, as it stood, prior to the 1988 amendment. Sections 17, 17-A and 17-B respectively permitted exemption and stipulated the conditions and liability under such exemption. We are now concerned with the transfer of the PF accumulation of a person leaving employment from one and obtaining re-employment in another establishment. Sub-section (3) of Section 17 provided that in respect of an establishment where exemption is granted, the employer under Clause (c) of Sub-section (3) of Section 17 was liable to transfer the amount of accumulation to the credit of that person in the Provident Fund of the establishment, left by him, to the credit of that person's account in the Provident Fund of the establishment, in which he is re-employed, within such time as may be specified by the Central Government. Thus, the liability was very much theirs even on the date of transfer. Sub-section (4) of Section 17 provided for cancellation of the exemption on any of the grounds mentioned in Clause (a), (aa), (b), (c), (d) thereof respectively. Clause (b) relates to the violation of Clause (c) of Sub-section (3). Similar provision is made in Sections 17-A and 17-B. Section 14 Sub-section (2-A) provides for punishment in respect of contravention or default in complying within any of the provision of the Act or of any condition, subject to which exemption was granted u/s 17, with imprisonment and fine, which may extend to three months and Rs. 1,000/- respectively. Section 14 has been amended by the 1988 Act to the extent of enhancement of the punishment. Therefore, even if the 1988 amendment may not apply, still then the punishment as provided for, less than that was enhanced in 1988 can very well be imposed.

36. While amending Section 17, some elaborate provisions have been incorporated, but there was no radical departure from the existing provisions. On the other hand, it was made more comprehensive. Act 33 of 1988 was enacted with the objects, which included making of existing penal provisions more stringent and suitable provision for charging interest on belated payment and for making the existing legal penal provisions applicable to the unexempted establishments, applicable to the exempted establishments, so as to check the defaults on their part. The 1988 Amendment Act was given prospective effect.

But, then the defaults or contravention, which were committed, prior to the 1988 Amendment coming into operation, if continued, would be governed by the amended provision, subject to Article 20 of the Constitution of India. Inasmuch as it is to plug these loopholes, the 1988 Amendment was brought about. The object and purpose of the 1988 amendment could not be frustrated by ignoring its application to a continuing default or contravention. In order to arrest these defaults or contraventions, the Act was amended. A contravention or default, is a continuing contravention or default, and as such a continuing offence, to which the amended provision would be applicable, if it continues even after the amendment.

37. A comparative table of Sections, 14, 17, 17-A and 17-B as reflected hereafter will enable us to ascertain the changes:

Before Amendment Act 33 of 1988 Section 14 After Amendment Act 33 of 1988 Section 14

(2-A). Whoever contravenes or makes default in complying with any provision of this Act or of any condition subject to which exemption was granted u/s 17 shall, if no other penalty is elsewhere provided by or under this Act for such contravention or non-compliance, be punishable with imprisonment which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

(2-A). Whoever contravenes or makes default in complying with any provision of this Act or any condition subject to which exemption was granted u/s 17 shall, if no other penalty is elsewhere provided by or under this Act for such contravention or non-compliance be punishable with imprisonment which may extend to [six months, but which shall not be less than one month, and shall also be liable to fine which may extend to five thousand rupees. ]

Before Amendment Act 33 of 1988 Section 17 After Amendment Act 33 of 1988 Section 17

(1) The appropriate Government may, by notification in the Official Gazette and subject to such conditions as may be specified in the notification, exempt from the operation of all or any of the provisions of any Scheme-

(1) The appropriate Government may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, [exempt, whether prospectively or retrospectively, from the operation] of all or any of the provisions of any Scheme--

(a) any [establishment] to which this Act applies if, in the opinion of the appropriate Government, the rules of its provident fund with respect to the rates of contribution are not less favourable than those specified in Section 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any Scheme in relation to the employees in any other [establishment]

of a similar character: or

(a) any [establishment] to which this Act applies if, in the opinion of the appropriate Government, the rules of its provident fund with respect to the rates of contribution are not less favourable than those specified in Section 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any Scheme in relation to the employees in any other [establishment] of a similar character: or

(b) and [establishment] if the employees of such [establishment] are in enjoyment of the benefits in the nature of provident fund, pension or gratuity and the appropriate Government is of opinion that such benefits, separately or jointly, are on the whole not less favourable to such employees than the benefits provided under this Act or any Scheme in relation to employees in any other [establishment] of a similar character.

(b) any [establishment] if the employee of such [establishment] are in enjoyment of benefits in the nature of provident fund, pension or gratuity and the appropriate Government is of opinion that such benefits, separately or jointly, are on the whole not less favourable to such employees than the benefits provided under this Act or any Scheme in relation to employees in any other [establishment] of a similar character [Provided that no such exemption shall be made except after consultation with the Central Board which on such consultation shall forward its views on exemption to the appropriate Government within such time limit as may be specified in the Scheme.]

(1-A) The Central Government may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification exempt from the operation of all or, any of the provisions of the Family Pension Scheme, any establishment if the employees of such establishment, are in enjoyment of benefits in the nature of family pension, and the Central Government is of opinion that such benefits are on the whole not less favourable to such employees than the benefits provided under this Act or the Family Pension Scheme in relation to employees in any other establishment of a similar character.

(1-A) Where an exemption, has been granted to an establishment under Clause (a) of sub-section (1):

(a) the provisions of Sections 6, 7-A, 8 and 14-B shall, so far as may be, apply to the employer of the exempted establishment in addition to such other conditions as may be specified in the notification granting such exemption, and where such employer contravenes, or makes default in complying with any of the said provisions or conditions or any other provision of this Act, he shall be punishable u/s 14 as if the said establishment had not been exempted under the said Clause (a);

(b) the employer shall establish a Board of Trustees for the administration of the

provident fund consisting of such number of members as may be specified in the Scheme:

(c) the terms and conditions of service of members of the Board of Trustees shall be such as may be specified in the Scheme;

(d) the Board of Trustees constituted under Clause (b) shall,

(i) maintain detailed accounts to show the contributions credited, withdrawals made and interest accrued in respect of each employee;

(ii) submit such returns to the Regional Provident Fund Commissioner or any other officer as the Central Government may direct from time to time;

(iii) invest the provident fund monies in accordance with the directions issued by the Central Government from time to time;

(iv) transfer, where necessary, the provident fund account of any employee; and

(v) perform such other duties as may be specified in the Scheme.

(3) Where in respect of any person or class of persons employed in an establishment an exemption is granted under this Section from the operation of all, or any of the provisions of any Scheme (whether) such exemption has been granted to the establishment wherein such person or class of persons is employed or to the person or class of persons as such), the employer in relation to such establishment-

(3) Where in respect of any person or class of persons employed in an establishment an exemption is granted under this Section from the operation of all or any of the provisions of any Scheme (whether) such exemption has been granted to the establishment wherein such person or class of persons is employed or to the person, or class of persons as such), the employer in relation to such establishment-

(a) shall, in relation to the provident fund, pension and gratuity to which any such person or class of persons is entitled, maintain such accounts, submit such returns, make such investment, provide for such facilities for inspection and pay such inspection charges, as the Central Government may direct;

(a) shall, in relation to the provident fund, pension and gratuity to which any such person or class of persons is entitled, maintain such accounts, submit such returns, make such investment, provide for such facilities for inspection and pay such inspection charges, as the Central Government may direct;

(b) shall not, at any time after the exemption, without the leave of the Central Government, reduce the total quantum of benefits in the nature of pension, gratuity or provident fund to which any such person or class of persons was entitled at the time of the exemption; and

(b) shall not at any time after the exemption, without the leave of the Central

Government, reduce the total quantum of benefits in the nature of pension, gratuity or provident fund to which any such person or class of persons was entitled at the time of the exemption; and

(c) shall, where any such person leaves his employment and obtains reemployment in another establishment to which this Act applies, transfer within such time as may be specified in this behalf by the Central Government, the amount of accumulations to the credit of that person in the provident fund of the establishment left by him to the credit of that person's account in the provident fund of the establishment in which he is reemployed or, as the case may be, in the Fund established under the Scheme applicable to the establishment.

