
(1993) 04 KL CK 0031

In the High Court Of Kerala

Case No : O.P. No's. 620, 993, etc. of 1991 and 40, 210, etc. of 1992 and 564 and 3177 of 1993

Poulose and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 07-04-1993

Acts Referred:

Companies Act, 1956 — Section 617

Constitution of India, 1950 — Article 14, 19(1), 348

Kerala Construction Workers Welfare Fund Act, 1989 — Section 1(3), 11, 14, 16, 17

Citation : (1993) 04 KL CK 0031

Hon'ble Judges : T.L. Viswanatha Iyer, J

Bench : Single Bench

Advocate : K.A. Abdul Gafoor, in O.P. No. 4607/1991, for the Appellant; V.K. Beeran, A.A.G. for Respondent 1, 3 and 4 in O.P. No. 4607/1991 and K. Krishnan Nair, for Respondent 2 in O.P. No. 4607/1991, for the Respondent

Judgement

T.L. Viswanatha Iyer, J.—Petitioners in this batch of original petitions are all contractors, most of whom are registered with the Public Works Department of the Kerala State in accordance with the executive orders issued by the Government, from time to time and incorporated in the Kerala Public Works Department Manual. Only persons so registered are entitled to submit tenders for "works", which term includes civil works and water supply and sanitary installation works. Most of the Petitioners are engaged in doing civil works, but some of them are engaged in doing electrical works, fabrication, painting, etc. The registration enures for a period of two years at a time, the registration being granted on payment of graded scales of fee as fixed by the Government, for contractors classified as A, B, C, D. The challenge in these original petitions is to certain provisions of the Kerala Construction Workers' Welfare Fund Act (20 of 1989) (the Act) and the Scheme framed thereunder. There is also a further question as to the relevant , date with reference to which the contributions are payable under the Act, about which I shall mention the details later.

2. In particular, the challenge is to Sections 2(g), 8(2) and 9 besides Clauses 25 and 26 of the Scheme. The challenge is on different grounds. Before discussing the merits of the challenge, I shall set forth the salient features of the Act and the object with which it was enacted.

3. The Act was preceded by an Ordinance No. 3 of 1989 which was promulgated by the Governor on May 3, 1989. It was subsequently replaced by the Act. The statement of objects and reasons for the enactment states that the workers engaged in construction operations are rather unorganised and hardly enjoy the amenities and benefits available to those in other fields of labour. Those engaged in the field get only meagre wages. In order to ensure their welfare, it was proposed to constitute a fund to grant relief to, to promote the welfare of, and to pay pension to, the construction workers in the State. The Act was intended to achieve this object. The preamble to, the Act as it appears in the English translation authorised under Clause (3) of Article 348 of the Constitution of India mentions that it is enacted as it is expedient to provide for the constitution of a fund to grant relief to, to promote the welfare of, and to pay pension to, the construction workers in the State and for certain other matters incidental thereto. The Act was brought into force by notification dated December 26, 1989, issued by the Government u/s 1(3) with effect from January 1, 1990.

4. Section 2 is the definition section. Since the Act is intended for the welfare of construction workers there are detailed definitions of construction work, construction worker, contractor, contribution, employer and the like. I shall extract these and other relevant definitions for purpose of convenience of reference.

(c) "Construction work" means any construction work carried out by the State Government or quasi-Governmental agency or by a public or private undertaking or by a society or by a private individual and includes construction of any building, road, pathway, causeway, bridge, culvert, canal, tank, channel, pond, dam, tunnel, sea walls, walls for the prevention of soil erosion, embankments, bunds, drainage, kanas, culverts, jetties, compound walls, well and the like, breaking of rocks and rubbles and the repair in whatsoever manner relating thereto and the demolition thereof but does not include the construction works relating to places of public worship or construction work for a residence by a person for his own residential purposes costing not more than Rs. one lakh, repair works other than extension and reconstruction of . his residence, construction work undertaken by the Government of India do any of its establishments or institution;

(d) "Construction Worker" means any person who is employed for wages to do any work in connection with a construction work and who gets his wages directly or indirectly from an employer or from a contractor and includes a person engaged in any work connected with the supply of materials for construction works and a worker specified in any categories in Schedule 1.

