Jyothi Home Industries Vs Regional Provident Fund Commissioner

Court: Karnataka High Court

Date of Decision: April 16, 1993

Acts Referred: Employees Provident Fund Scheme, 1952 â€" Section 26 (1), 26 (1) (a)
Employees State Insurance Act, 1948 â€" Section 1 (3), 2 (9)

Citation: (1993) ILR (Kar) 1714

Hon'ble Judges: K.A. Swami, Acting C.J.; A.J. Sadashiva, J

Bench: Division Bench

Advocate: K. Kasturi, A.G. Holla, S.N. Murthy and B.C. Prabhakar and Law Firm, for the Appellant; Shylendra Kumar, Central Govt. Stdg. Counsel, for the Respondent

Judgement

K.A. Swami, Ag. C.J.

1. All these Writ Appeals are preferred against the Order dated 22,1.1993 passed by the learned Single Judge in W.P.Nos.25471 and 25472 of

1990 and other Writ Petitions. Except Writ Appeal Nos.681 and 682 of 1993, which are preferred by the respondents in the Writ Petitions all

other Writ Appeals are preferred by the petitioners in the Writ petitions. Hence all the Writ Appeals are heard together and are disposed of by this

common Judgment.

2. In the Writ Petitions, the petitioners sought for a declaration that Para 26(1)(a) of the Employees'' Provident Funds Scheme 1952 (hereinafter

referred to as the "Scheme") as amended by the Notification No. S-35012/90-SS.II dated 19.10.1990 is ultra vires being beyond the scope of

the provisions of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "Act"). The petitioners

challenged the aforesaid Notification dated 19.10.1990 on another ground viz., that it was not placed before the Parliament as required by Section

7(2) of the Act. However it was noticed by the learned Single Judge in para 6 of his Order that the Notification had, in fact, been placed before

the Parliament on 7.1.1991 and 8.1.1991 in terms of Section 7(2) of the Act. Therefore, the learned Single Judge has observed that the above

contention need not be considered. Before us, such a contention was not urged having regard to the fact that the impugned Notification dated

19.10.1992 was placed before the Parliament.

3. The learned Single Judge has held that the Notification dated 19.10.1990 which modified Para 26(1) of the Scheme has to be read in the light of

the Decision of the Supreme Court in The Regional Provident Fund Commissioner, Andhra Pradesh Vs. Sri. T.S. Hariharan, . The learned Single

Judge has specifically held thus:

It is not merely in relation to the coverage that the principles are set down in that decision it is in relation to concept of employment itself as to the

applicability of the Act that is considered. The Supreme Court took into consideration that the Act is intended to apply only to establishments

which have attained financial stability and is prosperous enough to be able to afford regular contribution and contribution by the employer is an

essential part of the statutory scheme for effectuating the object of inducing the workmen to save something and therefore, must possess stable

financial capacity to bear the burden of regular contribution under the Act.

It is also further observed by the learned Single Judge in the light of the observations made in the Judgment of the Supreme Court in Hariharn''s

case thus:

It must be dictated by the normal regular requirement of the establishment reflecting its financial capacity and stability and therefore, the

employment in the context must mean that those who have been employed by the establishment by taking into account the general requirement of

the establishment for its regular work which would have a commercial nexus with its general financial capacity and stability. The concept of

employment is construed as employment in the regular course of business of the establishment and such employment obviously would not include

employment of a few persons for a short period on account of some exigencies and necessarily it requires determination of the question in each

case on its own peculiar facts. If this be the true legal position as to the concept of employment whether any period is prescribed by the

respondents under the scheme or not would not be of much relevance. It only gives an indication or guidance. What is of importance is whether an

employee is regularly employed for the purpose of establishment in the light of the test laid down by the Supreme Court in Hariharan''s case. If

such an interpretation is placed on the expression ""every employee employed in connection with the factory or establishment"", no difficulty would

arise.

While referring to the contention of the learned Counsel for the petitioners that the difficulty would arise only in applying the Scheme, the learned

Single Judge has further observed thus:

Though one may be eligible for making contribution, he may not be eligible to withdraw that amount for unless he fulfilled certain conditions. Thus,

I cannot say that the provisions of the Scheme as now framed do not fit in with the other provisions of the scheme. AH that is required to be seen

is whether the employees are employed for a reasonable length of time in the regular course of employment. So far as the employees are migratory

in character are concerned practical difficulties may arise in the matter to maintain accounts or furnish returns but this case of hardship by itself will

not render the provisions themselves invalid, if the concept of employment as stated in Hariharan''s case is borne in mind. The scheme is framed not

merely for certain class of employees but it is universal in application. Viewed from that angle. I think it cannot be said that the provisions of the

Act is either ultra vires or arbitrary or unreasonable. In that view of the matter, I do not find that there is any substance in any of the contentions

urged on behalf of the petitioners. Petitions are therefore, liable to be dismissed.

4. The grievance made in WANo. 681 and 682/1993 filed by the respondents in the Writ Petitions is with regard to postponement of the

implementation of the Scheme till the date of the Judgment of the learned Single Judge under Appeal and also with regard to certain observations

made by the learned Single Judge as to an employee being regular employee in terms of the Decision of the Supreme Court in Hariharan''s case.

5. The contentions of the appellants who are the petitioners in the Writ Petitions are: that the Scheme as modified is contrary to the very object of

the Act and the Scheme; that a casual employee employed for a day or two or for a few days in a month cannot be brought under the Scheme

because such an employee would not be entitled to the benefit of the Act and the Scheme and he will also be not interested in contributing towards

Provident fund because he is not a regular employee, employed in or in connection with the work of an establishment, as such he cannot be

brought under the Scheme. Whereas the Notification dated 19.10.1990 bearing No. S-35012/90-SS,ll, attempts to bring such employees also

under the Scheme. It is also further submitted that the Scheme as it stood prior to 19.10.1990 specifically provided that an employee who has

completed three months'' continuous service or has actually worked for not less than 60 days within a period of three months would alone be

eligible for the benefit of the Scheme; that such a provision enabled the employer as well as the Provident Fund Officer to judge as to whether such

an employee was regularly employed in or in connection with the work of a factory or other establishment. Whereas the amended Para 26(1) (a)

of the Scheme takes into its fold even the persons who are not employed for the regular work of the establishment or in connection with the work

of the establishment. Thus, it is contended that Para 26(1)(a) of the Scheme is beyond the scope and object of the Act and the Scheme in

question.