(c) shall, where any such person leaves his employment and obtains re-employment in another establishment to which this Act applies, transfer within such time as may be specified in this behalf by the Central Government, the amount of accumulations to the credit of that person in the provident fund of the establishment left by him to the credit of that person's account in the provident fund of the establishment in which he is re-employed or, as the case may be, in the Fund established under the Scheme applicable to the establishment,

(4) Any exemption granted under this Section may be cancelled by the authority which granted it by order in writing, if an employer fails to comply--

(4) Any exemption granted under this Section may be cancelled by the authority which granted it, by order in writing, if an employer fails to comply--

(a) In the case of an exemption granted under sub-section (1), with any of the conditions imposed under that sub-section or with any of the provisions of sub-section(3);

(a) In the case of an exemption granted under sub-section (1), with any of the conditions imposed under that sub-section [or sub-section (1-A)] or with any of the provisions of sub-section (3);

[(aa) in the case of an exemption granted under sub-section (1-A), with any of the conditions imposed under that sub-section; and]

[(aa) in the case of an exemption granted under sub-section (1-C), with any of the conditions imposed under that sub-section; and]

(b) in the case of an exemption granted under sub-section (2), with any of the provisions of sub-section (3);

(b) in the case of an exemption granted under sub-section (2), with any of the provisions of sub-section (3);

[(c) in the case of an exemption granted under sub-section (2-A), with any of the conditions imposed under that sub-section or with any of the provisions of sub-section (3-A);

[(c) in the case of an exemption granted under sub-section (2-A), with any of the

conditions imposed under that sub-section or with any of the provisions of sub-section (3-A)];

(d) in the case of an exemption granted under sub-section (2-B), with any of the provisions of sub-section (3-A).]

(d) in the case of an exemption granted under sub-section (2-B), with any of the provisions of sub-section (3-A)].

[(5). Where any exemption granted under sub-section (1), sub-section (1-A)], sub-section (2), sub-section (2-A) or sub-section (2-B) is cancelled, the amount of accumulations of the credit of every employee to whom such exemption applied, in the provident fund [the family pension fund or the insurance fund] of the establishment in which he is employed shall be transferred within such time and in such manner as may be specified in the Scheme or the Family Pension Scheme [or the Insurance Scheme] to the credit of his account in the Fund or the Family Pension Fund [or the Insurance Fund], as the case may be.

[(5) Where any exemption granted under sub-section (1), sub-section 4[(1-C), sub-section (2), sub-section (2-A) or sub-section (2-B) is cancelled, the amount of accumulations to the credit of every employee to whom such exemption applied, in the provident fund, [the family pension fund or the insurance fund] of the establishment in which he is employed [together with any amount forfeited from the employer's share of contribution to the credit of the employee who leaves the employment before the completion of the full period of service] shall be transferred within such time and in such manner as may be specified in the Scheme or the Family Pension [Scheme] [or the Insurance, Scheme] to the credit of his account in the Fund or the Family Pension [Fund] [or the Insurance Fund], as the case may be.

(6) Subject to the provisions of sub-section (1-A), the employer of an exempted establishment or of an exempted employee of an establishment to which the provisions of the Family Pension Scheme apply, shall, notwithstanding any exemption granted under sub-section (1) or sub-section (2), pay to the Family Pension Fund such portion of the employer's contribution as well as the employee's contribution to its provident fund within such time and in such manner as may be specified in the Family Pension Scheme.

[(6) Subject to the provisions of sub-section [(1-C)], the employer of an exempted establishment or of an exempted employee of an establishment to which the provision of the Family Pension Scheme apply, shall, notwithstanding any exemption granted under sub-section (1) or sub-section (2), pay to the Family Pension Fund such portion of the employer's contribution as well as the employee's contribution to its provident fund within such time and in such manner as may be specified in the Family Pension Scheme. ]

Section 17 -A Section 17 -A

(1) where an employee employed in an establishment to which this Act applies

leaves his employment and obtains re-employment in another establishment to which this Act does not apply, the amount of accumulations to the credit of such employee in the Fund, or as the case may be, in the provident fund of the establishment left by him shall be transferred within such time as may be specified by the Central Government in this behalf, to the credit of his account in the provident fund of the establishment in which he is re-employed, if the employee so desires and the rules in relation to that provident fund permit such transfer.

(1) Where an employee employed in an establishment to which this Act applies leaves his employment and obtains re-employment in another establishment to which this Act does not apply, the amount of accumulations to the credit of such employee in the Fund, or as the case may be, in the provident fund of the establishment left by him shall be transferred within such time as may be specified by the Central Government in this behalf, to the credit of his account in the provident fund of the establishment in which he is re-employed if the employee so desires and the rules in relation to that provident fund permit such transfer.

(2) Where an employee employed in an establishment to which this Act does not apply leaves his employment and obtains re-employment in another establishment to which this Act applies, the amount of accumulations to the credit of such employee in the provident fund of the establishment left by him may, if the employee so desires and the rules in relation to such provident fund permit, be transferred to the credit of his account in the Fund or as the case may be, in the provident fund of the establishment in which he is re-employed.

(2) Where an employee employed in an establishment to which this Act does not apply leaves his employment and obtains re-employment in another establishment to which this Act applies, the amount of accumulations to the credit of such employee in the provident fund of the establishment left by him may, if the employee so desires, and the rules, in relation to such provident fund permit, be transferred to the credit to his account in the Fund or as the case may be, in the provident fund of the establishment in which he is re-employed.

#### Section 17-B Section 17-B

Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or [the Family Pension Scheme or the Insurance Scheme], as the case may be, in respect of the period up to the date of such transfer; Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

Where an employer, in relation to an establishment, transfers that establishment

in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or [the Family Pension Scheme or the Insurance Scheme], as the case may be, in respect of the period up to the date of such transfer; Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

38. Before amendment, the exemption used to be granted on the basis of a scheme which provided for administration of such fund through a trust or use to be administered by a trust already established. Admittedly, Kelvin Trust used to administer the PF Fund in respect of the employees of Kelvin and Waverly, then Broadloom Division of Kelvin. This is only being recognized in the Act itself. Section 17 does not exempt an exempted fund from the application of the Act as a whole. It used to exempt an exempted fund from the application of the scheme framed under the Act, by reason of the approved scheme notified in the exemption so granted, in view of the fact that such scheme contained conditions not less favourable than those of the scheme. Thus, it cannot be said that the 1952 Act was not applicable in respect of an exempted fund or that the RPFC has no control over such fund. The Act was applicable and control was permitted within the purview of the Act, as were made applicable by reasons of the provisions contained in 1952 Act itself, both before and after the Amendment Act 33 of 1988.

39. In the present case, the default is still continuing and as such the default or contravention is now amenable to the Law as it stands today. Therefore, we may now examine the position in Law, as it stands today. However, we may keep in mind that there was no radical change in the provision already existed. It was made more stringent, more comprehensive. It was made suitable to attract penal provisions in respect of contraventions and defaults including those, which are continuing in nature. We may, therefore, now examine the position in relation to the status of an exempted establishment.

Status of an exempted PF:

40. Now let us examine the provisions of the 1952 Act having regard to an exempted fund. By reason of Sub-section (3) of Section 1 of the 1952 Act the provisions of the said Act is applicable to every establishment, which is a factory engaged in any Industry specified in Schedule 1, in which 20 or more persons are employed. But the said provision is subject to Section 16. Admittedly both Kelvin and Waverly are factories engaged in an industry specified in Schedule 1, where more than 20 persons were/are employed. The said two factories do not come u/s 16. Thus, provisions of 1952 Act are applicable to both the establishments. Before Waverly was taken over by Hooghly Mill, Waverly was part of Kelvin and was subject to 1952 Act. However, the Kelvin had a P.P. Trust, because of the exemption granted to it u/s 17. Admittedly, in the said Kelvin P.P.

Trust, the PF of the employees of Broadloom (Waverly) was also included and maintained. Because of the exemption u/s 17 granted to the Kelvin Trust, the provisions of the 1952 Act, as a whole, and the Scheme framed under that Act, as such, was not applicable. But, at the same time, admittedly it was applicable to the said fund so far as it relates, in its application, to an exempted fund. The application of provisions of 1952 Act cannot be ruled out in respect of an exempted fund. We may, examine now, how far it is so applicable and what would be the liability of the Trustees, vis-a-vis, the employer.

