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

% *Judgment delivered on: 19th November, 2014*

+ **W.P. (C) No. 5362/2013**

M/S POLYTHENE BAG FACTORY Petitioner
Represented by: Mr. Anurag Ahluwalia, Adv.

Versus

ASSISTANT P.F. COMMISSIONER Respondent
Represented by: Mr. Dinesh Kumar, Adv.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide the present petition, the petitioner has assailed the order dated 16.04.2010 passed by the Employees Provident Fund Appellate Tribunal, New Delhi, in ATA No. 398 (5) of 2003.
2. The petitioner has also assailed the recovery proceedings emanating therefrom.
3. Mr. Anurag Ahluwalia, learned Counsel appearing on behalf of the petitioner submitted that petitioner is an Establishment functioning in the Forest Department under the State of Gujarat. It has not applied voluntarily for the coverage of The Employees' Provident Funds and

Miscellaneous Act, 1952 (for short 'EPF Act'), but the EPF Authority / Respondent brought the petitioner / Establishment within the ambit of the Act and assessed the dues by including the casual employees engaged by the petitioner. The petitioner is a non-profit making Establishment and provisions of EPF Act are not applicable to it. Thus, the order passed by the Authority is illegal.

4. Ld. Counsel has referred Sections 1 and 3 of EPF Act, which read as under:-

“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.

3. Power to apply Act to an Establishment which has a common provident fund with another Establishment. -
Where immediately before this Act becomes applicable to an Establishment there is in existence a provident fund which is common to the employees employed in that Establishment and employees in any other Establishment, the Central Government may, by notification in the Official Gazette direct that the provisions of this Act shall also apply to such other Establishment.”

5. Mr. Ahluwalia, Ld. Counsel further submitted that EPF Act is applicable upon an Industry if 20 or more workmen are employed by it. To this effect, the petitioner has drawn attention of this Court to the details showing Muster Roll, information, year, month with muster roll number and amount of PBF. He submitted that in the year 1998-99, there were 9 occasions where the number of the workmen touched 20, in the year 1997-98, the number of the workers reached to 20 on 13 occasions and in the year 1991, the number of workmen touched 20 on

5 occasions only. Despite, the Id. Authority passed the order dated 27.09.2001 as under:

“On 25.09.2001, Shri B.J. Nayak-Asst. Forest Conservator Rajpipla-Silva Division, Department of Forest appeared on behalf of the Establishment and submitted that the contribution towards the Provident Fund and other allied dues in respect of Employees of the Establishment have not been deposited in the EPF A/Cs for the period under consideration. He also submitted the details of the employees and the wages paid to them in form of a statement duly certified by the by the Dy. Forest Conservator and Range Forest Officer, Rajpipla Division, Department of Forest, Govt. of Gujarat which has been taken on record. As the said statement has been certified by the competent authorities of the State Government the same is taken as authentic and the dues are assessed on its basis as under: -

<i>Period</i>	<i>A/c I</i>	<i>A/c II</i>	<i>A/c X</i>	<i>A/c XXI</i>	<i>A/c XXII</i>
<i>02/1986</i>	<i>493810</i>	<i>24810</i>	<i>147376</i>	<i>17142</i>	<i>500</i>
<i>to</i>					
<i>08/1999</i>					

In addition to the above, due to non-payment of the dues in time by the Establishment an interest amounting to Rs.3,07,249/- calculated @ 12% p.a. w.e.f 01/07/1997 onwards on the outstanding dues as provided under section 7Q of the Act has also become due for payment by the Establishment as under: -

<i>I</i>	<i>II</i>	<i>X</i>	<i>XXI</i>	<i>XXII</i>
<i>226431</i>	<i>11042</i>	<i>61587</i>	<i>7927</i>	<i>262</i>

In this context, I have gone through the information available on the records of the department as well as the

submission of the Establishment and have found the above mentioned dues and interest being claimed by the department to be genuine and reasonable.

