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

Judgment delivered on: 6th August, 2014

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W.P.(C) 8233/2011

SINHA SHIPPING PVT.LTD.

..... Petitioner

Represented by: Mr.Sanjeev Bahl and
Mr. Eklavya Bahl, Advocates.

Versus

THE ASSISTANT PROVIDENT FUND COMMISSIONER,
REGIONAL OFFICE, DELHI NORTH

..... Respondent

Represented by: Mr.Dilip Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. Vide the present petition, the petitioner has assailed the order dated 27.04.2011 passed by the Employees' Provident Fund Appellate Tribunal, New Delhi, in ATA No. 849(4)2007, as well as the order dated 29.06.2007 passed by the Assistant Provident Fund Commissioner, Regional Office, Delhi (North).

2. The petitioner has averred the ground that the learned Tribunal failed to appreciate that the petitioner Company was not having 20 employees at any point of given time and as such, the petitioner Company was not amenable to the provisions of the Employee's Provident Funds Miscellaneous Provisions Act, 1952 (hereinafter to be referred as 'the Act').

3. Mr.Sanjeev Bahl, learned counsel appearing on behalf of the petitioner Company submits that the PF Authority as well as the Tribunal erred in not accepting the explanation of the petitioner Company that the two employees, who were taken as employees of the Company, were never been their employees being personal employees of the Managing Director of the petitioner Company. Only their payments were routed through the Company and that too on account of the Managing Director. The said two employees were working as a driver and sweeper and they were not at all discharging any duty of the Company either directly or indirectly.

4. The second ground taken by the petitioner Company is that the PF Authority and the learned Tribunal erroneously opined on the presumption that the Company was involved in the business of manufacturing ships and as such covered under the Schedule I of Section 2(i) and Section 4 of the Act.

5. Learned counsel for the petitioner Company submits that the petitioner has categorically brought to the notice of the Authority as well as the Tribunal that it is only involved in the business of providing ancillary services to the ship owners in relation to maintenance of the ships etc. and as such, by no stretch of imagination, provisions of PF Act could be made applicable to it.

6. Learned counsel further submits that neither the PF Authority nor the learned Tribunal applied their mind on the said aspect of the matter. The learned Tribunal erred in holding that since the petitioner Company's name 'M/s Sinha Shipping Pvt. Ltd.' contains the word 'ship', which

itself shows that it is engaged in the business of manufacturing of ships and as such covered under Schedule I of Section 2(i) under serial No.11 of the explanation.

7. To strengthen his arguments, learned counsel for the petitioner company relied upon the case of ***The Regional Provident Funds Commissioner, Punjab Vs. Shibu Metal Works, AIR 1965 SC 1076 (V 52 C 172)***, wherein held as under:-

“14. The other circumstance which has to be borne in mind in interpreting the entry is that the interpretation should not concentrate on the word "products" used in it. If this word had been used, say for instance in the material provisions of the Sales-tax Act, the decision as to whether a particular product is liable to pay the tax, would depend upon the consideration whether the product in question falls within the scope of the said Act or not, and in that context, interpretation would naturally concentrate on the character and nature of product in question. In the present case, the entry takes us back to the first clause of Sch. I which refers to any industry engaged in the manufacture of any of the products enumerated by the different entries in Sch. I. So, in construing the relevant entry, what we have to ask ourselves is : is the industry of the respondent engaged in the manufacture of any product mentioned in the entry ? It is the character of the industrial activity carried on by the respondent's undertaking that falls to be determined, and the question is not so much as to what is the product produced as what is the nature of the activity of the respondent's undertaking; is the respondent's undertaking engaged in the manufacture of the products in question ? This consideration is relevant for the purpose of determining the content of the entry.

