*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 02nd November, 2017
Pronounced on: 04th January, 2018

\+ **W.P (C) No. 4312/2004**

CENTRAL BOARD OF TRUSTEE .... Petitioner
Through: Mr.Gaurav Dhingra, Adv.

versus

EMPLOYEES PROVIDENT FUND APPELLATE TRIBUNAL & ANR. ..... Respondents
Through: Mr.Mukul Talwar Sr.Adv. with Mr.Sunil Kumar, Adv. for R-2.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

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1. This writ petition, which challenges an order, dated 17th July 2003, passed by the learned Employees' Provident Fund Appellate Tribunal (hereinafter referred to as "the learned Tribunal"), requires this Court to decide whether the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act") embraces the Dayal Singh Library Trust Society (Respondent No. 2 herein) in its sweep. The learned Tribunal has answered the issue in the negative. The petitioner is aggrieved thereby, and has invoked Article 226 of the Constitution of India.

2. First, to dispense with the prefatory recital of facts which, in a case such as this, has a necessarily limited role to play. Suffice it to

state that, pursuant to issuance of summons, under Section 7-A of the Act, to Respondent No. 2 (which is a Society set up solely for the purpose of running a Public Library), receipt of response thereto, and grant of an opportunity, to the said respondent, of personal hearing, a communication, dated 14th June 1996, was issued, by the petitioner, to Respondent No. 2, covering it, provisionally, under the Act, w.e.f. 1st September 1993, and calling upon it, accordingly, to deposit Provident Fund (hereinafter referred to as "PF") contribution, as per the provisions of the Act. While depositing, in accordance with the said request, an amount of Rs. 1,21,766/-, Respondent No. 2 sought to challenge the said communication, dated 14th June 1996, before this Court, by way of CWP No. 2110/1996. *Vide* order dated 30th July 1998, this Court set aside the said communication, dated 14th June 1996, and remanded the matter to the petitioner, to consider the issue of coverage, of Respondent No. 2, under the Act, *de novo*. The payment, of Rs. 1,21,766/–, made by Respondent No. 2, was also directed to be refunded to it, even while holding that Respondent No. 2 would be bound by the *de novo* determination to be carried out by the petitioner. In accordance with the order passed by this Court, a fresh notice, dated 7th January 1999, under Section 7-A of the Act, was issued by the Regional Provident Fund Commissioner (hereinafter referred to as "the RPFC") to Respondent No. 2, culminating in an order, dated 30th June 2000, by the petitioner, again covering Respondent No. 2 under the Act w.e.f. 1st September 1993. An appeal, against the said order, dated 30th June 2000, was preferred, by Respondent No. 2, to the learned Tribunal, under Section 7-I of the

Act. The impugned order, dated 17th July 2003, passed by the learned Tribunal, decided the said appeal in favour of Respondent No. 2 and against the petitioner, holding Respondent No. 2 not to be covered by the Act. Respondent No. 2, as already stated hereinabove, is before this Court, aggrieved thereby.

Relevant statutory provisions/Notifications

3. Before adverting to the impugned order passed by the learned Tribunal, it would be apposite to refer to some of the applicable and relevant legal provisions.

4. The preamble to the Act states that it is "an Act to provide for the institution of provident funds, pension fund and deposit linked insurance fund for employees in factories and other establishments."

5. Section 1 of the Act deals with its "Short title, extent and application", and subsection (3) thereof reads as under:

> "(3) Subject to the provisions contained in section 16, it applies –
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> (a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed and
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> (b) to any other establishments employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf:

> Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification."

6. Two Notifications issued under Section 1(3) (b) *(supra)*, call for consideration in this case. Notification GSR 728, dated 20th April 1963 (which was made effective from 31st May 1963) covered "societies, clubs or associations which provide board or lodging or both facility for amusement or any other service to any of their members or to any of their guests on payment" whereas Notification G.S.R. 1294, dated 16th November 1974 and published in the official Gazette on 30th November 1974, brought "societies, clubs and associations which render service to their members, without charging any fee over and above the subscription fee or membership fee" within the ambit of the Act. These Notifications have been the subject matter of considerable debate, during the hearing of the present case.

7. Section 16 of the Act reads thus:

> "**16. Act not to apply to certain establishments –**
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> (1) This Act shall not apply –
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> (a) to any establishment registered under the Co-operative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any State relating to co-operative societies, employing less than 50 persons and working without the aid of power; or

(b) to any other establishments belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory Provident fund or old-age pension in accordance with any Scheme or rule framed by the Central Government or the State Government governing such benefits; or

(c) to any other establishments set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory Provident fund or old-age pension in accordance with any scheme or rules framed under that Act governing such benefits;

(2) If the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient to do so, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt whether prospectively or retrospectively, that class of establishments from the operation of this Act for such period as may be specified in the notification."

8. Section 5 of the Act deals with "Employees' Provident Fund Schemes", and sub-section (1) thereof empowers the Central Government to, "by notification in the Official Gazette, frame a Scheme to be called the Employees' Provident Fund Scheme for the establishment of provident funds under this Act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply" and further stipulates that "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." In exercise of the powers conferred by this Section, the Central Government framed, *vide* S.R.O. 1509 dated 2nd September, 1952, the Employees' Provident Funds Scheme, 1952 (hereinafter referred to as "the Scheme"). The main operational provisions of the said Scheme were to come into force at once, by virtue of Clause 1 (2) thereof. Sub-clause (3) (a) of Clause 1 of the Scheme made the scheme applicable "to all factories and other establishments to which the Act applies…", subject to Sections 16 and 17 of the Act. The proviso to the said sub-clause excepted the applicability of the Scheme to tea factories in the State of Assam. Sub-clause (3)(b) of Clause 1 of the Scheme specified the dates from which the Scheme was to be deemed to be applicable, in respect of various establishments/categories of establishments, enumerated thereunder. Sub-clause (xxxii), thereunder, stipulated that the scheme would, "as respects the establishments covered by the Notification of the Government of India in the Ministry of Labour and Employment, No. G.S.R. 728, dated the 20th April, 1963, come into force on the 31st day of May, 1963", whereas sub clause (lxxvii) stipulates that "the provisions of the Scheme shall, as respect societies, clubs, or associations which render service to their members without charging any fee over and above the subscription fee or membership fee specified in the notification of the Government of India in the Ministry of Labour, No. G.S.R. 1294, dated 16th November, 1974, come into force on the 30th day of November, 1974."

