IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No. 15096 of 2011

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Solar Alternatives and Associated Programmes, Phulwarisharif, through its Secretary, Paul Mariadas, son of Late Selvaraj, resident of St. Mary's Compound, Phulwarisharif, P.S. Phulwarisharif, Distt. Patna.

.... Petitioner

Versus

1. Union of India through the Central Provident Fund Commissioner, Employees Provident Fund Organization, Bhawishya Nidhi Bhawan, 14 Bhikaiji, Cama Place, New Delhi 110066.
2. Regional Provident Fund Commissioner, Employees Provident Fund Organization Bhawishya Nidhi Bhawan, Road No. 6, R. Block, Patna-1.
3. Assistant Provident Fund Commissioner, Employees Provident Fund Organization Bhawishya Nidhi Bhawan, Road No. 6, R. Block, Patna-1.
4. Enforcement Officer (E.P.F.), Bhawishya Nidhi Bhawan, Road No. 6, R. Block, Patna.

.... Respondents

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Appearance :

For the Petitioner/s : Mr. K.M.Joseph

For the Respondent/s : Mr. Sarvadeo Singh

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

<u>CAV ORDER</u>

13. 3-12-2015 The petitioner, invoking writ jurisdiction of this Court under Article 226 of the Constitution of India, has prayed for following reliefs:-

> **1. That impugned order dated 05.07.2011 passed by the Presiding Officer, EPFAT, New Delhi in ATA No. 164 (3) of 2008 be set aside as wholly arbitrary, without due application of mind to evidence on record and the pleadings of the appellant before that APFC and before the Appellate Tribunal and in violation of the mandate of law.**
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> **2. That the impugned order in the appeal dated 23.12.2003 (Annexure-5) contained in letter no. BR/E.B-1/Appl/8331/12160 holding that the petitioner's establishment is covered under**

Employee's Provident Fund and Miscellaneous Provisions Act, 1952 and order notice dated 09.06.2004 issued under section 7A of Employee's Provident Fund and Miscellaneous Provisions Act, 1952 be quashed as arbitrary, without due application of mind to the facts on record and in violation of provision of law.

3. That the petitioner's establishment, which employs less than 20 persons, be declared as not covered by the Employee's Provident Fund and Miscellaneous Provisions Act, 1952.

4. That during the pendency of this application the operation of the impugned orders dated 05.07.2011 passed by the Appellate Tribunal and impugned order contained in letter no. BR/E.B-1/Appl/8331/12160 dated 23.12.2003 be stayed.

The petitioner has pleaded that it is a Society registered under Societies' Registration Act, 1860 for promoting development and use of alternative sources of energy especially solar energy with a view to promote conservation of available sources of energy and protection of environment. The society is engaged in research, development and fabrication of instruments for tapping solar energy and spreading their use among people. It has established a workshop namely Solar Alternatives at St. Mary's Compound, Phulwarisarif, Patna.

The petitioner's establishment was inspected by the Enforcement Officer, Employees Provident Fund Organization/respondent no. 3 some time in the month of December, 2003. After examining the ledgers and vouchers for the period January, 2003 to March, 2003, the Enforcement Officer concluded that **Rs. 44,000/-** (Rupees forty four thousand) was paid as wages and the establishment had engaged about 30 labourers during the month of March, 2003 and accordingly, the establishment in question was coverable under the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "1952 Act"). Aggrieved with the report of the Enforcement Officer, the petitioner submitted an application before the Regional Provident Fund Commissioner, Patna that the petitioner's establishment had employed lesser employees, which was not beyond 20 in number. However, subsequently, the petitioner was noticed, vide letter no. BR/E.B-1/Appl/8331/12160 dated 23rd December, 2003 issued from the office of Regional Provident Fund Commissioner, Bihar, Patna regarding applicability of the "1952 Act" in respect of the petitioner's establishment. Even after receipt of the notice dated 23-12-2003, the petitioner again filed objection in detail on 12-01-2004 drawing the attention of the Regional Provident Fund Commissioner that the establishment was having only five regular employees and five apprentices, which was not sufficient for applicability of the “1952 Act”. Even though, objection was filed by the petitioner, again notice was issued from the office of Assistant Provident Fund Commissioner, vide letter no. 14291 dated 26-03-2004 regarding non-compliance of provisions of the “1952 Act”. The petitioner again filed reply on 21-05-2004 reiterating its earlier stand. Since no heed was paid by the respondents, the petitioner, aggrieved with the notice dated 23-12-2003 (**Annexure – 5** to the writ petition), filed a writ petition, vide C.W.J.C. No. 7980 of 2004. He also filed an application for staying the proceeding during the pendency of the writ petition. However, during pendency of the writ petition, an order was passed by the Assistant Provident Fund Commissioner, Bihar, Patna dated 23-03-2005, vide **Annexure – 14** under Section 7(A) of the “1952 Act”. The Assistant Provident Fund Commissioner declared that the provision of the “1952 Act” was applicable in respect of the petitioner’s establishment. However, the writ petition was subsequently taken up and by order dated 28-08-2007, the writ petition i.e.

