

**CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL -CUM- LABOUR COURT,
ASANSOL**

PRESENT: Justice Ananda Kumar Mukherjee (Retd.),
Presiding Officer,
C.G.I.T-cum-L.C., Asansol

EPFA No. 01 of 2021

Chittaranjan Locomotive Works, Chittaranjan Appellant.
Vs.	
Assistant Provident Fund Commissioner, Durgapur Respondent.

O R D E R

Dated: 16.11.2023

Mr. Sisir Kumar Mukherjee, Adv. for the Appellant.
Mrs. Mousumi Ganguli, Adv. for the Respondent.

1. This appeal has been preferred by the appellant under Section 7-I of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as EPF Act), being aggrieved and dissatisfied with the impugned order dated 19.10.2020 passed by the Assistant Provident Fund Commissioner and Assessing Authority, Durgapur in a proceeding under Section 7-A of the EPF Act, for default in contributing the Provident Fund dues by the appellant in respect of the contractual employees working under Chittaranjan Locomotive Works (hereinafter referred to as CLW), District- Burdwan (West Bengal) for the period from 19.11.2005 to 05/2013. In the impugned order the appellant was directed

to deposit Rs. 6,11,56,997/- (Rupees six crore eleven lakh fifty-six thousand nine hundred and ninety-seven only) for the period from 05/2005 to 05/2013 after having adjusted Rs. 3,01,401/- (Rupees three lakh one thousand four hundred and one only), which has been remitted by the contractors.

2. The instant appeal was filed on 22.01.2021 accompanied by a petition for condonation of delay of eighteen (18) days, wherein the appellant petitioner referred to an order passed by the Hon'ble Supreme Court of India in Suo Moto Writ Petition (Civil) No. 03 of 2020 relating to difficulty faced by the litigants across the country in filing their applications and petitions within the limitation period during COVID-19. The appellant relied upon the observation of the Hon'ble Supreme Court of India and urged that the period of limitation in all such proceedings, irrespective of limitation prescribed under the general law or special laws whether compoundable or not shall stands extended w.e.f. 15.03.2020 till further order(s) to be passed by the court and by exercising the power under Article 142 read with 141 of the Constitution of India declared that the order is binding within the meaning of Article 141 of the Constitution of India to all Courts, Tribunals and Authorities. In view of such order of the Hon'ble Supreme Court of India in Suo Moto Writ Petition (Civil) No. 03 of 2020, I hold that the appeal is not barred by limitation and the same needs to be disposed on its merit.

3. In brief, the fact of the case leading to the present appeal is that the appellant is a unit of the Government of India and under the control of the Ministry of Railways, Government of India. Provident Fund is paid to the workers and staff members of CLW under its own rules and regulations, which are more beneficial than the scheme under the EPF Act and it is exempted from the application of the EPF Act. The appellant establishment at times avail services of different contractors, who are the principal employers and the appellant

establishment is their client, having no control in fixation of terms and conditions of service of the contractor firms. On 24.10.2013 the respondent authority issued Notice bearing No. EPFO/SRO/DGP/58680/CLW to the appellant establishment disclosing for the first time that a proceeding under Section 7-A of the EPF Act had been initiated against the appellant. It was informed that an Employees' Provident Fund Code No. WB/58680 had been allocated to the appellant. According to the appellant allotment of such Employees' Provident Fund Code was a suo moto act on the part of the respondent authority as the appellant establishment is an exempted establishment having their own Provident Fund scheme for their employees. The proceeding under Section 7-A was fixed upon different dates and finally an amount of Rs. 6,11,56,997/- (Rupees six crore eleven lakh fifty-six thousand nine hundred and ninety-seven only) was assessed against the appellant towards the Provident Fund dues for its employees working under the contractors.

4. In the proceeding under Section 7-A of the EPF Act the respondent tried to lay the responsibility on the appellant for non-payment of Provident Fund dues for its employees working under contractor firms from 05/2005 to 05/2013 and asked the respondent to produce records of concerned contractual workers which are not available with the appellant establishment after such a long period. It is further submitted that most of the contractor firms and their workers are no more working with CLW and they are not covered under the said Act. Challenging the impugned order, it is urged that the respondent authority failed to consider the material facts and avoided the actual issue. According to the appellant the respondent erred in calculating the Provident Fund dues against the appellant. The appellant had taken the service of outside agencies as client and was not aware of the number of workers and manner of their performance. The appellant has no authority to instruct the employees working under the agencies. Therefore, the appellant is not responsible for making any Provident

Fund contribution for the workers of the agencies. Referring to the decision of the Hon'ble Supreme Court of India in the case of **Employees State Insurance Corporation vs. C.C. Santhakumar [2007 (1) SCC 584]**, which was relied upon in the impugned order, it is contended by the appellant that the ratio of said decision has no application to the present case. It is urged by appellant's advocate that without identifying the beneficiaries of such Provident Fund amount and without adducing any evidence by the contractors working in the establishment of the appellant, the respondent has arbitrarily and illegally assessed the Provident Fund dues against the appellant for which it is not liable. The appellant therefore, prayed for setting aside the impugned order dated 19.10.2020.