Explanation.- It any doubt arises as to whether a perspn is or is not a construction worker for the purpose of this Act, the question shll be referred to the Chief Executive Officer or an officer authorised by the Government in this behalf whose decision thereon shall be final;

(e) "Contractor" means any person registered as a Contractor with any Department of the Government of Kerala or with any Department of any other State Government, or with any local authority or with the Kerala Water Authority or Devaswom Boards or Universities in the State, for carrying out construction work for consideration or any person carrying out construction work for consideration for a Government Company as defined in Section 617 of the Companies Act, 1956 (Central Act 1 of 1956) for any Board, Corporation or Society owned or controlled by the Government of Kerala and includes the Kerala State Construction Corporation;

(f) "contribution" means the sum of money payable to the Fund by employers and construction workers u/s 8;

(g) "Employer"- means,-

(i) In the case of construction work undertaken .for the State Government or for the local authority or for the Kerala Water Authority or for any Universities in the State or for a Kerala Government Company as defined in Section 667 of the Companies Act, 1956 (Central Act 1 of 1956) or for a Board, Corporation or a Society owned or controlled by the Kerala Government, the contractor;

(ii) In any other case, the person for whom construction work is done;

(h) "Fund" means the Kerala Construction Workers" Welfare Fund established u/s 3 and the scheme;

(i) "Scheme" means the Scheme framed under this Act.

It will be seen from the definition of "construction work" that while inter alia it means every type of construction work carried out by the State Government or any of the authorities mentioned, it excludes construction work undertaken by the Government of India or any of its establishments or institutions Since the contribution payable by the employer is with reference to the cost of the construction work undertaken by him, no contribution is payable in respect of works undertaken by the Government of India, or any of its establishments and institutions, since they are taken out of the purview of "construction work". Clause (g) against which the challenge has been spearheaded, makes a two fold definition of "employer"-in the case of construction works undertaken for the State Government or the authorities or bodies mentioned in Sub-clause (i), the contractor himself is the employer while, in any other case, it is the person for whom the construction work is done. Therefore the contribution has to be paid by the contractor in the case of works done for Government or quasi-Government bodies, and in all other cases, the contribution is paid by the builder himself, i.e., the person for whom the construction work is done. And here lies

the crux of the controversy in these cases, as I shall mention presently. To proceed with the features of the Act, "Construction Worker" under Clause (d) includes the twenty six categories of persons specified in Schedule I as also those engaged in any work connected with the "supply of materials for construction works.

5. Section 3 empowers the Government to frame a scheme by notification in the Gazette to be called the Kerala Construction Workers Welfare Fund Scheme, for the establishment of a Fund, the Fund being for the welfare of construction workers. As soon as may be after the scheme is framed, a Fund shall be established in accordance with the provisions of the Act and the Scheme. I shall extract Section 3(1) which will be relevant in the subsequent discussion:

3. Kerala" Construction Workers" Welfare Fund.- (1) The Government may, by notification in the Gazette, frame a scheme to be called the Kerala Construction Workers" Welfare Fund Scheme for the establishment of a Fund under this Act for the welfare of the construction workers and there shall be established as soon as may be after the framing of the scheme, a Fund in accordance with the provisions of this Act, and the Scheme.

The Fund shall vest in and be administered by a Board to be constituted u/s 16 of the Act, the Board being a body corporate with perpetual succession and a common seal. The Board shall consist of fifteen Directors nominated by the Government of whom five will represent the construction " workers, five the contractors and other employers, and five, the Government. One of these Directors shall be appointed as the Chairman of the Board by the Government. The term of office of the contractors is three years. The Act contains in its Sections 17 and 18 provisions for removal of the Directors, their resignation and for the filling up of vacancies in the Board. Sub-section (3) of Section 3 states that the scheme may provide for all or any of the matters specified in Schedule II. Sub-section (4) enumerates the amounts which shall be credited to the Fund. Section 4 provides for the registration of construction workers as members. Every construction worker is entitled for registration as a member, provided he satisfies three conditions of eligibility, namely that (1) he should be between the ages of 18 and 60, (2) he should not be the member of any other welfare fund scheme established under any law for the time being in force and (3) he should have been engaged in construction work for not less than ninety days during the preceding financial year. The modalities for filing the application for registration and its consideration are prescribed in the subsequent Sub-sections and an appeal is provided to the Chief Executive Officer of the Board or other specified authority, against the rejection of the application for registration of any construction worker. Sections 6, 11 and 13 provide for cessation or forfeiture of membership, or closure of accounts in the contingencies mentioned, namely when the construction worker attains the age of 60 years, or when he is not engaged in construction work for not less than ninety days in an year, or on his failure to pay the contribution payable by him for a continuous period of not less

than one year, or on his not wishing to continue his membership, when the amount outstanding to his credit will be returned to him upon application in the manner prescribed. Section 7 obliges every contractor to maintain a register in the prescribed form showing the details of employment of registered construction workers employed in the construction work undertaken by him, which may be inspected without prior notice by the Chief Executive Officer or any other officer authorised by him.