6. The learned Counsel for the appellants placed reliance on a Decision of the Supreme Court in Hariharan''s case and also the Decision reported

in 1993 (1) L.L.N.311(Raj). In addition to this, the learned Counsel for the appellants also placed reliance on the Decisions reported in and

Workmen of Bharat Heavy Electricals Ltd. Vs. Union of India and others, The last Decision was relied upon in support of the Decision of the

learned Single Judge for postponement of the implementation of the Scheme till the date of the order passed in the Writ Petition.

7. At this stage, we may also refer to another submission of Sri Kasturi, learned Counsel for the appellants, that if the Scheme is implemented

covering the casual labourers also, it would amount to tax on employment because casual labourers are neither interested in taking the benefit of

the Scheme nor they are agreeable for contribution towards the Provident Fund.

8. On the contrary, it is contended by Sri Shylendra Kumar, learned Senior Standing Counsel for the Central Government appearing for the

respondents in the other Writ Appeals and for the appellants in W.A.Nos. 681 and 682 of 1993 that in the background of the amendment effected

to Para 26 of the Scheme there can be no other interpretation except the one that the Scheme as modified by the impugned Notification dated

19.10.90 takes into its fold all the employees who are employed by the establishment irrespective of whether they are casual or regular employees.

According to the learned Counsel, neither the duration of the employment nor the nature of employment is determinative of the question as to

whether the employee is eligible to be covered by the Scheme. What determines the question is the employment of the employee in or in''

connection with the work of a commercial establishment. It is also contended that Hariharan''s case is decided with reference to the question as to

whether a particular establishment is or is not covered by the Act and the Scheme. In order to cover an establishment under the Act and the

Scheme, it is necessary that there must be 20 or more employees employed in or in connection with the work of the establishment or factory; that

for the purpose of determining whether an establishment or factory is covered by the Scheme, 20 or more persons must be regularly employed and

the financial position of the establishment is also necessary to be taken into account; but once the establishment or a factory is covered by the Act

and the Scheme, every employee of such establishment or factory will be covered by the Scheme irrespective of the duration or the nature of

employment of such employee as long as the employee works in the establishment. The learned Senior Standing Counsel for the Central

Government has also brought to our notice the background under which Para 26(1) came to be amended.

9. It is contended by the learned Senior Standing Counsel for the Central Government that the Scheme came into force from 1.11.1990; therefore,

it was not open to the Court to postpone the implementation of it merely because the operation of the same was suspended during the pendency of

the Writ Petitions. At any rate, the liability of the employer continued to exist and as such to the extent the employer is required to make the

contribution to the Provident Fund, it was not open to the Court to postpone the operation of the Scheme till the date of Judgment. The learned

Senior Standing Counsel for the Central Government also placed reliance on the decisions of the Supreme Court reported in , AIR 1979 SC

1803, I.E. Newspapers (Bombay) Private Ltd. v. Union of India (1), (1986) 159 ITR 856 (SC) , Andhra University Vs. Regional Provident Fund

Commissioner of Andhra Pradesh and Others, We will advert to them at the appropriate stage.

10. In the light of the contentions urged on both sides, the following Points arise for Consideration:

(1) Whether Para 26(1)(a) of the Scheme as amended by the Notification dated 19.10.1990 is ultra vires of the provisions of the Act?

(2) Whether the Scheme does not fit in with the concept of the employment as embodied in the Act, and as interpreted by the Supreme Court in

Hariharan"s case?

(3) Whether the learned Single Judge is justified in law in directing the respondents to give effect to the Scheme only from the date of the order

passed in the Writ Petitions?

(4) What order?

POINTS Nos. 1 & 2:

11. Para 26(1)(A) of the Scheme as it stood prior to the Notification dated 19th October 1990, and after amendment reads as follows:-

Prior to amendment After amendment

26(1)(a): Every employee employed in or Every employee employed in or in

in connection with the work of a factory or connection with the work of factory or

other establishment to which this scheme other establishment to which this

applies, other than an excluded employee scheme applies other than an excluded

shall be entitled and required to become a employee, shall be entitled and required

member of the fund from the beginning of to become a member of the Fund from

the month following that in which this the day this paragraph comes into force

paragraph comes into force in such factory in such factory or other establishment.

or other establishment, if on the date of

such coming into force he has completed

(three month''s continuous service) or has

actually worked for not less than (60 days

within a period of three months or less) in

that factory or other establishment or in

any other factory or other establishment

(to which the Act applies) under the same

employer, or partly in one and partly in the

other or has been declared permanent in

any factory or other establishment

whichever is earliest.

The above amendment to Para 26(1)(a) came to be effected under the following circumstances:

The Estimates Committee of the 8th Lok Sabha which went into the matter as to whether the criteria laid down as to 90 days and 60 days of

employment for earning eligibility for P.F.membership in its 78th Report, opined thus:

The Committee are of the opinion that there should be no period of eligibility for membership of the fund and every employee who works in a

covered establishment should be enrolled as a member of the fund as soon as he or she joins the service on a regular basis in such an

establishment.

The Central Government in its reply stated thus:

The term "regular basis" is not generally used in relation to employments in the private sector. The appointment is either on casual, short term,

contract or on long term basis. The evasions of the type mentioned by the Committee generally take place in employments which are on casual or

short term contract basis. So far as persons employed on long term basis are concerned, there is normally no evasion. However, the Government

accepts the recommendations of the Committee in principle and will consider providing that if a person joins the service of an establishment on a

long term basis, i.e., an appointment which is likely to continue for more than 60 days, he shall be enrolled as a member of the fund immediately on

joining the service.

