THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.15372 of 2015

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Associate Security & Intelligence Agency through its proprietor namely, Md. Serfuddin Ahmad having its office at Krishna Sadan, Chakkar Maidan Road East, Muzaffarpur, District - Muzaffarpur.

.... Petitioner/s

Versus

1. The Regional Provident Fund Commissioner, Employees Provident Fund Organization, Regional Office, Bihar, Patna.
2. The Assistant Provident Fund Commissioner, Sub-Regional Office, Muzaffarpur.
3. The Presiding Officer, E.P.F. Appellate Tribunal, New Delhi.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Gopal Krishna

For the Respondent/s : Mr. Amrendra Narayan Rai

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

DATE : 24-04-2017

The present writ petition has been filed by the petitioner challenging the order dated 29.3.2015 passed in ATA No. 151(3) of 2013 by the Employees' Provident Fund Appellate Tribunal, New Delhi (for short 'Tribunal') whereby the appeal preferred by the petitioner against the order dated 29.01.2013 passed by the Assistant Provident Commissioner, Sub-Regional Office, Muzaffarpur has been dismissed and the order passed under Section 7A of the Employees' Provident Fund and Miscellaneous Provision Act, 1952 (for short E.P.F. and M.P. Act 1952) has been upheld.

2. The brief facts of the case are that the petitioner

establishment is engaged in security services, which is imparting manpower to various establishments for security purposes and covered under the purview of E.P.F. and M.P. Act, 1952 and the scheme framed thereunder. A proceeding under section 7A was initiated against the petitioner for assessment of dues for the period April, 2004 to September, 2007. The Inspector visited the establishment for inspection of records. In his report dated 8.12.2012 he recorded the findings as follows:-

> **(i) The number of staffs engaged by the establishment was found to be 35 out of whom as declared by the establishment 25 were ex-servicemen and 10 were the civil employees at the time of coverage i.e., April, 2004. The civil engagement of employees was for one month only and they were also deprived from the benefit of provident fund in the light of notification no. S.O. 872 dated 5.4.2000.**
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> **(ii) Though, the establishment claimed that certain employees were drawing more than 6500/- per month and treating them to be excluded employees, the establishment did not extend P.F. benefits to those employees but the establishment failed to provide appointment letter showing salary, the date of appointment etc.**
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> **(iii) The establishment has submitted an affidavit dated 17.5.2008 declaring non maintenance of books account and non submission of IT returns.**
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> **(iv) The rate of pay as reflected in the**

salary register in respect of Guards was found much less than the salary prescribed under the Minimum Wage Act in the month of October, 2006 and November, 2006.

(v) The establishment on the basis of his self prepared income and expenditure register showed much more expenditure under the head of house rent and fooding charges in order to cover up the payment of less than the salary prescribed under the Minimum Wage Act.

(vi) In view of notification no. S.O. 931(E) dated 17.08.2004 the exemption to ex-servicemen from P.F. benefits is not acceptable and hence P.F. dues is payable by the establishment on the salary paid to all the security personnel w.e.f. 17.08.2004.

(vii) As the establishment failed to produce supporting document in respect of employees who were not excluded benefit of P.F. membership on the ground of salary being more than 6500/-, the establishment is liable to pay the P.F. dues on the salary limit of Rs. 6,500 with regard to of those employees.

(viii) Since salary for the month of October, 2006 and November, 2006 was paid less than the minimum wages hence P.F. dues is payable on the rate of minimum wages.

(ix) The HRA & Food expenditure about the minimum wages amount is not taken for the

purpose of P.F. dues.

3. The copy of deposition made by the Inspector was provided to the establishment for its response. The establishment submitted its response on 18th January, 2013 wherein it contended that the deposition report given by the Inspector is not matching with the ground reality. It said that as per its own calculation, the security guards were employed as and when required on oral orders of the principal employer. It further contended that provident fund calculation is calculated at the flat rate, which would never match with the records available. It also contended that there are few especially Managerial staffs as well as highly paid gunmen whose salary is much more than Rs. 6500/-. Hence, they are not liable for P.F. contribution.

