Bombay High Court Ralliwolf Limited vs The Regional Provident Fund ... on 15 September, 2000 Equivalent citations: (2001) 1 BOMLR 235, 2001 (88) FLR 692, (2001) ILLJ 1423 Bom, 2001 (2) MhLj 169 Author: . D Chandrachud Bench: . D Chandrachud ORDER Dr. D. T. Chandrachud, J. 1. Rule, returnable forthwith. Respondents waive service. By consent taken up for final hearing. 2. The issue involved in the present proceedings is whether an action to recover dues payable under the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, is maintainable when the employer who is sought to be proceeded against, is an Industrial Company in respect of whom a proceeding is pending under the Sick Industrial Companies (Special Provisions) Act, 1985. Since the petition involves a lis not merely between the employer, the Petitioner before the Court, and the Regional Provident Fund Commissioner and the grant of any relief would impinge upon vital interests of the employees engaged in the industrial undertaking, the Unions representing workmen were impleaded in these proceedings. Accordingly, the Association of Engineering Workers and the Maharashtra Rajya Rashtriya Kamgar Sangh have been impleaded as the Third and the Fourth Respondents and the perspective of the workers has been placed for consideration before this Court by their learned Counsel as well. Since the issue involves a matter of some importance, with the consent of the learned Counsel for the parties, the petition is being heard and disposed of finally by this judgment. 3. On 4th September, 1991, a Company by the name of Rallies India Ltd. which was then described as forming a part of the Tata Group of Companies, sold its Engineering Division together with the Petitioner, which was a subsidiary, to the HMP Group of Companies. In 1998, the Petitioner made a reference before the Board for Industrial and Financial Reconstruction (B.I.F.R.) under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (S.I.C.A., 1985). On 1st May, 1998, the B.I.F.R. declared the Petitioner as a Sick Industrial Company and the Industrial Credit and Investment Corporation of India (I.C.I.C.I.) was appointed under Section 17(3) of the Act in order to prepare a rehabilitation proposal after considering the viability of the Petitioner. An Appeal against the order of the B.I.F.R. was filed by the Fourth Respondent, the Maharashtra Rajya Rashtriya Kamgar Sangh. By an order dated 12th March, 1999, the Appeal was allowed and the order of the B.I.F.R. was set aside. In its order, the Appellate Authority directed that the I.C.I.C.I., which was to work as an Operating Agency under Section 16(2) of the Act, shall engage the services of a firm of Chartered Accountants for conducting a special investigation into the audited accounts of the Petitioner especially for the five financial years prior to 31st December, 1998. The Appellate Authority directed that after the report was submitted and the objections of the parties were heard, the B.I.F.R. would take a view as to whether or not, the Petitioner was a Sick Industrial Company. This order of the A.A.I.F.R. was passed in view of the serious allegations made on behalf of the Union representing the workmen that the Petitioner was not, in fact, a sick industrial undertaking; that there had been a manipulation of accounts for the financial year ending 31st December, 1998 and that funds had been siphoned off by selling the products of the Petitioner to HMP Engineering Ltd., a Group

Company, at prices even below the cost of production. A reference to these submissions is contained in para 3(e) of the order of the A.A.I.F.R. dated 12th March, 1999. As directed by the A.A.I.F.R., the I.C.I.C.I. conducted a special investigative audit in respect of the accounts for the five years ending on 31st December, 1998. The investigative audit by the I.C.I.C.I. found that the Petitioner had appointed a Company known as 'HMP Engineering (P.) Ltd., which was a Group Company to sell its products in India and more than 70 percent of the total sales of the Petitioner were generally sold through HMP. The differential between the price at which products were sold to HMP as compared to those products which were sold to independent purchasers, was found to be between 40 to 50 percent. The prices at which products were sold to HMP had not been reviewed since 1993 though there were regular increases in the prices of the same products sold to other parties. The investigative report noted that HMP was making large payments on behalf of the Petitioner and large amounts of cash were being withdrawn from the Bank accounts of HMP mainly during the years 1996 to 1998. Since a substantial portion of the sales had taken place through HMP at a lower price, this had resulted in a decrease in the revenue of the Petitioner. 4. By its order dated 12th May, 2000, the B.I.P.R. came to the conclusion that there had occurred a deliberate diversion of the funds of the petitioner and that the promoters had not approached the B.I.F.R. with clean hands. In the circumstances, while rejecting the reference which had been filed under Section 15(1) of the S.I.C.A., 1985, the B.I.F.R. made the following observations : - "2. I.C.I.C.I., (OA) vide their letter dated 28.2.2000 have forwarded a status report with observations based on S.I.A. It has been observed that major transactions have been routed through HMP Engineers (P.) Ltd. and the prices offered by them have not been revised since 1993 in spite of regular increase in price of the same products sold to others. This has resulted in substantial decrease in the revenues of the Company. Considering the growing market conditions in portable power tool sector and spares sector the losses of the Company would have been substantially reduced, had the transactions not been routed through HMP. Besides, administrative and personel expenditure have shown upward trend. 3. I.C.I.C.I., in their letter dated 14.4.2000, have stated that the average variance in prices charged to M/s. HMP Engineers (P.) Ltd. and direct selling prices ranged from 42.70% in the year 1995 to 50.67% in 1997. Obviously, such a large price variation cannot he justified on any ground. 4. On the foregoing it is clear that there is substantial diversion of funds by the Company and the Company has been made artificially sick by deliberate diversion of Fund. The promoters have not taken care to protect the Company. Hence Company/promoters have approached the Board with unclean hands. The Bench, therefore, is unable to rely on the financial statements of the Company. Therefore, the reference made by the Company u/s 15(1) is non-maintainable and is rejected." 5. The B.I.F.R. rejected the reference which had been filed by the Petitioner under the S.I.C.A., 1985 on 12th May. 2000. Against the order of the B.I.F.R.„ an Appeal has been filed by the Petitioner before the A.A.I.F.R. which has been admitted by an order dated 16th August, 2000. The impact of the admission of the Appeal by and its pendency before the

