(2009) 02 CAL CK 0001

Calcutta High Court

Case No: Writ Petition No. 31362 (W) of 2008

West Bengal State Electrical Contractors Association and Others		APPELLANT
	Vs	
The Commissioner, Employees'' Provident Fund Organisation and Others		RESPONDENT

Date of Decision: Feb. 23, 2009

Acts Referred:

- Constitution of India, 1950 - Article 12, 14, 16, 226
- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 1, 1(3), 1(4), 16, 16(1)
- Employees State Insurance Act, 1948 - Section 2(9)
- Factories Act, 1948 - Section 7(1)

Citation: (2009) 2 CALLT 76 : (2009) 122 FLR 23 : (2009) 3 LLJ 379 : (2009) 6 SLR 782

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Anupam Chatterjee, Arunava Ghosh, Supriyo Chattopadhyay and Partha Sarathi Das, for the Appellant; Anindya Kumar Mitra, Bhaskar Mitra and Rammohan Chattopadhyay, for the Respondent

Final Decision: Dismissed

Judgement

Sanjib Banerjee, J.

The petitioners question the rationale of two of the conditions set as part of the eligibility criteria for fresh enlistment and renewal of license of electrical contractors under the West Bengal State Electricity Distribution Company Limited. The petitioners claim that the notice published on December 2, 2008 that has subsequently been modified on January 29, 2009 is arbitrary and unreasonable in so far as it mandates that contractors produce provident fund and employees'' state

insurance registration certificates to be considered for enlistment or renewal.

2. The first petitioner claims to be a registered society and is an association of contractors who have been working under the West Bengal Electricity Board now renamed as the West Bengal Electricity Distribution Company (hereinafter referred to as the company). The other petitioners are members of the first petitioner who are either enlisted with the company or aspiring to be so. The challenge in the petition is concentrated against the following two conditions, to be met by contractors who apply to be entered on the list of eligible contractors for the company to possibly allot work that may arise at a future date, which were included in the notice published in several newspapers in the beginning of December 2008:

(7) PF Code No. alongwith copy of PF Registration Certificate.

(8) ESI Registration No. with Registration Certificate.

3. During the pendency of the petition a subsequent notice was issued that contains the following two clauses which, in effect, modify clauses 7 and 8 of the original notice:

(1) Applicants (Electrical Contractors) must have PF Registration Code in the name of their own firm.

(2) Contractors'' employees not covered under ESI Scheme due to non-extension of benefit under the said scheme where WBSEDCL work-sites are situated, benefit under Workmen''s Compensation Act, 1923 must be applicable to them.

4. The petitioners insist that these are unfair conditions that have been sought to be imposed by the company in an unconscionable attempt to insulate the company against the rigours of beneficial legislation aimed at protecting workers. According to the petitioners it is a pure question of law and the facts pleaded by the company in its affidavit are irrelevant in the matter of assessment of the legality of the two conditions as modified. The petitioners argue that whether it is under the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the PF Act) or under the Employees'' State Insurance Act, 1948 (hereinafter referred to as the ESI Act) since the company is to be the principal employer qua the workers brought in by the contractors, the company has to take responsibility for the workers under both statutes and the overwhelming motive in setting the two impugned conditions is to shirk a duty enjoined on the company by statute. The petitioners say that to obtain registration under the PF Act and the ESI Act, a person has to meet the prerequisites set under such enactments and it is arbitrary and unconscionable for the company to discriminate between contractors eligible to obtain registration and those who are not. They suggest that in setting such conditions the company, an instrumentality of the State, has acted in derogation of the contractors'' rights under Articles 14 and 16 of the Constitution of India. They submit that notwithstanding the scope of judicial review being restricted

in assessing eligibility criteria set down by an authority within the meaning of Article 12 of the Constitution, the two conditions assailed here are so unreasonable and unfair that they should not bear scrutiny. The company labours to highlight the thankless task that it undertakes in grossly difficult terrain to reach electricity to far-flung corners of the State, from the high and craggy region in the north to the marshy swamps of the mouth of the river in the south. The company explains that it engages electrical contractors to obtain workers to attend to matters relating to new electricity connections, maintenance and overhauling work and attendant duties. The company says that the issue is not one of the company attempting to absolve itself of its obligation to the workers but to ensure that its contractors are organised and are not fly-by-night operators who place the workers and thereafter do nothing more than receive a commission while leaving the company to get the work done from the workers and take care of the interest of the contractors'' workers.

