IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.21026 of 2014(O&M)
Date of decision:17.10.2016

Central Board of Trustees ... Petitioner

Vs.

M/s Kalyan Filling Station ... Respondent

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA.

Present: Mr Rajesh Hooda, Advocate
for the petitioner.

None for the respondent.

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RAJIV NARAIN RAINA, J. (ORAL)

Notice of motion in this case was issued on 27.10.2014 on the premise that burden of proof rested on the corporation but onus had shifted to prove that they were not covered by the Act. Thereafter, successive attempts were made by the petitioner to serve the respondent. On 07.05.2015, this Court passed an order that as per office report, the 1st respondent was served through its Manager but no one has put in appearance on behalf of respondent No.1. The matter was adjourned to 17.09.2015, for further consideration. On 26.11.2015, this Court allowed an application under Order 1 Rule 10 read with Section 151 C.P.C. for substituting the petitioner i.e. the Regional Provident Fund Commissioner, Karnal with "Central Board of Trustees, Employees Provident Organization through

Regional Provident Fund Commissioner, Karnal" as the petitioner was wizened and had placed on record an amended memo of parties which was taken on record to over-write the objection on maintainability of the writ petition. And therefore, as per Section 5 (C) of the Employees Provident Fund and Misc. Provisions Act, 1952, the Central Board of Trustees has been brought into the picture and thus, the writ petition was rendered maintainable. On 12.01.2016, no one had appeared on behalf of the respondent. On 24.05.2016, also no one appeared on behalf of the respondent and it went without hearing. However, the matter was adjourned to today in order to give an opportunity to them to come forward and defend the case. It appears that the appeal filed by the 1st respondent before the Employees Provident Fund Appellate Tribunal, New Delhi was allowed in his favour on 13.03.2013. Since the 1st respondent has secured judgment in his favour from the Presiding Officer, Employees Provident Fund, Appellate Tribunal, New Delhi, it is intentionally not putting in appearance before this Court to avaid judgment.

Mr. Rajesh Hooda, learned counsel for the petitioner has argued that this Court should accept the service on the Manager of the 1st respondent as recorded in order dated 07.05.2015 as a proper service. The prayer of the learned counsel for the petitioner is accepted. Consequently, the 1st respondent is proceeded against ex parte when not coming forward despite its Manager served the summons.

Heard learned counsel for the petitioner on merits of the case and perused the paper book.

Learned counsel for the petitioner has taken me through the impugned order passed by the Appellate Tribunal wherein, it has been categorically recorded that when the Squad of Enforcement Officers visited both the establishments of the appellant and prepared a list of employees, the Squad reported presence of 22 employees whereas in respect of their facility at G.T.Road, Kohand Filling Station, 6 employees were reported to be working. Then according to the appellant (respondent herein) they questioned the validity of the list of employees and maintained that 11 employees had reported for work to the appellant establishment at business premises at Sector 12, Karnal instead of 22 employees as was reported by the Flying Squad.

However, while taking into consideration this contention, the Tribunal noticed that the Enforcement Authority while conducting the raid cum enquiry had directed the appellant to produce the records, viz., balance sheets, ledgers, cash books, vouchers and other, related material. However, despite availing numerous opportunities the appellant failed to produce the desired documents to their peril. The Enquiry Officer has stated that the appellant had not given out candidly the correct figures as to the numbers of employees engaged by it. At one stage, the appellant admitted to have employee strength of 17 and in the same breath admitted the employee strength at 19 men.

Ultimately, the learned Tribunal returned findings that: "Legally speaking, the Squad of Enforcement Officers are bound to record the name of the employee, his father's name, age, work assigned to him/status in the filling station, wages drawn by him and duration in service, their designation and whether regular, employees or temporary/casual or daily wages employees."

Prima facie, the findings of the learned Tribunal did not appear to be correct based on reliable reasoning. It is not for the learned Tribunal to appreciate the numerical strength of 22 or 11 or 17 or 19 employees which figures are noticed in the impugned order. There is no gainsaying that the Enforcement Officers do not have the instant power to get the antecedents of the employees verified and to connect a name with face. Such power does not vest in the Enforcement Officers under the Employees Provident Fund and Misc. Provisions Act, 1952 (for short 'the Act'). The learned Tribunal has taken this appeal in a most casual manner and has not acted properly under the Act in accordance with law. This is the most important aspect i.e. the casual approach of the learned Tribunal in deciding the appeal. The length of the impugned order is not significant, its lack of reasoning is. Thus, the reasoning must be appropriate and based on legal principles and the rule of law of evidence. It is well settled that the Enforcement Action under the

Act should be taken heavily on the employer to rebut the fact that it did not have more than 20 persons employed in the establishment and therefore, would not be covered by the Act. The flaw in the order is that it has turned the law upside down regarding discharge of onus and burden of proof which is the salutary principle in the Evidence Act. The numerical strength is based on appreciation of evidence gathered on the spot, when the establishment is caught unawares and to disprove the numerical strength of the employees working directly or indirectly with the employer the burden rests on the latter and not the department. The strength of employees is within the exclusive knowledge of the respondent and it is the duty of the respondent to satisfy the EPF authorities of the strength of its employees. The emphasis placed on Section 101 of the Evidence Act is misplaced and would not apply to the proceedings before the EPF authorities. These legal propositions have not been taken into consideration by the learned Tribunal while passing the impugned order on irrelevant considerations.