5. Respondent contested the appeal by filing its reply, wherein it is urged that appeal is not maintainable as the department i.e. Central Board of Trustees has not been impleaded as a party in this appeal, on the other hand the Provident Fund authority which is a quasi-judicial authority has been impleaded as a respondent. According to the respondent CLW was brought under the purview of the EPF Act w.e.f. 19.11.2005 by the virtue of Notification of the Ministry of Labour and Employment, Government of India vide G.S.R. No. 401 dated 10.11.2005 published in Part II, Section-3, sub-section (i) of the Gazette of India dated 19.11.2005 which came into force on the date of publication and was allotted Provident Fund Code No. WB/DGP/58680 in respect of the contractual employees only of CLW.

6. The appellant was directed to comply the provisions of the EPF Act and three (3) schemes were framed under letter dated 21.02.2013 but the establishment failed to comply. On 06.07.2012 a complaint was submitted by Mr. Ramen Pandey, the then member of Central Board of Trustees, Employees' Provident Fund Organization addressed to the Additional Central Provident Fund

Commissioner at Kolkata due to non-coverage of substantial number of contractual employees working at CLW under the EPF Act, forwarding therewith a complaint dated 06.07.2012 of one Mr. Ranjit Das, President of CLW contractors working union along with a list of thirty-three (33) numbers of contractors. The said complaints were forwarded to the office of the ACC for extending the benefits of Provident Fund to all the employees of CLW. The Ministry of Labour and Employment, Government of India vide its letter dated 18.09.2012 directed payment of minimum wages, Employees' State Insurance, Provident Fund and Gratuity to the contractual workers of CLW. Another complaint letter date 20.05.2013 of the Railway Contractor Mazdoor, Andal Station Road, Burdwan addressed to the office of the Chief Vigilance Officer and the Senior Deputy General Manager of Eastern Railways, Kolkata, the Regional Provident Fund Commissioner, Durgapur, and the Deputy Central Labour Commissioner, Dhanbad were received wherein it was alleged that Provident Fund benefits was not extended to more than three hundred (300) workers engaged by M/s. Bridgenandan Singh, Bhagalpur, in various works in Asansol Division.

7. In the proceeding under Section 7-A of the EPF Act several opportunities were given to the appellant establishment but particulars of the contractual employees who were engaged in the work of the establishment was not provided for determining the dues from 19.11.2005 to 05/2013. The establishment was directed to produce the following documents :

- (a) Attendance Registers
- (b) Cash Book and Vouchers
- (c) Payment Register / Pay Bill
- (d) General Ledger
- (e) Trading and Profit and Loss Accounts and Balance Sheets
- (f) Any other documents necessary for ascertaining the amount due
- (g) Copy of statutory return(s) in for 12A for the abovementioned period.

8. Representative of the appellant establishment submitted a representation on 20.02.2017 wherein it was contended that :

- (i) Contract procedures at Indian Railways being guided by Railway Board, time to time.
- (ii) In the contract agreement between CLW and contractors during the aforementioned period no Employees' Provident Fund Clause was included due to absence of guidelines and the same was admitted in the contract agreement w.e.f. 2014 onwards.

9. Respondent authority observed in the order that several opportunities were provided to the appellant to produce the documents for the purpose of indicating names and particulars in respect of the employees engaged in or in connection with work of the establishment and other details but the management did not comply the same. The respondent issued Notice under Section 32 of Civil Procedure Code, 1908 (hereinafter referred to as CPC) to Mr. V. P. Pathak, General Manager, CLW for his appearance and production of records and documents for the case period relating to the name of the contractors, period of the contract, number of employees engaged during the contract period, wages paid to the employees, contract amount and total amount paid to the contractors. Mr. Gopal Kumar, Area Enforcement Officer was directed to visit the establishment and submit his deposition after verifying all the records of the establishment but during the visit of Mr. Gopal Kumar the establishment could not produce any record for the case period. On 11.04.2018 Mr. Gopal Kumar and Mr. Sajal Brahma, Squad Enforcement Officers submitted that CLW having twelve (12) different Wings and all Wings are engaged with contractors for execution of their works. The establishment have submitted detail of contractors of only three (3) Wings i.e. Civil Engineering Wing, Medical Wing, and Mechanical Wing (Steel Foundry). The name and address of thirty-five (35) contractors of the Civil Wing are submitted by the establishment which contain names and

addresses of the contractors, nature of work, date of awarding contracts, date of completion of contract, contract value, and amount paid. The establishment however failed to submit the names, number of employees engaged and the amount paid to the contractual employees. In another statement details of six (6) contractors in the Medical Wing and six (6) contractors in the Mechanical Wing (Steel Foundry) were submitted. In its report the Enforcement Officer Squad indicated the details of contractors but could not provide the work order and other details in respect of the remaining (9) Wings of the establishment.

10. According to the respondent under Section 29 of the Contract Labour (Regulation and Abolition) Act, 1970 Registers and other records related to the contract labours are to be maintained by every principal employer and every contractor shall maintain such register and records giving such particulars of contract labour employed, nature of work performed by the contract labour, rates of wages paid to the contract labour and such other particulars in such form as may be prescribed. Every principal employer and every contractor shall keep and exhibit in such manner as may be prescribed within the premises of the establishment where the contract labour is employed, notices in the prescribed form containing particulars about the hours of work, nature of duty and such other information as may be prescribed.