In the light of the above and keeping in view the facts that any further prolongation of the proceedings will be unjustifiable (because the Establishment has always being absenting itself from the proceedings for the last so may proceedings), I, in exercise of the powers conferred upon me under section 7A of the Act and after having applied the best of my mind to the documents and details produced before me do hereby assess the dues outstanding and payable by the Establishment in the five EPF A/cs as Rs.6,83,638/- (Rs. Six lacs eighty three thousand six hundred thirty eight only) plus interest under section 7Q of the Act amounting to Rs.3,07,249/- (Rs. Three lacs seven thousand two hundred forty nine only) aggregate Rs.9,90,887/- (Rs. Nine lac ninety thousand eight hundred eighty seven only). ”

6. Being aggrieved, the petitioner challenged the order dated 27.09.2001 in Review and the same was rejected vide order dated 23.01.2002 as under: -

“ On due consideration of the above mentioned pleas advanced by the Establishment it is observed that none of this points provide any ground for non-applicability of the act to the Establishment and non-assessment of the dues payable in the respective EPF A/cs for the benefit of the employees of the Establishment, nor do the above mentioned pleas of the Establishment debar the employees of the Establishment from being entitled to the benefits extended to them under the Act. The Establishment’s being a government body does not exclude it from the purview of the Act. Further the Establishment may not be an industrial Establishment. But the Act is applicable to the non industrial Establishment also and the Hon’ble Courts referred to by the Establishment have never ruled that the Act will not be apply to the non-

industrial Establishments. Similarly, the Establishment's being engaged in socially beneficial activities and working on a no profit no loss pattern does not render its employees ineligible for and unentitled to the vital social security benefits extended to them under the Act.

7. Being aggrieved again, the petitioner filed an appeal and same was dismissed vide order dated 16.04.2010 as under:

“ Since the Applicability of the Act in question is the same as to the determine fast. It is not disputed that the Appellant is an Establishment and it was manufacturing Polythene bags. The appellant also not disputed the engagement of Casual Workers by him & it is also not disputed that the Casual Workers were not given the benefit of EPF Act. In the case of Satish Plastic Vs. RPF Commissioner, reported in 1981 Volume (2) LLJ at page 277, the Hon'ble High Court of Gujarat held that “the definition of Employees as content in Section 2 (F) was wide enough to take within its sweep a person permitted to work at his residence as well and further that even if a person was not fully employed but was principally employed in connection with the business of the shop. He would be person employed within the meaning of statutory language”. In the case of the Railway Employees Co-operative Banking Society Ltd. V/s. Union of India reported in 1980 LIC at Page 1212, the Hon'ble Court of Rajasthan held that “the wide definition of Employee in our opinion embarrasses a part time employee as also an Employee who is engaged for any work in the Establishment which may not necessarily be connected with the work of Establishment.

There are no distinctions between the temporary and permanent employees so for the EPF Act is concerned. So the casual employees engaged by the Appellant is also entitled to the benefit of EPF Act.”

8. Ld. Counsel submitted that if in any Establishment, the number of workers reached to 20 or more on some occasion due to work contingency, in that eventuality, this Act is not applicable. Moreover, the Authority under the Act had to conduct enquiry to establish the number of workers employed by the Establishment, however, the Authority failed to do so.

9. Ld. Counsel submitted that Section 7 (A) (1) (a) (b) and (2) (a) (b) of EPF Act read as under: -

“7A. Determination of moneys due from employers.—

(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,—

(a) in a case where a dispute arises regarding the applicability of this Act to an Establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the 3[Pension] Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.

(2) The officer conducting the inquiry under sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect of the following matters, namely:—

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

(b) requiring the discovery and production of documents;.....”

10. Mr. Ahluwalia, further submitted that aforementioned provisions give the power of enquiry to the Authority and that enquiry has to be conducted in a particular manner. However, in the present case, respondent Authority has not conducted any enquiry despite the nominal Roll submitted by the petitioner. Ld. Authority recorded that petitioner was given 18 opportunities to produce the record, however, produced belatedly. Thus, no further enquiry is required and keeping in view the material placed on record, the respondent Authority assessed the EPF and directed the petitioner to deposit the same.

11. Ld. Counsel further submitted, the respondent / Authority failed to establish that there were regular workers in number 20 or more engaged by the petitioner, however all were casual and sometimes the workers were 8-11, but occasionally crossed 20 to 23 in a particular month. Therefore, in such eventuality, the Respondent / Authority had to conduct enquiry, however it failed to do so and even otherwise, if the number of workers reached to 20 or more on some occasion, in that case, the EPF Act is not applicable.

12. To strengthen his arguments, ld. Counsel for the petitioner has relied upon a case of the ***Regional Provident Fund Commissioner, Andhra Pradesh v. T.S. Hariharan, 1971 2 SCC 68***, wherein it is held as under:

“10. 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.”