4. It is relevant to note here that reply of the establishment is completely silent about the ex-servicemen regarding whom the establishment was required to make contribution of the provident fund.

5. On receipt of the aforesaid reply of the petitioner dated 18.1.2013, the Assistant Provident Fund Commissioner, Employees Provident Fund Organization (for short EPFO), Muzaffarpur vide order dated 29.1.2013 passed under section 7A of the E.P.F. & M.P. Act, 1952 directed the petitioner

establishment to pay an amount of Rs.4,15,929/- as outstanding provident fund dues for the period April, 2004 to September, 2007 and an amount of Rs. 3,36,392/- as interest under section 7Q of the aforesaid Act for the period March 2 to August, 2002.

6. Being aggrieved by the aforesaid order dated 18.1.2013, the petitioner preferred statutory appeal prescribed under the EPF and MP Act, 1952 before the Tribunal vide ATA No. 151(3) of 2013 and, after hearing the parties, the Tribunal dismissed the appeal vide order dated 29.7.2015 preferred by the petitioner.

7. Challenging the aforesaid order dated 29.07.2015, the learned counsel for the petitioner submitted that order passed under section 7A of the E.P.F. an M.P. Act, 1952 relates to assessment of dues in respect of unidentified employees, whose whereabouts are not known. He submitted that assessment can only be made in respect of identified employees, but the Inspector and the Assistant Provident Fund Commissioner failed to consider this aspect of the matter. He contended that in this regard even the Tribunal has erred in appreciating the facts and law involved in the case. He contended that the Tribunal failed to appreciate the fact that up to 17.2. 2005, there were exemption for ex-servicemen and they were not required to become member under

the provident fund scheme. He contended that the order of assessment was made taking into account of those expenditure, which were not paid to any employees as wages. He contended that dues of amount as noticed by the Assistant Provident Fund Commissioner are not wages rather they are some incentives and allowances over which there would be no liability of payment of provident fund.

8. Per contra, Mr. Prashant Sinha, learned counsel for the EPFO submitted that the petitioner is wrongly raising the issue of identification of workers. He contended that the petitioner itself admitted before the Inspector and the Assistant Provident Fund Commissioner that it has 25 ex-servicemen regarding whom it is not making any provident fund contribution. Further, the petitioner has also admitted that certain employees are getting wages more that 6500/- per month. As such, on both these aspects, it is clear that workers are identified, hence, 7A authority has rightly assessed the dues and asked the petitioner to file statutory return. He contended that it is true that earlier ex-servicemen were exempted by the Government of India in exercise of powers conferred under section 16(2) of the E.P.F. and M.P. Act, 1952, but vide gazette notification dated 17.8.2004, the Government of India withdrew its earlier notification granting exemption, as a

consequence of which, provision of the Act became applicable upon such ex-servicemen.

9. He contended that establishment simply claimed that certain employees are getting salary over Rs. 6500/-, but it did not produce any appointment letter showing that they were appointed and getting salary of Rs. 6500/-. On the basis of aforesaid submissions, learned counsel for EPFO submitted that there is neither any error apparent on the face of the record nor the assessing authority nor the appellate authority lacked jurisdiction to decide the case. Hence, the writ petition being devoid of any merit is fit to be dismissed.

10. I have heard rival submissions made on behalf of the parties and carefully perused the record.

11. The E.P.F. and M.P. Act 1952 is a legislation for providing social security to employees working in any establishment engaging 20 or more persons on any day. It provides for compulsory deduction of provident fund from the employees and contribution from the employer which is deposited in the workers' account in the EPF office. The provident fund and other contributions have to be deposited by the employer by 15th day of the next month in which employee has worked in the establishment and the dues become payable to him because the

worker has already performed the employment upto the last day of the previous month. The contributions were to be deposited by the employer only after the beneficiary worker has already worked and thus earned this amount in terms of the contract of employment and the provision of the Act.