6. Section 8 is the crucial provision on which along with Section 2(g) centered the main arguments in the case. I shall read it for convenience:

8. Contribution to the Fund- (1) A member of the Fund shall contribute to the Fund at the rate specified in any of the slabs hereunder:

Slab

A. Ten rupees per month

B. Fifteen rupees per month

C. Twenty rupees per month

Provided that a member may change his rate of contribution at his option at the commencement of any year.

(2) An employer shall contribute one per cent of the cost of the construction work undertaken by him to the fund.

(3) In case where the employer is a Contractor, the contribution payable under Sub-section (2) shall be recovered by the Departments, Authorities, Company or other undertakings mentioned in item (i) in Clause (g) of Section 2 from the bills payable to the contractor and paid to the Fund within fifteen days in the manner prescribed. In the case of other employers, the contribution shall be paid in such manner to such authority and within such time as may be prescribed.

(4) The Government shall pay to the Fund every year an amount by way of grant which shall not be less than ten per cent of the contribution initially made by a member of the Fund under Sub-section (1).

It will be seen that while a member may contribute in any of the three slabs mentioned, an employer has to contribute 1 per cent of the cost of the construction work undertaken by him. Sub-section (3) provides the mode of recovery of the contribution payable by a contractor, by retention from the bills payable to, the contractor in the case of Government and quasi-Government bodies. In the case of other employers, the contribution is to be paid in such manner to such authority and within such time as may be prescribed. Government contribution is dealt with in Sub-section (4).

7. Another important provision which is also under challenge is Section 9 which also it is necessary to read:

9. Levy of fee from contractors.- (1) Notwithstanding anything contained in any other law or agreement for the time being in force, with effect "on and from the Commencement of this Act, there shall also be. levied every year a fee from every contractor" calculated at the "following rates in the manner prescribed, namely:

1. Contractor having A Class registration Rs. 1,000 per year.
2. Contractor having B Class registration Rs. 500 per year.
3. contractor having C Class registration Rs. 250 per year
4. Contractor having D class registration Rs. 100 per year.

(2) The fee levied under Sub-section (1) shall be credited to the Fund.

(3) The authority granting the licence shall not issue or renew licence to a contractor unless he is satisfied that the fee mentioned in Sub-section (1) has already been paid.

This provides for the levy of a fee from every contractor at the rates mentioned with a mandate to the authority granting the licence not to issue or renew the licence to a contractor unless he is satisfied that the fee mentioned in Sub-section (1) has already been paid. Section 14 delineates the purposes for which the Fund may be expended, as follows:

14. Purposes for which Fund may be expended.-Subject to the provisions of this Act and Scheme the Fund shall be expended for the following purposes, namely:

(1) Payment of pension to a member who is unable to work due to permanent disablement or who has completed the age of sixty years;

(2) payment of gratuity to the members of the Fund.

(3) payment of immediate assistance to members of the Fund in case of accidents; .

(4) for giving financial assistance for the funeral expenses of. the members and family members;

(5) for sanctioning loans and advances to members for construction of houses for their residence on such terms and conditions as may be fixed by the Board;

(6) for meeting the expenses in connection with the premia for Group Insurance of the members as the Board may deem fit;

(7) for giving financial assistance for the education of the children of the members as may be decided by the Board;

(8) for meeting medical expenses of the members or their dependents as may be decided by the Board;

(9) for payment of family .pension;

(10) for the payment of maternity benefits;

(11) for payment of financial assistance to members to meet expenses of the marriage of their children;

(12) for any other purpose specified in the Scheme.

The other provisions in the Act are not relevant for the purpose of this discussion and I am not therefore referring to them except Sections 34, 36 and 37. Section 34 relates to bar of jurisdiction of civil courts. Section 36 enable the Government to remove difficulties arising in giving effect to the provisions of the Act, hut with an important rider under the proviso that no such order removing difficulties shall be passed after two years from the date of commencement of the Article Section 37 is the rule making power under which Government may make rules either prospectively or retrospectively, for the purpose of carrying into effect the provisions of the Act.

8. The Act came into force on January 1, 1990. The Kerala Construction Workers Welfare Fund Board was constituted by the Government on April 5, 1990 in exercise of the powers vested in it u/s 16 of the Act. The Scheme which is dated May 10, 1990 was published in the Kerala Gazette dated May 16, 1990. As per Clause 1(3) of the Scheme, it was to come into force on such date as Government may by notification in the Gazette, appoint. Government accordingly fixed January 1, 1990 as the date, on which the Scheme shall come into force, by notification dated July 28, 1990 published in the "Kerala Gazette dated August 7, 1990 Clause 13" describes the powers and functions of the Board and Sub-clause (1) thereof is "All matters connected with the implementation of the Fund". The Fund envisaged by Section 3 of the Act was admittedly constituted on June 25, 1990, as stated at the Bar by the Board's Standing Counsel. The Fund appears to have been established by the Board as per a resolution passed by it on May 30, 1990, a copy of which was produCed by the Board's Standing Counsel. It was admitted at the Bar that no rules have so far been framed by the Government in exercise of the powers vested in them u/s 37 of the Act.