13. Ld. Counsel for the petitioner further submitted that under Section 7 (A) of EPF Act, the Respondent / Authority was duty bound to conduct the enquiry, which has not been done, however, in the absence of evidence on record, the impugned order has been passed.

14. To strengthen his arguments on this issue, ld. Counsel for the petitioner has relied upon a case of ***Food Corporation of India v. Provident Fund Commissioner and Ors. 1990 1 SCC 68***, wherein it is held as under:

“7. The question, in our opinion, is not whether one has failed to produce evidence. The question is whether the Commissioner who is the statutory authority has exercised

powers vested in him to collect the relevant evidence before determining the amount payable under the said Act.

8. It is of importance to remember that the Commissioner while conducting an inquiry under Section [7A](#) has the same powers as are vested in a Court under the CPC for trying a suit. The section reads as follows:

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

(2) The Officer conducting the inquiry under Sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a Court under the CPC, 1908, for trying a suit in respect of the following matters, namely:

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

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses.

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

9. It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person

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

15. Ld. Counsel further submitted that the EPF Act, does not contain the code of procedure, however, under Section 7A of EPF Act, the Respondent Authority has to conduct the enquiry as per the provisions contained in the Civil Procedure Code, 1908. In the present case, no such steps have been taken by the Respondent / Authority.

16. On the other hand, Mr. Dinesh Kumar, Id. Counsel appearing on behalf of respondent No. 3 submitted that petitioner has not produced the year-wise record of the workman, as to how many workmen were engaged by the petitioner. Moreover, as per Section 1 sub-clause (3) of EPF Act, the Scheme of the Act is applicable to all Factories and other Establishments and the petitioner Establishment is squarely falls under the Scheme of the Act.

17. Ld. Counsel has referred to Section 2 (f) of EPF Act, the same is reproduced as under: -

“
(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;.....”

18. Ld. Counsel submitted that employees / workmen are not excluded as noted above in Sub-clause (i) and (ii) of Section 2 (f) of EPF Act. Accordingly, the provisions of EPF Act are applicable on the petitioner Establishment.

19. Ld. Counsel further submitted that in the year 1997-98, there were 13 occasions, where the number of workers reached up to 20. Therefore, if the number of workers reached up to 20 or more, then the Act is fully applicable on the Establishment. Accordingly, the Assistant Provident Fund Commissioner in his order dated 27.09.2001 has recorded as under: -

“In Course of the proceedings under section 7A of the Act for assessment of the dues for the above mentioned period of default, i.e., from February, 1986 to August, 1999 more than sufficient opportunities on not less than 18 (eighteen) opportunities have been provided to the Establishment to present its case out of which only 08 dates the Establishment has presented its case through its representatives.”

20. Thus the Assistant Provident Fund Commissioner has given them numerous opportunities to produce the record, however, they did

not produce the same year-wise and it is not established whether in a particular year the workmen were less than 20. Therefore, the order passed by the Authority is proper and the present petition deserves to be dismissed. Moreover, Section 1 (5) of EPF Act prescribes as under:

“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.”

21. Ld. Counsel further submitted that this Act is applicable on an Establishment which continued to be governed by the EPF Act notwithstanding the number of persons employed therein at any times falls below 20.

22. Ld. Counsel submitted that it is an admitted case of the petitioner that the number of workmen reached 20 or more in a particular year and once the number of workmen touched 20, hence, the provisions of EPF Act are applicable on the said Establishment.

23. I have heard the learned counsel for the parties.

24. Vide order dated 24.09.2014, this Court directed the petitioner to make the statement whether the petitioner Establishment was an Income Tax Payee during the period 1978 to 2001. Accordingly, a letter dated 08.11.2014 accompanied by an affidavit was filed, whereby stated that the petitioner Establishment is a ‘no profit no loss’ unit in house production of polythene bags for their own department’s use for raising plants and has never earned profit or income. Salaries of the employees are paid from Government Grant and production cost is also

given by the Government. The factory is not making any profit on finished goods but the supply of goods to Government is on cost to cost basis for Government purpose only. The petitioner has never sold finished goods in open market and has never taken any profit on it. The petitioner has neither Permanent Account Number (PAN) nor Bank Account. The petitioner has never filed Income Tax Returns since 1978 to 2001.