The Central Board of Trustees also expressed the view on noticing the recommendations of the Estimates Committee, in its 124th meeting, thus:

The Board decided to do away with eligibility condition for becoming member of the provident fund whereby membership would be reckoned

from the day a person joins service in any covered establishment. The Board also decided that a scheme to restrict withdrawal from the fund to be

worked out so that the provident fund contributions made by the employer would not result in earning of extra wages.

It may also be pointed out here that in the notes put up before the Board, it was suggested that atleast 30 days employment for the employee to get

the eligibility to become a member of the Fund should be retained However, the Board decided to do away with the eligibility condition in respect

of a covered establishment.

12. Thus ultimately Para 26(1)(a) came to be amended by the Notification dated 19,10.1990 doing sway with the eligibility requirements and in

terms as already reproduced above.

13. It is relevant to notice that the Scheme has to be in conformity with the provisions of the Act. Even though Para 26(1)(a) of the Scheme came

to be amended by the Notification dated 19.10.90 as pointed out above, the definition of the term ''employee'' continues to be the same as it was

when the Decision in Hariharan''s case was rendered by the Supreme Court. Of course, it has been amended by the Amendment Act No.

33/1988 with effect from 1.8.1988 but that amendment has inserted only the following words: viz., ""includes any person:

i) employed by or through a contractor in or in connection with the work of the establishment;

ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961) or under the Standing orders of the

establishment.

This amendment does not in any way modify the substance of the definition of the ''employee'' viz., any person who is employed for wages in any

kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the

employer. The amendment only included other categories of persons in the definition of the word ''employee''. Therefore, the contention of the

learned Senior Standing Counsel for the Central Government that the Decision of the Supreme Court in Hariharan''s case should be confined to

cases in which it is required to find out as to whether a particular establishment or factory is covered by the Act or the Scheme cannot be

accepted. It is contended that the criteria to be applied for the purpose of determining as to whether an establishment or factory is covered by the

Act, and the Scheme would be quite different from the one to be applied with regard to the determination of the question whether a person is

employed in a covered establishment. In other words, it is contended that any person employed irrespective of the nature of the employment or

duration of the employment, as long as he is employed in a factory or other establishment, he is covered by the Scheme. We find it difficult to

accept this submission.

14. The object of the Scheme as pointed out by the Supreme Court in Hariharan"s case is as follows:

The Act was brought on the statute book for providing for the institution of provident fund for the employees in factories and other establishments.

The basic purpose of providing for provident funds appears to be to make provision for the future of the industrial worker after his retirement or

for his dependents in case of his early death. To achieve this ultimate object, the Act is designed to cultivate among the workers a spirit Of saving

something regularly and also to encourage stabilisation of a steady labour force in the industrial centres. This Act has since its initial enactment been

amended several times to extend its scope for the benefit of industrial workers. We are, however, concerned with the Act as it stood in 1962 when

notice was sent by the appellant to the respondent stating that the provisions of the Act had been made applicable to his establishment.....

15. Thus, if the object of the Act is to be served, it cannot be made applicable to casual workers who are employed for a day or two or a few

more days and thereafter leave the establishment and go somewhere else. After leaving the establishment, they may or may not join another

establishment which is covered under the Scheme. Therefore, it would not be possible to ensure that such employees are benefited by the Scheme.

15.1. Consequently, it follows that in order to serve the basic object of the Act, it is necessary to ensure that it covers employees who are

employed regularly in or in connection with the work of the establishment and it is only such employees who can be persuaded to cultivate the habit

of saving. A person who is employed for a day or two or for certain period not in connection with the regular work of the establishment may not

be interested in saving for his future nor can he be expected to take the benefit of the Provident Fund Scheme. The contention that such a criteria

should be applied only in order to find out whether an establishment or a factory is covered by the Act and the Scheme and not for the purpose of

determining whether an employee of a covered establishment is eligible for admission to the membership of the provident fund scheme, cannot be

accepted.

16. It is contended by Shri Shylendra Kumar, learned Senior Standing Counsel for the Central Government, that Hariharan"s case is confined to

the facts of that case and therefore it cannot be made the basis for finding out as to whether Paragraph 26(1) (a) of the Scheme in question is ultra

vires of the provisions of the Act. Learned Counsel specifically placed reliance on para-3 of the Judgment in Hariharan''s case. In para-3 it has

been stated thus:

The question requiring our determination is a very short one. As there is no representation on behalf of the respondent in this Court and therefore,

we do not have the benefit of the respondent''s point of view we propose to confine ourselves strictly to the limited question of the scope of

Clauses (a) and (b) of Sub-section (3) of Section 1 and this judgment is not intended to be considered as expressing any opinion on other

controversial aspects. Before considering the relevant provisions of the Act it may be pointed out that according to the respondent''s Writ Petition

presented in the High Court in August, 1963, the New Cochin Cafe (treated as a hotel) was started in Ongole Town on November 20, 1956 and

the respondent usually employed only 18 or 19 persons. In 1961 there was total failure of rains in the Ongole region and that town was particularly

hard hit. The respondent had to employ two or three persons on contract basis for supplying water to the hotel. Those persons were engaged from

June to September 1961. The appellant has not questioned the correctness of these assertions for the purpose of this appeal. Let us now examine

the relevant provisions of the Act.

