IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No. 7484 of 2013

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M/S SHEELA CHITRA MANDIR, DUMRAON AT BUXAR DISTRICT- BUXAR THROUGH ITS PROPRIETOR SRI SHYAM BIHARI SINGH

.... PETITIONER

Versus

1. THE UNION OF INDIA THROUGH THE REGIONAL PROVIDENT FUND COMMISSIONER, BIHAR AT PATNA, OFFICE AT R-BLOCK (SERPENTINE ROAD), ROAD NO. 6, PATNA-800001
2. THE ASSISTANT PROVIDENT FUND COMMISSIONER (COMPLIANCE), BIHAR AT PATNA, OFFICE OF R-BLOCK (SERPENTINE ROAD), ROAD NO. 6, PATNA-800001
3. THE PRESIDING OFFICER, EMPLOYEES PROVIDENT FUND APPELLATE TRIBUNAL, 4TH FLOOR, CORE-2, SCOPE MINAR, LAXMI NAGAR, NEW DELHI – 110092.

.... RESPONDENTS

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Appearance :

For the Petitioner : Mr. Dhanendra Chaubey, Advocate
For the Respondents : Mr. Prashant Sinha, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

CAV ORDER

12. **27-11-2015** In the present writ petition filed under Article 226 of the Constitution of India, the petitioner has prayed for quashing of an order dated 05-09-2012 passed by the Presiding Officer, Employees Provident Fund Appellate Tribunal, New Delhi (hereinafter referred to as the 'Appellate Tribunal') in A.T.A. No. 64 (3) of 2003. By the said order, the Appellate Tribunal has dismissed the appeal of the petitioner. The petitioner has also prayed for quashing of an order dated

27-08-2002 passed by the Assistant Provident Fund Commissioner (Compliance), Patna/Respondent no. 2 under Section 7-A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as '1952 Act'), whereby a dues of Rs. 1,65,992/- (one lac sixty five thousand nine hundred ninety two) has been quantified. The petitioner has also prayed for quashing of a communication, whereby demand was made, vide letter no. 5074 dated 02-09-2002.

Short fact of the case is that the petitioner's establishment was brought under the purview of "1952 Act" w.e.f. 22-12-1985 and a code number was also allotted, vide Code no. BR/5676 to the petitioner's establishment. After the establishment was covered under the "1952 Act", notices were issued for assessment under Section 7-A of the "1952 Act". Notice was issued long back in the year 1995, however; the petitioner raising the grievance that the establishment was not required to be covered under the "1952 Act" approached this Court by filing a writ petition, vide C.W.J.C. No. 10006 of 1995. This Court noticed that the Assistant Provident Fund Commissioner was satisfied that establishment had employed sixteen persons, however; since both the parties had agreed that prior to 1988 for applicability of the "1952 Act", there was requirement of only five employees in an establishment. Thereafter for application of the Act, it was twenty or above twenty employees. This Court by its order dated 19-05-1997 disposed of the writ petition after quashing the order dated 21-09-1995 by the Assistant Provident Fund Commissioner and the matter was remitted back to the Assistant Provident Fund Commissioner, Bihar to decide the matter afresh after giving opportunity to the parties. The said order has been brought on record, as **Annexure – 3** to the writ petition. However, during the pendency of the writ petition, the Assistant Provident Fund Commissioner had passed an assessment order on 18-06-1996 and it was held that **Rs. 91,759/-** (rupees ninety one thousand seven hundred fifty nine) was due. It is evident that order dated 18-06-1996 was not brought to the notice of the writ court in C.W.J.C. No. 10006 of 1995, which was disposed of on 19-05-1997. Thereafter, the petitioner filed a separate writ petition, vide C.W.J.C. No. 12044 of 1996 challenging the order dated 18-06-1996 passed by the Assistant Provident Fund Commissioner, Bihar, Patna