41. Section 17 provides that the appropriate Government may exempt all or any of the provisions of any scheme, subject to such conditions as may be specified, through notification in the Official Gazette. Such exemption is allowed when the rate of contribution is not less favourable than provided in the Act and the benefits granted are not less favourable to the employees and that the employees were in enjoyment of Provident Fund, Pension or Gratuity not less favourable than the benefits provided under the Act and the scheme.

42. Section 17(1-A) provides that Sections 6, 7-A, 8 and 14-B would be applicable to the employer of the exempted establishment, in addition to such other conditions specified in the notification granting exemption, if employer contravenes or makes default in complying with any of the provisions of the said Sections referred to above or the conditions or any other provisions of the 1952 Act, then the employer shall be punishable u/s 14, as if the establishment was not an exempted one. Section 17(1-A)(b) requires the employer to establish a Board of Trustees for the administration of the Provident Fund, as may be specified in the scheme. The conditions of service of the members of the Board of Trustees in terms of Clause (c) shall be such as may be specified in the scheme. It further requires, in Clause (d), the Board of Trustees to (i) maintain detailed accounts to show the contributions credited, withdrawal and interest accrued, in respect of each employee; (ii) submit such returns to the Regional Provident Fund Commissioner (RPFC) or any other officer, as the Central Government may direct from time to time; (iii) invest the Provident Fund money in accordance with the directions issued by the Central Government from time to time; (iv) transfer, where necessary, the Provident Fund account of any employee; and (v) perform such other duties as may be specified in the scheme.

43. Thus, we find that by reason of Clause (d) of Sub-section (1-A) of Section 17, the Board of Trustees, is also responsible for the discharge of functions specified in Clauses (i) to (v). The Board of Trustees cannot escape from the liability, with regard to compliance of the provisions contained therein. At the same time, the employer, also, cannot evade its liability, by reason of Sub-section (1-A) of Section 17 of the 1952 Act.

44. Section 17(1-B) provides that contravention or default, in complying with Clause (d) of Section 17(1-A), by a Board of Trustees established under Clause (b) of the said sub-section, is deemed to be an offence committed by it, under Sub-section (2-A) of Section 14 and punishable thereunder. Section 17(3)

requires the employer to maintain accounts, submit returns, in relation to the Provident Fund and make investment and provide for such facilities for inspection and pay such inspection charges, as the Central Government may direct. By reason of Clause (b) of Section 17(3), an employer is forbidden from reducing the total quantum of benefits in the nature of Provident Fund etc., to which any person is entitled at the time of exemption. Clause (c) of Section 17(3) prescribes that where any person leaves the employment and obtains re-employment in any establishment, to which the Act applies, then the employer is liable to transfer within the time specified by the Central Government, the amount of accumulation to the credit of that person in the Provident Fund of the establishment left by him, to the credit of that person's account in the provident fund of the establishment in which he is re-employed or as the case may be, in the Fund established under the Scheme applicable to the establishment. Section 17(4) empowers the PF Authority to recall the exemption, if an employer fails to comply with the provisions of Section 17(1-A) or Section 17(3). The effect of recalling, has since been provided in Section 17(5) with which we are not now concerned.

45. Section 17-A in Sub-section (1) provides that where an employee employed in an establishment to which the Act applies, leaves his employment and obtains re-employment in any establishment to which the Act does not apply, the amount accumulated in his credit in the Fund of the establishment left by him, shall be transferred within the time specified by the Central Government to the credit of his account in the Provident Fund of the establishment in which he is re-employed, if the employee so desires and the Rules in relation to that Provident Fund permit such transfer. Under Sub-section (2) where an employee employed in an establishment to which this Act does not apply, leaves his employment and obtains re-employment in another establishment to which the Act applies, the amount of accumulation to the credit of such employee in the Provident Fund of the establishment left by him, shall, if the employee so desires and the Rules in relation to such Provident Fund permit, be transferred to the credit of his account in the fund, as the case may be, to the Provident Fund of the establishment in which he is re-employed.

46. Section 17-A prescribes in its two sub-sections that transfer is mandatory in a case where an employee leaves one establishment and is re-employed in another, even though the 1952 Act may be applicable to one and not to the other and vice versa. The intention of incorporating this provision is clear and unambiguous. It had clarified and dispelled the doubt in a case where the PF of the two establishments are governed by different provision: viz.: a position different from a case where both the establishments are governed by same provision. In other words, it had explained that there would be no difficulty of transfer in cases other than those where the PF is exempted in both or where PF is non-exempted in both.

47. Section 17-B provides that where an employer, in relation to an

establishment transfers the establishment in whole or in part by sale, gift, lease or license or in any other manner whatsoever, the employer and the person, to whom the establishment is so transferred, shall, jointly and severally, be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme as the case may be, in respect of the period up to the date of such transfer, provided that the liability of the transferee shall be limited to the value of the assets obtained by such transfer.

48. Thus, where an establishment is transferred, the liability remains with the transferor namely the employer primarily. But, by virtue of Section 17-B, the transferee is also made liable for the same. However, the liability of the transferee is limited to the value of the assets obtained by him by transfer. But no such limit of liability has been provided for the Transferor. The Transferor's liability is full and primary. The liability of the employer being the transferor and the transferee is joint and several. The liability is confined to the contribution and the other sums due from the transferor/employer under the provisions of the Act or the Scheme.

The Liability:

Now a combined reading of these provisions postulate as follows:

49. When there is a transfer the employer/transfer or is liable to pay the contribution and all other sums due under the provisions of the Act and the Scheme. This provision of the Act and the Scheme includes an exempted fund as well. Along with the employer/transferor the transferee is also liable for the same. The liability of the transferor is absolute, that of the transferee is confined to the extent of the asset transferred.

50. When such transfer is effected in respect of a part of the establishment and the employees employed in that part of the establishment are employed in the transferee establishment, under the provisions of this Act, shall be deemed to be re-employed in the transferee establishment. Those employees shall be deemed to have left the employment of the transferor and had been re-employed in the establishment of the transferee.

51. In such circumstances, the employer/ transferor is liable to transfer the accumulation of the provident fund, credited in the accounts of such employees, to the fund established in the transferee establishment.

The extent of the liability:

52. We may now examine the facts of this case in the light of the above proposition.

53. Admittedly, Waverly, the transferee establishment has established a fund, which is also an exempted one. As discussed above, in terms of the agreement, certain amounts, in respect of the liability of the transferor/ employer, was paid by the transferee in the said fund. Admittedly, the account of the members of the

Kelvin Trust, since been transferred to the Waverly, till the date of transfer, was being maintained and accumulated in the Kelvin Trust. On the creation of Waverly Trust, these employees became members of the Waverly Trust, where their contribution and accumulation are being credited, since after the date of transfer, in their respective accounts in the fund.

54. Thus, the fund lying with Kelvin is liable to be transferred to the Waverly Trust. Since both the funds are exempted funds, we may find out the liability having regard to Section 17-B, Section 17-A read with Sub-section (3)(c) of Section 17 keeping in view the provisions contained in Clause (d) of Sub-section (1-A) of Section 17. Any infraction of Clause (d) would be an offence u/s 14(2-A) and it attracts the mischief of Sub-sections (4) and (5) of Section 17.

55. By reason of Clause (d) of Sub-section (1-A) of Section 17, the Kelvin Trust is liable to maintain detailed account to show the contribution credited, withdrawal made and interest accrued in respect of each employee and was also liable to submit such returns to the RPFC and to invest the amount in accordance with the directions issued by the Central Government and transfer where necessary, the account of any employee.

56. Thus, Clause (v) of Sub-section (1-A) of Section 17 read with Clause (c) of Sub-section (3) of Section 17, makes it incumbent on Kelvin to transfer the entire accumulation, together with interest, of the members of the fund since left Kelvin and reemployed in Waverly as soon as the Waverly Fund was created. The failure to transfer within the time specified, after the Waverly Trust is created, by the Kelvin Trust makes the trustees of the Kelvin Trust, the transferor/employer Kelvin is also equally liable by reason of Section 17-B.

57. Section 17-A makes the transfer compulsory even when the Act applies to one and does not apply to the other or vice versa, But in this case, the Act after being applicable to both, the liability conforms to Clause (v) of Sub-section (1-A) of Section 17 read with Clause (c) of Sub-section (3) of Sections 17 and Section 17-A and 17-B respectively.