On the basis of the aforesaid statement contained in para-3 of the Judgment, it is contended that the Decision is confined to the facts of that case. It

may be relevant to notice that even in the aforesaid para-3, it has been specifically stated that the Court is going to examine the question as to the

scope of Clauses (a) & (b) of Sub-section (3) of Section 1 of the Act, which is also relevant for our purpose. While examining that question only,

their Lordships have specifically decided the nature of the employment contemplated by Clauses (a) and (b) of Sub-section (3) of Section 1 of the

Act. In the later portion of the Judgment it has been specifically pointed out that the persons who were employed by the establishment concerned

in that case during the period June to September 1961 for supply of water due to famine condition, could not be considered as employees

employed in the regular course of business of the establishment, because they were employed under the special circumstance, i.e., under the famine

condition. It is also relevant to notice that in Hariharan''s case it has been specifically considered as to the nature of employment which comes

within the scope of the Act. In this regard, it is relevant to notice the relevant portions of the Judgment in paras 7 to 9:

7. Section 16 which has already been set out in extenso seems to us to throw considerable light on the point raised. It may be recalled that this

section excludes from the applicability of the Act, establishments belonging to the Government and to local authorities and infant establishments. It

is, therefore, obvious that this Act is intended to apply only where an establishment has attained sufficient financial stability and is prosperous

enough to be able to afford regular contribution provided by the Act. Contribution by the employer is an essential part of the statutory scheme for

effectuating the object of inducing the workmen to save something regularly. The establishment, therefore, must possess stable financial capacity to

bear the burden of regular contribution to the Fund under the Act. In this connection it may be recalled that by virtue of Section 1 (5) an

establishment to which the Act is applied continues to be governed by the Act notwithstanding that the number of persons employed by it at any

time falls below the required number. This liability to be governed by the Act ceases only if the terms of the Proviso to Section 1(5) are complied

with. The financial capacity of the establishment to bear the burden must, therefore, have some semblance of a reasonably long term stability. In

other words, the employment of requisite number of persons must be dictated by the normal regular requirement of the establishment reflecting its

financial capacity and stability. It, therefore, follows from this that the number of persons to be considered to have been employed by an

establishment for the purpose of this Act has to be determined by taking into account the general requirements of the establishment for its regular

work which should also have a commercial nexus with its general financial capacity and stability. This seems to us to be the correct approach under

the statutory scheme.

8. To accede to the appellant''s argument would lead to some startling consequence. By way of illustration, if for the purpose of extinguishing

accidental fire an establishment is compelled to employ a few persons for about a couple of hours, even then however, weak and unstable its

general financial capacity, the establishment would be covered by the Act and would have to contribute towards the provident fund for the benefit

of its regular employees, of course excluding those whose services were utilised for a short while for extinguishing the fire. In this illustration we are

assuming that the employees would have no objection to being governed by the Act. This in our opinion, could never have been the intention of the

legislature. Similarly, we find it difficult to impute to the legislature an intention to exclude from the application of the Act an establishment which

regularly employs for its general business the required number of persons for a major part of the year, say, for 360 days every year, merely

because the employment of the required number does not extend to full one year. Both the extreme views, the one canvassed on behalf of the

appellant and the other postulated in the observation of the High Court that the required number of persons must continuously work in the

establishment for one year, do not conform to the scheme and object of the Act and are, therefore, unacceptable.

9. Considering the language of Section 1(3)(b) in the light of the foregoing discussion it appears to us that employment of a few persons on account

of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the

establishment and which does not reflect its business prosperity or its financial capacity and stability from which it can reasonably be concluded that

the establishment can in the normal way bear the burden of contribution towards the provident fund under the Act would not be covered by this

definition. The word ""employment"" must, therefore, be construed as employment in the regular course of business of the establishment; such

employment obviously would not include employment of a few persons for a short period on account of some passing necessity or some

temporary emergency beyond the control of the company. This must necessarily require determination of the question in each case on its own

peculiar facts. The approach pointed out by us must be kept in view when determining the question of employment in a given case.

Thereof, it is clear that the Decision in Hariharan''s case specifically decides the nature of employment in order to attract the provisions of Sub-

section (3) of Section 1 of the Act, and also the Scheme. That being so, it is not possible to agree with the contention of the learned Senior

Standing Counsel for Central Government that Hariharan''s case is confined to the facts stated in para-3 of the Judgment and as such it cannot at

all be applied to the case on hand. If the contention of the learned Senior Standing Counsel for Central Government is accepted, it would amount

to introducing two types of employment for the purpose of the Act. One type of it is to determine whether the establishment or the factory can be

held to have been covered by the Act, and the Scheme; and another type of employment for the purpose of finding out eligibility of the employee,

for the purpose of claiming benefit of the Scheme and the Act. This is neither contemplated under the Act nor by the Scheme. The Scheme has got

to be in conformity with the Act. Ultimately, after discussing the Supreme Court Decision, the learned Single Judge has stated in categorical terms,

as reproduced above, that the employment must be construed as ''employment in the regular course of business of the establishment'' and it shall

not include the employment of the few persons for short period on account of some passing necessity or some emergency beyond the control of

the company. However, it is also necessary to remember that this question has to be decided in each case on the facts and circumstances of the

case and having regard to the circumstances under which the employment has taken place. This is also made clear by the Supreme Court in para-9

of the Judgment reproduced above. We may also point out here, the opinion of the Estimates Committee in its 78th Report and the reply by the

Central Government, which are extracted in para 11 supra. Estimates Committee has opined that the employment should be on regular basis. The

Central Government also has opined that the service under the establishment must be on a long term basis and an appointment which is likely to

continue for more than 60 days, he shall be enrolled as a member of the fund immediately on joining the service. Thus, in the opinion of these two

Authorities, casual employment or employment on some temporary need is not to be covered by the Act or the Scheme.

16.1. The contention of the petitioners is that Para 26(1) (a) of the Scheme, as amended, if interpreted to take into its fold, the employees who are

not employed in the regular course of business of an establishment and employed only for passing necessity or temporary emergency, it would be

beyond the scope of the provisions of the Act and would be opposed to the very object of the Act. On the contrary, it is the contention of the

learned Senior Standing Counsel for Central Government, that in order to enable an employee to become eligible for the membership of the

Scheme from day one of his employment, the requirements of 90 days and sixty days are done away with and if the interpretation as contended by

the petitioners is accepted, it would result in defeating the very object of the amendment and the employers will continue to exploit the employees

by depriving them of the benefit of the Scheme.