(**Annexure – 4** to the writ petition). Since again the question of applicability of the "1952 Act" was raised, a Bench of this court by its order dated 13-05-1998 passed in C.W.J.C. No. 12044 of 1996 (**Annexure – 5** to the writ petition) disposed of the writ petition without going into the merit of the case. This court directed the respondent authority to dispose of the matter regarding the applicability of the provisions of the Act in accordance with law. It was clarified that ***"Till then the order dated 18-06-96 as contained in Annexure – 1 shall not be given effect to".***

Ofcourse, in the writ petition, the petitioner in paragraph – 12 has stated that the petitioner again filed a writ petition, vide C.W.J.C. No. 6829 of 1998 for quashing of order dated 18-06-1996 & 15-07-1998 and Demand Notice dated 17-07-1998, the petitioner, to the reasons best known to him, has not stated that the said writ petition was finally disposed of on 17-09-1999 and this Court approved the applicability of the "1952 Act" in respect of establishment of the petitioner. However, by filing supplementary counter affidavit, the respondent no. 1 & 2 have brought on record the order dated 17-09-1999 passed in C.W.J.C. No. 6829 of 1998. Since the petitioner had purposely suppressed this fact, this court would have rejected the writ petition only on the ground that the petitioner had not approached this court with clean hands, however; this court heard the parties at length. After the order dated 17-09-1999, whereby while approving the applicability of the "1952 Act" in respect of petitioner's establishment, regarding determination of the dues, the matter was remitted back to the concerned authority for passing a fresh order within specified time. In compliance with the order dated 17-09-1999 passed in C.W.J.C. No. 6829 of 1998 (**Annexure – B** to the supplementary counter affidavit), the assessing authority i.e. Assistant Provident Fund Commissioner (Compliance) assessed the liability and passed order on 27-08-2002 (**Annexure – 6** to the writ petition), which has been challenged in the present writ petition and thereafter, vide **Annexure -6/1** i.e. letter no. 5074 dated 02-09-2002, the petitioner was directed to deposit the said amount. Again, the petitioner approached this Court by filing a writ petition, vide C.W.J.C. No. 12127 of 2002, however; keeping in view the fact that against the order passed under Section 7-A of the Act, there was statutory remedy available to the petitioner of appeal, the writ petition was disposed of by its order dated 23-01-2003 (**Annexure – 7** to the writ petition). Thereafter, certain development had taken place, in which, it appears that appeal of the petitioner stood dismissed, which was assailed by the petitioner again in a writ petition, vide C.W.J.C. No. 16943 of 2010. The Single Bench did not interfere and the petitioner thereafter filed an appeal, vide L.P.A. No. 487 of 2011. The L.P.A. Court allowed the appeal and directed the Appellate Tribunal to restore the appeal and decide the same on its merit, vide **Annexure – 8** to the writ petition. Finally, the appellate authority by its order dated 5th September, 2012 dismissed the appeal i.e. A.T.A. No. 64 (3) of 2003, which too has been assailed in the present writ petition.

It is a peculiar case that though the applicability of the "1952 Act" in respect of petitioner's establishment was finally approved by a Single Bench of this court by its order dated 17-09-1999 in C.W.J.C. No. 6829 of 1998, Sri Dhanendra Chaubey, learned counsel for the petitioner had consumed much precious time of this court on this issue. He again started arguing that the "1952 Act" is not at all applicable in respect of petitioner's establishment on the ground that the petitioner's establishment has not employed persons up-to twenty or above. He has again argued that for applicability of the "1952 Act" in an establishment, there must be at least 20 employees. He emphasized that the writ petition is required to be allowed on this ground alone that in view of employees lesser than 20 in the petitioner's establishment the "1952 Act" is not at all applicable and as such, order passed by the Assistant Provident Fund Commissioner as well as appellate authority are liable to be set aside. He has alternatively argued that the order of the assessment authority is liable to be set aside on the ground that the assessing authority has not identified the employees. He submits that while passing assessment order under Section 7-A of the 1952 Act, it is necessary to identify the employees. According to him, the assessment order does not reflect about the identification of the employees. To strengthen his submission on this point, he has placed reliance on a judgment of this Court reported in **2013 (2) P.L.J.R. 931 (M/s Roxy Cinema Vs. State of Bihar & Ors.)**. He has specifically referred to paragraphs 6, 11 and 12 of the said judgment and submits that even on alternative argument in absence of identification of the employees the impugned orders are liable to be set aside.