The Original and Appellate Orders

9. The order, dated 30th June 2000, passed by the RPFC, held Respondent No. 2 to be covered by the Act on the sole ground that there was no denial, by it, of the fact that it was employing more than 20 employees, and that it was charging Rs. 5/-, from every individual aspiring to become its member.

10. The learned Tribunal, in appeal, opined that it was "not disputed that the Appellant Establishment is a non-commercial, non-profitable and charitable trust, which has been established and is running for the use of general public." The appeal was ultimately allowed on the ground that the present petitioner (who was the respondent in the appeal) had not been able to counter the submission, of Respondent No. 2 (who was the appellant in the appeal), to the effect that the amount of Rs. 5/- charged by it from its members was not towards subscription, but was for library card, plastic cover, etc and that, consequently, Respondent No. 2 was not covered under the Act. On this ground, the RPFC proceeded to hold that the provisions of the Act did not apply to Respondent No. 2.

Rival contentions

11. Detailed arguments, were advanced, before me, by Mr. Gaurav Dhingra, learned counsel appearing for the petitioner and Mr. Mukul

Talwar, learned Senior Counsel appearing for Respondent No. 2, respectively.

12. It may be noted, at the outset, that, though the original demand, as proposed against Respondent No. 2, was premised on "Schedule Head SP # 47 (vi)", to the Act, which is stated to cover institutions "in which activity of imparting knowledge or training is systematically carried on", neither the original order, dated 30th June 2000, of the RPFC, nor the appellate order, dated 17th July 2003, of the learned Tribunal, proceeds on the said ground. I may also note that the said submission was not canvassed, before me, by Mr. Dhingra either, and does not find place even in the written submissions filed by the petitioner. In any case, it is self-evident that Respondent No. 2, which was running a library, could not be said to have been "imparting knowledge or training" systematically or otherwise. To "impart" knowledge is altogether different from providing access to reading material which, if properly assimilated, would result in enhancement of knowledge.

13. The petitioner, in the present appeal, essentially contends that Respondent No. 2 would be covered under the Act, either under Notification GSR 728, dated 20th April 1963 *(supra)* or under Notification GSR 1294, dated 16th November 1974 *(supra).* These Notifications, as has already been noted hereinabove, if applicable, would bring Respondent No. 2 within the ambit of the Scheme w.e.f. 31 May 1963 [by virtue of clause (xxxii) of Clause

1(3)(b) of the Scheme], or with effect from 30th November 1974 [by virtue of clause (lxxvii) of Clause 1(3)(b) of the Scheme], respectively.

14. Before me, Mr. Gaurav Dhingra, learned counsel for the petitioner, limited his case to the coverage, of Respondent No. 2, under Notification GSR 1294, dated 16th November 1974, contending that Respondent No. 2 was liable to be regarded as a "society, club or association which rendered service to its members without charging any fee over and above the subscription fee or membership fee". He also sought to point out that the establishment run by Respondent No. 2 was not excepted under Section 16 of the Act. My attention was invited, in this context, to para 2 of the Memorandum of Association (hereinafter referred to as "the MOA") of Respondent No.2, which states that the object of Respondent No. 2 was "to establish a library and to purchase out of the funds in possession of the undersigned, books, furniture and other appliances for the said library and to house it in a suitable building at Simla and/or such other place or places as may hereafter be decided…" Reliance was also placed, by the petitioner, on Rules 2 and 14 of the Rules and Regulations applicable to the Library, which read as under:

> "2. For enrolment, an individual is required to apply on the prescribed Membership Form which is available with the Librarian and can be obtained on paying a fee of Rs. 3/–.
>
> 14. However, for use of Lending Sub Section of the Library, following rules shall apply: –

(a) Every Member who wishes to borrow books for study at his/her residence, shall have to deposit the sum of Rs. 100/– (Rs One hundred only) as refundable security.

(b) For this purpose, he/she will have to be so registered by specifically applying to the Library Management. Once his/her request is finally accepted and the refundable security deposit is made, he/she shall be issued with 4 (four) tickets against which two books and two old periodicals/magazines can be lent to the subscriber in person only for a period of 15 days. Books may be reissued for a further period of 15 days provided that no requisition for them has been received by the Librarian in the meantime.

(c) The tickets are Non-Transferable.

(d) For books which are not returned to the Library within the specified period, the subscriber shall be liable to pay late fee at the rate of Rs. 1.00 per day for each volume. The General Manager/Librarian may at his discretion reduce the late fee after recording in writing. The subscriber shall not be issued any other book unless he/she has paid the late fee. A receipt shall be issued for such payment.

(e) In case of non-payment of late fee dues, the General Manager is authorised to make necessary deduction from his/her deposit with the Library.

(f) A book which is lost by the subscriber must either be replaced by him/her or alternatively, the cost of the book as fixed by the Librarian, must be paid in lieu thereof.

(g) In case of withdrawal cancellation or suspension of Membership of the Lending Sub Section, the tickets shall be surrendered to the Librarian and No Dues Certificate obtained. The refundable security deposit made by the Member will then be refunded to him/her without interest. Incase there be any dues against the Member, the same shall be deducted from out of the security deposit amount."