9. The challenge is primarily to Sections 2(g) and 8(2) as also to the levy of licence fes u/s 9. There is also a challenge to Clauses 25 and 26 of the Scheme to which I shall refer later. In addition to these challenges, there were ancillary points raised as to the date with reference to which the contribution becomes payable whether it was January 1, May 16, June 25 or August 7, 1990, the significance of which I shall mention later while dealing with this point. A further ratification of this point was whether the liability attached to works commenced earlier, but, completed after the relevant date or whether it was only re-works tendered and awarded after the relevant date. Whatever date it is, these points have been highlighted in O.P. Nos. 620 and 8071. of 1991, particularly the latter. There wss also a challenge, though feeble that .the field occupied by the Act is already covered by Central enactments like the Employees Provident funds and Miscellaneous Provisions Act, 1952 (the EPF Act), the Payment of Gratuity Act,

1972 (Gratuity Act) and the Employees State Insurance Act, 1948 (ESI Act), and since the assent of the President has not been obtained for the Act, it was inoperative.

10. I may at this juncture mention that counter-affidavits have been filed both by the State and the Board in O.P. No. 5057 of 1991. The contentions of the Respondents are gleaned from these counter-affidavits.

11. The challenge, as I mentioned earlier, was primarily centered on Sections 2(g) and 8(2). The contribution under the Act is, u/s 8, payable by an "employer". It has already been noted that Section 2(g) makes a two way definition of "employer" by making a distinction between contractors engaged in construction works of the State Government and quasi-Governmental authorities or bodies mentioned in Sub-clause (i) and those undertaking works for Ors. . In relation to the former category, the contractor is made liable to make the contribution, while in the latter, the builder, i.e" the person for whom the construction work is undertaken pays the contribution. This distinction is stated to be vicious, arbitrary and unreasonable, and violative of Article 14 of the Constitution Counsel make a further distinction also between contractors who do work for the Central Government, its establishments and institutions, and those who carry out works for the State Government and quasi Governmental authorities and bodies. The former are totally exempted because of the exclusionary definition of "construction work" u/s 2(c) while the latter are compelled to contribute to the Fund. This is Anr. aspect of the discrimination alleged in Section 8 read with Section 2(g). All contractors, for whomsoever they undertake construction work are similarly situated and circumstanced. Section 8 read with, Section 2(g) confers a benefit on some contractors, exonerating them from liability while denying the benefit to Ors. who are made liable. This is stated to be gross discrimination. Some of the counsel who appeared, however put forward a plea of unequals being treated as equals by the impugned provisions resulting in discrimination, relying on the decisions in Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, , Kunhali Haji v. State of Kerala 1965 KLT 390, State of Kerala v. Haji K. Kunhipokkar 1966 KLT 694, and State of Kerala v. Haji Kutty Naha 1968 KLT 649.

12. This plea of the contractors is met by the Respondent State with the contention that the contractors for construction works undertaken by Government, quasi-Governmental authorities and bodies are made liable for the contribution to facilitate easy collection of the contribution and to avoid evasion. The amount could be deducted from their-bills and paid "over to the fund. Nothing prevents a contractor from making provision for the contribution as well while submitting his tender for the work and pass it"on to the Government or the other authorities or institutions. The contractor always gets an opportunity to quote a rate inclusive of the contribution. Therefore, it is the Government and its institutions that in effect pay the amount, and not the contractor. Further, Government has got various categories of workmen, working with it. It is not

possible for them to make contribution for one category of workers namely the construction workers, while not granting it to Ors. . The legislation in question is a welfare measure falling under Entry 24 of List III to the Seventh Schedule to the Constitution and it should receive a liberal approach, in favour of its validity. It is further pointed out that no classification exists of contractors as contractors for Central Government, or for State Government and its agencies or for private individuals. All contractors, for whomsoever the works, are treated equally, and made liable or not liable for the contribution, depending on the person, or the authority, for whom the work is undertaken.