16.2. We have already pointed out that it is not every type of employment that attracts the provisions of the Act, as contained in Sub-section (3) of

Section 1 of the Act. It is the employment in the regular course of business of the establishment alone which attracts the provisions of the Act. The

duration is not material, but it is the nature of employment which is material in order to attract the provisions of the Act. As long as the employment

is for the purpose of regular course of business, in other words, it is in or in connection with the business of the factory or establishment it would

attract the provisions of the Act and the Scheme. If the employment is not in or in connection with the regular business of the factory or

establishment it would not - attract the provisions of the Act and in such an event, the duration would not be relevant. However, we must add here

that as and when such question arises it has to be determined with reference to the facts and circumstances of each case, It has to be determined

as to whether the employment is in or in connection with the regular business of the establishment or not As the Scheme has to be read and

construed in conformity with the provisions of the Act, unless it contains in express terms or by necessary implication, a provision which is contrary

to the provisions of the Act, it cannot be held as ultra vires of the provisions of the Act. In the instant case, Para 26(1)(a) of the Scheme as

amended by the Notification dated 19.10.1990, does not contain in express terms or by necessary implication a provision which is contrary to the

provisions of the Act. In fact, Para 26(1)(a) as amended, more or less uses the wards used in the definition of the expression ''employee'' in Clause

(f) of Section 2 of the Act. The expression ''employee'' is defined as follows:

(f) ""employee"" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an

establishment, and who gets his wages directly or indirectly from the employer, and includes any person -

(i) employed by or through a contractor in or on connection with the work of the establishment;

(it) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961). or under the standing orders of the

establishment;

Para 26(1)(a) of the Scheme also states that every employee employed in or in connection with the work of a factory or other establishment to

which this Scheme applies, other than an excluded employee, shall be entitled and required to become a member of the Fund from the day this

paragraph comes into force in such factory or other establishment. Therefore the import of Para 26(1)(a) of the Scheme is the same as that of the

definition of the word ""employee"" in Section 2(f) of the Act. That being so, we are of the view that Para-26(1)(a) of the Act, cannot be held to be

ultra vires of the provisions of the Act. But the scope of it, as already pointed out, is only to cover such of the employees who are employed in the

regular course of business in or in connection with the work of the establishment. As pointed out by the Supreme Court in Hariharan''s case, such

employment does not include the employment of a person for a short period on account of some passing necessity or some temporary emergency

beyond the control of the establishment or factory which cannot be considered to be an employment in or in connection with the work of the

establishment or factory as the case may be. Thus, we are of the view that Para 26(1)(a) of the Scheme read with Sub-section (3) of Section 1 of

the Act, and the definition of the word ''employee'' as contained in Clause (f) of Section 2 of the Act, would cover only such of the persons who

have been employed in or in connection with the work of the establishment in the regular course of business of the establishment or the factory as

the case may be and it would not include employment of the persons for a short period on account of some passing necessity or for some

temporary need or emergency. Further, the question as to whether a person has been employed in regular course of business of the factory or the

establishment or is only employed for emergency or for temporary necessity or on short term employment, arises in a case, it will have to be

decided in the facts and circumstances of that case. This conclusion of ours is in conformity with, and advances, the object of the Act, as pointed

out by the Supreme Court in Hariharan''s case (supra). As otherwise, the very object will be defeated because a person who is temporarily

employed in or in connection with the regular work in the establishment will not be interested either in the benefit of the Provident Fund Scheme.

Further he will not be available to have such benefit because his stay in the establishment itself would be tempoary.

16.3. Learned Senior Standing Counsel for Central Government however placed reliance on a Decision of the Supreme Court in Andhra

University Vs. Regional Provident Fund Commissioner of Andhra Pradesh and Others, and contended that no narrow interpretation should be

placed on the provisions of the Act and the Scheme resulting in defeating the very object of the Act and the Scheme. In the aforesaid case, the

Supreme Court, no doubt observed that the Act is a beneficent piece of social welfare legislation intended to promote and secure the well being of

the employees and the Court should not adopt a narrow interpretation which will have the effect of defeating the very object and purpose of the

Act. it may be relevant to notice that in that case, the University was running a Department of. Publications and Press. The contention put forth was

that as it was part of the University and the University could not be considered either as a factory or the establishment; therefore, the fact that the

University owned a press by itself could not be termed as a factory or the establishment so as to attract the provisions of the Act and the Scheme.

It was held that for the purpose of the Act, the press run by the University could be considered as an establishment even though it was owned by

the University. It was in this context, the Supreme Court observed that - narrow interpretation on the provisions of the Act and the Scheme should

not be placed so as to defeat the very intendment of the enactment. The relevant portion of the Judgment is as follows:

7. We are unable to see how this provision is of any assistance to the appellants. Section 2-A was inserted in the Act merely for the purposes of

clarifying the position that the Act applies to composite factories. It is not intendment of the Section to lay down even by remotest implication that

an establishment, which is factory engaged in an industry specified in Schedule I will not be liable for coverage under the Act merely because it is

part of a larger organisation carrying on some other activities also which may not fall within the scope of the Act. In construing the provisions of the

Act, we have to bear in mind that it is a beneficent piece of social welfare legislation aimed at promoting and securing and well-being of the

employees and the Court will not adopt a narrow interpretation which will have the effect of defeating the very object and purpose of the Act.

Once it is found that there is an establishment which is a ''factory'' engaged in an ''industry'' specified in Schedule-1 and employing 20 or more

persons, the provisions of the Act will get attracted to the case and it makes no difference to this legal position that the establishment is run by a

larger organisation which may be carrying on other additional activities falling outside the Act.

16.4. The question that came up for consideration in that case as already pointed out was as to whether the Press run by the University could

come within the scope of establishment. It was in that connection the Supreme Court held that the interpretation to be placed on the provisions of

the Act should advance the object and intendment of the Act and any interpretation which defeats or affects any intendment of the Act should be

avoided. As already pointed out, the object of the Act is to provide provident funds for the employees and also to encourage saving habits for the

employees, so that they can be benefited after their retirement or it may be useful for their dependents. That object can be achieved only if the

Scheme is to attract the persons who are employed in or in connection with the work of the establishment or the factory in the regular course of

business. Therefore, we are of the view that the interpretation placed by us cannot be held to be contrary to the observations contained in Andhra

University''s case.