A.A.I.F.R. will have to be considered for the purpose of determining the issues which arise in the present petition. 6. In the Writ Petition which has been filed by the Petitioner, a reference has been made to the fact that a lock out came to be declared by the Petitioner by a notice dated 9th June, 1999 by which operations at the establishment at Mulund, Mumbai, came to be suspended. Proceedings thereafter ensued between the Petitioner and the Third Respondent before the Industrial Court in a Complaint of unfair labour practices filed by the Employer, being Complaint (ULP) No. 742 of 1999. The Petitioner had given a notice of change under Section 9-A of the Industrial Disputes Act, 1947 to the Third Respondent in order to implement a reduction in wages and an alteration in certain conditions of service. Ultimately, according to the averments in the Petition, an amicable settlement came to be arrived at on 12th October, 1999 on the subject of the notice of change and normal operations at the factory at Mulund were restored on 20th October, 1999. 7. The present Petition relates to the dues and outstandings of the Petitioner under the Employees Provident Funds and Miscellaneous Provisions Act, 1952. Between the period May, 1996 to May, 2000 a sum of Rs. 3,15,66,508/- has been found to be due and payable under the provisions of the said Act to the First and Second Respondents. Out of the said amount, an amount of Rs. 66,59,230/- represents the employees' share towards the provident fund which had been deducted by the Petitioner from the wages and salaries of the employees but has not been paid to the Regional Provident Fund Commissioner who maintains provident fund accounts of individual employees. Necessarily also, the Petitioner has not paid its own contribution towards the provident fund of the workmen engaged by it. In the affidavits filed in these proceedings by the Fourth Respondent - Union as well as by the Regional Provident Fund Commissioner, there has been a reference to the fact that in the past also there had been a default by the Petitioner in the payment of its provident fund dues. In an earlier Writ Petition (W.P. No. 844 of 1997) which was filed by the Petitioner against inter alia the Regional Provident Fund Commissioner, an order in terms of Minutes was passed by a learned Single Judge of this Court (Mr. Justice P. S. Patankar) on 20th March, 1997, by which the Petitioner agreed to pay its dues then outstanding for the period from April, 1996 to January, 1997 amounting to Rs. 93.76 lacs in 12 monthly installments with interest at the rate of 12% per annum. Though the order which was passed by the learned Single Judge was a consent order, the Petitioner failed to pay the installments towards the provident fund dues in pursuance of the installments which were granted by the order. Ultimately, the provident fund dues have increased and, according to the Regional Provident Fund Commissioner as well as according to the Chart which has been submitted in para 21 of the Petition, an amount of Rs. 3,15,66,508/- has not been paid by the Petitioner. 8. The Petitioner having failed to pay its contribution towards the provident fund dues, a proceeding was initiated under Section 7A of the Act for determining the monies which were due and payable by the Petitioner. Upon the conclusion of the said proceedings, recovery certificates were issued on 12th March, 1998 and on 29th April, 1998 for recovery of provident fund dues in the amounts of Rs. 1.23 crores and Rs. 1.20 crores respectively. The

Petitioner has thereafter filed a proceeding under Section 7B of the Act before the Competent Authority for a review of the order on the ground that there was an arithmetical mistake in the order which had been passed under Section 7A of the Act. The authorities exercising jurisdiction under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, have issued demand notices dated 13th June. 2000 seeking the payment of the aforesaid amounts respectively of Rs. 1,20,91,886/ - and Rs. 1,23,64,928/-. On 29th June, 2000 warrants of attachment have been served upon the Petitioner by which the movable and immovable properties of the Petitioner have been attached towards the payment of the provident fund dues. Prohibitory orders have been issued on 14th June, 2000 to the Bankers of the Petitioner in pursuance of the demand of the First Respondent towards the payment of provident fund dues. The representations made by the Petitioner having not yielded a reversal of the action which had been taken against the Petitioner, the present proceedings have been filed in order to challenge the actions of the First and Second Respondents. The Petitioners have impugned the demand notices, the orders of attachment and the prohibitory orders. 9. The submission which has been urged on behalf of the Petitioner is that the action which has been adopted by the authorities under the provisions of the E.P.F. Act, 1952, is contrary to the provisions of Section 22(1) of the S.I.C.A., 1985. The learned Counsel appearing on behalf of the Petitioner submitted that though the reference which was filed by the Petitioner under Section 15(1) of the S.I.C.A., 1985 was rejected, since an appeal filed against the order of the B.I.F.R. is pending before the A.A.I.F.R., no proceedings for execution, distress or the like against the properties of the Petitioner could have been maintainable. 10. In considering the correctness of the submission which has been urged on behalf of the petitioner, reference may be made to some of the fundamental provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. The Act of 1952 is an Act to provide for "the institution of provident funds, pension funds, and deposit linked insurance funds for employees in factories and other establishments." The Act is a piece of beneficent legislation intended to provide, as a matter of social security, the benefit of provident fund and other entitlements to employees to whom the Act applies. Section 5 of the Act empowers the Central Government to frame the employees' provident fund scheme for the establishment of provident funds under the Act for employees or for any class of employees and specify the establishments or class of establishments to which the said scheme shall apply. After the framing of the scheme, a Fund is established which is vested in and administered by the Central Board constituted under Section 5A of the Act. Section 6 of the Act prescribes that the contribution which has to be paid by the employer to the Fund, shall be eight and one third per cent of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees. The employees' contribution shall be equal to the contribution payable by the employer. The proviso to Section 6 stipulates that the Central Government may prescribe that in its application to an establishment or a class of establishments the rate of contribution shall be ten per cent instead of eight and one third per cent. Section 6-A of the Act provides for the employees' pen-