13. Article 14 does not forbid classification. But the classification should be reasonable and not arbitrary and it should have a rational nexus to the object sought to be achieved. This has been the basis of the application of the Article, though it has found its ramifications in various decisions rendered from time to time. The classification which satisfies the test of Article 14, may be founded on different bases, geographical or according to objects or occupations or the like. If a law deals equally with all, persons or things of a well defined class, it will not be open to the charge of denying equality on the ground that it has no application to Ors. of a different class. Classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary. It must be rational. It means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. [In Re: The Special Courts Bill, 1978,]. In *Shashikant Laxman Kale and Another Vs. Union of India (UOI) and Another*, , the court, after an elaborate discussion of the cases on the point reiterated these principles, particularly the dictum in *Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others*, , where it was stated:

The test could only be one of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by expertise. A reasonable classification is one which includes all who are similarly situated and none who are not. In order to ascertain whether persons are similarly situated, one must look beyond the classification and to the purposes of the law.

In *Spences Hotel Pvt. Ltd. and Another Vs. State of West Bengal and Others*, , the Supreme Court observed in paragraph 26 that the rule "of equality requires no more than that the same means and methods be applied impartially to all the constituents of a class so that the law may operate equally and uniformly upon all persons in similar circumstances (This passage is no doubt with reference to taxation but the same principle must apply to other laws as well). I am not referring to any more decisions which are legion, except to state that the question whether any impugned Act is arbitrary or not is normally to be answered on the facts and in the circumstances of a given case. As observed by Vivian Bose, J. in *Bidi Supply Co. Vs. The Union of India (UOI) and Others*, , so

far as Article 14 is concerned, it is "not the law that changes but its application, geared to the felt necessities of the time and the circumstances prevailing.

14. The main challenge in these cases, as I have already indicated, is to Section 8 read with Section 2(g) which" are said to operate unequally on contractors similarly situated. The main thrust of the submission is that while contractors of State Government, and its establishments, authorities and institutions mentioned in Sub-clause (i) of Section 2(g) are made to pay contribution u/s 8, those doing construction work for Ors. are not made liable, and the person liable being . the one for whom the, work is, undertaken Equally contractors of Central Government, its establishments and institutions are exempt While those working for the State Government and its bodies are made liable. Contractors of the Government like the Petitioners are thus singled out for hostile discrimination. Even at the outset, I must mention that there is no case that any of the Petitioners are exclusively undertaking only "State Government works or that they are not, contractors for Ors. nor is there any bar to such contractors registered with the State Government undertaking works, for the Central Government or for private bodies or individuals. This basic fact has to be kept in mind while dealing with the matter. As a matter of fact, there is no separate class of contractors doing work exclusively for-State Government-not that I am of the opinion that even if such an exclusive group is in existence, it will affect the result of these cases.

15. The construction work may be undertaken either for the Central Government or its establishments or institutions, or for the Kerala Government or its institutions or bodies, or for Ors. including private parties. So far as the construction works of the Central Government are concerned, they are taken out of the purview of the Act and therefore neither the contractor nor the Central Government pay any" contribution under the Act. So far as a private employer is concerned the contribution is payable by the employer himself. It is in relation to the works undertaken by the Kerala Government or its institutions, or bodies that the contractor becomes liable to pay the contribution by deduction out of the bills payable to him. A contractor may do work either for the Central Government or for the Kerala Government or for private agencies. He becomes liable only for works undertaken for the Kerala Government and its agencies. So far as contractors are concerned they are all similarly situated, whether they do the work for the Central Government or for the Kerala Government or for private employers. There is no classification of contractors a those working for the Central Government or for the Kerala Government or for private parties. A contractor when he undertakes work for the Kerala Government will have to make the contribution by deduction from out of his bills while the same contractor when he does the work for a private party is not obliged to make the contribution, but only the private party. Contractors as a whole are treated alike and subjected to the same liabilities or conferred the same rights under the Act. There is aio discrimination at all between contractor and contractor. The contribution is deducted out of the amounts payable by the Government only for

the purpose of convenience, for the purpose of speedy recovery of the contribution, and to prevent evasion. No additional liability is really cast on the contractor inasmuch as it is open to him to quote appropriately in the tender, inclusive of the contribution as well. There is no hostile discrimination involved in this, for the reason that there are no separate classes of Government contractors and other contractors. This is a case of persons similarly situated namely contractors as a class being dealt with equally and made subject to the same liabilities in similar circumstances. Article 14, only requires that all persons similarly situated should be subjected to similar treatment. That is the case here. The *raison d'être* for Section 8 and for the recovery of the contribution from the bills of the contractor has been satisfactorily explained. It is not arbitrary, but perfectly just and reasonable with a rational nexus to the object sought to be achieved by the Act namely the constitution of a welfare fund for the benefit of the construction workers who are subjected to various disabilities as an unorganised sector of labourers. The challenge to Sections 2(g) and 8 under Article 14 must fail.