Mr. Rajesh Hooda, learned counsel for the petitioner relies on ***Saraswati Construction Company Vs. Central Board of Trustees and another,*** 2010 (171) DLT 3 wherein, the Delhi High Court held as under:-

> *"It is settled legal position that if any establishment or employer is not covered under the said Act, then it is for the employer to place sufficient cogent and convincing material before the designated authority*

in an enquiry under Section 7 A so as to satisfy the authority with regard to the non-applicability of the Act and on failure to place any such material, the onus cannot be shifted on the EPF authorities to prove the applicability of the Act, who under no circumstances, can be in possession of necessary records evidencing the extent of strength of employees in any particular establishment. In the case of Himachal Pradesh State Forest Corporation v. Regional PF Commissioner (Supra) cited by the counsel for the petitioner, being distinguishable on facts would not be applicable to the present case. As in the facts of the said case employer itself had admitted its liability under the Act and since due to delay of 16 years period, the employer was not in possession of the records, the Court directed the benefits only with respect to those employees who are identifiable and whose entitlement was proved on evidence. So far as the facts of the present case are concerned, the petitioner itself never came forward to place on record the documents or took any such plea of non-availability of the documents, therefore, the said judgment of the Apex Court will not cut any ice to help the petitioner in the facts of the present case."

Mr. Hooda, has produced a copy of the order dated 27.09.2010 passed by the Supreme Court in SLP (C) CC 14569 of 2010 whereby, the aforesaid order of the learned Single Judge in ***Saraswati Construction Company*** case was upheld and the SLP was dismissed.

Mr. Hooda has also relied on another judgement of Delhi High Court in ***J.K.College of Nursing and Paramedicals Vs.***

Union of India and others, 2012 (1) LLJ 746, wherein, the Delhi High Court held as follows:-

> *"9. I am unable to agree with the contention of the counsel for the petitioner that the judgement in Saraswati Construction Company v. Central Board of Trustees (supra) per incuriam and I have no reason whatsoever to disagree from the view taken therein. The strength of employees can be within the exclusive knowledge of the establishment only and it is the duty of the establishment to satisfy the EPF authorities of the strength of its employees. The emphasis placed on Section 101 of the Evidence Act is misplaced. The said rule is a rule of evidence in the Court and in my opinion would not apply to the proceedings before the EPF authorities. Though the counsel for the petitioner invites attention to Section 7 (J) of the Act but the same is not found to be of any assistance in this regard; rather the same enables the Tribunal, as distinct from the EPF Authority, to regulate its own procedures and vests only certain powers of the Civil Court in the Tribunal to enable the Tribunal to prosecute the witnesses falsely deposing before it. In any case, the reliance by the counsel for the respondents on Section 106 of the Evidence Act is also apposite. The Division Bench of the Calcutta High Court also in State of West Bengal vs. Board of Revenue, West Bengal 1975 LIC 1162 relied upon Section 106 of the Evidence Act to hold the burden in such cases to be on the establishment. I also find that LPA No.400/2010 preferred against the judgment in Saraswati Corporation Co. was dismissed on 2nd June, 2010.*
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> *13. In the present case, the petitioner has not placed*

any material before this Court to displace the findings returned by the authorities below and which onus as laid down in Laksmi Restaurant (Supra) was definitely on the petitioner."

In this case, the Delhi High Court has taken into consideration the numerous decisions of various High Courts which are noticed: ***(a) Chudasma Engineering Works Vs. RPFC, Bangalore 1985 (67) FJR 363 (Karnataka); (b) Employees' State Insurance Corporation Vs. Rasu Tools Ltd. 2000 LLR 350 LNIND 1999 AP 506; (2000) I LLJ 372 (Andhra Pradesh); (c) Regional Director, ESI Corporation, Bangalore Vs. Malekopmath Metal Forms Private Ltd. 2003-I-LLJ-47.; (d) Regional Director, ESI Corporation Vs. G. Sivaprasad, LNIND 2009 KER 539: (2010) I LLJ 279 (Kerala); (e) Gopi Chand Vs. Employees' State Insurance Corporation, 2011-II-LLG 426 (Del).; (f) Syndicate Printers Vs. Regional Director, ESI Corporation MANU/TN/0515/2011.; (g) Bankim Chandra Chkravarty Vs. Regional Provident Fund Commissioner AIR 1958 Patna 314; (h) Lakshmi Restaurant Vs. The Regional Provident Funds Commissioner, Delhi 10 (1974) DLT 369: LNIND 1974 DEL 157***.