15. Mr. Dhingra further contended, relying on ***Andhra University vs. R.P.F. Commissioner***, ***(1985) 4 SCC 509***, ***Regional Provident Fund Commissioner vs. Naraini Udyog & Others***, ***(1996) 5 SCC 522, The Regional Provident Fund Commissioner, Andhra Pradesh vs. SRI T.S. Hariharan, (1971) 2 SCC 68, M/S Polythene Bag Factory vs. Asst. P.F. Commissioner, 2015 (147) DRJ 207, Polo Amusement Park Ltd. vs. EPF Applt. Tribunal, 2008 (147) DLT 233*** and ***Professional Assistance for Development Action vs. Presiding Officer, Employees Provident Fund Appellate Tribunal, 2010 (168) DLT 555***, that non-profit organizations were also covered under the Act, provided they fulfilled the requirements of Section 1 (3)(b) thereof.

16. Arguing in opposition, Mr. Mukul Talwar, learned Senior Counsel appearing for Respondent No. 2, submitted that Section 1 (3)(b) of the Act was entirely irrelevant to the issue at hand, and that Section 5 of the Act required the organization, in order for it to be brought under the Act, to be first covered by the Scheme. Mr. Talwar contested the applicability, of the Scheme, to Respondent No. 2, on the ground that the amount of Rs. 5/-, charged by Respondent No. 2 from its members, was not a subscription fee at all. The contention was that the Scheme would apply only to "societies, clubs, associations, which rendered service to their members without charging any fee over and above the subscription fee for membership fee", and that the use of the expression "over and above" indicated that the organization being sought to be brought under the umbrella of

the Scheme had necessarily to be charging a subscription fee. According to him, an organization, or an establishment, which did not charge subscription fee in the first place, could not be brought under the Scheme or, consequently, the Act. He relies, for this purpose, on the judgment of the Supreme Court in ***Central Bank of India v Sisir Kumar Shaw, (1976) 2 SCC 859***. He draws my attention to the cost breakup of the amount charged from a member, on his obtaining membership, as set out in para 7 of the response, dated 14th of July 1999, submitted by Respondent No. 2, to the RPFC which is as under:

"S. No.	Documents Issued		Rough Cost
(1)	Rules of the Library		Rs. 1.30
(2)	Cost of Membership Card (this card is initially issued to an individual who is desirous of becoming a member free of cost and it is our past experience that out of 2/3 cards is issued, only one individual turns up and becomes a member)		Rs. 2.30 (Approx.)
(3)	Membership Identity Card		Rs. 0.80
(4)	Plastic Cover		Rs. 0.50
	Total		Rs. 5/–"

17. Mr. Talwar further emphasizes the submission, contained in para 8 of the aforesaid communication dated 14th of July 1999, to the effect that, as regards security deposit, the said amount was being charged only from those members who attained the status of "lending

members", which allowed them to borrow two books and two old magazines to take home for perusal/reading. The security deposit, it was submitted, was meant to ensure the return of the said books and magazines, and not for earning any interest or income out of the said amount. It was essentially as a protection against loss of books and magazines.

18. In rejoinder, Mr. Dhingra submitted that, once the organization or establishment fell within the four corners of Section 1(3)(b) of the Act, a liberal construction was, thereafter, to be extended to the said provision, and relies, for the said purpose, on ***Professional Assistance for Development Action vs. Presiding Officer, Employees Provident Fund Appellate Tribunal, 2010 (168) DLT 555***. He points out that it was submitted, by Respondent No. 2, in its counter affidavit filed in response to the present writ petition, that it had 23 employees. His submission was, therefore, that there was no way in which the respondent could escape coverage under the Act.

Analysis

19. Under clause (a) or clause (b), an organization can be brought within the envelop of Section 1 (3) of the Act only if it is an "establishment". The word "establishment" has not been defined in the Act. However, it is not necessary for me to labour long on this issue, as there is no serious contest, before me, thereon. Reference to two decisions, of the High Court of Madras, rendered in the context of

the Act itself, would suffice. In ***Sri Varadarajaswami Transports Pvt. Ltd v Regional Provident Fund Commissioner,AIR1965Mad 466***, "establishment", as used in the Act, was held to "mean an organization which employs persons, between whom and the establishment, the relationship of employee and employer comes to exist". ***Vittaldas Jagannathadas v Regional Provident Fund Commissioner, AIR 1965 Mad 508*** held "establishment", as used in the Act, to mean an "organized body of men maintained for a purpose …" (though, on another point, this decision was overruled by a Division Bench in ***R. L. Sahni& Co. v U.O.I., AIR 1966 Mad 416***). I express my respectful concurrence with the said decisions, and the meaning, ascribed therein, to the word "establishment", as used in the Act.

20. Viewed any which way, there can be no manner of doubt that Respondent No. 2 is an "establishment", in every sense of the word. It was established for a specific purpose, employed persons and carried out a systematic activity, serving the public thereby; ergo, it fulfills the well-recognized indicia that serve to mark out any "establishment", as understood in common parlance, and as defined in the two decisions referred to hereinabove.

21. Clause (a) of Section 1 (3) of the Act covers every "establishment which is a factory engaged in any industry specified in Schedule I" of the Act. An "establishment", in order to come within the ambit of the said clause, is required to satisfy three criteria, viz. (i) it has to be a "factory", (ii) the factory has to be "engaged in an

industry", and (iii) the industry has to be specified in Schedule I of the Act. "Factory" is defined, in clause (g) of Section 2 of the Act as meaning "any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power". Quite obviously, Respondent No. 2 cannot be regarded as a "factory", as thus defined, as no manufacturing process is carried out by, or within, it. The first ingredient of clause (a) of Section 1 (3) of the Act being, thus, itself unsatisfied, it is not necessary to examine the applicability, of the said clause, any further.

22. Proceeding to clause (b) of Section 1 (3), it is seen that the said clause covers "establishments employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf".