16. The next challenge is to Section 9 which obliges a contractor to make payment of a licence fee ranging from Rs. 1,000 to 100 depending upon the class to which he belongs. This amount is credited to the fund under Sub-section (2) of Section 9. Sub-section (3) of Section 9 states that the authority granting the "licence" shall not issue or renew the licence to a contractor unless he is satisfied that the fee levied has already been paid. This is challenged as an unauthorised levy. Petitioners content, that this levy is only a fee, and not a tax, and being a fee, it cannot be sustained unless there is *quid pro quo* for the levy. This contention requires Examination. The Respondents have no case that the "levy in question is a tax. In fact the levy does, not fall within any of the entries 46 to 62 of List II to the Seventh Schedule to the Constitution which enumerate the various taxing powers of the State. The legislation being under entry 24 of List III, the levy of fee is referable to entry 47 of that List. As a fee, it has to satisfy the test of *quid pro quo*. (*The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*,), As stated in *Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others*, , the power of any legislature to levy a fee is conditioned by the fact that it must be "by and large" a *quid pro quo* for the services rendered. But it is not necessary to have an exact mathematical correlation between the fee and the services rendered. It is enough if the relationship is of a general character. But then, it is essential that there should be some *quid pro quo* or some services rendered to the person who pays the licence fee to sustain it as a licence fee. (See also *Sri Krishna Das Vs. Town Area Committee, Chirgaon*, .

17. Section 9 provides for the licence fee with an added condition that the licence shall not be granted or renewed unless the licensing authority, is satisfied that the licence fee has been paid. Section 9 thus speaks of a licence but nowhere in the Act or in the scheme is there any provision for a licence I could not find any provision for such a licence nor was any pointed out to me either by counsel for

the Petitioners or the Additional Advocate General, or the Standing Counsel for the Board. There was only a vague suggestion that the licence may be the registration contemplated by the P.W.D. Manual. It is thus not clear from the Act or the scheme as to what is the licence contemplated by Section 9(3). The Act or the scheme do not anywhere provide for any, services to the contractors. They do not also require the contractors to obtain registration thereunder to enable them to carry on any contract work. Registration with the Government is under executive orders, for which registration fee and security are insisted on by the Government. If so, a separate levy by way of licence fee under the Act is not really justified. So far as the contractors are concerned, the only function performed by the Board or the Chief Executive Officer is a scrutiny of the registers maintained by them u/s 7 containing the details prescribed. But the purpose of the register is only to ascertain, who are the employees of the contractor during the year, perhaps to facilitate determination of the question whether a worker has actually worked for ninety days in a year or not. These details in the register do "not have any nexus or relationship with the contributions payable either by the worker or by the contractor. The worker's contribution is a fixed amount as per the slab opted by the worker. It does not vary with the employment except that he gets registration or continues his registration only if he has been employed for ninety days in the preceding year. So far as the contractor is concerned, he contributes, only for works done for the Government or Governmental institutions at a fixed rate of 1 per cent of the cost of construction, which is ascertainable without reference to his registers, and is actual amount recovered from out of his bills. I have already held that the contractor does not derive his right to carry on contract works by virtue of any provision in the Act or in the scheme. Further, the licence fee is payable irrespective of whether the contractor does any work or not for Government in a particular year. Since the licence fee has to be related to some service, and since no service is actually rendered by the Board to the contractor, it has to be held that the fee levied u/s 9 cannot be sustained as a licence fee. It is an impost which casts a restriction on the right of the contractor to carry on his profession guaranteed by Article 19(1)(g) of the Constitution. The levy of the licence fee, and Section 9 under which it is levied, are both therefore unconstitutional and void.

18. The next challenge is to Clauses 25 and 26 of the scheme. These clauses relate to the returns to be submitted by the employer containing inter alia, details regarding the workers employed by him. These are alleged to be asking for the impossible from the contractor. It is pointed out that the returns required details of the employees of the contractor to be given. Such employees are not always regularly employed by the contractors. They come and go, and fluctuate. The obligation on the contractor to return details of such a fluctuating body of persons who work here today and elsewhere tomorrow is asking too much of the contractor, casting a very onerous burden on him. I am unable to agree. What the returns contain are details concerning the employees. It is in effect an

epitome of the attendance and wages registers disclosing the persons who worked with the contractor day-by-day, and for what wages- It is not made clear as to how the requirement of such a return casts an onerous or impossible burden on the contractor, particularly when he will necessarily have to maintain registers for payment of wages, attendance register etc., for his own purposes. It is only a projection of those registers for purposes of the Act and the scheme and no more. At any rate, insistence on such returns, even if difficult or onerous, cannot spell invalidity to the clauses themselves. This contention is overruled.