C.W.J.C. No. 7980 of 2004 was dismissed, in view of the fact that against the order passed under Section 7(A) of the "1952 Act", there was remedy available to the petitioner under Section 7(I) of the "1952 Act" by way of filing an appeal before the Employees Provident Fund Appellate Tribunal. It was pointed out that after the order dated 23-03-2005 passed by the Assistant Provident Fund Commissioner, Bihar, the petitioner had also filed a review petition under Section 7(B) of the "1952 Act" before the Assistant Provident Fund Commissioner for review of its order. Finally, the petitioner filed an appeal before the Employees Provident Fund Appellate Tribunal, New Delhi (hereinafter referred to as "Appellate Tribunal), vide A.T.A. No. 164(3) of 2008, which stood dismissed on 5th July, 2011. The said order has been assailed in the present writ petition.

Mr. K.M.Joseph, learned counsel for the petitioner has argued that the Enforcement Officer has completely failed to appreciate that in the establishment, there were five regular employees and some apprentices, however; without any cogent reason, the Enforcement Officer in its report had stated that the petitioner's establishment had employed more than 20 persons in the month of March, 2003. By way of referring to **Annexure – 11** to the writ petition i.e. copy of report of the Enforcement Officer dated 14-01-2005, he has argued that apprentices, driver of the transport vehicle etc. have also been treated as employees of the establishment, which is contrary to the provision contained in Section 2(F) of the "1952 Act". Learned counsel for the petitioner further states that a comprehensive reply was filed on 07-03-2005 before the authority concerned after receipt of the report of the Enforcement Officer that the petitioner had never at any point of time employed more than five regular employees, five apprentices and three daily-wage/temporary employees at the establishment. It was indicated that the list of 36 persons mentioned in the report of the Enforcement Officer included the apprentices, students under the National Institute of Open Schooling Centre and also names of number of rickshaw pullers, truck and auto drivers of the town, who were paid their wages for carriage etc. on various dates, but they were not employees. It has been argued that despite the fact that the petitioner had filed an elaborate show cause reply before the authority concerned in a proceeding initiated under Section 7(A) of the "1952 Act", the learned Assistant Provident Fund Commissioner, contrary to record, in its order dated

23-03-2005 (**Annexure – 14** to the writ petition) has recorded that the establishment had failed to submit its reply on the scheduled date. He submits that the Assistant Provident Fund Commissioner has passed the order only on the basis of report of the Enforcement Officer ignoring the specific stand of the petitioner's establishment in its reply. He submits that in complete non-application of mind, the learned Appellate Tribunal has also passed the order. It has been argued that the learned Appellate Tribunal has not even bothered to notice the grounds supported with the documents in the appeal filed by the petitioner and in perfunctory manner, the Appellate Tribunal has dismissed the appeal. It has been emphatically argued that for application of "1952 Act", there must be more than 20 regular employees in an establishment. In case of petitioner's establishment, there were only five regular employees. The action of the respondents has been assailed by learned counsel for the petitioner on the ground that though the petitioner had taken specific stand that apprentices, students and members of transporting agencies were also treated as employees of the establishment, which was contrary to the settled principle, neither the Assistant Provident Fund Commissioner nor the Appellate Tribunal has taken note of such reply of the petitioner.

Mr. K.M.Joseph, learned counsel for the petitioner to strengthen his argument that while considering the applicability of the "1952 Act", the apprentices or temporary or daily-wagers may not be treated as employees has placed reliance on judgment of the Hon'ble Apex Court, reported in **1971 (2) Supreme Court Cases 68 (The Regional Provident Fund Commissioner, Andhra Pradesh -Vs.- Sri T. S. Hariharan)**, **(2006) 2 Supreme Court Cases 381 (Regional Provident Fund Commissioner, Mangalore -Vs.- Central Arecanut & Coca Marketing and Processing Coop. Ltd., Mangalore)** and also on **(2009) 2 Supreme Court Cases 661 (New India Assurance Company Limited -Vs.- Abhilash Jewellery)**. In sum and substance, it was submitted by learned counsel for the petitioner that the order passed by the Assistant Provident Fund Commissioner as well as the Appellate Tribunal is a result of non-application of mind and accordingly, impugned orders are liable to be set aside.

Sri Sarvadeo Singh, learned Central Govt. Counsel, who has appeared on behalf of the respondents/Employees Provident Fund Organization has vehemently opposed the prayer of the petitioner. He submits that the petitioner, one way or the other, succeeded in delaying the implementation of the social act. He submits that "1952 Act" was implemented with a view to protect the interest of poor employees, whereas, the petitioner since 2003 till date has succeeded in frustrating the implementation of the "1952 Act". He submits that initially in the year 2003 itself, an inspection was conducted by the Enforcement Officer and after noticing the fact that the petitioner had employed more than 30 persons, the petitioner was noticed regarding applicability of the "1952 Act". Subsequently, in a proceeding under Section 7(A) of the "1952 Act", again a report was called for from the Enforcement Officer, who again submitted a detailed report on 14-01-2005 indicating therein that the establishment had employed more than 20 persons in the month of March, 2003. After the report was received, the order was passed by the Assistant Provident Fund Commissioner, which was communicated to the petitioner, vide letter dated 23-03-2005 (**Annexure – 14** to the writ petition). He has argued that after receipt of the report of the Enforcement Officer, the petitioner had not brought any material to create doubt in the report, which suggested that the petitioner had employed more than 20 persons. By way of referring to averment made in the counter affidavit, Sri Sarvadeo Singh, learned counsel for the respondent/EPFO submits that impugned orders are not required to be interfered with and the writ petition is fit to be rejected.