5. The petitioners suggest that upon enlistment, jobs are handed out to contractors who deploy the workers for the purpose. The petitioners say that it is inconceivable that an enlisted contractor can altogether remove himself from the scene and expect the job awarded by the company to be completed by his workers. The petitioners submit that the petitioners have no control in obtaining registration either under the PF Act or under the ESI Act and say that such position has been recognised by a Division Bench of this Court in a judgment rendered on March 5, 2007 in MAT No. 4043 of 2006 (Assistant Provident Fund Commissioner v. T.C. Ghosh and Ors.) where it has been held that unless the applicant for registration met the statutory benchmark as to the number of workers, such applicant had no right to insist on registration.

6. The following paragraphs of the unreported judgment, in an appeal from an interim order directing the allotment of provisional or temporary provident fund registration code, have been stressed:

In the case before us, the writ-petitioner/respondents could not convince us that they have got any right to have any temporary/provisional or even permanent Provident Fund Registration Code number in their favour as per the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 or the scheme framed thereunder when they have virtually admitted in the writ applications that the number of employees engaged by them are less than 20.

In such a situation, there is no scope of getting any separate Provident Fund Code number as the writ-petitioners did not come within the purview of the said Act. We fail to appreciate what purpose will be served by giving such temporary/provisional Provident Fund Registration Code number when the appellant before us will not be entitled to take any money from the writ-petitioners by virtue of such provisional/temporary Provident Fund Registration Code. Merely because an employer in an improper way claimed some unreasonable demands, for that reason

a statutory authority cannot be directed to do some illegal acts not provided in the statute.

The petitioners also rely on another Division Bench order of July 17, 2006 in MAT No. 1499 of 2006 (National Hydro-electric Power Corporation and Ors. v. Kurseong Carriers (Private) Limited and Anr.) where an interim order permitting the writ petitioners to participate in the tender without production of a provident fund code was tested. It was held that there was no basis for demanding such a qualification from an intending bidder and the interim order was maintained. The petitioners refer to Section 1 of the PF Act and to the definitions of "employer" and "employee" in such statute. Section 8A(2) of the Act has also been placed.

1. Short title, extent and application. - (1) This Act may be called the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) Subject to the provisions contained in Section 16, it applies:

(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

(b) to 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:

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.

(4) Notwithstanding anything contained in Sub-section (3) of this section or Sub-section (1) of Section 16, where it appears to the Central Provident Fund Commissioner, whether on an application made to him in this behalf or otherwise, that the employer and the majority of employees in relation to any establishment have agreed that the provisions of this Act should be made applicable to the establishment, he may, by notification in the Official Gazette, apply the provisions of this Act to that establishment on and from the date of such agreement or from any subsequent date specified in such agreement.

(5) An establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below twenty:

2. Definitions.:

...

(e) "employer" means:

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under Clause (f) of Sub-section (1) of Section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent;

(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 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;

8A. Recovery of moneys by employers and contractors.:

...

(2) A contractor from whom the amounts mentioned in Sub-section (1) may be recovered in respect of any employee employed by or through him, may recover from such employee the employee''s contribution under any Scheme by deduction from the basic wages, dearness allowance and retaining allowance (if any) payable to such employee." The moot point of the petitioners is that it is the company which has to discharge the obligation of putting in money with the provident fund authorities and it is also the company which has to ensure compliance with the ESI Act in the matter of depositing the appropriate contribution under such Act. Section 2(9) of the ESI Act is placed by the petitioners:

2. Definitions. - ...

(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 the 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 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 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;

7. The petitioners have relied on a judgment reported at People''s Union for Democratic Rights and Others Vs. Union of India (UOI) and Others, for the principle that no employer, far less an instrumentality of State, can act in derogation of the labour laws. A judgment reported at Employees'' State Insurance Corpn. Vs. M/s. Harrison Malayalam Pvt. Ltd., is cited to emphasise the obligation of the principal employer. The judgment reported at Regional Director, E.S.I. Corporation Vs. Kerala State Drugs and Pharmaceuticals Ltd. and Others, is placed in the same context.