23. One of the arguments advanced by the petitioner in its written submissions is that the requirement of notification in the official Gazette, as contained in Section 1(3)(b) of the Act, applies only to the words immediately preceding the said requirement, i.e., "class of such such establishments". In other words, it has been sought to be contended that an establishment, which employs twenty or more persons, would, *ipso facto*, attract the mischief of Section 1 (3)(b) of the Act, whether the establishment is notified or not. Respondent No. 2, admittedly, has 23 employees (as stated in the counter affidavit filed

by the said respondent before this Court); consequently, it is sought to be submitted, the Act applies to Respondent No. 2.

24. A bare reading of clause (b) of Section 1(3) of the Act reveals that it is most unsatisfactorily punctuated. Had the clause read "establishments employing twenty or more persons, or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf", it would be apparent that the condition of notification, of the establishment, in the Official Gazette, would apply only to the words "class of such establishments", and would not apply to "establishments employing twenty or more persons". Individual establishments, employing twenty or more persons, would, thereby, be *ipso facto* covered under the provision, even if they were not notified. On the other hand, had the expression read "establishments employing twenty or more persons, or class of such establishments, which the Central Government may, by notification in the Official Gazette, specify in this behalf", the presence of two commas, one after the words "establishments employing twenty or more persons", and the other after the words "class of such establishments" would indicate that the requirement of notification in the Official Gazette would apply to *both* the preceding categories of establishments. In other words, in such a case, individual establishments, even if they were employing twenty or more persons, would be subject to the rigour of the clause only if they were notified in the Official Gazette.

25. As things stand, however, there is no comma, in the entire expression "establishments employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf", as it figures in clause (b) of Section 1 (3) of the Act. That throws up the issue of whether the requirement of notification in the official Gazette applies even to individual establishments employing twenty or more persons – such as Respondent No. 2.

26. This issue squarely arose for consideration, before a Division Bench of this Court, in ***Polo Amusement Park Ltd v EPF Appellate Tribunal, 2008 (147) DLT 233***. Learned counsel for the petitioner has, in the written submissions filed by him pursuant to the conclusion of hearing before me, relied on this decision, averring that, in the said judgment, "this Hon'ble Court held that the Section 1(3)(b) is applicable to any establishment which employs 20 or more persons *and it is not mandatory that the said establishment should be one covered by any specific notification issued by the Central Government in the Official Gazette and notification by the Central Government is required only in cases where establishment employs less than 20 persons."* However, a reading of the judgment reveals that the above observation was only to be found in the order of the learned Tribunal, as reproduced in the said judgment, and did not form any part of the opinion of this Court on the issue, which alone would constitute the *ratio decidiendi* of the judgment. Ultimately, in the said decision, this Court left the issue unanswered and remanded the matter for

consideration afresh to the learned Tribunal. As such, this decision cannot throw any light on the controversy.

27. In a short order, passed by a learned Single Judge of this Court in ***Goods Shepherd Public School v Employees Provident Fund Organization, MANU/DE/1444/2014***, a view was taken that, once the number of employees in the establishment reached twenty, Section 1 (3)(b) applied, even if the number of employees were subsequently reduced to less than twenty. The specific finding, in this regard, reads thus:

> "… It would be a different issue, if such Trainee Teachers had left subsequently as the same would not have any effect on the applicability of the Act inasmuch as once the number of 20 is attained, even if the number gets reduced below 20, that would not make the Act inapplicable."

Even so, this Court did not consider, in the said order, the issue flagged hereinabove, i.e., whether, *sans* any notification in the Official Gazette, an establishment would, merely by virtue of the number of employees working therein being twenty or more, be *ipso facto* covered by the Act. On this issue, therefore, the said order proceeds *sub silentio*.

28. ***Polythene Bag Factory v Asstt. Provident Commissioner, 2015 (147) DRJ 207***, on which, too, the petitioner relies in its written submissions, was also limited to the issue of whether, the number of employees in an establishment having once reached twenty, subsequent reduction of such number below twenty, would take the

establishment out of the clutches of the Act. Needless to say, this issue was answered in the negative.

29. How, then, is the imbroglio to be resolved? Does the admitted fact that Respondent No. 2 employs more than twenty workers, automatically bring it within the sweep of the Act even without any notification having been issued, covering Respondent No. 2? Does this Court have to look no further?

30. The answer, in my opinion, is to be found within the provision itself. If the contention of Mr. Dhingra is to be accepted, it would mean that any individual establishment, which employs more than twenty persons, would automatically come within the fold of the Act, but a "class of such establishments" would be so covered only if a notification, in the Official Gazette, is issued in this regard. Such an interpretation, per se, appears to be unreasonable. Moreover, the proviso to Section 1 (3) empowers the Central Government to, by notification in the Official Gazette, apply the provisions of the Act to any establishment employing less than twenty persons. It appears incongruous that, if an establishment employing less than twenty persons, requires a notification, in the Official Gazette, to bring it within the ambit of the Act, an establishment employing more than twenty persons does not require any such notification. The requirement of a notification, in the Official Gazette would, therefore, apparently apply to both clause (b) of Section 1 (3) of the Act, as well as to the proviso thereto, the essential difference being that, in the case

of the proviso, i.e. in the case of establishments employing less than twenty persons, the Central Government may notify the establishment only after giving not less than two months' notice of its intention so to do.