Sri Prashant Sinha, learned counsel for respondents/E.P.F.O. has vehemently opposed the prayer of the petitioner. He submits that right from very inception the petitioner one way or the other had tried to delay the implementation of the “1952 Act”, which is a social act meant for welfare of poor employees. He submits that the applicability of the “1952 Act” in respect of petitioner’s establishment was finally approved by a Bench of this court in C.W.J.C. No. 6829 of 1998. He has argued that purposely the petitioner had suppressed this fact in the writ petition. Even though the applicability point was approved by this court, learned counsel for the petitioner during argument has emphasized as if the “1952 Act” was not at all applicable in respect of the petitioner’s establishment. According to Sri Sinha, learned counsel for respondents, the writ petition is fit to be rejected on the ground of suppression of fact itself. He submits that it was mandatorily required for the petitioner to indicate in the writ petition that applicability point has already been approved by this court, but this fact was suppressed. The respondents by filing supplementary counter affidavit have brought on record a copy of the order dated 17-09-1999 passed in C.W.J.C. No. 6829 of 1998, vide **Annexure – B** to the supplementary counter affidavit. He further submits that after the matter was remitted back, in view of order dated 17-09-1999, full opportunity was given to the petitioner to produce all relevant record, however; the petitioner only produced Attendance-cum-Payment Register for the period 4/1990 to 3/1992 and copy of registration certificate under Shops & Establishment Act. He submits that learned counsel for the petitioner before the Assistant Provident Fund Commissioner had categorically stated that old records were not available. As per the Attendance-cum-Payment Register for the period 4/1990 to 3/1992, the petitioner himself accepted that at the relevant time, there were nine numbers of employees. He submits that in view of provision contained in Section 24 of the Cine-Workers & Cinema Theatre Workers (Regulation of Employment) Act, 1981, in case of five or more workers employees in such cinema/theatre, the provisions of "1952 Act" was made applicable by Government Notification in the year 1984 and thereafter, the petitioner's establishment was given code number by the Employees Provident Fund

Organization. Only thereafter, assessment process was initiated, but the petitioner one way or the other delayed the matter for a quite long time by filing number of writ petitions and appeals and finally, the assessment authority i.e. Assistant Provident Fund Commissioner by the impugned order determined the dues against the establishment, which was approved by the appellate authority. According to learned counsel for respondents, the writ petition is fit to be rejected.

Besides hearing learned counsel for the parties, I have also perused the materials available on record. On perusal of the record, *prima facie* the Court is satisfied that no illegality has been committed either by the assessing authority or by the appellate authority. On perusal of the record, it is evident that an inspection was conducted in the establishment and inspecting officials had submitted report. Thereafter, for the first time, assessment order was passed on 18-06-1996, vide **Annexure – 4** to the writ petition. However, on technicality i.e. since subsequent to the said order, the writ court had remitted back the matter for deciding the issue of applicability, the said order was set aside. Thereafter, the question of applicability was raised before this court by the petitioner by filing a writ petition, vide C.W.J.C. No. 6829 of 1998. To better appreciate the matter, it would be appropriate to quote the order dated 17-09-1999 passed in C.W.J.C. No. 6829 of 1998, which is as follows:-