8. The company says that the scope of judicial review available in the matter of assessing eligibility criteria is limited and submits that the government must be free to set its eligibility criteria. The company says that the reasons for setting the conditions depend on administrative exigencies and an invitation to tender is in the realm of contract where the power under Article 226 of the Constitution is scarcely exercised. The company relies on the judgments reported at (2004) 4 SCC 19 (Directorate of Education and Ors. v. Educomp Datamatics Ltd. and Ors.) and Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others, in such context.

9. The company says that in such a case the authority may not always be seen as the principal employer. The company draws inspiration from the case of another

licensee reported at C.E.S.C. Limited and Others Vs. Subhash Chandra Bose and Others, and relies on paragraphs 12 to 14 thereof:

12. A judgment of this Court in P.M. Patel & Sons v. Union of India, rendered in the context of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 was pressed into service on behalf of the appellants to contend that when rolled beedis, prepared by the workers elsewhere, were placed for acceptance or rejection, conforming to the standards envisaged by the manufacturers, that in itself was held constituting an effective decree of supervision and control. The benefit of the said Act was extended to beedi workers employed through contractors and the question arose whether such workers came within the definition of ''employee'' in Section 2(f) of the said Act. The definition of the word ''employees'' provided that it shall include any person employed by or through a contractor, in or in connection with work of the establishment, which words were held wide enough to include work performed elsewhere than the factory itself, including the dwelling house of a home worker, as also that the manufacturing operation, simple as it was, performed by illiterate workers, young and old, subjecting to rejection and acceptance, was by itself an effective degree of supervision and control, establishing the relationship of master and servant.

13. In whatever manner the word ''employee'' u/s 2(9) be construed, liberally or restrictedly, the construction cannot go to the extent of ruling out the function and role of the immediate employer or obliterating the distance between the principal employer and the immediate employer. In some situations he is the cut-off. He is the one who stumbles in the way of direct nexus being established, unless statutorily fictional, between the employee and the principal employer. He is the one who in a given situation is the principal employer to the employee directly employed under him. If the work by the employee is conducted under the immediate gaze or overseeing of the principal employer, or his agent, subject to other conditions as envisaged being fulfilled, he would be an employee for the purpose of Section 2(9). Thus besides the question afore-posed with regard to supervision of the principal employer the subsidiary question is whether in the instant case the contractual supervision exercised by the immediate employer (the electrical contractors) over his employee was exercised, on the terms of the contract, towards fulfilling a self-obligation or in discharge of duty as an agent of the principal employer.

14. P.M. Patel case can also be no help to interpret the word ''supervision'' herein. The word as such is not found employed in Section 2(f) of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 but found used in the text of the judgment. It appears to have been used as a means to establish connection between the employer and the employee having regard to the nature of work performed. But what has been done in Patel case cannot ipso facto be imported in the instant case since the word ''supervision'' in the textual context requires independent construction. In the ordinary dictionary sense "to supervise" means to

direct or oversee the performance or operation of an activity and to oversee it, watch over and direct. It is work under eye and gaze of someone who can immediately direct a corrective and tender advice. In the textual sense ''supervision'' of the principal employer or his agent is on ''work'' at the places envisaged and the word ''work'' can neither be construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at all times and at each and every step of the work. A harmonious construction alone would help carry out the purpose of the Act, which would mean moderating the two extremes. When the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidentally, or occasionally, while the work is in progress, so as to scrutinise the quality thereof and to detect faults therein, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would in our view be supervision for the purposes of Section 2(9) of the Act. It is the consistency of vigil, the proverbial ''a stich in time saves nine''. The standards of vigil would of course depend on the facts of each case. Now this function, the principal employer, no doubt can delegate to his agent who in the eye of law is his second self, i.e., a substitute of the principal employer. The immediate employer, instantly, the electrical contractors, can by statutory compulsion never be the agent of the principal employer. If such a relationship is permitted to be established it would not only obliterate the distinction between the two, but would violate the provisions of the Act as well as the contractual principle that a contractor and a contractee cannot be the same person. The ESIC claims establishment of such agency on the terms of the contract, a relationship express or implied. But, as is evident, the creation or deduction of such relationship throws one towards the statutory scheme of keeping distinct the concept of the principal and immediate employer, because of diverse and distinct roles. The definition is well drawn in Halsbury''s Laws of England (Hailsham Edition) Vol. I at page 145, para 350 as follows:

An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given to him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control and supervision of the principal.