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22. *The proper way to determine the content of this entry appears to us to be to hold that all products which are generally known as electrical engineering products, or mechanical engineering products, or general engineering products, are intended to be covered by the entry, and the object of Sch. I is to include within the scope of the Act every industry which is engaged in the manufacture of electrical engineering products, mechanical engineering products, or general engineering products. It is the character of the products that helps to determine the content of the entry; can the product in question be reasonably described as an electrical engineering product, or a mechanical engineering product, or a general engineering product? That is the question to ask in every case, and as we have already indicted, in considering the question as to whether the product falls under the category of general engineering product, general engineering should be construed in the limited sense which we have already shown. It may be that in a large majority of cases, the products included within the entry may be produced by electrical or mechanical or general engineering process; but that is not the essence of the matter. The industrial activity which manufactures the three categories of products already enumerated by us, brings the industry within the scope of Sch. I, and therefore, attracts the application of the Act."*

8. Regarding non-application of mind by the Appellate Authority, Mr. Bahl, learned counsel submits that the Appellate Authority has not applied its mind as it has not given any reasoning on the issue that the petitioner Company was involved in the business of manufacturing ships. He submits that if this finding is not given by the Quasi-Judicial Authority, then order passed by the said Authority is bad in law.

9. To strengthen his arguments on the above issue, learned counsel

has relied upon the case of ***Surya Charitable Welfare Society Vs. Central Board of Trustees, Through Central Provident Fund Commissioner & Anr. 171 (2010) DLT 283***, wherein held as under:-

“14. The contention of the petitioner before me is that office of the respondent without considering the aforesaid consideration applied the provisions of the Act to the society with effect from 22.2.2007. The petitioner's contention before the Appellate Tribunal was that the respondent held the ex-parte inquiry under Section 7A against the petitioner establishment without the service of summons or notice under Section 7A.

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17. After considering the order of the Appellate Tribunal dated 11.12.2009 it appears that no reason and grounds have been given for making the final observation in paras 6 and 7 of the impugned order. It is settled law that the findings of any quasi-judicial authority must be based upon reasons and grounds. Similarly, the finding arrived at must be supported by cogent logical examination of facts and the provisions of law after taking note of the contentions raised by the parties and dealing with them. I find that the findings recorded in paras 6 and 7 of the impugned order are unsupported by reasons and that a conclusion has been reached without dealing with the grounds stated in the appeal under Section 7I of the Act. It appears that while coming to the conclusion by the tribunal, the grounds and contentions raised by the petitioner have not been dealt with. The Appellate Tribunal ought to have appreciated the fact that the order passed under Section 7A was ex-parte order, no opportunity was given to the petitioner of being heard. Secondly, various serious issues were raised by the petitioner which ought to have been decided by the Appellate Tribunal in its order. Some of the points have not been mentioned in the impugned order. Thus, the

impugned order is not sustainable. The matter is required to be determined afresh by the Tribunal after discussing the issues raised by the petitioner.”

10. On the other hand, Mr. Dilip Singh, learned counsel appearing on behalf of the respondent submits that the petitioner Company was brought under the purview of the Employee's Provident Funds Miscellaneous Act, 1952, with effect from 01.07.1996, after having employed 20 employees under the Scheduled Head 'Shipping. Thus, the petitioner Company was allotted Code bearing No. DL/21171 on the basis of the report submitted by the Enforcement Officer as per his enquiry report dated 16.09.1998.

11. Moreover, Sh. Sanjay Kumar Sethi, Manager (Accounts) vide his letter dated 09.09.1998 provided the information that the petitioner Company had employed more than 19 employees, i.e., 20 as on 01.07.1996 and prior to that they were not employed more than 19 employees. Accordingly, coverage letter was issued on 29.01.1999 asking the Management to report compliance from that date on provisional basis.

12. Learned counsel further submits that the Assistant Provident Fund Commissioner framed the following issues for consideration:-

“(a) Whether the so called casual staff employed at the residence of the Managing Director are his personal servants or those of the co. and

(b) Whether Co. Estt. Does not fall in any of the schedule Under Sec.1(3) (a) or (b).”

13. Learned counsel submits that regarding issue (a), according to Section 2(f) of the Act, word 'employee', means any person who is

employed for wages in any kind of work, manual or otherwise, in or in connection with the work or 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 Apprentice Act, 1961 (52 of 1961) or under the standing orders of the establishment.

14. Learned counsel further submits that the two employees, namely Sh. Rajinder (Sweeper) and Sh. Ved Prakash (Driver), working at the residence of the Managing Director cannot be treated as apprentices as they were not appointed under the Apprentice Act, 1961 and the petitioner Company did not have any standing orders to make them eligible to pay stipend. The aforementioned persons had regularly been paid by the petitioner Company under the head 'stipend', which subsequently merged/debited to 'salary account', for which the petitioner Company claimed income tax rebate for having been paid them. He submits that they can also not be treated as casual as they were not engaged temporarily for few days for any passing necessity beyond the control of the employer

15. He submits that having claimed the aforementioned income tax rebate, petitioner Company cannot escape its liability to treat them as 'NOT employees' of the Company.