11. It is urged by the respondent that under paragraph – 30(1) of Employees' Provident Fund Scheme, 1952 (hereinafter referred to as EPFS) the employer shall in the first instance, pay both contribution payable by him as employer's contribution and also, on behalf of the member employed by him directly or through contractor. In case of employee employed by or through contractor. Sub-paragraph (2) lays down that the contractor shall recover the contribution paid by such employee as the member's contribution and shall pay to the principal employer the member's contribution so deducted together with an equal

contribution referred to as employer's contribution and also administrative charges. The respondent / Commission contended that the principal employer is fully responsible for payment of Provident Fund contribution under the scheme and it is a well settled position that the principal employer is responsible for maintaining and preserving all relevant records relating to contractual employees engaged in or in connection with the work of the establishment. Since the appellant establishment did not produce relevant records, the Provident Fund dues payable to the contractual employees were assessed on the basis of work order submitted by the establishment. It is the case of the respondent that the instant appeal has no merit and the same liable to be dismissed.

12. From the rival contentions of the appellant and respondent, the moot questions which emerge for consideration are as follows:

- (i) Is the appellant establishment covered by the EPF Act in respect of the contractual employees working in or in connection with the work of the establishment?
- (ii) Whether the appellant establishment is liable for remitting Provident Fund dues in respect of its contractual employees for the period from 11/2005 to 05/2013?
- (iii) Has the respondent been able to identify the beneficiaries for the purpose of whom the assessment of dues have been made under Section 7-A of the EPF Act?
- (iv) Is the impugned order dated 19.10.2020 sustainable under the facts and law?

13. The appeal was finally heard on 14.09.2023 in presence of learned advocates for both parties.

14. Mr. Sisir Kumar Mukherjee, learned advocate for the appellant at the

outset submitted that CLW being an establishment engaged in construction, maintenance, and operation and commercial activities of the Indian Railways, the Government of India has excluded the Indian Railways from the purview of the EPF Act as it is exclusively managed by the Government of India whose employees are in enjoyment of the Provident Fund, Pension and other retiral benefits under the Rules made by the Central Government, specified in the Notification of the Ministry of Labour and Employment, Government of India, New Delhi G.S.R. No. 401 dated 10.11.2005 which was notified in the Gazette of India on 19.11.2005.

15. Mr. Mukherjee, learned advocate for the appellant argued that the respondent authority suo moto issued a Provident Fund Code bearing No. WB/DGP/0058680/000 to the appellant establishment which was communicated to the establishment by letter no. WB/DGP/0058680/000/0-1/2781(I)(II)(III) dated 08.02.2013. It is further contended that CLW engaged various production units and or subsidiary works for running its production business and it invite service of various contractors by entering into agreements with concerned railway authority. The appellant does not recruit the contractors but only avail their services by purchasing finished product and have no involvement in the work nor any control over the employees engaged by the contractors to perform the work at CLW on turnkey basis. The contractors have been allotted independent Employees' Provident Funds codes and are recognized as establishment by the Employees' Provident Funds Organisation. The said contractors not only work for CLW but for other establishments and the appellant is not liable for payment of Provident Fund dues in respect of the contractor firms working at CLW.

16. The other limb of argument advanced on behalf of the appellant is that the impugned order assessing huge amount of Rs. 6,11,56,997/- (Rupees six crore

eleven lakh fifty-six thousand nine hundred and ninety-seven only) as Provident Fund dues against the appellant authority is without foundation. Learned advocate for the appellant contended that on 27.03.2019 a representative of CLW furnished a list of 152 contracts and other particulars such as names of the contractors, name of the work, date of awarding the contract, date of completion of work, contract values and amount paid was submitted before the respondent authority. In course of proceeding the respondent authority ought to have summoned the contractor firms to find out the number of employees engaged by them and the wages paid to the contractual employees for the purpose of assessing Provident Fund dues. Learned advocate argued that without identifying the beneficiaries for receiving such Provident Fund amount, the respondent authority has failed to discharge its duty and claimed that he impugned order is liable to be dismissed.

17. To fortify his argument learned for the appellant advocate relied upon the following decisions :

- (i) **Food Corporation of India vs. RPFC, Chandigarh and Others [SLP (Civil) No. 1677/2009],**
- (ii) **Kaushik K. Chatterjee vs. Assistant Provident Fund Commissioner, Employees' Provident Fund Organization [WP No. 1674 of 2016], and**
- (iii) **Gurbir Kaur vs. RPFC, EPFO and Others [2006 (109) FLR 818]**

18. Learned advocate for the respondent in reply argued that the instant appeal is not maintainable as it has not been filed against the Department, The Central Board of Trustees. It is pointed out that though the provisions of the EPF Act do not apply to the regular employees of Indian Railways. The appellant establishment has been brought under the purview w.e.f. 19.11.2005 under Section 1(3)(b) on the strength of a Gazette Notification of the Ministry of Labour and Employment , Government of India published in G.S.R. 401 dated