31. Reference may usefully be made, in this context, to the judgment of a Division Bench of the High Court of Kerala (speaking through Kurian Joseph, J, as his Lordship then was) in ***Thankamma Baby v E.P.F.A.T., (2010) III LLJ 439 (Ker)***. The employer, in that case, employed more than twenty employees, and was running a factory. The said factory was, however, not "engaged in any industry specified in Schedule I" of the Act. It did not, therefore, attract clause (a) of Section 1 (3) of the Act. The question before the High Court was, therefore, whether the employer could be regarded as "any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf", so as to bring it within the peripheries of clause (b) of Section 1 (3). Dealing with the issue, the High Court observed thus (in para 5 of the report):

> "There is no dispute that there are more than 20 employees in the factories or establishments of the petitioners. The situation emerging from the factual matrix as appearing in these cases is that in the factories run by the petitioners where there is a manufacture or manufacturing processes involved, there are 20 or more employees. *There is no dispute that the factories do not come under industry specified under Schedule I. But the crucial question is, is not the factory of the petitioners and establishment coming under the notified establishments?"*
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> (Emphasis supplied)

The italicized words, in the above passage from the judgment, make it clear that, in the opinion of the High Court, the employer could, even if it employed more than twenty persons, fall within clause (b) of Section 1(3) of the Act, only if it "came under the notified establishments". In other words, notification, in the Official Gazette, was treated, by the High Court, as a *sine qua non* for clause (b) of Section 1(3) of the Act to apply, *even in the case of establishments employing more than 20 persons.* This interpretation stands reiterated in para 7 of the same judgment, wherein it is held, clearly and unmistakably, as under:

> "The expression under Section 1(3)(a) takes on only those establishments which are factories and which are engaged in the industry specified under Schedule I, whereas under Section 1(3)(b) 'other establishments, whether factories or non-factories' *which are included in the notification issued by the Central Government,* are covered by the Act. In other words, be it a factory establishment or a non-factory establishment, the EPF & MP Act covers such establishments under Section 1(3)(b) of the Act, *in case those establishments employ 20 or more persons* ***and in case*** *those establishments are specified by the Central Government in the notification."*
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> (Emphasis supplied)

32. ***Thankamma Baby (supra)*** relied on another Division Bench judgment, of the High Court of Kerala itself, rendered in ***Provident Inspector v Kerala Janata Printers & Publishers (P) Ltd, AIR 1965 Kerala 130***, which opined that "if… any establishment, factory or non-factory, whether engaged in industry or not, is to be brought within the Act, that can be done by issuing a notification under Clause (b) of sub-section (3) of Section 1." This, again, emphasises that any

establishment can be made subject to the Act by issuance of a notification under Section 1(3)(b) thereof.

33. The same view stands reflected in para 21(A) of the judgment of the High Court of Bombay in ***Central Hindustan Orange and Cold Storage Co. Ltd v Prafullachandra Ramachandra Oza, AIR 1967 Bombay 126***, wherein it is stated thus:

> "Clause (a) of sub-section (3) of Section 1 of the Act restricts the application to some industries and as soon as the industries are specified in Schedule I, the Act is automatically made applicable to those industries by its own force. *So far as the other establishments are concerned, that can only be done by the Central Government issuing a notification. Other establishments are ipso facto not covered unless a notification to that effect is issued."*
>
> (Emphasis supplied)

34. To the same effect, it may be mentioned, rules the High Court of Gujarat in ***Ojas Corporation v Regional Provident Fund Commissioner, 1970 Lab IC 81***.

35. I am entirely in agreement with the above view and, therefore, express my respectful concurrence with the principle, enunciated in the above decisions, that notification in the Official Gazette, by the Central Government, is a *sine qua non* for clause (b) of Section 1 (3) of the Act to apply, even in the case of establishments employing twenty, or more, employees.

36. That Respondent No. 2 employees 23 employees is, as Mr. Dhingra correctly pointed out, conceded in the counter-affidavit filed by the said respondent in the present proceedings. The first pre-requisite, for Section 1(3)(b) of the Act, to apply, thereby stands satisfied.

37. Is, then, Respondent No. 2 covered by any notification issued by the Central Government under Section 1(3)(b) of the Act?

38. As has already been noticed hereinabove, two Notifications have been pressed, into service, by Mr. Dhingra, who submits that the case of Respondent No. 2 would stand covered by both the notifications; needless to say, applicability of either one would be sufficient to render the Act applicable to the said respondent. The first is Notification No. G.S.R. 728, dated 20th April 1963, made effective from 31st May 1963, which covers "societies, clubs or associations which provide board or lodging or both or facility for amusement or any other service to any of their members or to any of their guests on payment." The second is Notification No. G.S.R. 1294, dated 16th November 1974, made effective from 30th November 1974, which covers "all societies, clubs and associations which render service to their members, without charging any fee over and above the subscription fee or membership fee."

39. In order to examine the aspect of coverage, of Respondent No.2, under either, or both, of the above Notifications, it would be

necessary, in the first instance, to set out certain clauses of the MOA of Respondent No. 2, as well as some of the Rules and Regulations governing Respondent No. 2 and the Library run by it.

40. Clause 2 of the MOA of Respondent No. 2 stipulates that the object of the Respondent No. 2-Society "shall be to establish a library and to purchase out of the funds in possession of the undersigned, books, furniture and other appliances for the said library and to house it in a suitable building at Simla and/or such other place or places as may hereafter be decided by us or by our successors appointed according to rules and regulations framed by us." The "undersigned", in the MOA consist of the President, Honorary Secretary and three Members of the Respondent No. 2-Society.

41. Rules 1 and 2 of the Rules and Regulations of the Respondent No. 2-Society, read as under:

> "1. The Society shall consist of 7 Trustees. It shall be the duty of the Trustees to maintain the Library in as good a state of efficiency as the Income from the funds at the disposal of the Society allows, spending the income after allowing for the repair of the building (if any) which the Trustees may buy or erect for housing the Library and the cost of Library establishment, in the purchase of fresh books, and newspapers and magazines, and forming such a reserve fund as to the Trustees may appear desirable. The fund as to the disposal of the Trustees may be invested in such manner as they may think appropriate.
>
> 2. The Library shall be under the control and Management of the said Trustees and shall be open to the use of the general public subject to such rules and regulations as the Trustees may frame in that behalf, provided that no charge

shall be levied for the perusal of book and newspapers and magazines in the said Library during its hours of business."

42. Among the Rules and Regulations applicable to the Library, are the following (at the cost of reiteration):

"1. The Library is open to members of the public once they are enrolled as members.