12. In case of failure to deposit legitimate dues of the workers the EPFO under section 7A of the E.P.F. and M. P. Act, 1952 initiates assessment proceeding for the purpose of assessing the liability of the employer to deposit legitimate dues of the workers.

13. In the present case, the petitioner has challenged the order passed by the Tribunal mainly on the following grounds :

(i) The impugned order relates assessment of P.F. dues in respect of unidentified employees;

(ii) the establishment was exempted from the liability of P.F. contribution vide notification issued by Government of India bearing S.O. No. 872 dated 15th April, 2000; and

(iii) certain civil employees were drawing Rs. 6500/- per month and above as wages and, hence, they would fall in the category of excluded employees under the provident fund scheme of the EPFO and MP

Act, 1952.

14. So far as the issue of identified employees is concerned, it is true that the assessment is to be made with regard to identified employees only but it is duty of the employer under the E.P.F. and M.P. Act, 1952 to prepare the list of the employees engaged by it and, if employer failed to perform its duty, it cannot be allowed to take advantage of its own laches. Further, the petitioner cannot raise the issue of identification of workers as it had itself admitted that it has employed 25 ex-servicemen regarding whom it is not making any contribution as it was exempted from the liability of the P.F. contribution under the order of the Central Government. Besides this, the petitioner even failed to raise this issue before the assessing authority. Furthermore, the petitioner has admitted in course of enquiry that it was not maintaining any books of account or any other required document in respect of the ex-servicemen employees in the establishment.

15. It would be pertinent to note here that the establishments, which earlier exclusively employed only ex-servicemen who were in receipt of military pension were excluded by the Government of India in exercise of power, under section 16(2) of the E.P.F and M. P. Act, 1952, but vide Gazette

Notification dated 17.8.2004, the Central Government recalled the earlier Notification granting exemption as a consequence of which provision of the aforesaid Act became applicable upon such establishment.

16. The Gazette Notification vide S.O. No. 931 (E) dated 17.08.2004 reads as under:-

> **"In exercise of the powers conferred by sub-section (2) of Section 16 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 52), the Central Government, being of the opinion and having reviewed the circumstances and conditions for grant of exemption to the establishments which exclusively employ only ex-servicemen who are in receipt of military pension hereby withdraws notification No. S.O. 872 (F. No. S-35014/4/99-99-SS-II) dated 5th April, 2000 with immediate effect from the date of publication of this notification in the Official Gazette of India."**

17. Thus, once the exemption notification of the Government of India was revoked/recalled, the petitioner was not eligible to take the benefit of the Notification No. S.O. 872 dated 05.04.2000 and the establishment was liable to make contribution with regard to 25 ex-servicemen employed by it.

18. Under the circumstances, if the petitioner failed to comply with the statutory requirements of the Act, the authority

after due compliance of the provision of E.P.F. and M.P. Act, 1952 in exercise of powers conferred under section 7A of the Act rightly passed the order on 29.1.2013, which is in conformity with the scheme of the Act. Similarly, the Tribunal, after elaborately dealing with each and every point argued by the petitioner vide its order dated 29.7.2015 rightly dismissed the appeal which too is in conformity with the scheme of the E.P.F. and M.P. Act, 1952.

19. The only other point argued by the petitioner is that certain employees were working in managerial capacity or were highly paid gunmen and were drawing salary above Rs. 6500/- per month, and hence, they were excluded employees. However, the petitioner failed to produce any authentic evidence in this regard. The Tribunal in its order recorded that the establishment even failed to produce certain employees who could speak that they are getting more than Rs. 6500/- per month as wages. The Tribunal has rightly recorded that mere statement on the part of the establishment that certain employees are getting more than Rs. 6500/- per month was not sufficient for the 7A Authority to exclude such employees. The petitioner did not produce any appointment letter showing that any employee was appointed over the statutory cap of salary of Rs. 6500/-.

20. In view of the discussions made above, I see no

merit in this application. It is dismissed, accordingly.

(Ashwani Kumar Singh, J)

Ravi/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	02.05.2017
Transmission Date	NA