16. In view of the facts recorded above, the learned Authority declined to agree to the petitioner Company's view that payment of stipend to the

employees are of minor importance and that so called ‘stipend’ paid to the casual trainee workers are not wages/salary. Moreover, the petitioner Company could not adduce any evidence to the effect that these two were casual trainee workers.

17. On the issue of applicability of EPF Act upon the petitioner Company, learned counsel for the respondent submits that same has been questioned during the trial and the Appellate Authority has recorded that the burden to prove that the staff strength of the petitioner Company never reached 20 lies on the petitioner Company and relied upon the case of *M/s Saraswati Construction Company Vs. Central Board of Trustees, 2010, LLR, Page 684*, wherein this Court held as under:-

“it is a settled legal position that if any established or employer is not covered under the said Act then it is for the employer to place sufficient cogent and convincing materials before the designated authority under an inquiry under Section 7A of the Act so as to satisfy the authority with regard to inapplicability of the Act and on failure to place any such material the onus cannot be shifted on the Authority to prove the applicability of the Act.”

18. Learned counsel further submits that as recorded by the learned Authority, petitioner Company has not filed any document showing the exact staff strength of its establishment except the list of 20 employees furnished to the Authority. He submits that the driver and helper, who were stated to have been engaged by the Executive Director of the petitioner Company, were being paid under the head ‘stipend’, thus proved that they were working in connection with the work of the establishment.

19. Learned counsel submits that on the issue noted above, the learned Appellate Authority has relied upon the case of ***M/s Royal Talkies Vs. Employees State Insurance Corporation, AIR 1978 SC 1478***, wherein the Apex Court held as under:-

“There must be nexus between the establishment and the work of the employee and it may be a loose connection. The employee may not do nothing directly for the establishment, he may not do anything statutorily obligatory in the establishment, he may not do even nothing which is primarily or necessarily for the survival or smooth running of the establishment or natural to the venture, it is only if the employee does some work it is ancillary incidental or has relevance or link with the objects of the establishment.”

20. Learned counsel further submits that payment of amount to both the driver and helper under the head ‘stipend’ was not disputed. It was contended that this amount was re-imbursed. However, the petitioner Company failed to prove before both the Authorities that this amount was actually re-imbursed and the Clerk wrote the same by mistake.

21. Learned counsel drawn the attention of this Court to the definition of the word ‘employee’, which makes it clear that no difference is made between a casual and a permanent employee and the employees engaged through a contractor are to be treated as employee of the establishment.

22. He submits that qua the above issue, the learned Appellate Authority has relied upon the case of ***P.M.Patel Vs. Union of India, 1986 Vol. 1 SCC 32***, wherein held as under:-

“the definition of the word employee were vide, this includes not only person directly employed by the

employer also those employed through a contractor that included not only those employed in the factory but also those employed in connection with the work of the factory.”

23. Mr. Dilip, Learned counsel submits that the petitioner Company was functioning under the name of ‘M/s Sinha Shipping Pvt. Ltd.’ and the name itself shows that the petitioner Company engaged to deal with ships.

24. Moreover, status of the petitioner Company existed since 01.07.1996 to 2007, i.e., for more than a decade. Therefore, at this stage, the petitioner Company cannot be allowed to take the plea that the Company is not involved in the business of manufacturing ships and do not come under the First Schedule of the Act.

25. It is important that there must be a nexus between the establishment and the work of the employees in order to attract the provisions of the Act. In the present case, the petitioner Company is providing the service to the foreign employer. However, the exact nature and style of the activities that has been carried out by the petitioner company is not on record. Therefore, the petitioner company has not discharged the onus to prove that the particular activity would not fall under Section 2 (i) of the Act. Moreover, apart from providing the service to the foreign company, whether the petitioner’s company is having a separate identity or not is a question of fact, therefore, the petitioner company ought to have produced the relevant documents or materials before the authority under the Act. However, they failed to produce the documents in respect of the activity being carried out by it.

26. In view of the above noted facts, the instant petition is dismissed with no order as to costs.

**SURESH KAIT
(JUDGE)**

AUGUST 06, 2014
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