2. For enrolment, an individual is required to apply on the prescribed Membership Form which is available with the Librarian and can be obtained on paying a fee of Rs. 3/–.

3. To be enrolled as a Member, an individual shall ordinarily be sponsored by either a Trustee of the Dyal Singh Library Trust Society or his/her employer or a responsible member of public acceptable to the Library Management. In exceptional cases, the General Manager of the Society has been empowered to enrol an individual as a Member of the Library, without being suitably sponsored.

4. Once enrolled as a Member of the Library, the individual shall be issued with a Membership Card, free of cost.

5. Safe custody and proper use of the Membership Card at all times is the responsibility of the Member concerned. In case of loss of the Card, Library Management will be immediately informed in writing by the Member whereafter a new card will be issued to him/her at a cost of Rs. 3/-.

13. No charges shall be levied from the Members to use of the Reading Room or the Non-Lending Sub Section of the Library.

14. However, for use of Lending Sub Section of the Library, following rules shall apply:-

(a) Enquiry Member who wishes to borrow books for study at his/her residence, shall have to deposit a

sum of Rs. 100/– (Rupees One hundred only) as refundable security.

(b) For this purpose, he/she will have to be so registered by specifically applying to the Library Management. Once his/her request is finally accepted and the refundable security deposit is made, he/she shall be issued with 4 (four) tickets against which to books and 2 old periodicals/magazines can be lent to the subscriber in person only for a period of 15 days. Books may be reissued for a further period of 15 days provided that no requisition for them has been received by the Librarian in the meantime.

(c) The Tickets are non-transferable.

(d) For books which are not returned to the Library within the specified period, the subscriber shall be liable to pay late fee at the rate of Rs. 1.00 per day for each volume. The General Manager/librarian may at his discretion reduce the late fee after recording in writing. The subscriber shall not be issued any other book unless he/she has paid the late fee. A receipt shall be issued for such payment.

(e) In case of non-payment of late fee dues, the General Manager is authorized to make necessary deduction from his/her deposit with the Library.

(f) A book which is lost by the subscriber must either be replaced by him/her or alternatively, the cost of the book is fixed by the Librarian, must be paid in lieu thereof.

(g) In case of withdrawal or cancellation or suspension of Membership of the Lending Sub Section, the tickets shall be surrendered to the Librarian and No Dues Certificate obtained. The refundable security deposit made by the Member will then be returned to him/her without interest. In case

there be any dues against the Member, the same shall be deducted from out of the security deposit amount."

43. Apropos Notification GSR 728 *(supra)*, it is clear that Respondent No. 2, being a society, falls within the ambit of the expression "societies, clubs or associations". Is it possible, however, to hold that Respondent No. 2 can be said to be "providing board or lodging or both or facility for amusement or any other service"?

44. Quite obviously, Respondent No. 2 does not, in its library, provide "board or lodging or both". That leaves us with the remainder of the clause, i.e. "facility for amusement or any other service".

45. "Facility" is defined, in P. Ramanatha Aiyar's Advanced Law Lexicon, as "the quality of being easily performed; absence of difficulty; dexterity; ease in performance; *that which promotes the use of any action*"."Amusement" has been defined, by the Supreme Court, in ***M. J. Sivani v State of Karnataka, AIR 1995 SC 1770***, as "diversion, pastime or enjoyment or a pleasurable occupation of the senses, or that which furnished it".

46. Applying the above definitions of "facility" and "amusement", I am of the opinion that the definition of "amusement" is expansive enough to include the activity of being able to read books, and borrow them in order to read them at home. Equally, I am convinced that providing the books, at one place, wherefrom any member could

access the same and read them, as also to borrow them, albeit against deposit of a refundable security, certainly amounts to providing a "facility", which would obviate the requirement of the member concerned having to source the books from outside. Indeed, that libraries "facilitate" reading of books is, in my opinion, a truism which does not call for any further discussion.

47. Mr. Mukul Talwar, learned Senior Counsel appearing for the respondent, did not, fairly, join issue on these aspects, while arguing on the applicability of Notification GSR 728 *(supra)*. Rather, he candidly submitted that, if the facility provided by Respondent No. 2, in its library, was liable to be regarded as having been provided "against payment", it might well be covered by the said Notification. He would, however, seek to contend that Respondent No. 2 does not, in fact, charge any "payment", from the members of the library, for using the facilities available therein, or even for borrowing books therefrom. The element of "payment" being absent, Mr. Talwar would contend that the Notification dated 20th November 1963 would not apply to his client.

48. A holistic appreciation of the various clauses of the MOA of Respondent No. 2, read with the Rules and Regulations applicable to the Library, would indicate that there is substance in the contention of Mr. Talwar. The various payments, to which the Rules and Regulations of the Library allude, are (i) Rs. 3/-, for obtaining the Membership Form, (ii) Rs. 3/-, for obtaining a new Membership Card,

in case of loss of the Membership Card originally issued, (iii) Rs. 100/-, to be paid as "refundable security" by any Member who wishes to borrow books and (iv) Rs. 1/-, payable as late fee for failure to return the books within the period specified. Regarding the amount of Rs. 5/-, which is collected from any person, at the time of obtaining Membership, Respondent No. 2 has, in its communication, dated 14th July 1999, addressed to the RPFC, provided the breakup of the said amount, which constitutes payments for (i) being provided the Rules of the Library, (ii) the Membership Card, (iii) the Membership Identity Card and (iv) the plastic cover therefor.

49. Requiring a member to make the above-mentioned payments cannot, in my view, justify holding that Respondent No. 2 was providing facilities, in its library, "on payment". The words "on payment" connotes a direct and immediate access between the payment, and the facilities being provided. The payment has necessarily to be *for* providing the facilities. Indeed, in ***Black v Ross, 2 Moore PCNS 277***, it has been held that "the meaning of the words 'on payment of freight,' in a Bill of Lading or Charter Party, is not that freight is to be paid either immediately before or immediately after the delivery of the cargo, *but that the two acts are to be concurrent*". Even if one were not to stretch the words "on payment", as used in Notification GSR 728 *(supra)*, to that extent, an immediate and perceptible nexus, between the payment recovered from the member, and the facility/facilities provided to her/him, is necessary, in order for the Notification to apply.