sion scheme and Section 6-C for the employees' deposit linked insurance scheme. Section 7-A empowers the Provident Fund Commissioner and his officers to determine, inter alia, the amount due from any employer under the provisions of the Act. Section 11 of the Act provides for the priority of payment of contributions over other debts. Section 12 lays down that no employer shall, by reason only of his liability for the payment of any contribution under the Act or the scheme reduce, the wages of any employee or the total quantum of benefits in the nature of old age pension, gratuity, provident fund or life insurance to which the employee is entitled under the terms of his employment, express or implied. 11. The penalties which are provided for a breach of the provisions of the Act are contained in a group of Sections beginning with Section 14. Section 14-B of the Act empowers the Central Provident Fund Commissioner to recover damages from an employer who makes a default in the payment of any contribution due from him. Though in the present case, no damages have been levied under Section 14-B of the Act, and what is claimed is only the dues of the Petitioner towards contributions of the employees as well as the employer, the provisions of Section 14-B are relevant for considering the effect of proceedings under the S.I.C.A., 1985 in relation to the 1952 Act. Section 14-B was amended by Act No. 33 of 1988 with effect from 1.9.1991. Section 14-B as amended provides as follows : "14-B. Power to Recover Damages - Where an employer makes default in the payment of any contribution to the Fund, the Pension Fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under sub-section (2) of Section 15 or sub-section (5) of Section 17 or in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified under Section 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the scheme : Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard : Provided further that the Central Board may reduce or waive the damages levied under this Section in relation to an establishment which is a Sick Industrial Company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, (1 of 1986) subject to such terms and conditions as may be specified in the Scheme." 12. In exercise of the powers conferred by the Act, Central Government has framed the Employees' Provident Fund Scheme, 1952. Para 26 of the Scheme requires that every employee employed in or in connection with the work of a factory or other establishment to which the Scheme applies, other than an excluded employee, shall become a member of the Fund. Para 30 of the Scheme postulates that the employer shall, in the first instance, pay both the contribution payable by himself and also, on behalf of the member employed by him, the contribution payable by such member. The principal employer is obligated to pay the contributions payable by himself in respect of employees directly employed by him as

well as in respect of employees engaged by or through a contractor together with the administrative charges. Para 31 of the Scheme provides that the employer shall not be entitled to deduct the employer's contribution from the wage of a member or otherwise to recover it from him. However, the employee's contribution can be recovered under para 32 by the employer by means of a deduction from the wages of the members of the scheme. Para 32-B is once again relevant because it is relatable to the question of a waiver of damages in the case of a Sick Industrial Company. Para 32-B provides as follows : - "32-B. Terms and conditions for reduction or waiver of damages : - The Central Board may reduce or waive the damages levied under Section 14-B of the Act in relation to an establishment specified in the second proviso to Section 14-B, subject to the following terms and conditions, namely : - (a) in case of a change of management including transfer of the undertaking to workers' co-operative and in case of merger or amalgamation of the Sick Industrial Company with any other Industrial Company, complete waiver of damages may be allowed : (b) in cases where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its scheme, in this behalf recommends, waiver of damages up to 100 percent may be allowed; (c) in other cases, depending on merits reduction of damages up to 50 percent may be allowed." Para 38 of the Scheme provides that the employer shall, before paying the member his wages in respect of any period or part of a period for which contributions are payable, deduct the employee's contribution from his wages which together with the employer's contribution as well as administrative charges shall be paid to the Fund within fifteen days of the close of every month. The amounts recovered every month from the wages of an employee as well as the contribution made by the employer are required to be entered by the employer every month in the contribution card opened in the name of each member of the Scheme, under para 40. Para 40-A provides that every employer shall, on an employee becoming a member of the Fund, provide a Pass Book to every such member and maintain the Pass Book in the form and manner as directed by the Commissioner from time to time. Para 59 of the Scheme requires that an account shall be opened in the office of the Fund in the name of each member in which shall be credited; the contribution of the member, the contribution of the employer as well as the amount of Interest. Para 60 requires the Commissioner to credit to the account of each member interest at such rate as may be determined by the Central Government. 13. These provisions of the E.P.F. Act, 1952 emphasise the true nature and character of the provident fund. The Act and the Scheme mandate that the employer make a deduction from the wages payable to the employee who is a member of the Fund equal to the contribution of the employee to the Fund every month. The employee's contribution together with the employer's contribution is required to be paid in to the Fund by the employer within the stipulated period. These amounts, whether by way of a contribution of the employee or the contribution of the employer, are monies which belong to the employee. An account which is required to be maintained in the name of each member of the provident fund, contains the contributions of the employee, the employer as well as the interest which has been credited. Provident fund is the foundation of an important mea-