The Penalties & Recoveries:

58. We may now examine the penalties that could be attracted in the facts and circumstance of the case. Penalties are provided in Section 14, 14-B of the said Act. Recovery is provided in Section 15 thereof, which provides as follows:

"14. Penalties: (1) Whoever, for the purpose of avoiding any payment to be made by himself under this Act, [the Scheme], [the Family Pension Scheme or the Insurance Scheme] or of enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to [one year, or with the fine of five thousand rupees or with both.]

39[(1-A) An employer who contravenes, or makes default in complying with the provision of Section 6 of Clause (a) or Sub-section (3) of Section 17 in so far as

it relates to the payment of inspection charges, or paragraph 38 of the Scheme in so far as it relates to the payment of administrative charges, shall be punishable with imprisonment for a term which may extend to (three years), but-

(a) which shall not be less than (one year and a fine often thousand rupees) in case of default in payment of the employees' contribution which has been deducted by the employer from the employees' wages.]

[(b) which shall not be less than six months, and a fine of five thousand rupees, in any other case;] 43[\* \* \* \*]

Provided that the Court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term] [\*\*\*\*]

[(1-B) An employer who contravenes, or makes default in complying with the provisions of Section 6-C or Clause (a) of Sub-section (3-A) of Section 17 in so far as it relates to the payment of inspection charges, shall be punishable with imprisonment for a term which may extend to [one year) but which shall not be less than [six months) and shall also be liable to fine which may extend to [five thousand rupees]; Provided that the Court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term [ \* \* \* \*].

(2) [Subject to the provisions of this Act, the Scheme), [the Family Pension Scheme or the Insurance Scheme) may provide that any person who contravenes, or makes default in complying with, any of the provisions thereof shall be punishable with imprisonment for a term which may extend to [one year: or with fine which may extend to four thousand rupees, or with both.]

[(2-A) Whoever contravenes or makes default in complying with any provision of this Act or of any condition subject to which exemption was granted u/s 17 shall, if no other penalty is elsewhere provided by or under this Act for such contravention or non-compliance be punishable with imprisonment which may extend to [ six months, but which shall not be less than one month, and shall also be liable to fine which may extend to five thousand rupees.]

[\* \* \* \* ] 14-B. Power to recover damages.-Where an employer makes default in the payment of any contribution to the Fund, [the Family Pension Fund or the Insurance Fund, ] or in the transfer of accumulations required to be transferred by him under Sub-section (2) of Section 15, [or Sub-section (5) of Section 17] or in file payment of any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified u/s 17, [the Central Provident Fund Commissioner or such other officer as may be authorized by the Central Government, by notification in the Office Gazette in this behalf] may recover [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme);]

[Provided that before levying and recovering such damages, the employer shall

be given a reasonable opportunity of being heard].

[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established u/s 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, (1 of 1986) subject to such terms and conditions as may be specified in the Scheme.]"

59. Section 15 of the said Act provides as follows:

[ \* \* \*\*] 15. Special Provision relating to existing provident funds.- (1) [Subject to the provisions of Section 17, every employee who is a subscriber to any provident fund of [an establishment] to which this Act applies shall, pending the application of a Scheme to] the [establishment] in which he is employed, continue to be entitled to the benefits accruing to him under the provident fund, and the provident fund shall continue to be maintained in the same manner and subject to the same conditions as it would have been if this Act had not been passed.

(2) [On the application any Scheme to [an establishment], the accumulations in any provident fund of the [establishment], standing to the credit of the employees who become members of the Fund established under the Scheme] shall, notwithstanding anything to the contrary contained in any law for the time being in force or in any deed or other instrument establishing the provident fund but subject to the provisions, if any, contained in the Scheme, be transferred to the Fund established under the Scheme, and shall be credited to the accounts of the employees entitled thereto in the Fund."

Can the liability be evaded?:

60. Thus, it appears that Section 14 and 14-B attract the application of this Act even in respect of the exempted fund. Section 15 also requires maintenance of the fund in the same manner, which is subject to Section 17, and Sub-section (2) of Section 15 requires transfer in the same manner. Therefore, the RPFC is competent to take steps in the matter, where the accumulation is not being transferred by the transferor to the transferee fund. It was sought to be contended by Mr. Mitra that the amount is shown in the Balance Sheet, but in effect there is no fund. Such a ground cannot be put forth to escape the liability under provisions of Sub-clause (v) of Clause (d) of Sub-section (1-A) of Section 17 read with Clause (c) of Sub-section (3) of the said Sections 17, 17-A and 17-B, respectively. A liability, which is a statutory liability, cannot be evaded on that ground.

61. It is then contended that the trustees of the Kelvin Trust have a primary liability to pay the workers of Kelvin. True, it has its primary liability to Kelvin workers. But, in respect of the Provident Fund, nothing more can be paid to a worker, who is a member of the Fund, except what is accumulated in the credit

of such employee's P.F. Account. It is employees' contribution and the employer's contribution against a particular workman and the interest accrued thereon, that is credited in his account. The Trustees of the Fund do not pay anything out of their own pocket. Therefore, this primary liability cannot absolve their other primary liability to transfer the accumulation in the credit of the members transferred to Waverly. This is also a primary statutory liability.

62. The accumulation retained by the Kelvin Trust, is the accumulation in the credit of the members transferred to Waverly and it belongs to each such member. The same is being held by the Kelvin Trust, as Trustees, for and on behalf of the said members. It is not their own fund. In any event, since Waverly Trust has been created, the Trustees of Waverly Trust, are the Trustees of the members of Waverly Trust. Therefore, they do not have any legal right to hold on to the fund so far as it relates to the members of Waverly Trust. The holding of such fund by such Trustees are clearly misappropriation, even if temporary, until it is paid. Denial to pay makes them liable for misappropriation or Criminal breach of Trust, for which they may be criminally prosecuted, even under the ordinary criminal law namely the Indian Penal Code u/s 403 or 405 etc. thereof.

63. It is contended by Mr. Mitra that if the fund is transferred, it will affect the workers of the Kelvin, who are not parties to the proceedings. Unless one is a party to the proceeding, his right cannot be affected. Therefore, the Fund cannot be transferred without the members of the Kelvin Trust being added as party to the proceedings. This contention is wholly fallacious and absolutely unsustainable. No right of the workers of Kelvin can be affected by reason of transfer of the accumulation in the credit of the members of Waverly, inasmuch as, every individual workman is entitled to the accumulation of the fund standing in his credit namely his contribution and the employer's contribution to his credit and the interest accrued thereon. An employee has no right or lien over the accumulation of any other or fellow employee. The amount that would be transferred is the accumulation in the credit of the members of Waverly, which has nothing to do with those of the members of the Kelvin Trust.

64. Therefore, reliance placed on Mani Subrat Jain and Others Vs. State of Haryana and Others, to contend that absence of legal right, makes the writ petition not maintainable, is wholly misplaced. Inasmuch as, this was sought to be made out on the ground that u/s 41 of the Contract Act the claim was barred.

Section 41 Contract Act: If applies:

65. Mr. Mitra had referred to Section 41 of the Contract Act. It provides that if a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. Relying on this provision he contends that since Hooghly Mills have already paid to the Waverly Trust, it cannot enforce the claim again against the Trustees of the Kelvin Trust. In support, he relied on the decision in Textiles and Yarn (P) Ltd. Vs. Indian National Steamship Co. Ltd., and Kapur Chand Godha Vs. Mir Nawab Himayatalikhan Azamjah, . So far as the

principles laid down in those decisions are concerned, there cannot be any two opinions. A ratio decided in a particular decision has to be applied on the basis of the facts and circumstances and the context on which such ratio was decided. It has to fit in the situation it deserves. It cannot be misapplied where the facts are completely distinguished and the question is altogether different. Section 41 applies to a contract. Here there is no contract between Kelvin Trust and Waverly Trust. Therefore, Section 41 of the Contract Act does not apply. It applies where a promisor makes a promise to a promisee. Neither was there any promise, inasmuch as, it was a statutory liability of the Kelvin Trust under Sub-section (v) of Clause (d) of Sub-section (1-A) of Section 17 read with Clause (c) of Sub-section (3) of the said Section 17. Promise or no promise, it has to be transferred from Kelvin Trust to Waverly Trust by the Trustees. It was not a money due to the Waverly Trust from the Kelvin Trust. It was the account of the respective members transferred from Kelvin to Waverly, namely, who left employment of Kelvin and were re-employed in Waverly. It was the accumulation in their credit, which, under the statute, is to be transferred to their credit to the fund where re-employed.