He further argues on the strength of a ruling of the Gujarat High Court delivered in ***K.S. Engineers & Contractors and Asstt. Provident Fund Commissioner and Another 2012-IV-LLJ-667(Guj),*** wherein, the Gujarat High Court has held as follows:-

" The petitioner- employer is require to prove the fact that the provisions of PF Act were not applicable to

him. Onus had shifted on to the employer to place sufficient cogent and convincing material before the Designated Authority in inquiry under Section 7-A of the Act so as to satisfy the Authority with regard to non-applicability of the PF Act and on failure to do so the liability had to be determined on the basis of the available material. As stated earlier, the petitioner has failed to place on record any material to show that the workers employed by him, at the relevant point of time, were less that 20 or that the provisions of PF Act were not applicable during the period in question. It has to be noted that the appellant herein did not remain present and no argument was addressed before the Employees' Provident Fund Appellate Tribunal in his own appeal; and no material was placed on record by the appellant even before learned single judge to take any different view of the matter."

In ***Saimangala Enterprises, Bangalore Vs. Regional Provident Fund Commissioner-II, Bangalore, 2012-IV-LLJ-778,*** the High Court of Karnataka held as under:-

" Thus, it is seen petitioner has been making attempts to improve its case stage by stage and step by step by producing the records in instalments. If really petitioner was in possession of such records nothing prevented it from producing in 7-A proceedings at the earliest stage. In view of the facts that these records are not counter signed either by the employer or any other authority makes it difficult for being accepted and as such entries found therein has to be seen with utmost circumstances. In view of the same finding given by the Appellate Authority for not taking into consideration the

affidavits of those employees who claim to be not on the rolls of the petitioner establishment cannot be found fault with. I do not find any good ground to interfere with the said finding of the Appellate Authority. Insofar as the wage register which the petitioner claims to have produced and not considered by the respondent authorities are concerned, is also without any merit. The said wage registered has been examined by the authorities and rejected for reasons aforesaid. Admittedly, in the Annexure appended to the income tax returns filed for the relevant assessment year, salaries paid to them have been reflected. However, no supporting documents to demonstrate that there were only 17 employees in the establishment has been produced by the petitioner and the said wage register extract also does not form part and parcel of the income tax returns. In the absence of any cogent and convincing material made available before the respondent authority by the petitioner establishment that it had employed less than 20 employees it cannot be said that respondent authority committed an error in arriving at a conclusion that petitioner establishment is to be covered under the provisions of the EPF & MP Act. In view of the same, I do not find any good ground to interfere with the order impugned herein."

Lastly, he relies on a Single Bench decision of the Madhya Pradesh High Court in **Ankur Vidya Mandir Vs. Regional Provident Fund Commissioner**, 2003 (2) LLJ 658 wherein it has been held as under:-

" This Court in its writ jurisdiction cannot hold an inquiry rather de novo one whether petitioner has ever

> *employed 20 persons or more or less. It is for the authorities under the Act to hold an inquiry and then decide how many persons have been employed in petitioner's Institute. It was done. A report of Inspector was called and relied upon. The petitioner was granted an opportunity to challenge the report by submitted their record. They did not do so. Accordingly, the report of Inspector which was made on the spot of Institute was relied upon being the best piece of evidence for holding that 20 employees are employed in petitioner's Institute.*
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> *It is a welfare legislation. It is always for the benefit of employees. It must be implemented by the petitioner by contributing towards P.F. for their employees".*

The view of the different High Courts appear to be the same on the point in issue and on the strength of these rulings, Mr. Hooda has argued that the total strength of employees can be within the exclusive knowledge of the establishment only and it is the duty of the establishment to satisfy the EPF authorities of the strength of its employees. The emphasis placed on Section 101 of the Evidence Act is wholly misplaced in the impugned order. The said rule is a rule of evidence in court and would not apply to the proceedings before the EPF authorites.

As such, Mr. Hooda has finally argued that the findings recorded by the learned Tribunal are against the provisions of the Act and are not sustainable in the eyes of law. I agree with Mr. Hooda's contentions and there is nothing before me to take another view in the matter which is closest to the facts of this case. The findings recorded by the learned Tribunal are not sustainable in law and are liable to be brushed aside.

For the reasons recorded above, this petition is allowed and the impugned order of the learned Tribunal (Annex P-1) is set aside. The order of the Assistant Provident Fund Commissioner, Karnal is restored.

October 17, 2016. **(RAJIV NARAIN RAINA)**
hemlata **JUDGE**

Whether speaking/reasoned *Yes*

Whether reportable *No*