sure of social security provided to employees of those establishments to whom the Act applies. The monies which have been deducted from their wages as well as the amounts which the employer is required to pay as his contribution, belong to the employees and constitute their rightful and just entitlement for the eventual payment of provident fund benefits. These monies can be withdrawn by the employee in certain eventualities even prior to the attainment of the age of superannuation. The scheme makes provision for withdrawal from the Fund and for the grant of advances from the Fund in special cases. These include the following : - "66-B Withdrawal from the Fund for the purchase of a dwelling house/flat or for the construction of a dwelling house including the acquisition of a suitable site for the purpose. 68-BB Withdrawal from the Fund for repayment of loans in special cases. 68-H : Grant of advances in special cases. 68-J : Advance from the Fund for illness in certain cases. 68-K : Advance from the Fund for marriage of children. 68-L : Advance from the Fund in abnormal conditions. 68-M : Advance from the Fund to members affected by cut in the supply of electricity. 68-N : Advance to members who are physically handicapped. 68-NN : Withdrawal within one year before the retirement of the member." 14. The Sick Industrial Companies (Special Provisions) Act, 1985 was enacted to make in public interest, special provisions with a view to securing the timely detection of sick and potentially Sick Companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such Companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto. Section 3(o) defines the expression 'Sick Industrial Company'. Under sub-section (1) of Section 15 where an Industrial Company has become a Sick Industrial Company, the Board of Directors of the Company, shall, within sixty days from the date of finalisation of the duly audited accounts of the Company for the financial year as at the end of which the Company has become a Sick Industrial Company, make a reference to the Board for determination of the measures which shall be adopted with respect to the Company. Under sub-section (1) of Section 16 of the Act, the Board is empowered to make an enquiry for determining whether any Industrial Company has become a Sick Industrial Company. Under sub-section 2 of Section 16, the Board can appoint an operating agency to enquire into and make a report with respect to such matter as may be specified by it. Section 17 of the Act specifies that after making an enquiry under Section 16, if the Board is satisfied that a Company has become a Sick Industrial Company, the Board shall decide whether it is practicable for the Company to make its net worth exceed the accumulated losses within a reasonable time. Under sub-section (3) of Section 17 the Board can direct the operating agency to frame a scheme where the Board decides that it is not practicable for the Sick Industrial Company to make its net worth exceed its accumulated losses within a reasonable time and that it is necessary and expedient in the public interest to adopt the measures referred to in Section 18. Section 18 of the Act contemplates the framing of a scheme by the operating agency where an order is passed by the Board under Section 17(3) of the Act. After the scheme is prepared, it is required to be examined by

the Board and the Board is empowered to make such modifications as it may deem fit after considering the suggestions and objections received thereto. The scheme is thereafter sanctioned under sub-clause (4) of Section 18 and after it comes into operation the scheme binds the Company, its shareholders, creditors, guarantors and the employees amongst others. 15. Section 22 of the Act inter alia provides for suspension of legal proceedings and contracts in certain cases in relation to sick Industrial Companies. Sub-section 1 of Section 22 provides as follows : - "22. Suspension of legal proceedings, contracts, etc. :- (1) Where in respect of an Industrial Company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanction scheme is under implementation or where an appeal under Section 25 relating to an Industrial Company is pending, then, notwithstanding anything contained in the Companies AC, 1956(1 of 1956) or any other law or the memorandum and articles of association of the Industrial Company or any other instrument having effect under the said Act or other law, no proceedings for the winding-up of the Industrial Company or for execution, distress or the like against any of the properties of the Industrial Company or for the appointment of a Receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the Industrial Company or of any guarantee in respect of any loans, or advance granted to the Industrial Company shall lie or be proceeded with further, except with the consent of the Board, or, as the case may be, the Appellate Authority." The provisions of Section 22 came to be amended in 1993. As a result of the amendment it is not merely proceedings for execution, distress or the like or for the appointment of a Receiver that can lie or be proceeded with except with the permission of the Board or the Appellate Authority but no suit for the recovery of money or for the enforcement of any security against the Industrial Company or of any guarantee in respect of any loans or advance granted to the Industrial Company shall lie or be proceeded with further, except with such consent of the Board or the Appellate Authority. Section 22 of the Act comes into operation where (i) an enquiry under Section 16 is pending, or (ii) a scheme referred to under Section 17 is under preparation or consideration or (iii) a sanctioned scheme is under implementation or (iv) an appeal under Section 25 relating to an Industrial Company is pending before the Appellate Authority. The provisions of Section 22 of the Act have an overriding effect notwithstanding anything contained in the Companies Act, 1956 or in any other law. In fact, once a scheme is made, even the scheme is give an overriding effect by Section 32 of the Act. 16. The provisions of the S.I.C.A., 1985 have been interpreted in several judgments of the Supreme Court. In Maharashtra Tubes v. S.I.I.C. of Maharashtra, the Supreme Court considered the applicability of the provisions of Section 22(1) of the S.I.C.A.„ 1985 in relation to the provisions of the State Financial Corporation Act, 1951. The Supreme Court held that both the 1951 Act as well as the 1985 Act are special statutes, the former having been enacted to assist industrialisation by the grant of financial assistance and the latter, to provide for the revival and rehabilitation of sick industrial Companies. The Court held that the underlying object and purpose of the S.I.C.A.„ 1985 is that during the pendency of the enquiry under

