IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4173 OF 2015
WITH
CIVIL APPLICATION NO. 541 OF 2016

Central Board of Trustees, EPF ...Petitioner
vs.
M/s.Nutan Pushpak Premises Co-op. Society Ltd. ....Respondent

Mr.Suresh Kumar with Ms.Sangita Yadav for Petitioner.
Mr.Ashok D. Shetty, a/w. Ms.Rita K. Joshi with Mr.Swapnil P. Kamble, for the Respondent.

CORAM : S.C. GUPTE, J.

29 APRIL 2016

ORAL JUDGMENT :

Heard learned Counsel for the parties.

2 This writ petition filed by the Board of Trustees of the Employees Provident Fund Organisation seeks to challenge an appellate order passed by the Provident Fund Appellate Tribunal. By the impugned order, the Appellate Tribunal allowed the employer’s appeal and set aside an order passed by the Assistant Provident Fund Commissioner, which held that the Respondent employer was covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (“the Act’).

3 The Respondent employer is a co-operative society registered under the Maharashtra Co-operative Societies Act, 1960 being a co-operative society of owners of commercial premises, employing at all material times less than thirty employees. These employees were all watchmen and sweepers employed for protection and maintenance of the premises. The employees carried on work without the aid of power. On these facts, the controversy in the present petition concerns whether or not the Respondent society is covered by

the provisions of the Act. By an order dated 3 June 2008, the Assistant Provident Fund Commissioner came to the conclusion that the establishment was covered under the Act. The conclusion was on the basis of the following reasoning :

(a) The society answers the description of the classes of establishment, which are notified under a notification issued under Section 1(3)(b) of the Act, namely, "All societies, clubs and associations which render service to their members, without charging any fee over and above the subscription fee or membership fee".

(b) The establishment is not covered under the exclusionary clause contained in Section 16 of the Act, inasmuch as all three conditions of Section 16(1)(a) are not satisfied concurrently. The establishment is registered under the Maharashtra Co-operative Societies act, 1960, but works with the aid of power.

(c) The decision of our court in the case of **Backbay Premises Co-operative Society Ltd. vs. Union of India**[1] is distinguishable and not applicable to the case of the establishment.

4 By its impugned order, the Appellate Tribunal allowed the Respondent employor's appeal and set aside the order of the Assistant Provident Fund Commissioner on the ground that the Respondent society was not shown to be using power directly and proximately for its work. The Appellate Tribunal held, relying on a decision of the Supreme Court in the case of **Hotel New Nalanda vs. ESIC**[2], that the use of power should be direct and proximate in its working and not simply use of electric power for providing light in the work area. The Appellate Tribunal, accordingly, held the order of the Provident Fund Authority to be unsustainable.

5 Mr.Suresh Kumar, learned Counsel for the Petitioner, has advanced

1 **1997 II CLR 1075**
2 **2001 Vol.XV SEC (L&S)**

two submissions in support of the petition:

(I) It is submitted that the establishment in the present case is specifically notified under Section 1(3)(b) of the Act and thus, covered under the Act. It is submitted that the Respondent society answers the description of the establishment under Item No.34 of Appendix I notified by the Union Government in the Gazette of India (GSR 1294 dated 16.11.1974) published in the Gazette of India, Part II.

(II) It is submitted that the Respondent society is not covered by sub-section (1) of Section 16 and accordingly, is not excluded from the application of the Act.

6 Insofar as Item No.34 of Appendix I is concerned, the relevant entry is quoted below :

> “All Societies, clubs and associations which render service to their members, without charging any fee over and above the subscription fee or membership fee.”

Our court in the case of **Backbay Premises** (supra) considered item 16(2) of Appendix I to the Provident Fund Scheme. Item 16(2) included “societies, clubs or associations which provide boarding or lodging or both or facility for amusement or any other service to any of their members or to any of their guests on payment”. Our court held that Item 16, read as a whole, dealt with non-factory industries, which *inter alia* provided facilities like boarding, lodging, amusement or any other service to members or their guests on payment. The Court held that a housing society cannot, by any stretch of imagination, come within the ambit of non-factory industries. The argument before the court was that the society levied maintenance charges, municipal taxes and recovered contributions towards sinking fund, repair fund and maintenance fund and therefore, fell within the category of societies, clubs or associations which provide services to their members on payment. That argument was negatived by the Court. It is submitted in the present case that the particular item considered in the case of **Backbay Premises** was separate from the item with which we are concerned in the present case. It is submitted that the particular facilities or services, which were referred to in Item No.16(2), and which were considered by our court in the case of **Backbay Premises,** are not the same as those forming part of Item No.34. The argument is that Item No.34 describes service to members without reference to any particular facility and that too without charging any fee over and above the subscription fee or membership fee. The entities covered under the particular item must, in the first place, render service to their members. A co-operative housing society or a premises co-operative society, which is an organization of owners of houses or premises, does not render any particular service to its members. In fact, our Court in **Backbay Premises'** case agreed with the conclusion of the Regional Provident Fund Commissioner in that case that the society was not covered under Item 34 of Appendix-I. The Court held that the words “subscription fee or membership fee” in Item 34 indicated that Item 34 did not apply to housing societies under the Maharashtra Co-operative Societies Act which recover maintenance and other charges, and that in fact, a housing society does not render any service to its members.

7 Secondly, the Respondent society is excluded from the operation of the Act under sub-section (1) of Section 16 of the Act. The provision excludes establishments registered under any law for the time being in force in any State relating to co-operative societies, employing less than fifty workers and working without the aid of power. The Respondent society is admittedly a co-operative housing society registered under the Maharashtra Co-operative Societies Act, 1960. Far from there being any material to show that it employs more than fifty workers, the material on record in the form of salary registers maintained all these years actually show that at no point of time fifty or more workers were employed with the Respondent society. There is also no case that the establishment was working with the aid of power. Merely because electricity is used in the premises of the society for providing light and other amenities at the work place, it cannot be said that the establishment works with the aid of power. Working with the aid of power implies that there must be some work or process

carried on in the establishment with the use of power. Such use must be direct and proximate as regards the activity carried on by the establishment. An indirect application such as use of electric bulbs for providing light or electric fans for providing comfortable working environment, does not amount to working with the aid of power. The Respondent society, accordingly, answers fully the description of an establishment covered under clause (a) of sub-section (1) of Section 16, all three characteristics necessary for such coverage being present in its case.

8 In the premises, the impugned order of the Appellate Tribunal does not suffer from any infirmity and there is no merit in the writ petition. The petition is, accordingly, dismissed.

9 It appears that in pursuance of the first ex parte order passed by the Assistant Provident Fund Commissioner, the Provident Fund Authorities have already recovered from the Respondent society's bank a sum of Rs.10,58,000/- towards the provident fund dues. The first order of the Assistant Commissioner was set aside and the matter was remanded to the Assistant Provident Fund Commissioner for a fresh hearing, as noted above. Since the order of the Appellate Tribunal holding the Respondent society as an establishment not covered under the Act is upheld by this court and accordingly, the order of the Assistant Provident Fund Commissioner stands set aside, there is no case for the Provident Fund Authorities to retain the amount collected from the Respondent society. Accordingly, the civil application of the Respondent society, namely, Civil Application No.541/2016, is allowed in terms of prayer clause (a) thereof.

(S.C. Gupte, J.)