> **"Heard learned counsel appearing for the petitioner and learned counsel appearing for the respondents.**
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> **In this writ application the petitioner has challenged the order of the Assistant Provident Fund Commissioner, Bihar Patna dated 15-7-98 (annexure-7) as also the order as contained in annexure-4 dated 18-6-96 and also a letter dated 17-7-98 from the Employees Provident Fund Organisation at Patna dated 17-7-98 (annexure-B).**
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> **The short facts of this case are that by a notice contained in annexure 1 dated 13-2-95 the petitioner was asked to show cause and produce his document in a proceeding under section 7(A) of the Employee's Provident Funds and Miscellaneous Act, 1952 (hereinafter referred to as the Act). The petitioner appears to have challenged the applicability of the provisions of said Act to his establishment but the same was decided against him by order contained in annexure-2 which was challenged before this court in a writ proceeding and by annexure-3 the order of this Court in the said writ application (annexure-2) was quashed and the matter was remitted to the Assistant Provident Fund Commissioner, Bihar Patna for deciding the matter afresh after giving opportunity of hearing to the petitioner. Thereafter the authority has passed final order in the matter of applicability of the Act to the petitioner's establishment by order contained in annexure-7 which is under challenge in this writ application. It appears that before a decision contained in annexure-7 would be taken by another order contained in annexure-4 the authority determined the money due from the petitioner under section 7(A)(i)(d) of the Act. That order was passed without looking into the petitioner's documents as by then the petitioner**

was contesting the very applicability of the Act to his establishment. Against the order contained in annexure-4 the petitioner again moved this Court through a writ petition which was disposed of by order contained in annexure-5 in which this Court without going into the merit of the matter relating to annexure-4 directed the authority to take decision with regard to applicability of the Act and till then the order contained in annexure-4 dated 18-06-96 was put in abeyance. As stated earlier the petitioner again challenged annexure-4 as well as a consequential letter contained in annexure 8. After going through the annexure-7 I find no illegality in the same and it appears that the authority has rightly held the Act to be applicable in the petitioner's establishment.

So far as the order as contained in annexure-4 is concerned in my view the same needs interference because in all fairness the issue of determination of money dues from the petitioner ought to have been considered after decision with regard to applicability of the Act and since it was not done the petitioner failed to produce his documents etc. which he was entitled to in an enquiry under section 7 (A) of the Act. Annexure – 8 is merely a consequential order directing the petitioner to remit the money due with him.

In view of aforesaid discussions the order contained in annexure 4 and the order contained in annexure 8 are quashed and the matter is remitted back to the concerned authority for passing a fresh order only with regard to determination of dues from the petitioner and after affording him an opportunity of hearing and producing his record. It is made clear that in case the petitioner takes unnecessary adjournment causing delay the authority may proceed ex parte. For expediting the proceeding the petitioner is directed to appear before the concerned authority along with a certified copy of this order within a month from today, thereafter the proceeding shall be concluded as expeditiously as possible and preferably within a period of three months from today.

This application is disposed of with the aforesaid observations/directions."

On perusal of the order dated 17-09-1999, it is evident that in the writ petition, which was filed on behalf of the petitioner, this Court had already held that "1952 Act" was applicable in respect of petitioner's establishment. Though, the matter was remitted back with a direction to pass fresh order regarding determination of the dues from the petitioner. After the order dated 17-09-1999, the matter was again examined by the Assistant Provident Fund Commissioner, Bihar and it was decided against the petitioner, vide **Annexure – 6** to the writ petition. On perusal of **Annexure – 6**, it is evident that though the writ court had directed the authority concerned to decide the determination of dues preferably within a period of three months. Again, it is evident that the petitioner succeeded in delaying the determination before the Assistant Provident Fund Commissioner. Number of opportunities were given to the petitioner to produce all relevant records, however; the petitioner failed to produce entire record, whereas, the assessment was related from the year 1986. The petitioner could only produce Attendance-cum-Payment Register for the period 4/1990 to 3/1992 i.e. April, 1990 to March, 1992. It is surprising that while remitting back the matter, this court had already decided the issue of applicability, learned counsel for the petitioner before the Assistant Provident Fund Commissioner had raised first ground of opposition that establishment was not coverable under the "1952 Act", which can be noticed from page 2 of the impugned order dated 27-08-2002. It would be appropriate to quote relevant portion of page 2 of the order dated 27-08-2002, which is as follows:-