66. Mr. Mitra contended further that though Hooghly Mills was a party to it, it has not shown how it had paid the amount to Waverly Trust, was it for the terms of the transfer. But this question is wholly irrelevant. It is not a performance of a third party. The receipt of the fund from Hooghly Mills cannot be equated to be the acceptance of performance of a third party. Mr. Mitra, however, has not been able to show that the entire dues or accumulation in the credit of the members of Waverly Trust, as maintained in the Kelvin Trust, was made good by the transferee. On the other hand, he had banked upon a statement made in paragraph 6 of the writ petition.

67. According to Mr. Mitra, the arrear liability having been paid by Hooghly Mills, the Waverly Trust cannot claim the said amount from Kelvin Trust, inasmuch as by reason of Section 17-B, it was equally the liability of the transferee, Hooghly Mills. The Trust cannot seek double payment since Hooghly Mills was also jointly and severally liable u/s 17-B. He also contended that in fact it was a claim by Waverly Trust, in order to reimburse the Hooghly Mills. In other words, it was virtually an attempt of Hooghly Mills to recover its dues from Kelvin through Waverly Trust, when such recovery is otherwise barred by the Law of Limitation.

68. This argument is wholly unsustainable. Unless the Trust is authorized to secure loan from Hooghly Mills on condition of repayment, no amount can be (sic) Hooghly Mills in repayment of loan. Mr. Mitra has not been able to show us anything that this payment was made by Hooghly Mills to Waverly Trust by way of loan, which is now being sought to be reimbursed by Waverly Trust after obtaining fund from Kelvin. Mr. Mitra could have asked for production of statement of accounts and Balance Sheets of Waverly Trust. He could have pressed this point to the hilt. But he has not done so. In the absence of any material, such a contention cannot be sustained. As such the question of

Limitation or otherwise or that this matter should be thrashed out before a Civil Court, an argument towards the maintainability of the present writ petition, as made by Mr. Mitra cannot be sustained.

69. However, if we read the statement made in Paragraph 6 of the writ petition, then it would be possible for us to discover the fallacy in the argument advanced by Mr. Mitra. The said paragraph proceeds to aver that Hooghly Mills had paid the arrear liability of Provident Fund taken by Hooghly Mills. The liability remains arrear until it is deposited in the fund, The liability of the employer ceases as soon the amount is deposited in the fund. It remains an arrear liability so long it is not deposited. Therefore, this sentence has to be interpreted to mean that it was the transferor/employer's arrear liability, which was not deposited by the employer in the Kelvin Trust in respect of its members since re-employed in Waverly after having left employment of Kelvin. The amount already accumulated in the respective accounts of its members since re-employed in Waverly after having left employment of Kelvin, can never be termed as arrear liability. Such arrear liability was till June 29, 1986. The accumulation in the fund already deposited by the employer in the Kelvin Trust cannot be the liability of the employer. It was a statutory liability of the Trustees to transfer the accumulation as discussed in paragraph 9 hereinbefore.

70. As rightly contended by Mr. Pal, appearing for the petitioners, while giving reply, Section 41 of the Contract Act has no manner of application in the present case on the basis of payment of certain funds by Hooghly Mills in the Waverly Trust. The question of transfer is a statutory liability. It is not a contract between the transferor and transferee. The fund belong to the credit of each individual member, whose rights flow from the provisions of the P.P. Act since governed by Section 17, according to the scheme approved. There are cannot be any contract, contrary thereto. A contract, even if there be any, directly in conflict with the statutory liability or the provisions of the statute are against law and are not legal, as such would be void. That apart, there was no proof of such payment. It was not a promise. There was no relationship of promisor or promisee in between Kelvin Trust and Waverly Trust. There could not have been any contract or promise between Kelvin Trust and Waverly Trust, for the simple reason that Waverly Trust was created after the transfer. The alleged contract could have been part of the contract, by which transfer was effected. But, at that point of time, Waverly Trust was not in existence. Therefore, there could not be any contract between Kelvin Trust and Waverly Trust. However, the transfer was between Kelvin and Hooghly Mills. It is never alleged by Kelvin or Kelvin Trust that there was a contract between Kelvin Trust and Hooghly Mills. Even if there be any contract between Kelvin and Hooghly Mills, it can be enforced between Kelvin and Hooghly Mills. Kelvin Trust has an independent existence and could not be bound by any contract between Kelvin or Hooghly Mills. Since Waverly Trust was created long after transfer, there could not be any contract between Kelvin and Waverly Trust. It is never contended on behalf of the respondents that there was any Contract or promise by or between Kelvin Trust and the Waverly

Trust. Therefore, there could not be any relation of promisor or promisee in between Kelvin Trust and Waverly Trust. Therefore, the decision cited by Mr. Mitra Textile and Yarn Pvt. Ltd. v. Indian National Steam Ship Co. Ltd. (supra) cannot be attracted in the present case. On the other hand, the decision cited by Mani Subrat Jain and Others Vs. State of Haryana and Others, helps the contention of the petitioner. It does not help Mr. Mitra. Admittedly, it is contended by the petitioner that only the arrears due to be paid in the fund was paid, but the accumulation of the fund in the credit of the respective members at the hands of the Kelvin Trust was not paid. In any event by no stretch of imagination, the Kelvin Trust can appropriate any fund transferable u/s 17(3)(c) or 17-B from Kelvin Trust to Waverly Trust. Thus, there is no scope in raising any disputed question of fact about the payment made by Hooghly Mills. Therefore, the decision in Union of India v. Ghaus Md. (supra), laying down the principle that disputed question of fact cannot be gone into by the High Court in exercise of writ Jurisdiction has no application in this case. The decision in Sampat Singh and Others Vs. State of Haryana and Others, does not seem to be applicable in view of the facts and circumstances of the present case. Similarly, the decision in Shri Alagappa Spinning Mills, Madurai v. Regional Commissioner, Employees Provident Fund (supra), has no manner of application in view of the fact there the question was related to a Court sale, which was held to be outside the pale of Section 17-B. Whereas the ratio decided in Bhagirath Kanoria v. Bahadur Singh helps the petitioner, not the respondent, inasmuch as, there was no transfer in between two Trusts.

71. Alternatively, Mr. Mitra contended that even if, the alleged payment by Hooghly Mills is accepted, as payment as u/s 17-B, then also no legal right can be said to be available to the Waverly Trust. This is a fact, which does not require determination in this case. Reliance on Union of India v. Ghaus Md. (supra) is equally misplaced. Now we are concerned with the question of liability joint or several of the transferor or transferee. It is a question between two exempted funds and its respective Trustees, in relation to Section 17(1-A)(d)(v) and (3)(c). It does not require any determination of fact. It can be ascertained from the account as maintained in terms of Section 17(1-A)(d)(i). It can be ascertained from the Balance Sheet itself. As directed by this Court, the Balance Sheet was also produced. This amount was shown in the account of the Kelvin Trust. This fact also appears to have been admitted by the Kelvin Trust. The admission is apparent from various correspondences viz.: Annexure K addressed by Waverly to the RPFC on December 27, 1991, Annexure R addressed by Kelvin Trust to Waverly Trust on March 24, 1993. However, by filing supplementary affidavit, this letter dated March 24, 1999 contained in Annexure R was sought to be explained. It is contended that it was issued by a person, who was neither authorised nor competent. The said Letter was issued upon a misconception and misapprehension. It cannot bind the Kelvin Trust. But such a contention cannot be accepted. Inasmuch as, by reason of Section 17(1-A)(d)(i), the Trustees are bound to maintain the accounts. As such, it was so maintained and shown in the

accounts against the members of the Kelvin Trust, since reemployed in Waverly and became members of Waverly Trust. Therefore, this amount was liable to be transferred by reason of Sub-clause (v) of Section 17(1-A)(d) thereof read with Sections 17(3)(c) and 17-B.