10.11.2005. Learned advocate submitted that a Provident Fund code WB/DGP/58680 vide S.O. 45(E) dated 17.01.2006 was issued to the appellant establishment but they failed to contribute the Provident Fund dues in respect of the employees working under the contractors from 11/2005 to 05/2013. It is argued that in a proceeding under Section 7-A of the EPF Act Summons were issued on 25.06.2013. The proceeding continued from 28.10.2013 to 19.10.2020 but the Management of CLW did not produce the documents they were asked to and, in their representation, dated 20.02.2017 submitted by Mr. H. P. Bar, Assistant Engineer it has been admitted by the establishment that the contract agreement between CLW and contractors for the period under consideration did not include any clause for deduction of Provident Fund. Only after a letter bearing no. GMA/Ruling/95-B dated 14.01.2014 clause relating to Provident Fund has been included in the agreement from the year 2014 onwards. It is submitted that all the Service Records relating to the employment through contractors were in the possession of the employer establishment and the onus was upon the appellant establishment to provide the details about the person employed, the period of their employment, their basic pay and allowance and their Provident Fund contribution. The appellant establishment has illegally withheld specific information in order to avoid the consequence of non-payment. Therefore, the Assistant Provident Fund Commissioner was rightly assessed the Provident Fund dues of Rs. 6,11,56,997/- against the appellant establishment.

19. In support of her argument, learned advocate for the respondent placed reliance on the following decisions:

- (i) **Saraswati Construction Company vs. Central Board of Trustees [W.P.(C) No. 5625/2007]**, wherein the Hon'ble High Court of Delhi held that :

“ Once the petitioner itself failed to substantiate its case by means of any supporting documentary evidence, then, no fault can be found with the

finding of fact arrived at by the Regional Provident Fund Commissioner while passing orders under Section 7A and 7B of the Act. The Appellate Tribunal also upheld the orders passed by the Regional Provident Fund Commissioner and dismissed the appeal filed by the petitioner. I do not find merit in the submission of the counsel for the petitioner that the onus was on the respondent to prove that the petitioner had deployed 20 or more workers at the relevant time of the inspection as the entire documentary evidence always remained in the control, power and possession of the establishment.”

- (ii) In another case, **Employees State Insurance Corporation vs. C.C. Santhakumar [2007 (1) SCC 584]**, the Hon'ble Supreme Court of India held that :

“ When the records are not produced by the establishment before the Corporation and when there is no cooperation, the Corporation has got the power to make assessment and determine the amount under Section 45A and recover the said amount as arrears of land revenue under Section 45B of the Act. This is in the nature of a best judgment assessment as is known in taxing statutes. When the Corporation passes an order under Section 45A, the said order is final as far as the Corporation is concerned. Under Section 45A(1), the Corporation, by an order, can determine the amount of contributions payable in respect of the employees where the employer prevents the Corporation from exercising its functions or discharging its duties under Section 45, on the basis of the material available to it, after giving reasonable opportunity. But, where the records are produced, the assessment has to be made under Section 75(2)(a) of the Act.”

It is urged that the order passed by the respondent suffers from no illegality or impropriety, and calls no interference. The appeal is therefore liable to be dismissed.

20. An objection has been raised by the respondent that the appeal would fail

for non-impleadment of Central Board of Trustees. In this matter Rule – 11 (8) of the Tribunal (Procedure) Rules, 1997 laid down that :

“ If the Tribunal is satisfied that it is not reasonably practicable to serve notice of appeal upon all the respondents, it may, for reasons to be recorded in writing, direct that the appeal shall be heard notwithstanding that some of the respondents have not been served with notice of the application—

Provided that no appeal shall be heard unless:-

.....

(ii) Notice of appeal has been served on the authority which passed the order against which the appeal has been filed.”

In the present case the authority who passed the order against the appellant has been impleaded as respondent. Therefore, I find no irregularity in the appeal and hold the same to be maintainable.

21. Having considered the arguments advanced by the learned advocates for the parties and on a conspectus of the materials on record, it transpires that the appellant establishment is under the control and management of the Government of India, whose employees are enjoying the benefits of Provident Fund and other retiral benefits according to their scheme. The establishment is therefore exempted under Section 16 (1) (b) of the EPF Act in respect of its regular employees. The Ministry of Labour and Employment by its Notification dated 17.01.2006 in S.O. 45(E) notified that in exercise of the powers conferred by clause (f) of sub-section (3) of Section 1 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), the Central Government hereby specifies to amend the Employees' Provident Fund Scheme, 1952, namely :

“ 1. (i) This Scheme may be called Employees' Provident Fund (Amendment) Scheme, 2004.

(ii) It shall come into force with effect from the date of its publication in the Official Gazette.

2. In Para 1, sub-para (3) after clause (C III) the following may be added :-

(XXIV) With respect to the establishments engaged in Railways for construction, maintenance, operation and commercial activities of Railways excluding Indian Railways exclusively managed by Government of India whose employees are in enjoyment of the Provident Fund, Pension and other retiral benefits under the Rules made by the Central Government; specified in notification of the Govt. of India in the Ministry of Labour and Employment G.S.R. 401 dated 10-11-2005 published in Part II of Section 3 Sub-section (i) of the Gazette of India dated 19-11-2005 comes into force from the date of Publication.”