And this statement of law was used with approval by this Court in Superintendent of Post Offices v. P.K. Rajamma.

10. The judgments reported at The Regional Director, E.S.I. Corporation 143, Sterling Road, Madras 34 Vs. S SR.S. Brothers, and 1989 LIC 776 (Suhas Chandra Bose and

Ors. v. Employees'' State Insurance Corporation and Ors.) are cited in the same vein. In addition, the judgments reported at (2006) 3 LLJ 223 (K.V. Hymavathi v. Special Deputy Tahsildar and Ors.) and (2006) 2 LLJ 1109 (Forest Development Corporation of Maharashtra Ltd. v. Regional Provident Fund Commissioner and Ors.) have also been placed.

11. The company refers to the standard form used in West Bengal, Sikkim and the Andaman and Nicobar Islands by the office of the Employees'' Provident Fund Organisation to suggest that it is common practice for the provident fund organisation to receive applications for registration of an establishment even though the establishment may not employ 20 or more persons. It is not in dispute that the standard form of intimation by the regional office of the provident fund organisation in Calcutta in the matter of applicability of the provisions of the PF Act and the schemes framed thereunder, includes an application received for extension of the Act u/s 1(4) thereof on a voluntary basis to an establishment. The relevant form reads as follows:

To

....

Sub: Applicability of the Employees'' Provident Funds & Miscellaneous Provisions Act, 1952 and the Scheme framed thereunder to:

M/s. ....

On the basis of particulars furnished by you on .... and on the basis of the inspection of the records of your establishment conducted by the Enforcement Office on .... it is evident that:

(a) Your establishment/factory viz. M/s. .... is engaged in .... which is included in Scheduled-I/Class of establishments in Employees'' Provident Funds and Miscellaneous Provisions Act, 1952.

(b) That the said establishment/factory has employed .... persons on ....

(c) That it has fulfilled the provisions of Section 1(3)(b) of the Employees''

Provident Funds and Miscellaneous Provisions Act, 1952 on .... therefore, the provisions of the E.P.F. and Misc. Provisions Act, 1952 and the Schemes framed thereunder are applicable to your above named establishment together with head office and its branches/departments whether situated at the same places or at different places with effect from .... subject to further verification of your records for the earlier period.

With reference to your Application No. .... dated .... received for extension of E.P.F. & Misc. Provisions Act, 1952 u/s 1(4) of the said Act on a voluntary basis a Code No. is hereby allotted to your establishment namely .... provisionally covering your

establishment with effect from .... pending issue of a notification by the Government of India in exercise of the powers conferred on them by Sub-section (4) of Section 1 of the E.P.F. and M.P. Act, 1952.

The Code No. WB/CA/.... is allotted to your establishment for the purpose of making compliance with the various provisions of the E.P.F. and Misc. Provisions Act, 1952 and the Schemes framed thereunder namely E.P.F. Scheme 1952, Employees'' Pensions Scheme, 1995 and Deposit Linked Insurance Scheme, 1976. The Code No. should invariably be quoted in all the correspondences with the Office.

All the forms prescribed under the Employees'' Provident Fund Scheme, 1952, the Employees'' Pension Scheme, 1995 and the Deposit Linked Insurance Scheme, 1976 are available in the P.F. Office and will be supplied free of cost on receipt of your indent, specimen of forms are enclosed.

Employees'' Pension Scheme contributions, should be separated from the Employees'' Provident Fund Contributions and shown separately in the respective Forms and remitted separately in Account No. 10 .... As regards E.P.F., E.P.S. and E.D.L.I. dues for the period from .... to .... the arrear should be remitted on or before .... The receipt of this letter alongwith its enclosures may kindly be acknowledged....