72. It is contended by Mr. Mitra that the writ petition has been filed with an oblique motive and as such cannot be maintained. He relied on *Sampat Singh v. State of Haryana* (supra). In view of the discussion made above, it cannot be held that this writ petition was made with an oblique motive to reimburse the Hooghly Mills. Therefore, the decision cited does not help him. The contention raised, is wholly misplaced.

**Locus Standi of the Petitioner:**

73. The next question as to the maintainability as raised by Mr. Mitra was that the writ petition was moved by one of the Trustees of the Waverly Fund without being so authorised by the other trustees, who were made respondents in the writ petition, particularly, in view of the fact that the said respondents had disputed the authority of the petitioner in the Affidavit-In-Opposition filed by them. However, subsequently the other Trustees had filed an application and sought to join the petitioner in the writ petition as petitioners and prayed for their transposition in the category of petitioners. On the basis of such prayer, which was not opposed by the petitioner, despite being objected to by the respondent Kelvin, was allowed by this Court and the other Trustees have since been transposed in the category of petitioners and have joined together to move this petition along with the petitioner. The said order has not been challenged, neither any prayer was made for adjournment of the hearing, in order to enable them to challenge the said order. Therefore, this point is no more relevant.

**Kelvin's liability: Statutory:**

74. Mr. Mitra had also contended that the statutory liability of the Trustees of Kelvin Trust is confined to the workers of Kelvin. The liability towards the Waverly Trust is not a statutory liability cast upon the trustees of the Kelvin Trust. At best it can be a civil dispute, which can be thrashed out before a Civil Court, and for which no writ petition can lie. Therefore, the present writ petition is an abuse of process of Law. He relied on the *Secretary, Parnasree Club v. State of West Bengal* (supra). According to him, it is a simple case of recovery of money on behalf of Hooghly Mills, in respect of which the petitioner cannot claim any legal right.

75. The answer to this question is very simple. By reason of Section 17(1-A)(d) (v) read with Sections 17(3)(c) and 17-B the Trustees of Kelvin Trust are liable to transfer this amount to Waverly Trust. The liability is a statutory liability attracting penal action and is in effect an infraction, as contemplated u/s 17(1-A) (a) read with Section 14 and 14-B Sub-section (1-B). Therefore, the RPFC has every right to take steps, within the scope and ambit of the provisions of the 1952 Act, as discussed above. Therefore, the Writ is very much maintainable

against the RPFC. It is not a civil dispute, particularly, when the amount can be ascertained from the accounts maintained by the Trustees by reason of Section 17(1-A)(d)(i), (iii) and (iv). Therefore, this contention of Mr. Mitra is unsustainable.

76. The other contentions of Mr. Mitra that this Writ is not maintainable since the relief sought for, would, in effect, be a money decree with execution. In view of the foregoing discussions, this contention is also misplaced.

77. Mr. Mitra contended that prior to 1988 amendment of the 1952 Act (Act 33 of 1988) the liability u/s 17(1-A) could not be conceived of. In the present case, the transfer having been effected before the 1988 amendment, Section 17(1-A) or (1-B) cannot be attracted to that part of the liability, which is that of the employer and not of the Trustees. Even if it is an offence, by reason of Section 14-C read with Section 14-A, it is to be decided by a Magistrate. The High Court cannot usurp the Jurisdiction of the Magistrate. Then again, non-compliance would bring about the consequences u/s 17(4) and 17(5) and nothing more.

78. True, until 1988 amendment was brought about, Sub-section (1-A), Sub-section (1-B) of Section 17 as amended, could not be attracted. But that does not liquidate the situation by reason of Section 17(3)(c) read with Section 17-B, which were already there. Even without Sub-section (1-A) of Section 17, the RPFC had some control over the exempted Fund through the exercise of power under Sub-sections (4) and (5) of the said Section. Thus, the authority of the RPFC cannot be ignored. So long the authority of RPFC subsists the writ petition can very well be maintained. Sub-section (1-A) of Section 17 is the restatement of the liability already existed i. e. implicit in it. That apart, after the provision was brought in the Act, any continuation of the infraction would come under the amended provisions. One cannot be absolved or the liability by reason of absence of provision before amendment. Since the fund was being trusted to the Trustees, it was the liability of the Trustees. Such liability of the Trust cannot be segregated with that of the employers, who are equally liable. We are not dealing with the question of offence at this stage. As rightly contended by Mr. Mitra, this Court cannot usurp the jurisdiction of the Magistrate. Even without the same, this Writ Court can intervene in the present facts and circumstances.

79. The object of the 1988 amendment was for the purpose of seeking to plug the loopholes through which the application of the Act was being avoided. It had sought to include the exempted establishments within the applicability of the Act, to check defaults and also to introduce methods in order to ensure compliance of the provisions of the Act. Though, the amendments were prospective in nature, but after the amendment, the amended provisions would also be applicable In respect of continuing default. It does not exclude past liability. It is a case of repeal and re-enactment as contemplated within the meaning of Section 6 of the General Clauses Act, 1897, which equally applies in case of amendment. In any event the penal provisions are applicable to an infraction subject to Article 20 of the Constitution of India. However, in cases, where the infraction continues after

the amendment, the amended provision is very much applicable to that part of the infraction, which continues, inasmuch as such infraction constitutes fresh infraction.

Method of interpretation of amended provisions:

80. Section 6 of the General Clauses Act, 1897 deals with the effect of repeal of any Central Act or Regulation. Clause (b) of Section 6 of 1897 Act provides that by reason of repeal, the previous operation of any enactment so repealed and any action duly done or suffered thereunder, shall not be affected. Clause (c) prescribes that it will also not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment. Similarly, Clause (d) provides for saving of penalty, forfeiture punishment incurred in respect of any offence committed under any enactment so repealed. Thus, despite the repeal the liability accrued would not disappear. A repealing or amending Act is in the nature of legislative scavenger. Its sole object is to get rid of certain quantity of obsolete matter *Mohindar Singh Vs. Mst. Harbhajan Kaur*, The normal effect of repealing a statute is to obliterate it from the statute book completely, as if it had never been passed; it must be considered as a Law that never existed. Section 6 of 1897 Act provides an exception to this Rule *Sadasheo Jagannath Barapatre Vs. Hemaji Hiranman Bakde*, . It is also to be understood that the repeal of an Act means revocation or abrogation of the Act. Section 6 of the General Clauses Act applies even in the case of a partial repeal or repeal of part of an Act *G. Ekambarappa and Others Vs. Excess Profits Tax Officer, Bellary*, . Whenever, there is a repeal of enactment, consequence laid down in Section 6 of the General Clauses Act will follow, unless, as the Section itself saves or a different intention appears. In the case of simple repeal, there is scarcely any room for expression of a contrary intention. But when the repeal is followed by a fresh legislation on the same subject, we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicated a different intention. It cannot be said as a broad proposition, that Section 6 of the General Clauses Act is not applicable whenever there is a repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also, unless the new legislation manifests an intention incompatible with or contrary to the provisions of the repealed Section. Such incompatibility will have to be ascertained from a consideration of all the relevant provisions of the new Law: mere absence of a saving clause is not by itself material *Munshi Lal Beni Ram Glass Works Vs. Sri S.S. Singh, Assistant Labour Commissioner and Others*, . The line of inquiry would be, not whether the new Act expressly keeps alive old rights and liabilities, but whether it manifests an intention to destroy them. We cannot, however, subscribe to the broad proposition that Section 6 General Clauses Act is ruled out, when there is a repeal of enactment followed by a fresh legislation. Section 6 would be applicable in such cases also, unless the new legislation manifests an intention incompatible with or contrary to the provisions of the Section. Such incompatibility would have to be ascertained from the consideration of the relevant provisions of the new Law *State of Punjab v.*

Mohar Singh AIR 1955 SC 84 ; Indira Sohanlal Vs. Custodian of Evacuee Property, Delhi and Others, .