Section 16, the preparation of a scheme under Section 17, the implementation of a sanctioned scheme or the pendency of the Appeal under Section 25, actions for execution, distress or the like shall not He or be proceeded with and "should be frozen" unless expressly permitted by the specified authorities until the notification for the revival of the industrial undertaking is finally determined. The Supreme Court held that in cases of sick industrial undertakings, the provisions contained in the 1985 Act would ordinarily prevail and govern over the 1951 Act. Both the 1951 Act as well as the 1985 Act were held to be special provisions and each one of them contains a statutory provision giving overriding effect to the respective statute. The Supreme Court held that it was the S.I.C.A., 1985 which would prevail over the State Financial Corporations Act, 1951. The judgment in the Maharashtra Tubes case also lays down that the word "proceeding" in Section 22(1) cannot be given a narrow or restricted interpretation so as to confine it only to legal proceedings. Therefore, a proceeding under Section 29 of the 1951 Act against a defaulting industrial concern was held to be within the purview of Section 22(1) of the S.I.C.A., 1985. 17. A similar view, as in its judgment in the Maharashtra Tubes case was taken by the Supreme Court in Gram Panchayat v. Shree Vallabh Glass Works Ltd., where the Supreme Court held that coercive steps to recover dues for the payment of property tax under the Bombay Village Panchayats Act, 1959 would fall within the contemplation of Section 22(1) of the S.I.C.A., 1985 and that no coercive steps could, therefore, be taken without the permission of the B.I.F.R., Similarly in its judgment in Tata Davy Ltd. v. State of Orissa, the Supreme Court held that arrears of sales tax dues could not in view of the provisions of Section 22(1) be recovered by coercive process unless the B.I.F.R. gave its consent. 18. The submission of the Petitioner is that in view of the law laid down by the Supreme Court in relation to the provisions of Section 22(1), the recovery of provident fund dues of employees would fall within the purview of that Section. The First Respondent cannot, in the submission of the Petitioner, resort to coercive steps to enforce the recovery of provident fund dues in view of the provisions of Section 22(10. 19. At the outset, it has to be noticed that the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 came to be amended by Act 33 of 1988. The amendment of 1988, in so far as it is material for the present purposes, expressly notices the position of a Sick Industrial Company under the Sick Industrial Companies (Special Provisions) Act, 1985. Section 14-B empowers the Provident Fund Commissioner to levy damages where there is a default in the payment of provident fund dues. The levy of damages presuppose the existence of a default in the payment of a contribution which is due and payable to the Fund. By the Amendment of 1988, the second proviso came to be inserted in Section 14-B as a result of which the Central Board constituted under Section 5A of the Act was empowered to reduce or waive damages in relation to an establishment which is a Sick Industrial Company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction under the provisions of the S.I.C.A., 1985 subject to the terms and conditions of the scheme. In order to render the second proviso applicable, it is thus necessary that (1) the establishment must be of a Rick In-

dustrial Company, (ii) that in respect of the Sick Industrial Company a scheme should have been sanctioned by the B.I.F.R., under the S.I.C.A., 1985 for its rehabilitation and (iii) the reduction or waiver of damages would be subject to the terms and conditions as may be specified in the scheme framed under the S.I.C.A.. 1985. Para 32 of the Employee's Provident Fund Scheme, 1952 expounds upon the second proviso to Section 14-B. Clause B of para 32-B postulates that the Central Board may allow a waiver of damages up to 100 per cent in cases where the B.I.F.R., for the reasons to be recorded in the scheme recommends such waiver. 20. The amendment to the E.P.F. Act, 1952 was enacted by Act 33 of 1988. Parliament was conscious of the existence of the Sick Industrial Companies Act, 1985 which had been enacted a few years earlier. In amending the provisions of section 14-B. Parliament empowered the Central Board to reduce the quantum of damages that may be required to be paid under the said Section. There is no provision by which the liability of the employer to pay the contribution of the employer or the contribution of the employee has been excused or exempted. Even in the case of a sick industrial undertaking, the obligation of the employer to deduct and pay the employee's contribution together with his own contribution continues to subsist. Parliament as a matter of legislative policy has enacted that the employer shall, however, be granted a waiver of damages payable under Section 14-B where the undertaking of the employer is a sick industrial undertaking and a scheme for its rehabilitation has been sanctioned. There again, it must be noticed that the eligibility to the grant of waiver under section 14-B is subject to those conditions which have been prescribed therein. Parliament having thus amended the E.P.F., Act, 1952 to take within its purview the position of a sick industrial undertaking, the extent of the immunity which has been conferred upon such undertaking with reference to provident fund dues under the Act, must be confined to what has been legislated by Parliament. The extent of the immunity or exemption cannot be extended beyond what was allowed in terms of the amendment to the E.P.F. Act, 1952. 21. Apart from this position, the question that arises for consideration is as to whether a Company which is a sick industrial undertaking can claim the benefit of the provisions of section 22 in respect of the dues payable towards provident fund and other benefits under the E.P.F. Act, 1952. In the present case, as a matter of fact, it must be noticed that the reference to the B.I.F.R., came to be made some time in 1998. The dues which have become payable relate to the period both prior and subsequent to the making of the reference. The dues cover contributions of the employees as well as of the employer. The contributions of the employees have been deducted by the employer in the instant case but have not been paid into the Fund. The moneys have been unlawfully retained by the employer. 22. In Dy. Commercial Tax Officer v. Corromandal Pharmaceuticals, the Supreme Court considered the question as to whether dues on account of Sales Tax which had occurred after the date of the sanctioned scheme would fall within the purview of Section 22(1) of the Act. A Bench of the Supreme Court consisting of two learned Judges held that while the language of Section 22 was wide, it would have to be construed reasonably to apply only to those dues which were reckoned or included in the sanctioned scheme. Consequently