12. Upon the original notice being published by the company, the petitioner No. 1 made a representation to the company with a three-fold prayer. The contractors'' body wanted a waiver of authentication of papers from the licensing board. Such matter has not been pressed in these proceedings. The two other demands were that contractors should be permitted to obtain a PF code from another organisation; and, the requirement of ESI registration should be waived. It was following such representation that the subsequent notice was published on or about January 29, 2009 requiring applicants to have PF registration code in their own names and dispensing with the mandatory requirement of ESI registration on the company''s appreciation that the ESI scheme may not be applicable to all work sites of the company. However, in lieu of ESI registration in respect of work sites not covered by the ESI scheme, the company required the applicant contractors to indicate that the benefits under the Workmen''s Compensation Act, 1923 would be applicable to the relevant contractors'' workers.

13. Since the initial notice permitted contractors to, in a sense, borrow PF registration codes from other organisations, one of the grounds taken in the petition is that such a system is open to misuse. It is not relevant to look into such argument as the amended notice does not permit "outsourced" PF registration codes being submitted by any contractor seeking enlistment or renewal. The petitioners seek to make out that draconian conditions have been imposed by the company. If such is the case and the conditions set as part of the eligibility criteria are alleged to be harsh, the scope of judicial review is limited unless it is demonstrated that the entire exercise is to exclude most others and confer a benefit

on a chosen few; even in such a case the writ court would be slow to interfere for the State and its instrumentalities must be allowed freedom to set their terms in doing business and the criteria could be undone only if they were found to be arbitrary, discriminatory, mala fide or actuated by bias. The petitioners attempt to make out a case of illegality. It would, doubtless, be illegal if the company attempted to bypass the provisions of either statute or took any measure that would rob the ultimate workers of any benefit under either statute. However, it is difficult to gauge from the mere notice as amended that such is the intention of the company. It is possible that the company could cite the enlistment criteria at a future date when a question arises as to the liability of the company in the matter of a benefit due under either statute to a worker working under an enlisted contractor. It may then not do for the company to refer to the eligibility criteria and claim that the contractor would be solely liable for all benefits due to every worker under such contractor and the company had no responsibility in the matter. The liability of the company has then to be assessed on the reading of the statutes. But it is premature to project what the company''s stand would be at a future date and claim today that the eligibility criteria set are illegal. If the company acts in the manner that the petitioners apprehend, such conduct may be held to be unfair or even be seen to be illegal, but the unfairness or the illegality would be in the apprehended conduct and not in the eligibility criteria.

14. It is not necessary also to address the question raised by the petitioners that in the matter of the applicability of the PF Act and of the ESI Act, the ultimate responsibility to ensure compliance with the provisions thereof would be that of the company. The eligibility criteria do not spell out that the company would be absolved of any liability in the matter of compliance with the provisions of either statute. Further, even if an enlisted contractor meeting the new conditions failed to deposit the amounts due on account of provident fund in respect of all or any of the workers under such contractor, the company may still have to stand up and take responsibility therefore. There is no direct nexus between the eligibility criteria and the company''s liability under law; merely because it seeks registration codes from its aspiring contractors under the PF Act and the ESI Act, does not absolve the company of its liability, if any, to the workers under the enlisted contractors in respect of the benefits available to them under either Act.

15. In the Division Bench judgment in the unreported case of T.C. Ghosh & ors., Section 1(4) of the Act is not specifically referred to. There are three parts to Section 1(4) of the Act. In the first part it is provided that even when the statutory preconditions as to the applicability of the provisions of the Act - whether u/s 1(3) or u/s 16(1) thereof - were not met, an establishment could still make the provisions of the said Act applicable to it. The second part is the condition for the provisions of the PF Act to apply to an establishment which would otherwise not be covered by the said Act: there would have to be an agreement between the employer and the majority of employees in relation to the concerned establishment that the