81. Section 6 of 1897 Act does not expressly deal with the effect of amendment of an Act. But there is no other Law, which lays down the effect of amendment of an Act. In order to ascertain such a situation we are to fall back on the principles of interpretation of statute. As a matter of fact, a majority of repealing Acts are those, which re-enacted the Law. In essence, there is no distinction between such re-enacted Laws and Laws, which merely profess to amend. If the amendment of the existing Law is marginal the Act professes to amend. If it is extensive, it repeals the Law and re-enacts it. Therefore, Section 6 applies to amendments, as much as it applies, when an Act is repealed and another Act is re-enacted. In order to support this contention we may agree with the reasons given in New Singhal Dal Mill Vs. Firm Sheo Prasad Jainti Prasad, followed in Nagar Maha Palika, Agra v. Prabhu Dayal, 1968 AILER 514 . u/s 6 previous operation of old enactment and the action taken thereunder always survived, unless a contrary intention is expressed or implied in the new amended provision. Where the legislation repeals a particular provision, the natural presumption is, that the repeal must have been with a particular intention. We may find support from Nasib Singh Vs. Bajo Ram .

82. The Court while interpreting the provisions of an amending Act has to apply the principles laid down in Heydon 's case (1584) 3 Co Rep 7a, p.7b:76 ER 637, which is also known as Purposive Construction or Mischief Rule. The Court has to consider four matters in construing such provision:

(i) what was the law before making of the Act, (ii) what was the mischief for which the law did not provide, (iii) what is the remedy that the Act has provided, and (iv) what is the reason of the remedy. The rule then directs that Courts must adopt that construction which "shall suppress the mischief and advance the remedy". The rule was explained in the The Bengal Immunity Company Limited Vs. The State of Bihar and Others, . In the words of S.R. dAS, C.J. "It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon's case was decided." Heydon's case was followed in various decisions of the Apex Court vide Dr Baliram Waman Hiray Vs. Justice B. Lentin and Others, , Commissioner of Income Tax, Patiala and Others Vs. Shahzada Nand and Sons and Others, and Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, .

Crystallization of the liability:

83. Having regard to the provisions of the 1952 Act, as discussed above, the liability of the Kelvin Trust has since been crystallized. The liability was always there. It was specifically crystallized by the amendment. There is nothing under the exempted scheme or under the Act or Scheme to enable the Kelvin Trust to hold on to the account of the members going out of the Trust and becoming

members of some other Trust. The fund is trusted to the Trustees. The fund was a trust fund and the Trustees held the fund in trust. The fund never belongs either to the trustees or to the employer. They had no claim on the fund in respect of the account of the outgoing members. As soon as the member ceases to be a member of the Trust, the Trustees were bound to refund the amount to the member upon such cessation. But as soon as the outgoing member becomes a member of another fund, the Kelvin Trust was liable to transfer the said fund to the newly created fund. It had no right to hold over the said fund. Prior to the 1988 Amendment u/s 17-B, on the transfer of an establishment, the transferor and the transferee were jointly and severally liable to pay the contribution and other dues as the case may be up to the date of such transfer. But the liability of the transferee was limited to the value of the assets obtained by such transfer. Thus, the transferor is equally liable to pay the same. Therefore, the Kelvin Trust could not escape the liability.

84. By virtue of the amendment, the liability has been crystallized as referred to above. The default or contravention is a continuing one. The liability, which has not been discharged continues to remain a liability until discharged. Such undischarged liability would now be governed by the amended provision. In respect of liabilities already discharged, prior to the amendment, ceased to be a liability after the amendment and as such the amended provision could not be applied. But, if the liability subsists, it becomes subject to the amended provision and would be governed by the same.

85. As observed earlier in order to ascertain the effect of the amendment, we are to fall back on the principle of mischief rule or purposive construction. The amendment that has been made clearly indicates that those were intended to suppress the mischief, under which the Kelvin Trust is seeking to take shelter. Therefore, an interpretation, which will suppress the mischief, is to be preferred than the one, which will add to the mischief. Therefore, the liability that was continuing as on the date when the amendment becomes effective, would now be governed by the amended provisions.

86. Thus, as discussed above, the Kelvin Trust has a liability to transfer Provident Fund account of an employee where necessary. In the present case, admittedly, the fund was necessarily to be transferred to the Waverly Trust, it was the liability of Kelvin Trust to do so. Kelvin is equally liable, as the Kelvin Trust is to maintain detailed accounts showing contributions credited in respect of each employee. It is also liable to submit return to RPFC. It is further liable to invest the P.F. moneys according to the direction issued by the Central Government from time to time. These are all liabilities as provided in Section 17(1-A)(d) as substituted by the Act 33 of 1988. An infraction of Clause (d) of Section 17(1-A) is an offence u/s 14(2-A). Such offence is continuous until the transfer is effected.

87. In the circumstances, the Kelvin Trust cannot withhold the amount. It is liable to transfer the same together with interest accumulated in the respective account. In case it is not so done, in view of Section 17 Sub-section (1-A) read

with Section 14 Sub-section (2-A), the RPFC is competent to take steps against both the Trusts as may be provided in Law. The issue of the notice requiring Waverly Trust not to disburse the dues of the members of Waverly Trust, in respect of the claim for the period prior to June 30, 1986, which had not been received from the Kelvin Trust, is well within the competence of RPFC and justified. Inasmuch as, if it is so done, in the absence of any such fund, the payment would be made from the accumulation credited in respect of the other employees or the members after June 30, 1986 eroding the fund itself.

Status of Trustees of Exempted Fund:

88. The liability of Kelvin Trust is a statutory liability. The Trust, which is vested with statutory liability, is bound by the statute to discharge such liability. An exempted Trust is not a private Trust. Its activities are controlled and guided by the condition or scheme approved while granting exemption u/s 17. The conditions or scheme has the approval of and is governed by statute. The liability of such Trust arises under the statute. Such Trust discharges statutory liability. While dealing with Provident Fund, the Trustees deal with the fund, which otherwise would have been dealt with by the authorities under the P.F. Act. Trustees of an exempted fund are also authorities recognised under the P.F. Act. Therefore, such Trust cannot claim itself a character of private trust. It is a statutory Trust with statutory characteristic, having statutory liability u/s 17(1-A) (b)(d) and (1-B). When the liability is a statutory one and an authority is statutorily liable and discharges its statutory liability and its activities are governed by statute and it deals with a particular class of public, then it discharges a public duty or function. Therefore, it is an instrumentality and agency of the State. Inasmuch as, unless exemption was granted, the fund would have been governed by the P.F. Act and RPFC would have been responsible for it. In view of the exemption, the Trust steps into the shoes of the P.F. Authority to discharge the same liability according to the approved scheme. Thus it cannot claim a character different from that of an authority under the P.F. Act and as such the Trust while dealing with a fund exempted u/s 17, is an instrumentality and agency fulfilling the test laid down in *Anadi Mukta Sadguru MVS Trust v. V.R. Rudani* (supra).

Is the liability enforceable : Can the Court mould the relief:

89. Mr. Pal had relied on *Chiranjit Lal Chowdhry v. Union of India*, (supra) and *B. R. Rambhadriah v. Secretary, F&A Department A.P.* (supra), in support of his contention that the Court can enforce public statutory duty when a person is responsible for public function or discharge statutory liability and that in appropriate cases, Court can mould the relief to suit the purpose or the exigencies of a particular case. In *Chiranjit Lal* (supra), the Apex Court had held a writ of mandamus can be prayed for enforcement of statutory duties or to compel a person holding a public office to do or forbear from doing something, which is incumbent upon him to do or forbear from doing, under the provisions of any Law. When there is no legal obligation to abstain from exercising the powers

conferred upon them by Law, the Court can be called upon to enforce even if proper prayers are not formulated. An application cannot be thrown out, simply on the ground that proper writ or direction has not been prayed for. In *B.R. Rambhadriah v. Secretary F&A Department A. P.* (supra), the Apex Court had held that the Court could undoubtedly take note of changed circumstances and suitably mould the relief to be granted to the party concerned, in order to meet the justice in a case, as far as possible. The anxiety and endeavour of the Court should be to remedy the injustice, when it is brought to its notice, rather than deny relief to an aggrieved party on purely technical and narrow procedural grounds. Such a view was taken by this Court in *Sm. Nihar Kumari Debi and Others Vs. Commissioner of Police*, .

90. Mr. Mitra, however, contended that though the Court can mould, but in the process of moulding, it cannot substitute the prayer. He also contended that *Bhagirath Kanoria v. Bahadur Singh* (supra) does not apply to civil claim. It may apply to Kelvin. But it cannot apply to Kelvin Trust. He also contended that the delay in moving this application was also not explained. The answer to his contention is that delay cannot defeat justice. The Kelvin Trust cannot take shelter of technicalities in order to appropriate the P.F. accumulation in the Trust. However, technicalities can neither overcome nor supersede the substantive provisions of Law. Then justice would be the first casualty. In the present case, the reliefs, as have been asked for, can be moulded without substituting it. The relief, which is being proposed to be granted to meet the ends of justice, cannot be said to be substitution of the relief.