where a Sick Industrial Company had after the date of the sanctioned scheme collected the amount of sales tax but had failed to pay it over to the revenue, it would not be open to the Company to seek shelter under the provisions of Section 22(1). In that connection, the Supreme Court held as follows : - "The language of Section 22 of the Act is certainly wide. But, in the totality of the circumstances, the safeguard is only against the impediment, that is likely to be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in, by Section 22 of the Act. So, we are of the view that though the language of Section 22 of the Act is of wide import regarding suspension of legal proceedings from the moment an inquiry is started, till after the implementation of the scheme or the disposal of an appeal under section 25 of the Act, it will be reasonable to hold that the bar or embargo envisaged in Section 22(1) of the Act can apply only to such of those dues reckoned or included in the sanctioned scheme. Such amounts like ales tax, etc., which the Sick Industrial Company is enabled to collect after the dale of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22 of the Act. Any other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amounts due to the Revenue and withhold it indefinitely and unreasonably. Such a construction which is unfair, unreasonable and against spirit of the statute in a business sense, should be avoided," 23. In a number of reported judgments, learned Single Judges of this Court have had occasion to consider the impact of Section 22(1) of the S.I.C.A., 1985 in the area of the payment of workers' dues. In Baburao P. Tawade v. HES Ltd.. Bombay, Mr. Justice B. N. Srikrishna held that the payment of earned wages could not have been within the purview of Section 22(1) of the Act and that the provisions of the S.I.C.A., 1985 must be held to apply only to such proceedings which are not required for the day-to-day running of the Sick Industrial Company. The learned Judge noticed that Section 22(1) had been amended by Parliament in 1993 to expand its width. The object of Section 22, according to the judgment of the leaned Single Judge, was to ensure that "the attempts at revival of a Sick Industrial Company are not rendered nugatory by predatory creditors nibbling away at the capital and other assets of the Industrial Company which is being revived". The learned Judge referred to the judgments of the Supreme Court in Gram Panchayat v. Shree Vallabh Glass Works Ltd., and Maharashtra Tubes v. S.I.I.C. of Maharashtra, as well in the case of M/s. Shree Chamundi Moped Ltd., v. Church of South India Trust Association, Madras, in which it has been held by the Supreme Court that Section 22(1) would not come in the way of a proceeding instituted by the landlord of a Sick Industrial Company for eviction on the ground of default in the payment of rent. Before the learned Single Judge, the judgment of a learned Single of the Allahabad High Court in Modi Industrial Ltd. v. Addl. Labour Commissioner, Ghaziabad, was cited. On a review of the law, Mr. Justice B. N. Srikrishna held thus: "No construction can be put upon the provisions of Section 22, which could result in a situation of exploitation of human beings, contrary to the provisions of our constitutional directives. I am therefore unable to accept the contention

that the payment of earned wages to the workmen (it cannot be disputed that payment under settlement would be 'wages' within the meaning of Section 2(rr) of the Industrial Disputes Act) was intended to be defeated by invoking the bar under Section 22(1) or to drive the workmen to run to New Delhi for seeking the consent of the B.I.F.R., every time their monthly wages were required to be paid. That, surely, was not the Parliament's intention, in my view. The reconciliation suggested by the learned Judge in Modi Industries case (supra) appeals to me and, therefore, the bar in Section 22(1) of the S.I.C.A., must be held to apply only to such proceedings which are not required for the day-to-day running of the Sick Industrial Company, even under a sanctioned schemed or otherwise. Any other interpretation would lead to a ludicrous and unintended result". The judgment of the learned Single Judge thus holds that Section 22 of the S.I.C.A., 1985 must be reasonably construed to refer to only those proceedings which are not required for the day-to-day operation of the Company. The payment of earned wages is clearly required for the day-today operation of the Company and therefore, a proceeding for the recovery of earned wages would not fall within the purview of Section 22(1). A similar view has been taken by another learned Single Judge of this Court, Mr. Justice A.P. Shah, in Modistone Ltd. v. Deputy Commissioner of Labour, wherein it was held that Section 22 would not operate in the field of payment of wages, gratuity and other statutory benefits payable to the workmen. The learned Single Judge referred to the fact that the judgment delivered by Mr. Justice B. N. Srikrishna in Baburao P. Tawade's case was approved in the case of Girni Kamgar Sanghatana Samitt v. Khatau Mackanji Spinning and Weaving Co. Ltd., and that a Special Leave Petition filed against the said judgment was rejected by the Supreme Court. Mr. Justice A. P. Shah summed up the position thus : - "Thus, it is a settled law that it is not open for the Company to take shelter of Section 22 in respect of the workers' wages and other dues. A feeble attempt was made by Mr. Vasudeo to distinguish the above judgment by contending that the present case relates to payment of gratuity to the workmen and since such claim is in the nature of arrears, the case would be governed by the decision of the Apex Court in Tata Davy Ltd. v. State of Orissa and Ors.,. I am unable to accept the submission made by the learned counsel for the petitioners. By no stretch of imagination gratuity can be called arrears of wages. The basic minimum which the workman is entitled to get is the wages and gratuity and other statutory benefits". In Corona Ltd. v. Sitaram Atmaram Ghag, Mr. Justice F. I. Rebello has placed the issue, of principle, as involving the workers' fundamental rights under Article 21 of the Constitution. The learned Judge held that the payment of wages and terminal benefits is a part of the right to life and consequently in enacting Section 22(1) of the S.I.C.A.. 1985 Parliament could not have contemplated that these dues which were part of the right to livelihood of the workmen under Article 21 should not be recovered. The learned Judge held thus : - "7E. What is involved herein are the wages and other legal dues of the workers. To my mind considering the various judgments including that of four High Courts referred to by the Industrial Court it is impossible to conceive a situation where Parliament, duly knowing the true import of Art.