G.S.R. 401 dated 10.11.2005 laid down that in exercise of the powers conferred by clause (b) sub-section (3) of Section 1 of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), the Central Government hereby specifies the following establishments employing 20 or more persons as the class of establishments to which the said Act shall apply with effect from the date of publication, namely :

“ Any establishment engaged in construction, maintenance, operation and commercial activity of Railways; other than Indian Railways and other Railway establishments owned and controlled by Central or State Government.”

The Notification therefore, makes the provision of the EPF Act applicable to various establishments engaged in Indian Railways for construction, maintenance, operation and commercial activity of Railways which are not exclusively managed by the Indian Railways. Different contractor firms which take part in performing work in or in connection with the work of Indian Railways are therefore mandated to extend the benefit of the EPF Act to its employees w.e.f 19.11.2005 i.e. the date of publication of G.S.R. 401 dated 10.11.2005 in Part II, Section 3 sub-section (i) of the Gazette of India. By virtue of such notification, there is no escape for the appellant establishment from complying such provisions.

22. For the purpose of tracing the liability and responsibility of the principal employer in remitting Provident Fund contribution it is worthwhile to consider the provisions of Paragraph 30 of EPFS which lays down as follows :

“ 30. Payment of contributions

- (1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).*
- (2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this Scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer's contribution) and also administrative charges. ”*

It therefore emerges from the aforesaid provisions of the scheme that the appellant establishment being the principal employer is responsible for identifying the workmen employed by the contractors and for making necessary payment of Provident Fund contribution towards their Provident Fund account w.e.f. date of application of the scheme i.e. 19.11.2005. In the present case the appellant establishment admitted non-compliance of the provision they were required to follow. It is the case of the appellant that they were unaware about allotment of any Provident Fund code to their establishment until they received summons for the proceeding under Section 7-A of the EPF Act for the first time on 25.06.2013. In course of hearing of the appeal the respondent authority was directed to produce copy of the Notice by which they informed the appellant for the first time about the allotment of Provident Fund code for coverage of the contractual employees of CLW at Chittaranjan under the purview of the EPF Act. learned advocate for the respondent submitted that the Provident Fund Code No.

WB/DGP/58680 was allotted to the appellant establishment for its contractual employees by a letter bearing no. WB/DGP/0058680/000/0-1/2781(I)(II)(III) dated 08.02.2013, wherein for the first time the Assistant Provident Fund Commissioner (Compliance), Durgapur allotted the Provident Fund code number to the appellant establishment and asked them to quote the number in all remittances, returns, and correspondence with their office. In the communication addressed to M/s. Chittaranjan Locomotive Works (for contractual employees), Chittaranjan, Burdwan it was informed that :

“ As your establishment, M/S. CHITTARANJAN LOCOMOTIVE WORKS (FOR CONTRACTUAL EMPLOYEES) is falling under the Schedule Head viz... ESTABLISHMENT ENGAGED IN RAILWAYS FOR CONSTRUCTION, MAINTENANCE, OPERATION (CODE: 181), and has employed _____ persons also and it fulfils requirements for application of the Act. Accordingly, the establishment is liable to implement the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and Schemes framed there under, viz... Employees' Provident Funds Scheme, 1952, Employees' Pension Scheme, 1995 and Employees' Deposit Linked Insurance Scheme, 1976 under section 1(3)(b) of the Act w.e.f. 19/11/2005. The statutory rate of Provident Fund contribution applicable to it i.e. @12% of salary/wages which consists Basic wages, DA (including cash value of food concession), retaining allowance, if any.”

In the said letter the Assistant Provident Fund Commissioner sought for payment of Provident Fund contribution and allied dues within fifteen (15) days of each preceding month. Prior to communication of the Provident Fund code to the appellant establishment the appellant did not have any occasion to remit the Provident Fund dues.

23. Learned advocate for the respondent in her argument referred to letter no. 2018/E(LL)/AT/CNR/3 dated 24.01.2018 issued by Joint Director/E(LL), Railway Board addressed to the General Manager, All Indian Railways and PUs

(as per standard list), copy of which was received by the Additional CPFC-II (Compliance) on 01.02.2018, wherein in Para 2(ii) it was pointed out that though Indian Railways was not directly covered, however, contractors working in Indian Railways are covered under the provisions of the Act. In this connection, Para 2 of the Railway Board's letter no. 2012/CE-I/CT/O/22 dated 14.12.2012 was to be referred. Respondent also produced a copy of letter bearing no. 2012/CE-I/CT/O/22 dated 14.12.2012 issued by the Working Director/ Civil Engineering(G)/ Railway Board which also states that as per Section 1(3), read with Section 16 of the Act, being the principal employer, even though Indian Railways are not covered under the Act in respect of the regular employees, the Contractors working with Indian Railways are covered under the provisions of the Act. The relevant provisions of the EPF Act and its Scheme on liabilities and duties of the principal employer are enclosed as Annexure-II. On considering the communications made by the Railway Board at different times there is no ambiguity of the fact that Indian Railways, the principal employer is enjoined with the liabilities and duties of applying the provisions of the EPF Act to the contractual employees working in their establishment. Since the notification clearly stated that such provision applied from 19.11.2005, there is no scope for the appellant to deny its liability. The issue relating to the application of the EPF Act to the appellant is accordingly set at rest without any ambiguity.