50. Viewed thus, it cannot, in my opinion, be held that Respondent No. 2 is providing reading, or lending, facilities, in its library, "on payment". Rather, Rule 13 of the Rules and Regulations of the Library clearly states that no charges would be levied, from the Members, for use of the Reading Room, or the Non-Lending Sub Section of the Library. Even for use of the Lending Sub Section, the amount of Rs. 100/-, which is charged, is by way of a "refundable security". An amount which is "refundable" cannot, in my view, be ever regarded as payment for rendition of services. It is obvious that the said "security" was collected only to insure against loss of books, and to ensure that the members preserved the books borrowed by them and returned them in proper condition. The said amount cannot, by any stretch of imagination, be regarded as a payment collected for providing the facility of borrowing books from the library. Apart from these amounts, the only other amount which is charged from the Member is a fee of Rs. 3/-, for obtaining the Membership Form. This, again, cannot be regarded as a payment made for use of the facilities provided in the library. It is obvious that the payment collected for providing a form, by filling which a person acquires access to a place providing facilities, cannot be regarded as the payment for being provided the facilities themselves. The amount which is collected, for example, for obtaining a form for application to a college, obviously does not represent the fees being charged by the college for providing education. The only two other amounts to which the Rules and Regulations of the Library refer, are a payment of Rs.3/-, for obtaining a new Membership Card, in case the originally issued Membership

Card is lost, and a late fee of Rs. 1/- per day, in case of delayed returning of books which have been borrowed. These are payments conditional upon certain eventualities, and obviously do not represent consideration for providing the facility of reading, or of borrowing books, available in the library of Respondent No. 2, or generally for the use of the said Library.

51. The upshot of the above discussion would be that, though Respondent No. 2 is liable to be regarded as a "society … which provides … facility for amusement" to its members, it cannot be held that the said facility is provided "on payment", so as to bring Respondent No. 2 within the ambit of Notification GSR 728 *(supra)*. The submission, of Mr. Talwar, that the said Notification does not apply to his client, therefore, merits acceptance.

52. Notification GSR 1294, dated 16th November 1974 *(supra)* covers "all societies, clubs and associations which render service to the members, without charging any fee over and above the subscription fee or membership fee". That Respondent No. 2 is a "society" is self-evident. Can it, however, be said that Respondent No. 2 "renders a service", to its members? And, if so, can it be said that such service is rendered "without charging any fee over and above the subscription fee or membership fee"? On the answers, to these questions, would depend the invocability, *qua* Respondent No. 2, of Notification GSR 1294 *(supra)*, and, consequently, of the provisions of the Act itself.

53. There cannot, in my opinion, be any serious dispute about the fact that Respondent No. 2, by providing, in its library, the facility of reading, and borrowing, books, "renders a service" to its members. The Supreme Court, in ***Lucknow Development Authority v M. K. Gupta, AIR 1994 SC 787*** defines the expression "service" in the following terms:

> "The term 'service' may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. The concept of service thus is very wide. How it should be understood and what it means depends on the context in which it has been used in an enactment."

54. Analogously, ***Jayanti Food Processing (P) Ltd v C.C.E., (2007) 8 SCC 34***, holds thus:

> "The term 'service' means to provide a service or services. It is an act of helpful activity – help, aid or to do something. It would also include supply of utilities commodities."

Thus defined, the expression "service" is, clearly, commodious enough to bring, within its sweep, the facility provided by Respondent No. 2 in its library.

55. The contention of Mr. Talwar is, however, that the amounts paid, to the library maintained by Respondent No. 2, by the members thereof, cannot be categorized as "membership fee" or "subscription fee". He, therefore, contends that, inasmuch as his client does not charge any "membership fee" or "subscription fee", it cannot be regarded as rendering service "without charging any fee over and

above the subscription fee or membership fee". The expression "without charging any fee over and above the subscription fee or membership fee", Mr. Talwar submits, would apply only where, in the first instance, subscription fee or membership fee is charged, and cannot apply to an organization which does not charge subscription fee or membership fee. In other words, Mr. Talwar would submit that the expression "without charging any fee over and above the subscription fee or membership fee" means "for a subscription fee or membership fee and nothing more".

56. While the submission of Mr. Talwar is certainly attractive, and to an extent persuasive as well, on a deeper scrutiny, accepting the interpretation canvassed by him would amount to stretching the expression "without charging any fee over and above the subscription fee or membership fee" to a vanishing point. *In my view, what is clearly sought to be excepted, from the ambit of Notification GSR 1294 (supra), by the usage of the expression "without charging any fee over and above the subscription fee or membership fee", are societies, clubs or associations which charge fees in excess of subscription fee or membership fee. Cases in which fees are charged, which are in excess of subscription fee or membership fee, alone stand excepted from the rigour of the Notification. In my view, there is nothing, in the said Notification, or the words used therein, which can exclude, from the ambit thereof, societies, clubs or associations, which provide services without charging any fees, or require payment,*

by the members, of amounts which cannot be regarded as "membership fees" or "subscription fees".

57. The matter may be viewed from another direction as well. If the words "without charging any fee over and above the subscription fee or membership fee" had been absent, in Notification GSR 1294 (*supra)*, and the expression used therein had read "all societies, clubs and associations which renders service to their members, without charging any fee", there could be no manner of doubt that a society such as Respondent No. 2, which was providing services free of cost, would be covered. Can such a society, then, be removed from the ambit of the Notification merely because of the usage, therein, of the words "without charging any fee over and above the subscription fee or membership fee"? The answer has necessarily to be in the negative. All that has to be seen, in order to decide whether a particular society, club or association, which is providing services, stands excepted from the scope of Notification GSR 1294 (*supra)*, or not, is whether the society, club or association is providing the services by charging something more than a subscription fee or membership fee. If the answer to this very is in the negative, the society, club or association in question would necessarily stand exposed to the rigour of the Notification. The conditional clause in Notification GSR 1294 (*supra*) cannot, in my view, be so read as to except, from the purview thereof, societies, clubs or associations in which the subscription fee or membership fee is zero.