21 of the Constitution would be deemed and presumed to have taken a view that the wages and terminal benefits to which the workers are entitled to are not payable until permission is obtained from the Board. Wages and terminal benefits to which the workers are entitled, must constitute and deemed to be part of their right to life. They are the minimum required for their sustenance and of their families. It is impossible in this situation to consider that for the purpose of rehabilitation of an industry workers must be denied their legitimate dues. Even in a case of winding up. Parliament realising the need to protect the workers has made them pari passu charge holders with secured creditors by introducing Section 529A and amending Sections 529 and 530 of the Companies Act. In these circumstances workers cannot be put in a worse position than that of a Company which is being wound up." A similar view had been taken by the learned Singe Judge in an earlier judgment in National Textile Corporation v. B. N. Jalgaonkar,. 24. In order to complete the reference to the judgments of the learned Single Judges on this point, reference may be made to the decision of a learned Single Judge of the Allahabad High Court in Mod Industries Ltd. v. Addl. Labour Commissioner, Ghaziabad,. In the decision of the Allahabad High Court, the Petitioner before the Court had been declared as a sick industrial undertaking by the B.I.F.R. A recovery certificates was issued by the Additional Labour Commissioner to recover the wages due to the workmen as arrears of land revenue under the UP Industrial Peace (Timely Payment of Wages) Act. 1978. In holding that Section 22 would not come in the way of the action for recovering the wages of the workmen, the learned Judge held as follows : - "In my opinion, the purpose and object of Section 22 cannot be to cover those proceedings or actions which are necessary for running the industry irrespective of the fact whether it is sick or non-sick. If the industry cannot run without workers, the workers also cannot expert to work without payment of their wages. The timely payment of the wages for which the provisions of the Act of 1978 have been enacted would thus be a step helping rehabilitation and it cannot be said that it creates an obstacle in fulfilling the object which the Act of 1985 has been enacted. Both the Acts are thus complimentary to each other. Section 22 cannot thus affect the proceedings taken under Section 3 of the Act of 1978 for compelling petitioner to make payment of the wages already accrued to the workers ....." Indeed, it was held by the learned Judge that compelling the workmen to work without wages would amount to forced labour which is prohibited by Article 23 of the Constitution. 25. The judgment of the Supreme Court in the Corromandal's case (supra) and judgments of the learned Single Judges which have been adverted to by me earlier, lay down the principles which should guide and determine the outcome of the proceedings in this case. The provident fund and other dues payable under the E.P.F. Act, 1952, are part of the legitimate statutory entitlements of the workers. The employer is obligated to pay the contribution of the employees a well as his own contribution to the Fund which is set up under the Act. The contribution of the employees is, in fact, a deduction from the wages which are due and payable to the employees. The deduction which is made from the wages is required to be deposited into the Fund by the Employer. These contributions belong to