24. The impugned proceeding against the appellant was for non-remittance of Provident Fund dues for the period from 19.11.2005 to 05/2013. The moot question which needs consideration is whether the appellant establishment is liable for payment of Provident Fund dues for the said period. In course of argument learned advocate for the appellant quoted a Circular bearing no. C-11/20/76/Misc./2020/CBE/TN/1027 dated 14.02.2020 and claimed that Employees' Provident Fund Organization in the said circular has laid down that any initiation of proceeding for period beyond five (5) years without evidence of

such prolonged default would be legally untenable. No such copy of the circular has been produced by the appellant. The claim herein is that the appellant has made a prolonged default by non-remittance of Provident Fund dues for the contractual workers working under the contractor firms. Appellant admitted that numerous contractor firms have carried out various nature of work for the establishment but Provident Fund contribution were not made. The prolonged default on the part of the appellant emerges from non-production of any evidence of payment. The appellant establishment in course of proceeding under Section 7-A has filed an application dated 21.03.2019 addressed to the Assistant Provident Fund Commissioner, Durgapur which was received by them on 27.03.2019. In the said letter it was categorically stated that on 14.02.2018 Civil Engineering Department has submitted a list of 152 contracts which were executed during the period from 19.11.2005 to 05/2013 and after correction the total number of contracts are found to be 149. From the enclosed document it is found that only the names of the contractor firms have been provided without their address, name of the work, period of work, contract value, amount disbursed have also been provided but relevant information like identity of employees engaged and wages paid to them have not been disclosed. To my mind non-disclosure of such information prevented the respondent authority from identifying the beneficiaries and assessing their dues.

25. Learned advocate for the respondent drew my attention to the impugned order wherein the assessing authority stated that the onus lies upon the Enforcement Officer to prove its case with the help of adequate records. Reliance was placed on the ration of the decision of the Hon'ble High Court of Delhi in the case of **Saraswati Construction Company vs. Central Board of Trustees (supra)** and the judgment of the Hon'ble Supreme Court of India in the case of **Employees State Insurance Corporation vs. C.C. Santhakumar (supra)**, wherein the Apex court observed that Under Section 45A(1), the Corporation, by

an order, can determine the amount of contributions payable in respect of the employees where the employer prevents the Corporation from exercising its functions or discharging its duties under Section 45, on the basis of the material available to it, after giving reasonable opportunity. But, where the records are produced, the assessment has to be made under Section 75(2)(a) of the Act. Section 45A (2) provides that the order under Section 45A(1) shall be used as sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such order as arrears of land revenue under Section 45B. It has been argued by learned advocate for the respondent that in the present case after sufficient opportunity given to the appellant, they did not come out with proper information regarding the identity of the employees working under the contractor or the wages paid to them. Therefore, the respondent after adjusting Rs. 3,01,401/-, already remitted by one of the contractors assessed Provident Fund dues at Rs. 6,11,56,997/- under Section 7-A of the EPF Act payable by the appellant.

26. From the very inception it appears to me that GRS 401 dated 10.11.2005 of the Ministry of Labour and Employment, Government of India was made applicable to the contractual employees working under the Railway establishments owned and controlled by the Central Government and State Government, w.e.f. 19.11.2005 and the notification to that effect was made in the Gazette of India dated 17.01.2006. Long after 7 years the Railway Board in its letter No. 2012/CE-I/CT/O/22 dated 14.12.2012 communicated to the FA and CAOs, All India Railways about the application of the EPF Act to the contractual employees of Indian Railways. The Provident Fund authority in their turn informed the appellant establishment about the application of the EPF Act and the Scheme framed thereunder under allotted code only on 08.02.2013. It is evident that the enforcement / application of the Act though notified, was in a nascent stage and the Provident Fund Code was allotted to the appellant mandating its application w.e.f. 19.11.2005, after eight years only in the year

2013. The appellant establishment not having prior coverage has failed to maintain particulars of the contractual employees and their basic wages, DA, cash value of food concession and retaining allowance.

27. Learned advocate for the respondent to fortify their claim relied upon a decision of the Hon'ble Supreme Court of India in the case of **Employees State Insurance Corporation vs. C.C. Santhakumar (supra)**, wherein for non-production of records by the employer after reasonable opportunity, the act of the corporation in determining the amount of contributions payable in respect of the employees on the basis of available materials with them was upheld. On a reading of the cited decisions, it appears to me that the case relates to Employees' State Insurance Act, 1948. The object of the said act is to provide benefits to employees in case of sickness, maternity, and employment injury and to make provisions of certain other matters in relation thereto. At the time of registration of an establishment under ESI Act before the corporation, particulars of the employees are furnished and employer makes necessary contribution for them. In a proceeding for recovery of contribution from the employer reasonable opportunity is given to the employer for furnishing particulars and providing records. In the event no record is produced after such opportunity the corporation can pass order on the basis of available record which are already with it. In the present case for recovery of Provident Fund dues from the employer establishment under Section 7-A of the EPF Act, the beneficiaries i.e. the employees for whom the Provident Fund dues are to be recovered, the period of recovery and their basic pay have not been ascertained by way of enquiry. Without collecting any information regarding particulars of beneficiaries, their period of employment and their pay structure the Provident Fund authority cannot draw any inference to make assessment of the outstanding Provident Fund dues. It has to be borne in mind that the object of the EPF Act is to recover the unpaid Provident Fund dues for crediting the same to the employee's account who have been deprived. The persons here are not identified. The proceeding