16.5. Reliance was also placed on a Decision of the Supreme'' Court in Regional Director, Employees'' State Insurance Corpn., Madras Vs.

South India Flour Mills (P) Ltd., It may be pointed out that, that case related to Employees'' State Insurance Act, 1948 (''ESI Act'' for short). The

question that arose for consideration was whether the construction work of additional buildings for expansion of factories taking place outside the

premises of the factory and the persons employed therefore would be attracted by the provisions contained in Section 2(9) of the ESI Act. The

term ''employee'' as defined in Section 2(9) of the ESI Act. is in the following term:

2(9) ""employee"" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies

and

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or

establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate "" employer on the premises of the factory or establishment or under the supervision of he principal

employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in

or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or

let on hire has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part,

department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment

or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961(52 of 1961) or under the standing

orders of the establishment, but does not include -

(a) any member of the Indian naval, military or air-forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central

Government a month:

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central

Government a month at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of

that period:

It was in the light of the definition of the word "employee" as contained in Clause (9) of Section 2 of the ESI Act, the Decision was rendered. It

may be pointed out here that the word "employee1 as defined in the" E.S.I. Act is not similar to the one defined in Section 2(f) of the Act.

Therefore, it is not possible to hold that the Decision in S.I Flour Mills (P) Ltd. case, is relevant for our purpose. In that Decision, it was held that

the work of construction of additional buildings required for the expansion of the factory was ancillary, incidental or having some relevance to or

link with the object of the factory, therefore, it was connected with the factory. It was also further held that it was not necessary that such work

must always have some direct connection with the manufacturing process that is carried on in the factory. It was further held that the expression

work of the factory"" should also be understood in the sense of any work necessary for the expansion of the factory or establishment or for

augmenting or increasing the work of the factory or establishment; and such work was incidental or preliminary to or connected with the work of

the factory or establishment. We are not concerned with such a situation in the instant case; therefore, it is not possible to hold that the aforesaid

Decision of the Supreme Court is of any assistance to the respondent in the Writ Petitions.

16.6. Reliance was also placed on a Decision of the Supreme Court in M/s. P.M. PATEL & SONS v. UNION OF INDIA, . In that case, the

question as to whether the Beedi workers rolling beedis at their home, could be considered to fall within the definition of the word "employee" as

contained in Clause (f) of Section 2 of the Act. The contention urged in that case was, as the employees did not carry on the work in the

establishment but actually carried on their work in their homes, they could not be considered as persons working in or in connection with the work

of the factory, Such a contention was negatived and it was held by the Supreme Court that the Beedi rollers even though worked at their home,

they did fall within the definition of the word "employee". The relevant portion of the Judgment is as follows: -

8..... Admittedly, the factory belonging to the manufacturer is, therefore, drawn within the compass of the Employees" Provident Funds Act and

the Scheme. It is also admitted by the petitioners that the workers employed within the factory premises would be covered by the Act and the

Scheme. The real question is whether the home workers are entitled to that benefit. Clause(f) of Section 2 of that Act defines an ""employee"" to

mean ""any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and

who gets his wages directly or indirectly from the employer, and includes any person employed by or through a contractor in or in connection with

the work of the establishment"". It will be noticed that the terms of the definition are wide. They include not only persons employed directly by the

employer but also persons employed through a contractor. Moreover they include not only persons employed in the factory but also persons

employed in connection with the work of the factory. It seems to us that a home worker, by virtue of the fact that he rolls beedis, is involved in an

activity connected with the work of the factory. We are unable to accept the narrow construction sought by the petitioners that the words ""in

connection with"" in the definition of ""employee"" must be confined to work performed in the factory itself as a part of the total process of the

manufacture.

Thus it is clear that in that Decision, whether a person employed temporarily or due to urgent immediate necessity is eligible for the benefit of the

scheme was not one of the questions for consideration. The Beedi Rollers even though worked at their home, it was not disputed that they were

regularly doing the work in and in connection with the work of the Factory or the establishment. The place of their work was held to be not

relevant as long as they carried on the work connected with the regular business of the factory or the establishment. Therefore, we are of the view

that the interpretation placed by us following the Decision of the Supreme Court in Hariharan''s case (supra), is not contrary to the Decision in M/s.

P.M.Patel & Sons case. Accordingly, we answer Point Nos. (1) and (2) as follows:

Paras 26(1) (a) of the Scheme as amended by the Notification dated 19.10.1990 is in conformity with the provisions of the Act, and as such, it is

not ultra vires. The scope of para 26(1) (a) of the Scheme is as already indicated in the preceding paras and if any question arises as to whether an

employee is eligible for the benefit of the Scheme has to be determined in the light of the interpretation placed by us and the decision of the

Supreme Court in Hariharan''s case. Para 26(1)(a) of the Scheme as amended and as interpreted by us is not contrary to that decision of the

Supreme Court in Hariharan''s case.

17. POINT No. (3): It is strenuously contended by the learned Senior Standing Counsel for the Central Government that when once the Scheme

came into effect on 1.11.1990, it was not at all permissible for this Court to direct the respondent to implement and give effect to the same from

the date of the order passed in the W.Ps. It is contended that the Scheme is law and the date on which the Scheme came into force, could not

have been changed. It is also contended that the provisions contained in the Scheme and the Act do not enable the Court to direct the respondents

to give effect to it at a later date.

17.1. On the contrary it is contended by the learned Counsel appearing for the petitioners in the Writ Petition that in the light of the provisions

contained in Para 38(1) of the Scheme and the official communication bearing No. 12/Mis./91.E1, dated 26th August 1991 from the Regional

Provident Fund Commissioner for Central Provident Fund, the direction issued by the learned Single Judge is justified. It is also submitted that the

direction is also in conformity with a Decision of the Supreme Court rendered in The District Exhibitors Association, Muzaffarnagar and others Vs.