the employees. The employees are entitled to those contributions and can draw upon them even while they are in service for meeting the unforeseen eventualities and exigencies that may arise in the life of an employee. They constitute an important measure of social security. The circumstances in which withdrawals and even advances can be given to an employee in service are specified in the scheme. No industrial undertaking can work or operate without the work which is rendered by the employees. No work can be demanded save and except for payment of wages and other statutory benefits. The payment of provident fund dues to the Fund, therefore, stands on the same footing as the payment of wages which is due to the employees. That is an entitlement to which the employees are entitled by dint of the work which they have put in. These are dues which are payable whether or not an undertaking is sick. They constitute an intrinsic part -of the employees' right to life under Article 21 of the Constitution. Having regard to the principles which have been laid down by the Supreme Court in the Corromandal Pharmaceutical's case (supra) and by the learned Single Judges of this Court, including those in Baburao P. Tawade's case I am of the view that the recovery of provident fund and other dues under the E.P.F. Act. 1952 does not fall within the scope and purview of Section 22(1) of the S.I.C.A., 1985. In coming to this conclusion I am fortified by the fact that Parliament, when it amended the provisions of the E.P.F. Act, 1952, granted only a limited protection confined to a waiver of damages under Section 14-B of the Act in the case of a Sick Industrial Company in respect of whom a sanctioned scheme is under implementation. 26. In Organo Chemical Industries v. Union of India, the Supreme Court held that the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 is a social security measure intended to effectuate the Directive Principles of State Policy contained in Articles 39 and 41 of the Constitution. Paras 2, 3 and 15 of the judgment of the Supreme Court contain, if I may say so, with respect, a lucid exposition of the object and purpose of the Act and are material to the present controversy : "2. .....the scheme of the Act is that each employer and employee in every 'establishment' falling within the Act do contribute into a statutory fund a title, viz. 6 1/4% of the wages to swell into a large fund wherewith the workers who toil to produce the nation's wealth during their physically fit span of life may be provided some retiral benefit which will 'keep the pot boiling' and some source wherefrom loans to face unforeseen needs may be obtained. This social security measure is a human homage the State pays to Articles 39 and 41 of the Constitution. The viability of the project depends on the employer duly deducting the workers' contribution from their wages, adding his own little and promptly depositing the mickle into the chest constituted by the Act. The mechanics of the system will suffer paralysis if the employer fails to perform his function. The dynamics of this beneficial statute derives its locomotive power from the funds regularly flowing into the statutory till." 3. The pragmatics of the situation is that if the stream of contributions were frozen by employers' defaults after due deduction from the wages and diversion for their own purposes, the scheme would be damnified by traumatic starvation of the fund, public frustration from the failure of the project and psychic demoralisation of the miserable beneficiaries when they find

their wages deducted and the employer get away with it even after default in his own contribution and malversation of the worker's share ....." 15. The measure was enacted for the support of a weaker sector viz. the working class during the superannuated winter of their life. The financial reservoir for the distribution of benefits is filled by the employer collecting by deducting from the workers' wages, completing it with his own equal share and duly making over the gross sums to the Fund. If the employer neglects to remit or diverts the moneys for alien purposes the Fund gets dry and the retirees are denied the meagre support when they most need it. This prospect of destitution demoralises the working class and frustrates the hopes of the community itself ....." 27. On behalf of the Petitioner, 3 reference was made to a decision of the Calcutta High Court dated 24th February, 1999 in Regional Provident Fund Commissioner v. M/s. Nuddea Industries Ltd. and Regional Provident Fund Commissioner v. The Nuddea Mills Co. Ltd., In the aforesaid case, the Nuddea Mills Co. Ltd. was the lessor which had granted a lease in respect of one of its industrial units in 1991 to Nuddea Industrial Ltd. for seven years. Dues were outstanding under the provisions of the E.P.F. Act, 1952 to the extent of Rs. 6.75 crores. Nuddea Industries Ltd. the lessee undertaking was not a sick unit whereas lessor Company was declared as sick. The Division Bench of the Calcutta High Court held that the benefit which was granted in favour of a sick unit could not be extended in favour of the Company which was not a Sick Industrial Company. Consequently, the lessee which was not a Sick Industrial Company could not be protected by Section 22(1). The direction given by the learned Single Judge in respect of the lessee undertaking was thus set aside. However, in so far as the lessor Company was concerned, the Division Bench was of the view that since it was a sick unit, it was entitled to the protection of Section 22 of the Act, and no steps could be taken to realise the dues by taking recourse to coercive measures. The Court, however, clarified that there was no merit in the submission that the assets in the hands of the lessee Company could not be sold, only because the lessor is a sick Company. The judgment of the Calcutta High Court, it is true, thus holds that at least in so far as the lessor Company was concerned, which was a Sick Industrial Company. Section 22(1) would operate to prevent a recourse to oppressive measures for the recovery of provident fund dues since the lessor Company was a sick Company. The Trial Court had granted an injunction in respect of the recovery which was sought to be effectuated against both the lessor as well as the lessee Companies. In appeal, the Division Bench confined the relief to the lessor Company which was a sick Industrial undertaking only. Having perused the judgment of the Calcutta High Court, I would respectfully hold that the amendments which were made to the E.P.F. Act, 1952 in 1988 were not placed before the Court. Besides, the entitlement of the workers to their wages and to their statutory dues has been considered at length by other learned Single Judges of this Court in (1995) II C.L.R. 81, (1999) II C.L.R. 371, (1997) 1 C.L.R. 1102 and 2000 (3) L.L.N. 167. The learned Single Judge of this Court in Baburao P. Tawade's case (1995) IIC.L.R. 81 has based his reasoning and conclusion on judgments of the Supreme Court to which reference has already been made earlier. As held by my learned Brother A. P. Shah in Modi-

stone (1999) II C.L.R. 371, the judgment delivered by our learned Brother, B. N. Srikrishna J. in Tawade's case (supra) was approved by the Division Bench in another case and a Special Leave Petition against the latter was rejected by the Supreme Court. 28. In the result, I am of the view that the provisions of Section 22(1) of the S.I.C.A., 1985 would not be of any assistance to the Petitioner in the facts and circumstances of the present case, having regard to the nature of the payments required to be made by way of provident fund and other contributions under the E.P.F. Act. 1952. I do not find any substance in the present Petition which is accordingly rejected. There shall be no order as to costs. Certified copy of the order expedited. An ordinary copy of this order may be made available to the parties.