under Section 7-A of the EPF Act is not a punitive provision and does not provide for assessing any damages against the employer as Provident Fund dues with an object to punish the establishment. The mechanism, procedure and object of the Employees' State Insurance Act, 1948 and the EPF Act are markedly different. In my considered view the facts and circumstances of the case in **Employees State Insurance Corporation vs. C.C. Santhakumar (supra)** are distinguishable from the facts and circumstances and the law involved in the present case. I, therefore hold that the principle laid down in the said decision by the Hon'ble Supreme Court of India is not applicable to the cases involved in Section 7-A of the EPF Act and the onus of proof applied in the aforementioned decision cannot be applied in the same degree to the present case.

28. In passing the impugned order the respondent authority has drawn strength from the decision of the Hon'ble High Court of Delhi in the case of **Saraswati Construction Company vs. Central Board of Trustees (supra)** and observe that the dodging tactics of the establishment (CLW) cannot be entertained at the cost of the poor hapless workers who have rendered services for the prosperity and growth of the principal establishment (CLW) and gone ahead in assessing the Provident Fund dues without passing a reasoned order. On a careful reading of the decision in the case of **Saraswati Construction Company vs. Central Board of Trustees (supra)** it would emerges that the said decision was delivered in a writ petition where the petitioner engaged in the field of construction had deployed employees through contractors to work for the establishment. The report of the inspectors disclosed that the number of permanent employees were 9 to 10 and daily wagers and other casual employees were between 25 to 40 persons. The petitioner was given reasonable opportunity to rebut the Inspection Report but failed to adduce any evidence. In a proceeding under Section 7-A of the EPF Act the Regional Provident Fund Commissioner came to a finding that the Act was applicable to the employer establishment. In a review under Section 7-B of the EPF Act the petitioner employer failed to

adduce any evidence. The Appellate Tribunal also upheld the order of the Regional Provident Fund Commissioner and dismissed the appeal. The petitioner then filed a Writ Petition and the Hon'ble High Court of Delhi held that there was no merit in the submission of the counsel for the petitioner that the onus was on the respondent to prove that the petitioner had deployed 20 or more workers at the relevant time of inspection as the entire documentary evidence was under the control, power and possession of the establishment. In the said decision the Hon'ble High Court found that the petitioner on its own admitted that they were employing 10 employees as regular employees and about 30 as daily wages or through petty contractors and once having taken such a stand the establishment of the petitioner would clearly fall under Section 2(f) of the said Act. The Hon'ble High Court of Delhi consequently found no infirmity in the order of the authority passed under Section 7-A of the EPF Act.

29. In reading the present case juxtapose with the cited decision, I find that the factual scenario in the present case is different. After a lapse of more than 8 years from the Gazette Notification, which made the EPF Act applicable to the contractual workers of the Indian Railways, the competent authority i.e. the Assistant Provident Fund Commissioner has allotted a Provident Fund Code to the appellant establishment for coverage of its contractual employees. Due to such lapse of time the appellant failed to produce information to indicate the beneficiaries. On the other hand in the cited decision the inspection report filed before the Provident Fund authority disclosed the number of permanent and casual employees who were working under the construction firm. The said finding was not rebutted by the learned advocate of the employer. On the other hand, there was an admission by the management of the petitioner firm that they were employing more than 20 persons. Since the employer did not produce any record to dispute the findings of the Regional Provident Fund Commissioner, the Hon'ble High Court did not interfere with the order of the Provident Fund commissioner or the Appellate Tribunal and dismissed the Writ Petition. The

facts of the present case are distinguished from the case cited by the learned advocate for the respondent **Saraswati Construction Company vs. Central Board of Trustees (supra)** and the principle laid down is not found applicable.

30. In the case of **Gurbir Kaur vs. The Regional Provident Fund Commissioner, Employees' Provident Fund Organization and Others [2006 (109) FLR 818]**, the Hon'ble Court of Calcutta held that :

“No doubt it is true that the primary obligation to disclose such particulars lies on the employer but even then the authority cannot shirk its responsibility to disclose those particulars in the order, so that the employer can verify the correctness of such computation. When the concerned authority determined the liability of the petitioner under Section 7A of the said Act on verification of the relevant records of the petitioner, the concerned authority cannot proceed on surmise and conjecture. Non-disclosure of such particulars in the order leads to the conclusion that the decision arrived at, was based on surmise and conjecture.”

31. The purpose of Section 7-A of the EPF Act is to determine the Provident Fund amount due from the employer in respect of the employees. The said amount after its determination is recovered for the purpose of payment to the beneficiaries. If the beneficiaries are not identified, then object of proceeding under Section 7-A of the EPF Act is not fulfilled by assessment of any amount as Provident Fund dues under Section 7-A of the EPF Act.