Besides hearing learned counsel for the parties, I have also perused the materials available on record. In the present writ petition, the petitioner has also filed rejoinder on 23rd September, 2015 and supplementary affidavit on 30th September, 2015. Alongwith the rejoinder, the petitioner has brought on record a copy of memo of appeal, which was filed under Section 7(I) of the “1952 Act” before the Appellate Tribunal. The petitioner by filing rejoinder and supplementary affidavit has tried to take the plea that since the establishment itself is granting benefit of the provident fund under its own scheme, there is no point for applicability of “1952 Act”. At the very outset, it may be noticed that the order under Section 7(A) of the “1952 Act” was passed on 23-03-2005, which was communicated vide **Annexure – 14** to the writ petition on 23-03-2005 itself. Ofcourse, in the writ petition, the petitioner has prayed for quashing of order of the Appellate Tribunal as well as order dated 23-12-2003, no specific pleading has been made in the writ petition for quashing of **Annexure – 14** and as such, it would be difficult for this Court to interfere with the order passed by the Assistant Provident Fund Commissioner, vide **Annexure – 14** to the writ petition. However, on perusal of the **Annexure – 24** to the rejoinder filed by the petitioner on 23rd September, 2015, it is evident that the petitioner had filed an exhaustive memorandum of appeal before the Appellate Tribunal raising the plea that the petitioner's establishment had never employed 20 or more than 20 persons, rather a specific stand was taken that the petitioner was having only 5 regular employees. Same plea was taken before the Assistant Provident Fund Commissioner also. It is stand of the petitioner that apprentices, students and even members of transporting agencies were also treated as employees in the establishment. This plea was consistently taken by the petitioner before the authority concerned and even before the Appellate authority. It is appropriate to note that the apprentices and temporary/daily-wages employees, whose services are not taken on regular basis continuously in an establishment, may not be treated as employees for the purpose of application of "1952 Act". This proposition has already been approved by the Apex Court long back in the year

1971 in **T.S.Hariharan's case** (*supra*). Learned counsel for the petitioner had placed reliance on paragraph – 10 of the said judgment i.e. **1971 (2) Supreme Court Cases 68 (The Regional Provident Fund Commissioner, Andhra Pradesh -Vs.- Sri T. S. Hariharan)**, which is required to be quoted here-in-below:-

> **"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 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."**

Similarly, in **(2006) 2 Supreme Court Cases 381 (Regional Provident Fund Commissioner, Mangalore -Vs.- Central Arecanut & Coca Marketing and Processing Coop.**

Ltd., Mangalore), the Apex Court has excluded apprentices from the definition of employees under the "1952 Act". For just decision in the matter, it would be appropriate to quote paragraph – 14 of the judgment, which is as follows:-

> **"14. Above being the position, it cannot be said that the 45 trainees concerned were employees in terms of Section 2(f) of the Act. In other words, an apprentice engaged under the Apprentice Act or under the Standing Orders is excluded from the definition of an "employee" as per Section 2(f) of the Act."**

Again, the Apex Court in **(2009) 2 Supreme Court Cases 661 (New India Assurance Company Limited -Vs.- Abhilash Jewellery)** has excluded apprentices from the definition of the employees, even though, it was in relation to dispute of insurance claim.

However, the learned Appellate Tribunal has not at all discussed the claim of the petitioner regarding exclusion of apprentices, temporary persons and person of transporting agencies from being considered as employees of the establishment, whereas in the memo of appeal i.e. **Annexure – 24** to the rejoinder of the petitioner, elaborate stand was taken by the petitioner before the Appellate Tribunal. The learned Appellate Tribunal has not discussed the claim of the petitioner and assigned no detailed reason.

The Court is of the opinion that once before the Appellate Tribunal, the petitioner with his supporting documents had taken the specific plea assailing the order of the Assistant Provident Fund Commissioner, it was required for the Appellate Tribunal to take note of those facts and pass a reasoned order. Since the order of the Appellate Tribunal was passed without assigning cogent reason, same is liable to be set aside.

Accordingly, the order of the Appellate Tribunal i.e. order dated 05-07-2011 passed by the Employees Provident Fund Appellate Tribunal, New Delhi in A.T.A. No. 164(3) of 2008 is, hereby, set aside and the matter is remitted back to the Appellate Tribunal to pass order afresh on the basis of materials already on record after affording full opportunity of hearing to the parties.

The writ petition stands allowed as directed here-in-above.

(Rakesh Kumar, J.)

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