58. I am also informed, in holding thus, by the avowed object and purpose of the Act. In a recent decision [***Shailesh Dhairyawan v Mohan BalkrishnaLulla, (2016) 3 SCC 619***], the Supreme Court (*vide* the concurring judgment of A. K. Sikri, J.), held thus:

> "31. The aforesaid two reasons given by me, in addition to the reasons already indicated in the judgment of my learned Brother, would clearly demonstrate that the provisions of Section 15(2) of the Act require purposive interpretation so that the aforesaid objective/purpose of such a provision is achieved thereby. The principle of "*purposive interpretation*" or "*purposive construction*" is based on the understanding that the court is supposed to attach that meaning to the provisions which serve the "*purpose*" behind such a provision. The basic approach is to ascertain what is it designed to accomplish? To put it otherwise, by interpretative process the court is supposed to realize the goal that the legal text is designed to realize. As Aharon Barak puts it:
>
> > "Purposive interpretation is based on three components: language, purpose, and discretion. Language shapes the range of semantic possibilities within which the interpreter acts as a linguist. Once the interpreter defines the range, he or she chooses the legal meaning of the text from among the (express or implied) semantic possibilities. The semantic component thus sets the limits of interpretation by restricting the interpreter to a legal meaning that the text can bear in its (public or private) language." Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005).]
>
> 32. Of the aforesaid three components, namely, language, purpose and discretion "*of the court*", insofar as purposive component is concerned, this is the *ratio juris*, the purpose at the core of the text. This purpose is the values, goals, interests, policies and aims that the text is designed to actualise. It is the function that the text is designed to fulfill.

> 33. We may also emphasize that the statutory interpretation of a provision is never static but is always dynamic. *Though the literal rule of interpretation, till some time ago, was treated as the "golden rule", it is now the doctrine of purposive interpretation which is predominant, particularly in those cases where literal interpretation may not serve the purpose or may lead to absurdity. If it brings about an end which is at variance with the purpose of statute, that cannot be countenanced. Not only legal process thinkers such as Hart and Sacks rejected intentionalism as a grand strategy for statutory interpretation, and in its place they offered purposivism, this principle is now widely applied by the courts not only in this country but in many other legal systems as well.*"
>
> (Emphasis supplied)

59. V. R. Krishna Iyer, J., in his inimitable style, encapsulated the ethos of the Act, in para 40 of the report in ***Organo Chemical Industries v U.O.I., (1979) 4 SCC 573***, in the following words:

> "*The measure was enacted for the support of a weaker sector viz. the working class during the superannuated winter of their life.* The financial reservoir for the distribution of benefits is filled by the employer collecting, by deducting from the workers' wages, completing it with his own equal share and duly making over the gross sums to the Fund. If the employer neglects to remit or diverts the moneys for alien purposes the Fund gets dry and the retirees are denied the meagre support when they most need it. This prospect of destitution demoralises the working class and frustrates the hopes of the community itself. The whole project gets stultified if employers thwart contributory responsibility and this wider fall-out must colour, the concept of "damages" when the court seeks to define its content in the special setting of the Act. For, judicial interpretation must further the purpose of a statute.
>
> (Emphasis supplied)

60. The Act is, unquestionably, a piece of welfare legislation; and, in its capacity as welfare legislation, the Act is required to be interpreted in a comprehensive and expansive manner, keeping in mind the best interests of the superannuated "butcher, baker and candlestick maker, whom it is intended to serve. If any provision, in the Act, admits of two possible interpretations, that interpretation, which would subserve the interests of the workman, has necessarily to be referred. At the very worst, even if the interpretation, of the conditional clause in Notification GSR 1294 *(supra)*, as canvassed by Mr. Talwar, is to be regarded as a possible interpretation, that would necessarily have to cede right of way to the more inclusive, and, therefore, more salutary, interpretation suggested in paras 34 and 35 *ibid*. In case a particular establishment is, unquestionably, outside the ambit of the Act, it would certainly be impermissible to bend backwards in order to bring it within the fold thereof. If, however, more than one interpretation, of the Notification issued under Section 1 (3)(b) of the Act, is possible, that interpretation, necessarily, has to be adopted, which includes the establishment, rather than that which excludes it.

61. Resultantly, I am of the opinion that Respondent No. 2 is covered by the provisions of the Act, read with Notification GSR 1294, dated 16th November 1974.

62. Consequently, the impugned order, dated 17th July 2003, is quashed and set aside, and the order, dated 13th June 2000, of the

RPFC, is restored, holding Respondent No. 2 to be covered, under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, as well as the Scheme framed thereunder, for the purposes of determination of Provident Fund dues w.e.f. 1st September, 1993 till date.

63. The order dated 30th June 2000, of the RPFC, had directed Respondent No. 2 to appear, before the concerned Presiding Officer on 20th July 2000 at 11 AM, for determination of its dues under the Act. The said direction is, of necessity, modified by requiring Respondent No. 2 to now appear before the concerned Presiding Officer, having jurisdiction to determine the dues payable by Respondent No. 2 under the Act, on 31st January 2018. The identity and location of the officer, before whom Respondent No. 2 would have to appear for the said purpose would be intimated, to it, by the petitioner, in writing, within one week from the date of receipt, by it, of a certified copy of this judgment.

64. The writ petition is disposed of in the above terms. There shall be no order as to costs.

C. HARI SHANKAR
(JUDGE)

JANUARY 4th 2018
neelam/gayatri