Union of India and others, and also a Decision of this Court in Workmen of Bharat Heavy Electricals Ltd. Vs. Union of India and others, of the

Scheme, specifically provides that the employer shall, before paying the member his wages in respect of any period or part of period for which

contributions are payable, deduct the employee''s contribution from his wages which together with his own contributions as well as an

administrative charge of such percentage of the pay (basic wages, dearness allowance, retaining allowance if any, and cash value of food

concessions admissible thereon) for the time being payable to the employees other than an excluded employee and in respect of which provident

fund contributions are payable, as the Central Government may fix, he shall within fifteen days of the close of every month pay the same to the

Fund by separate bank drafts or cheques on account of contribution and administrative charge. Sub-para (2) of Para 38 of the Scheme further

provides that the employer shall forward to the Commissioner, within twenty-five days of the close of the month, a monthly consolidated statement,

in such form as the Commissioner may specify, showing recoveries made from the wages of each employee and the amount contributed by the

employer in respect of each such employee. Thus it is clear that an employer can deduct contribution from the employee towards the Provident

Fund while paying the wages for the current month. He cannot deduct the contribution in respect of the past period of employment from out of the

wages payable for the current month. Para 76 of the Scheme provides that if the employer fails to submit the returns regularly he will be exposed to

penal consequences. It may be relevant to notice that during the pendency of the Writ Petition, the operation of para 26(1)(a) of the Scheme, as

amended by Notification dated 19.10.1990, was stayed, not only by this High Court, but also by the various High Courts. Taking this aspect into

consideration, the Regional Provident Fund Commissioner for Central Provident Fund issued the communication dated 26th August 1991

(Annexure A), which is as follows:-

Text of the official communication No. 12/Misc/91/E-1 dated 26th August, 1991 from Regional Provident Fund Commissioner for Central

Provident Fund Commissioner, 9th Floor, Mayur Bhavan, New Delhi - 110001 to all Regional Provident Fund Commissioners/ Sub-Regional

Offices.

You are aware that the validity of Notification No. CSR 689 dated 19.10.1''990 has been challenged in different High Courts and some of the

Hon''ble High Courts have stayed the operation of the part of the Notification. The Ministry of Labour, Govt of India have considered the matter in

consultation with the Ministry of Law, Government of India and have directed that the part of the notification dated 19 October, 1990 relating to

para 26 of the E.P.F. Scheme, 1952 be not given effect to - to ensure uniformity of treatment. Therefore, in due deference to the interim stay

granted by the Hon''ble High Courts, you are requested to ensure that the above directions of the Ministry of Labour, Govt. of India are followed

in all cases. The Ministry has also further directed to ensure that:

i) Counter Affidavits are quickly filed in all the cases;

ii) The number of cases filed in the Hon''ble High Court also furnished to this office immediately.

(This is issued with the approval of D.P.F.C.)"".

Thus, from the date of the interim order till the disposal of the Writ Petitions, Para 26(1) (a) of the Scheme was not implemented. It was the old

Para 26(1) as it stood prior to 19.10.1990 was being implemented. Therefore, if the direction of the nature given by the learned single Judge had

not been given, the employers could not have complied with the provisions of the scheme in respect of the contribution payable by the employees

from the date of the interim order till the date of the final disposal of the Writ Petitions, as it is not permissible for the employers to deduct the

contribution payable by the employees during the past period out of the wages payable for the current month, because Para 38(1) of the Scheme

specifically provides for deduction of wages payable for the current month only and not in respect of the past period of employment. Taking this

aspect of the matter into consideration, the Supreme Court, in District Exhibitors Association case (supra), held that the Scheme in so far it was

given retrospective effect, could not be implemented in respect of the contribution payable by the employees. In holding so, their Lordships of the

Supreme Court took into consideration the provisions contained in Para 32(1) of the Scheme. The relevant portions of the Judgment are as

follows:

20. The question, however, is whether by making the Scheme with retrospective operation, the employer could be saddled with the liability to pay

employees'' contribution w.e.f. 1st October, 1984 and if not from what other date? The answer to the question turns upon the implementation of

the Scheme and in particular the giving effect to Paras 30 and 32 of the Scheme. Para 30 provides that the employer shall, in the first instance, pay

both the contributions payable by himself and also the contribution payable by the employees. It shall be the responsibility of the principal employer

to pay both the contributions payable by himself and also in respect of the employees directly employed by him and also in respect of the

employees employed by him or through a contractor. Para 32 confers upon the employer the right to recover the employees contribution that has

been paid by him under para 30. That could be recovered by the employer by means of deduction from the wages of the employees who are liable

to pay. First proviso to para 32(1), however, limits that liability in expressly stating that no such deduction may be made from any wage other than

that which is paid in respect of the period of which the contribution is payable. It is obvious, from Paras 30 and 32 that the employer has to pay the

contribution of the employee''s share but he has a right to recover that payment by deducting the same from the wages due and payable to the

employees. It is significant to note that the deduction is not from the wages payable for any period, but only from the wages for the period in

respect of which the contribution is payable and no deduction could be made from any other wages payable to the employees. In other words, the

payment of employees contribution by the employer with the corresponding right to deduct the, same from the wages of the employees could be

only for the current period during which the employer has also to pay his contribution.

..... By retrospectively applying the Scheme could he be asked to pay the employees contribution for the period antecedent to the impugned

notification. We think not. The Act and the Scheme neither permit any such payment nor deduction. He cannot be saddled with the liability to pay

the employees contribution for the retrospective period, since he has no right to deduct the same from the future wages payable to the employees.