provisions of the Act should be made applicable to the establishment. The third limb provides that the central provident fund commissioner may, upon the two previous conditions being fulfilled, apply the provisions of the Act to the relevant establishment either from the date of the agreement between the employer and the majority employees at the establishment or from any subsequent date specified in such agreement. There is a further aspect to the sub-section in that it requires a notification to be made in the Official Gazette, but the issue as to whether the publication in the Official Gazette is mandatory for the applicability of the provisions of the Act to an otherwise exempted establishment, is irrelevant in the present context. The PF Act imposes onerous conditions on the employer. It makes the provisions of the Act applicable to certain establishments on the basis of the number of employees and the nature of work. It mandates that the employer within the meaning of the said Act has to discharge certain obligations in respect of the employees covered by the provisions of the said Act. It defies reason that if an employer not otherwise covered by the provisions of the said Act were to willingly agree to be covered thereby and confer the benefits thereunder to its employees, that the provident fund commissioner would stand in the way. The emphasis that has been placed by the petitioners on the word "may" in Section 1 of the Act to suggest that notwithstanding an agreement between an employer and the majority employees at its relevant establishment, the provident fund commissioner would still have discretion to refuse the registration, cannot be appreciated. It is not necessary to either lay down that upon there being an agreement between the employer and the majority of employees at an establishment, and an application for registration being made in respect of the establishment; it is incumbent on the provident fund commissioner to grant a registration. Yet, it is difficult to conceive of a situation where the provident fund commissioner - the protectorate of the employees in respect of benefits conferred under the statute - can refuse registration when the employer and the majority employees at an establishment otherwise not amenable to the provisions of the said Act concur to make the provisions applicable to the establishment. The refusal to accord registration would be the exception and such decision would have to bear scrutiny; the granting of registration would be the expected course of action.

16. There may be another reason why the word "may" has been used in Section 1(4) of the Act. If one were to disregard the opening clause of Section 1(4), the wording of the provision before it provides the manner of application of the provisions reads as follows:

... where it appears to the Central Provident Fund Commissioner, whether on an application made to him in this behalf or otherwise, that the employer and the majority of employees in relation to any establishment have agreed that the provisions of this Act should be made applicable to the establishment, he may, ...

17. The word "may", therefore, governs the clause "whether on an application made to him in this behalf or otherwise". The discretion that is ordinarily inherently associated with the word "may", has to be attributed to such clause in Section 1(4). The provident fund commissioner is empowered to make the provisions of the PF Act applicable to an establishment if there is an agreement between the employer and the majority employees at the establishment in that regard. The commissioner can do so either on an application made to him for such purpose or otherwise. The word "may" covers both situations: an application being made for registration or there being no application for such purpose. The tenor of the sub-section and ordinary logic would require the commissioner on receipt of an application assess whether there is an agreement between the employer and the majority of employees at the establishment which is otherwise not covered by the Act. But if there is no application and yet the commissioner is otherwise aware of an agreement between the employer and the employees of an establishment otherwise not amenable to the Act, the commissioner has a choice whether or not to suo motu grant the establishment a registration. Since either case - that of an application being received and of the commissioner''s authority to act otherwise - governs the word "may", there is reason in the use of such word in preference to "shall". Also, the word "may" leaves room for the provident fund commissioner to assess whether the agreement is for the benefit of the employees for, it is just as possible that an agreement ostensibly beneficial to the employees may have been brought about for some other unfair purpose.

18. The substance of the reasoning, without reference to the specific words of the statute, would also apply in the case of ESI registration. And, the lacuna in the eighth condition of the original notice in making ESI registration mandatory to all aspiring enlisted contractors has been removed upon subsequent recognition that not all parts of the company''s territory may be covered by the ESI scheme. The amended eighth clause allows a contractor whose area of operation would not be covered by the ESI scheme to make a declaration that it would extend the benefits under the Workmen''s Compensation Act to its workers. On the limited scope of scrutiny available in the circumstances and without speculating on what may be if the company were to cite the eligibility criteria to evade its responsibility to the workers under the enlisted contractors, it does not appear that either criterion assailed in these proceedings is arbitrary or illegal or discriminatory or otherwise unbecoming an authority under Article 12 of the Constitution to have set the same.

19. The writ petition fails. But since the petitioners did not apply for enlistment or renewal in view of the pendency of the proceedings, the company should be gracious enough to extend the deadline for receiving applications by at least a fortnight from date. There will be no order as to costs.

20. Urgent certified photostat copies of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.