32. learned advocate for the appellant relied upon the case of **Builders Association of India vs. Union of India and Others (CC No. 8035/2016)** where the Hon'ble Supreme Court dismiss the leave petition of the petitioner and observed that :

“ Without identification, the petitioner will not be liable to make the contribution. The process of identification will arise only at the stage of enquiry that is to be

conducted by the respondent-organization, the steps will also be taken to identify the workmen either of the petitioner or engaged through contractors. ”

33. For the purpose of considering the essence of identification of employees entitled to their Provident Fund in a proceeding under Section 7-A of the EPF Act it would be rewarding to follow the principle laid down in the case of **Kaushik K. Chatterjee vs. Assistant Provident Fund Commissioner, Employees' Provident Fund Organization (W.P. No. 1674 of 2016)** where the Hon'ble High Court of Bombay (Nagpur Bench) held that :

“Prima facie, this Court is of the view that there cannot be determination of liability of the provident fund dues under Section 7-A of the said Act without actually identifying the employees along with their verifiable addresses. It is not open for the respondent Assistant Provident Fund Commissioner to proceed to determine the liability of the employer under Section 7-A of the said Act by holding that the employer has failed to produce the evidence and therefore, the employees remain unidentified. This aspect is dealt with by the Apex Court in paragraph Nos. 7, 8 and 9 of the decision in the case of Food Corporation of India vrs. The Provident Fund Commissioner and others reported in 1990 I CLR 20, which are reproduced below.

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

8. It is of importance to remember that the Commissioner while conducting an inquiry under section 7A has the same powers as are vested in a Court under the Code of Civil Procedure for trying a suit. The section reads as follows:

"S. 7(A) Determination of Moneys due from Employer-- (1) The Central Provident Fund Commissioner, any Deputy Provident Commissioner or any Regional Provident Fund Commissioner may, by order determine the amount due from any employer under any provision of this Act (the scheme or the Family Pension Scheme or the Insurance Scheme as the case may be) and for this purpose may conduct such inquiry as he may deem necessary.

(2) The Officer conducting the inquiry under 9 wp1674.16.odt sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, for trying a suit in respect of the following matters, namely:

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses.

and any such inquiry shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196 of the Indian Penal Code."

9. It will be seen from the above provisions that the Commissioner is authorized to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person." "

34. The Hon'ble Supreme Court of India is absolutely clear in respect of three things that (1) Provident Fund Commissioner cannot saddle the liability upon the employer for the reason that the employer has failed to produce evidence, (2) the liability can be fixed only upon identifying the workmen or employees, and (3) it is the duty of the Provident Fund Commissioner to collect evidence and collect all materials before coming to proper conclusion.

35. Drawing guidance from the aforesaid decisions I hold that the respondent authority has miserably failed to identify the beneficiaries who would receive the Provident Fund amounts. Consequently, the assessment of Provident Fund dues made in the impugned order is without foundation and the same is found arbitrary and illegal. The assessed amount cannot be thrust upon the appellant as Provident Fund dues payable by it on the ground that the establishment did not produce relevant. If for argument's sake it is assumed that the assessment made by the Provident Fund authority is correct, then it would not be possible for the Provident Fund commission to disburse and apportion the amount to the beneficiaries. It also appears from the order under challenge that the assessment has been made for the period from 05/2005 to 05/2013, though the period of coverage in the Notice was from 19.11.2005 to 05/2013. The contractual employees of Railways come under the cover of EPF Act by Gazette Notification from 19.11.2005. Therefore, the extended coverage from 05/2005 to 10/2005 is not acceptable. Accordingly, I find and hold that the impugned order dated 19.10.2020 passed by the Assistant Provident Fund Commissioner (Assessing authority) suffers from illegality and the same is not tenable under the facts and law. The impugned order is therefore set aside.

36. The appellant establishment shall remain liable to make contribution in respect of their contractual employees who have rendered service in or in connection with the work of the establishment during the aforementioned period.

The case is therefore remanded back to the respondent authority for holding further enquiry for identifying the beneficiaries on the basis of additional evidence to be adduced and gathered. The appellant establishment under the control of and run by the Government of India, is duty bound to comply the law framed and is hereby directed to produce particulars of the contractor firm and workers employed by such contractor firm from their address in the office record and correspondence, before the respondent authority and lead necessary evidence in support of their case. It appears from the impugned order that a complaint was submitted by Mr. Ranjit Das, President of CLW contractors working union along with a list of thirty-three (33) numbers of contractors for extending Provident Fund benefits to the contractual employees of CLW. The respondent authority therefore should collect evidence from such union of contractual workers of CLW and arrive at a proper finding, consistent with the object and purpose of the EPF Act.

Hence,

O R D E R E D

that the appeal under Section 7-I of the EPF Act is allowed on contest, in part. The impugned order dated 19.10.2020 passed by the Assistant Provident Fund Commissioner is set aside. The case is remanded back to the Assistant Provident Fund Commissioner, Durgapur for passing a fresh order preferably within a period six (6) months from the date of communication of this order. A fresh hearing is required to be held providing opportunity to the appellant to adduce additional evidence and also collect relevant evidence from the union of the contractual workers of the establishment. The appellant shall participate in the proceeding under Section 7-A of the EPF Act on all date fixed.

(ANANDA KUMAR MUKHERJEE)

Presiding Officer,
C.G.I.T.-cum-L.C., Asansol.