> **"The learned Advocate Sri D. Choubey appeared on behalf of the estt and raised following point/dispute:**
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> 1. **The estt. Was not coverable under the Act.**
> 2. **That dues should be determined on the basis of records.**
> 3. **Old records are not available.**
> 4. **He produced attendance cum payment register for the period 4/90 to 3/92 only.**
> 5. **Registration certificate under Shop & Establishment vide no. 1363/641 of 6/2/86 which was renewed upto 31/12/91."**

This was not end of the matter. Sri Dhanendra Chaubey, learned counsel for the petitioner even has consumed much time of this court in arguing that petitioner's establishment was not coverable under the "1952 Act". Learned counsel for the petitioner, Sri Dhanendra Chaubey had forgotten that he was arguing before a coordinate Bench. Once this issue i.e. applicability of the "1952 Act" with establishment was already set at rest by a coordinate Bench in C.W.J.C. No. 6829 of 1998, which was filed by the petitioner himself, the learned counsel for the petitioner has really committed a serious error in raising the same issue before this court, which may not be approved. On perusal of the order dated 27-08-2002, it is evident that before the assessing authority, the register produced by the petitioner had at least reflected that the petitioner had employed about nine number of employees, whereas, the information supplied by the managing partner of the petitioner namely Sri Shyam Bihari Singh was noticed by the Assistant Provident Fund Commissioner, which reflected that the establishment had employed sixteen persons and as such, the learned Assistant Provident Fund Commissioner has rightly passed the assessment order on 27-08-2002 (**Annexure – 6** to the writ petition) and thereafter, demand notice was issued, vide letter no. 5074 dated 02-09-2002. The petitioner instead of availing statutory remedy under Section 7-I of "1952 Act", the remedy of appeal, directly approached this Court by filing a writ petition, vide C.W.J.C. No. 12127 of 2002, which was obviously disposed of for filing appeal before the appellate authority with certain further direction. The intention of petitioner for unnecessarily delaying the issue is evident from the fact that after the order of assessment, though appeal was filed, it appears that proper course had not been taken and as such, it stood dismissed. The said dismissal was approved by the Single Bench in C.W.J.C. No. 16943 of 2010, which was assailed by the petitioner, vide L.P.A. No. 487 of 2011. However, the appeal was allowed and the Appellate Tribunal was directed to restore the appeal and decide the same. Finally, the appellate authority by the impugned order has dismissed the appeal, vide **Annexure – 9** to the writ petition.

I do not find any defect in the order of the appellate authority. The order of the appellate authority has been passed in conformity of the order of the Assistant Provident Fund Commissioner. Ofcourse, the Appellate Tribunal has not given a detailed reason, but succinctly the reason has been assigned while approving the order of the Assistant Provident Fund Commissioner.

So far as judgment cited by the petitioner in the case of **M/s Roxy Cinema** (*supra*) is concerned, I do not see that the petitioner can get any favour by this judgment, in view of the fact that the petitioner has already admitted about employment of nine persons in the establishment before the Assistant Provident Fund Commissioner.

In view of the facts and circumstances, I do not find any defect in either of the orders. Moreover, it is reiterated that the petitioner has not approached this court with clean hands, otherwise, he would have categorically stated in the writ petition that issue of applicability of the Act was already decided by this court earlier in 1999 itself in C.W.J.C. No. 6829 of 1998. The petitioner has purposely suppressed this fact. However, this court is refraining from passing any adverse order in respect of suppression of such fact against the petitioner.

The writ petition stands dismissed.

(Rakesh Kumar, J.)

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