19. There was a contention raised by Sri N. Sukumaran for the Petitioners in some of those cases that the Act occupies the same field as those covered by the Payment of Gratuity Act, the Employees Provident Fund and Miscellaneous Provisions Act and the Employees State Insurance Act, which are all central enactments. The assent of the President has not been obtained for the Act and therefore the Central Acts should override the Act in question. There is no substance in this contention. Section 4 of the Act itself is specific that only a person who is not a member of any Welfare Fund Scheme established under any law for the time being in force can apply for registration under the Act. Therefore, if any employee is already covered by the provisions of any Other welfare scheme, the Act does not apply to him at all. The Act is intended to operate only in regions which are not occupied by other welfare scheme. Even otherwise I am not satisfied that there is any conflict between the Act and the Central Acts. The Central Acts apply only to establishments of the nature mentioned therein, whereas the Act in question applies to all contractors and employers as the case may be. The nature of the levy and the nature of the benefits are also different. This Act contemplates payment of contributions at certain slab rates by the employees and at a percentage of the cost of construction by the employers. The benefits are also different as can be seen from a perusal of Section 14. There is therefore no conflict between the two sets of enactments which renders the Act inoperative, for not obtaining the assent of the President.

20. O.P. Nos. 1261, 2880, 3537, 10721, 11766 of 1991 and 14601 of 1993 relate to electrical contractors. It was admitted by the learned Advocate General that such electrical contractors are not undertaking any "construction work" as defined , in the Act, and therefore they are not liable to make contributions thereunder. This is recorded.

21. O.P. No. 14697 of 1992 is by a painting contractor and O.P. No. 15442 of 1992 is by a person who has undertaken fabrication work. No construction work is involved in these works. To "construct" means to build, and "construction" means the manner or method of building; something constructed, a structure or a building. Mere painting work or fabrication of items for use in a construction do not constitute construction work under the Act and such contractors, like the electrical contractors, are not liable to make contribution u/s 8 of the Act.

22. The challenge to the validity of Sections 2(g) and 8 (2) of the Act therefore

fails. Petitioners are entitled to succeed only in relation to the licence fee leviable u/s 9. The Act or the scheme have not been challenged on any other ground. But before parting with this part of the case, I must mention about some grey areas in the working of the Act which require elucidation. There is no procedure in the Act or in the scheme for determination of disputes or questions which are likely to arise, like the cost of construction whether there is a construction work at all, and if so, as to when the construction was completed, when the contribution became payable and Ors. . Umpteen similar circumstances may be visualised, particularly in the application of the Act to private employers. Who is to make an assessment of the cost of construction, what is the procedure and who is the authority and so on are all left nebulous and without guidelines. None of them is made clear in the Act or in the scheme.

23. Another point on which parties required this Court to address itself was regarding the cost of construction. In the case of contractors who pay the contribution in respect of construction works undertaken for Government and governmental institutions, it was pointed out that considerable quantities of materials like iron and steel, cement, bitumen, etc., are supplied by Government, and the contractor is bound to procure only the other materials to carry out the work. So also mixing machinery, road rollers and the like are supplied by the Government for the work. In such cases, it was urged that the cost of construction should not include the value of these materials, and should be taken as the amount received by the contractor. Counsel for the Respondent demur and submit that there is no scope for reading down the term "cost of construction" in, this fashion. I do not think it necessary to decide on this point as it arises only in the case of Government contractors, who, as stated in paragraph 19 of the counter affidavit can pass it on to the Government by making appropriate provision in the tender. I leave this question open as unnecessary of adjudication at this stage.

24. The last point which is urged relates to the date from which the contribution becomes payable, whether it is 1st January 1990 when the Act came into force, or 16th May 1990 when the scheme was framed, or 25th June 1990 when the fund was constituted, or 7th August 1990, when the scheme was brought into force with effect from 1st January 1990. The counter affidavit filed on behalf of the Government states that the Act will be applicable only to works awarded and commenced after 1st January 1990. But the Petitioners contend that contribution becomes payable only in relation to works awarded after 7th August 1990, or at any rate after 16th May 1990 because according to them the framing of the scheme and its operation are the sine qua non for the liability for the contribution to arise.

25. Section 3 of the Act provides for the framing of a scheme for the purpose of establishment of a fund. The fund vests in and is administered by the Board. Section 8 makes the contributions payable to the fund.