21. Mr. Vikram Mahajan, learned Counsel for the Central Government submitted that it may be possible for the employers to make deduction

from subsequent wages of the workmen with the consent in writing of the Inspector as required under the third proviso to Para 32(1) of the

Scheme. This submission cannot be accepted since the third proviso could be taken advantage of by the employer only where no deduction has

been made from the wages of the employees due to accidental mistake or clerical error when the Scheme is operative. Such deduction which has

not been made by accidental mistake or clerical error could be made from the subsequent wages with the consent in writing of the Inspector

concerned. The case with which we are concerned is not covered by the third proviso. It is not the case of anybody that the employer could not

make deduction from the wages of the employees by accidental mistake or clerical error. The employer indeed could not have made the deduction

prior to the impugned notification dated 30th April, 1986 since the Scheme was not then applicable. The Scheme has been given retrospective

effect w.e.f. 1st October, 1984. The employer, therefore cannot take the benefit of the third proviso to Para 32(1) for deducting the employees

contribution in their wages payable in future.

22. xxxxx

23. In the result and for the foregoing reasons, we allow the appeals as indicated above by setting aside the judgment of the High Court. We

declare that the appellants are not liable to pay the employees contribution for the period from 1st October, 1984 to 30th April 1986.

In this connection, it is contended by the learned Senior Standing Counsel for Central Government, that the said Decision is rendered in the context

of giving effect to the Scheme retrospectively. As such, in the light of the aforesaid Decision, the employers contribution could have been made,

and it was because of this only, the Supreme Court in District Exhibitors Association, Muzafarnagar case declared that the employers therein were

not liable to pay the employees contribution for the period from 1st October 1984 to 30th April 1986 and consequently, their liability to make their

contribution was given effect to retrospectively.

17.2. No doubt the employers'' liability to make contribution from the date the Scheme was introduced can be implemented and there is no

difficulty in so far as the 20 employees are concerned, but those persons who are employed over and above 20 and can be considered eligible for

the benefit of the Act is again a question which has to be decided in each and every case. For more than two years, the Scheme has been

implemented as it stood prior to 19.10.1990. Para 26(1)(a) as introduced by the Notification dated 19.10.1990, if it is allowed to be operative

from 1.11.1990, it would result in opening pandora''s box, because in the case of every establishment, it will have to be decided whether the

persons employed over and above twenty were employed in or in connection with the work of the establishment and whether they were employed

in the regular course of business of the establishment. Another aspect of the matter which prevails upon us, to agree with the direction issued by the

learned Single Judge is that the Department itself has given effect to the interim orders and has directed in the manner as already pointed out. Thus

Para 26(1)(a) of the Scheme as introduced by the Notification dated 19.10.1990 was not given effect to till the date the final order passed in the

Writ Petitions. Such being the position, it is just and proper that Para 26(1) (a) of the Scheme should be given effect to only from the date of the

final order passed in the Writ Petitions as directed by the learned Single Judge.

17.3. We may also refer to a Decision of a learned Single Judge of this Court in Workmen of Bharat Heavy Electricals Ltd. Vs. Union of India and

others, which arose out of the ESI Act. In that case also, there was an interim order granted during the pendency of the Writ Petitions. On the

disposal of the Writ Petition, the Court held as follows:

10. This Court while entertaining the matters granted an interim order in favour of the workmen injuncting the employers from recovering the

amount from them and thereafter making contributions to the Corporation. Since this petition is liable to be dismissed, the law will take effect from

the date of Notification of the amendment coming into effect. If that is so, for the period when the order of stay was in force also, the employers

will become liable to make good the payments in respect of employees who fall within the category drawing Rs.1600 to Rs.3000/- as monthly

wages even though they could not avail of the benefits during that period. It is stated that employers would be put to grave hardship as they cannot

recover the amount from the employees who have not been able to avail of the benefits under the Act and it would be too much to expect them to

make the payments. At the instance of employees this Court made a interim order and any order of this Court should not result in prejudice to any

person in any manner. Extending the doctrine that the ''act of the Court shall prejudice no man'' the E.S.I. Corporation is restrained from

recovering the amounts till today from the employers in respect of employees whose monthly wages are Rs/ 1600-3000 but in case the employers

have already recovered such amount from the employees this part of the Order shall not apply to them.

Therefore, taking into consideration all the circumstances and the manner in which the Department itself has implemented the Scheme during the

pendency of the Writ Petitions, we are of the view that it is just and appropriate that the Scheme should be implemented from 22nd January 1993

as directed by the learned Single Judge.

17.4. The contention of the learned Senior Standing Counsel for the Central Government is that the communication issued by the enforcing agency

namely, the Department does not have the effect of postponing the operation of the Scheme and as such, the same cannot be made a basis for

directing the respondents to give effect to the Scheme from the date of the order of the learned single Judge. We have already pointed out that

several problems would arise if the Scheme has to be implemented from 1.11.1990. The nature of the employment of the persons over and above

20 will have to be decided in each and every case and that itself would occupy a long time and ultimately, it may become an exercise in futility.

Therefore, we are of the opinion that in such a situation it is open to the Court to give effect to the Scheme from a later date in order to see that no

hardship is caused to either of the parties due to the interim order passed by the Courts. Hence we are of the view that the direction issued by the

learned Single Judge to give effect to Para 26(1) (a) of the Scheme with effect from 22nd January 1993, is just and proper and does not call for

interference. Point No. 3 is answered accordingly.

18. There is one more contention of the petitioners to which we may make a passing reference, it is contended by Sri Kasturi, learned Counsel for

some of the petitioners that as the casual employee or an employee engaged for a short period would not be available to enjoy the benefits of the

Scheme, it would only result in imposing tax on the employees and as such the Scheme if interpreted in the manner contended by the learned

Senior Standing Counsel for Central Government, would be bad in law. In view of the findings recorded on Point Nos.1 to 3, we do not consider

it necessary to examine this contention.

19. For the reasons stated above, these Appeals are disposed of in terms of the findings recorded by us on Points 1 to 3 and the Order passed by

the learned Single Judge shall stand modified accordingly. Consequently, the Writ Petitions stand disposed of accordingly.

20. In the circumstances of the case, there will be no order as to costs.