25. But, the fact remains that the state of Gujarat has not granted exemption under Section 16 of EPF Act. Therefore, the financial position and use of goods do not prevent the applicability of the EPF Act.

26. As submitted by learned counsel for the respondent that the petitioner did not produce the year-wise record of the workmen, as to how many workmen were engaged by the petitioner. Moreover, as per Section 1(3) of EPF Act, the Scheme of the Act is applicable to all factories and other Establishments and the petitioner Establishment is squarely falls under the Scheme of the Act.

27. Section 2 (f) of EPF Act defines the word ‘employee’, which 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, employed by or through a contractor in or in connection with the work of the Establishment. The Assistant Provident Fund Commissioner had given numerous

opportunities to the petitioner Establishment to produce the record, however, they failed to do so year wise.

28. Section 1 (5) of EPF Act prescribes that 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 20.

29. The fact remains that as per the details of Muster Roll, in the year 1998–99, there were 9 occasions where the number of the workmen touched 20, in the year 1997-98, reached to 20 on 13 occasions and in the year 1991, number of workmen touched 20 on 5 occasions.

30. However, vide order dated 27.09.2001, the learned Authority observed that after going through the information available on records of the department as well as the submission of the petitioner Establishment, dues and interest being claimed by the department to be genuine and reasonable.

31. Accordingly, in exercise of powers conferred upon Authority under Section 7A of EPF Act, the said Authority has assessed the dues outstanding and payable by the Establishment in the five EPF A/cs as Rs.6,83,638/- (Rs. Six lacs eighty three thousand six hundred thirty eight only) plus interest under Section 7Q of EPF Act, amounting to Rs.3,07,249/- (Rs. Three lacs seven thousand two hundred forty nine only). Thus, aggregate comes to Rs.9,90,887/- (Rs. Nine lac ninety

thousand eight hundred eighty seven only).

32. Vide order dated 23.01.2002 passed in Review, the respondent Authority observed that the Establishment, being a government body does not exclude it from the purview of the Act. The Establishment may not be an industrial Establishment but the provisions of EPF Act are applicable to the non-industrial Establishments. The Establishment being engaged in socially beneficial activities and working on a 'no profit no loss' pattern does not render its employees ineligible for and disentitled to the vital social security benefits extended to them under the EPF Act. As opined in its order dated 16.04.2010 that there are no distinctions between the temporary and permanent employees as far as the EPF Act is concerned. So the casual employees engaged by the Establishment are also entitled to the benefit of EPF Act.

33. As submitted by the learned counsel for the respondent that if in any Establishment, the number of workers reached to 20 or more, in that eventuality, this Act becomes applicable.

34. I note, Section 16 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 prescribes the category of establishment that are excluded from the purview of the Act. It is not disputed that the Establishment has not been excluded as per Section 16 of the Act. One of the condition precedents for the applicability of the Act is that the Establishment shall have 20 or more persons as employees. An analysis of the documents and materials placed on record would show that during the year 1986, the number of employees

vary from 13 to 16; in 1987 from 8 to 17; in 1998 from 6 to 17; in 1989 7 to 18. In 1990, the number varies from 9 to 20. It is not in dispute that till the year 1990, the number of the employees was less than 20 in Establishment. However, in September, 1990 the number of employees has reached 20. Therefore, the Act becomes applicable to the Establishment. The record also shows that subsequent to the year 1990, the number of employees went down from 20. Once the Act becomes applicable, the Establishment shall continue to be governed by the Act even if the number of persons employed falls below twenty.

35. Thus, the order dated 16.04.2010 passed by the Employees Provident Fund Appellant Tribunal, New Delhi, is hereby set aside to the extent that the starting period for making the contribution to the Provident Fund is February, 1986.

36. Resultantly, the concerned Authority is hereby directed to assess the contribution to provident fund for the period starting from September, 1990 instead of February, 1986 and communicate the same to the petitioner.

37. Simultaneously, the respondent shall place the assessment before the Registrar, who shall release the amount, deposited by the petitioner pursuant to order dated 27.08.2013, as per the entitlement.

38. I hereby make it clear that if the provident fund amount is assessed to be more than the amount deposited by the petitioner, in that case, the petitioner shall deposit the difference amount to the

respondent, if less, the petitioner is entitled to get the withdrawal from the Registrar.

39. In view of above terms, the petition is partially allowed.

**SURESH KAIT
(JUDGE)**

NOVEMBER 19, 2014

Jg/sb