26. As per the counter affidavit of the first Respondent State and as per the

statement made before me by the Additional Advocate General, contribution is payable only in relation to works awarded and commenced after 1st January 1990. The contribution is liable to be passed on, by the contractors to the State Government or its institutions by making their tender appropriately. This was one of the premises on which liability imposed on the contractors in respect of State Government works was sought to be supported. If that be so, the liability should be related to a period when the contractor could make provision for it while submitting his tender, i.e., it should be after 1st January 1990. For this reason, I am unable to accept the submission of counsel for the Welfare Fund Board that the contribution is payable on all works completed on and after 1st January 1990. There is no basis for this submission, either in the Act or in the scheme. The stand taken in the State's counter affidavit is reasonable and just.

27. The next question is whether this date should be relegated further to 16th May 1990 or any other later date. The framing of the scheme is the first essential preliminary for the liability for contribution to arise for the reason that, only thereafter can the fund be constituted, to which the contributions are made. This happened on 16th May 1990, but the scheme did not come into force on that day and it was left to Government to bring it into force on such date as they may by notification in the Gazette appoint.

28. The second step was the constitution of the fund, which took place on 25th June 1990, when the fund was constituted pursuant to resolution by the Board. There was debate at the Bar as to whether the Board was entitled to establish the fund—the Petitioners taking the stand that it was for Government itself to establish the fund u/s 3, in the absence of any authority in the Act or in the scheme for the Board to constitute the fund. It was inter alia pointed out that as per clause 18 of the scheme, the Board's power was only to deal with all matters connected with the implementation of the fund, and not to constitute the fund itself. Though there seems to be considerable force in this submission, I do not think this controversy about the genesis of the fund has any impact on its validity, when it has in fact come into existence. I am not inclined to invalidate the establishment of the fund for this reason.

29. Since the existence of the fund is a necessary preliminary for the contribution to be levied and is integrally connected with the working of the Act and the scheme, and since the contribution is payable to the fund, I am of the opinion that the liability u/s 8 to make contribution will not arise for a period prior to the establishment of the fund, namely 25th June 1990.

30. However, the fund could not operate without the scheme being in force. That step was taken only on 7th August 1990, when Government notified under Clause 1(3) of the scheme that it shall come into force with effect from 1st January 1990. But then the question is whether Government was entitled to give retrospective effect, to the scheme from 1st January 1990, at a time when the scheme had not even been framed.

31. In framing a scheme and bringing it into operation, Government is exercising functions only as a delegated authority. The authority of such a delegate is strictly confined to the provisions of the statute which confers the delegated power. Accordingly, it has been held that Government has no power to frame a rule or issue a notification with retrospective operation unless such a power is conferred specifically or by necessary intendment: (Vide Income Tax Officer, Alleppey Vs. M.C. Ponnose and Others, , Accountant General and Another Vs. S. Doraiswamy and Others, , State of Madhya Pradesh v. Dall and Flour Mills (1991) 80 S.T.C. 138 among Ors.). The fact that the Government was left with the power by Clause 1(3) of the scheme to fix the date of its commencement does not ipso facto enable it to fix a date in such a manner as to make the scheme take effect retrospectively. Therefore the retrospective operation given to the scheme with effect from 1st January 1990, upto 7th August 1990 was ultra vires the powers of Government and bad. It can operate only prospectively from 7th August 1990.

32. Therefore the scheme, the existence and the operation of which were the sine qua non for the liability for the contribution, to "attach itself came into effect only on 7th August 1990. Therefore and consistent with the stand taken by the State, as referred to earlier, contribution became payable only in relation to construction works awarded and commenced after 7th August 1990. I hold so.

33. There were a few minor points like the excessive nature of the contribution at 1 per cent and Ors. which do not merit any further or serious consideration.

34. My conclusions may therefore be summarised as follows:

(a) Sections 2(g) and 8(2) of the Act and clauses 25 and 26 of the scheme are valid.

(b) Section 9 of the Act is unconstitutional and void.

(c) Contributions are payable u/s 8 of the Act only in respect of works awarded and commenced after 7th August 1990.

(d) Electrical contractors and contractors for doing painting and fabrication works are not liable to pay contributions under the Act.

(e) The findings herein relate to the "employers" as defined in Clause (i) of Section 2(g). I have not dealt with the cases of those covered by Clause (it) of the said Sub-section.

Accordingly O.P. Nos. 1261, 2880, 3537, 10721, 11766 of 1991, 14601, 14697 and 15442 of 1992 are allowed and the Petitioners therein are held not liable to pay contribution for the electrical, painting or fabrication works, undertaken by them.

The other writ petitions are disposed of with the findings in paragraph 34 above. The Board shall adjust the contributions received by them from any of these Petitioners towards contribution for works awarded and commenced after 7th

August 1990 and refund the excess, if any, to the Petitioners. If any of the Petitioners have objections regarding their nonliability or otherwise, they may bring it to the notice of the Board, who. shall deal with the same and pass orders in accordance with law.