#### Implications

91. We may remember the basic facts that until June 30, 1986, the PF account of each of the members of the Kelvin Trust employed in Kelvin in its Broadloom Division, were maintained in the Kelvin Trust. This amount included the contribution made by the workers and the employer and the interest accumulated thereon. Each member had a separate account comprising of his individual contribution and the employer's contribution made in respect of his account and the interest accrued in his account. Even though the fund is exempted, but it was subject to the condition, under which the exemption was granted. It was the amount of the individual worker, which was maintained in the Kelvin Trust) When the worker had left the service of Kelvin and was re-employed in Waverly, by reason of the transfer of the Broadloom Division of Kelvin to Hooghly Mills, u/s 17-B as it stood on June 30, 1986, he was entitled to get the accumulation in his account in the Kelvin Trust to be transferred to Waverly Trust, as soon it was created. The Kelvin Trust or the Kelvin had no manner of lien over or right to retain the said amount after the Waverly Trust was created and Kelvin was so informed. The accumulation in an individual account, though, might be invested according to the condition of the exemption, yet it remains an account of an individual worker. Such amount can be utilised for the purpose of investment, as permitted in the condition for exemption or under the provisions

of the Act, as the case may be. But, it cannot be utilized to pay the dues of the workers of Kelvin or for any other use. Similarly, Waverly Trust could not pay the dues of such members of Kelvin Trust transferred to Waverly Trust, in respect of the period prior to June 30, 1986, out of the fund received by it on account of individual worker, who might have been employed in Waverly after June 30, 1986. It is the individual account, which is to be debited in respect of the accumulation in such particular individual account. Therefore, neither the Kelvin Trust nor the Kelvin could retain or utilize the accumulation transferable to Waverly Trust neither it had any lien.

92. The amount was held in trust by Kelvin Trust. Therefore, the Trustees are bound by the condition of the Trust, which is governed by the condition of exemption, as well as the provisions of the Act as might be applicable to it. In case the conditions are infringed or provisions of the Act are contravened or in case of any default, the Trustees of the Kelvin Trust are liable for the consequences provided in the Act. In case such funds are utilized by Kelvin, in that event it has to make good the amount so utilized by it. out of the fund of the Kelvin Trust. Even if, such amount is utilized by the Kelvin Trust to pay the dues of the members of the Kelvin Trust, who are workers of Kelvin, utilizing the accumulation of the members of Kelvin Trust transferred and re-employed in Waverly and had become members of Waverly Trust, in that event, the Kelvin is liable to put in such funds in the Kelvin Trust, which otherwise Kelvin is liable to put in for meeting the liability such payment by transfer of such accumulation to Waverly Trust.

93. Kelvin and Kelvin Trust were dealing with the fund of the members of the Trust since transferred to Waverly. These are provided for under the Act and are amounts meant for social protection and welfare of the employees. Neither the Kelvin Trust nor Kelvin could exercise any right over the said fund, except as are provided in the condition for exemption and under the provisions of the Act. They are bound to maintain the account properly and comply with the provisions of the conditions of exemption as well as those of the Act. They are dealing with public money, in respect of a particular class of public, in discharge of certain statutory obligation, which has the characteristic of public function. The fund may not be of much consequence for the employer, but it is of great importance to an individual worker, whenever he needs to utilize such fund, as permitted in law, particularly, at the cessation of his employment. Without such fund, on the cessation of employment, an individual worker would be put to great stress, strain and difficulty. The consequences might be disastrous for him. His life after cessation of employment depends on the receipt of the amount, which he could utilize for such purposes. The object of the Act for creation of such fund is to protect an employee on the cessation of employment and to provide some kind of social security and welfare in his personal life. It is a social obligation of the employer and the Trustees, which they are statutorily obliged to discharge. The Trustees and the employers cannot be allowed to deal with such funds, according to their whims and caprices. Such infraction has to be viewed with great concern.

The contravention and default has very serious consequences, the gravity has to be weighed having regard to the consequent sufferings of the individual workman, whose trust are being belied and breached. Unless stern attitude is maintained, the purpose and object of the Act would be frustrated. No liberty could be allowed to the employer or the Trustees to handle the fund carelessly or with impunity. The laxity, if any, shown to such people, it would have a discouraging effect on the society. It would send a wrong signal and encourage contravention and violation. Serious and immediate steps need be taken to curb such contravention, default or infraction and people responsible for it, should be brought to book, so that it might send a signal that the Court will not take things lightly and the repercussion and the consequences may be grave and serious. Such defaults or contraventions are to be arrested forthwith and the provisions of the Act are to be implemented with all seriousness. The society cannot be permitted to suffer at the hands of the employer or the Trustees. Court cannot be an idle onlooker in such a situation. It has a bounden duty to activate itself to remove such social evil and advance the object and purpose of the Law and enforce the legal consequences.

Conclusion:

94. In this case, having regard to the case made out in the writ petition and the defence taken as a shield to it, the questions involved are consciously known to each of the parties and the parties had fought on it as best as they can. Therefore, no one can be said to suffer any prejudice, if just and proper relief is granted in this case. It is the enforcement of the liability under the Act, which has been sought for. Even if the prayer is not specific, still then such prayer can be said to be implicit. The relief sought for is the enforcement of statutory liability. The relief could be granted by enforcing the liability to transfer. The petitioner had relied on the actions taken by the P.P. Authority, as well as the information or intimation given by Kelvin Trust calling upon the Waverly Trust to agree to the amount indicated in the former's letter (Annexure-R). The Kelvin Trust has statutory liability and the statute is enforced by RPFC, upon whom various statutory functions have been entrusted. As such, though exempted, the RPFC has jurisdiction to take steps, if there is any infraction of any provision of the 1952 Act or of the condition under which exemption was given. Even in such a case, by reason of Section 17(I-A)(d) read with Section 14(2-A), the Kelvin Trust is liable for an offence, in respect of which, it cannot be denied that the RPFC has every right to exercise its jurisdiction conferred on it by the Act. As such writ is very much maintainable and that RPFC can take appropriate steps for the offence committed by the Kelvin Trust in delaying the process. In case the Kelvin Trust is short of fund, in that event, the Kelvin can also be made liable for it and its Officers can also be held liable for the offences under the Act. The RPFC has every jurisdiction to determine it and take appropriate steps even to the extent of taking penal steps or otherwise, against one or all or such person as he may deem fit and proper within the scope of the 1952 Act in the light of the observation made above.

Order:

95. In the circumstances, the Kelvin Trust shall transfer the amount of Rs. 2,00,98,363.02 as stood on June 30, 1986 together with the interest accrued on the said amount at the statutory rate till the date of transfer to the Waverly Trust. In case the Trust is short of fund, the Kelvin, which has utilized the fund of Kelvin Trust, shall pay the same to Kelvin Trust, which will in turn transfer the same to Waverly Trust. All these actions are to be undertaken and completed within three months from date. In default, the RPFC shall cancel the exemption and shall take custody and possession of all the funds and securities at the hands and assets and bank accounts of Kelvin Trust. In case there is any shortage, the assets, funds, securities, capitals and bank accounts of Kelvin shall remain attached until the fund is available in Kelvin Trust. It will be open to RPFC to take appropriate steps and pass appropriate order enforcing transfer of the said fund and recovery of the amount from Kelvin Trust and Kelvin respectively, in terms of Section 17-B or otherwise including recovery and also to take steps for the penal consequences, as the case may be. Let a writ of mandamus do issue accordingly to each of the respective respondents severally and jointly.

96. Until the amount is so transferred, the Kelvin Trust and the Kelvin is restrained from dealing with or disposing of its funds, assets and securities and from withdrawing any money from their respective Bank Account except in usual course of business and in discharge and payment of its statutory liabilities and wages payable to its workers, without leaving a balance of a sum of Rs. 3 crores.

97. In the result, the Writ Petition succeeds and is allowed to the above extent.

98. All parties and Banks etc. are to act on a xerox signed copy of the operative part of the Judgment.