

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.16250 of 2015

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M/s Shiva Agro Industries Pvt. Ltd., through its Director, Sri S.P. Narayan, son of Late Ram Prasad Sah, resident of Village/Mohalla- Bajrangpuri, P.S.- Alamganj, District- Patna.

.... Petitioner

Versus

1. The Employees Provident Fund Organization, through its Commissioner, Bihar having its Office in Provident Fund Building, R.Block, Road No.6, Patna.
2. The Regional Provident Fund Commissioner-1, Bihar, Patna.
3. The Assistant Regional Employees Provident Fund Organization, Bihar, Patna.

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Ashok Choudhary, Advocate
Mr. Shailendra Kumar Jha, Advocate
For EPFO : Mr. Ram Shanker Pradhan, Sr. Advocate
Mr. Jainandra Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 28-03-2017

An establishment having 20 or more employees under it, is covered under the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short 'the Act'). The question involved in the present case is it is whose burden to prove the strength and identity of the employees of the petitioner establishment.

2. The petitioner has preferred the present writ



application on 07.10.2015 with a prayer to direct the respondents to disclose the names and account numbers of provident fund of so-called employees along with parentage and correct address who worked under the petitioner's establishment. It is also prayed for issuance of an order for making an independent and fair inquiry by an impartial agency such as judicial Magistrate or the police officer against the respondents as they have levelled wild allegations against the petitioner despite the fact that it is a clear stand of the petitioner that 20 or more workers had never worked under it.

3. The facts of the case, in brief, are that the petitioner is a partnership firm having its factory in the town and district of Patna. Pursuant to an inquiry made by the Enforcement Officer on 13.04.1998, a proceeding was initiated against it under the provisions of Section 7-A of the Act. In the proceeding, a direction was issued on 09.08.2001 requiring the petitioner to furnish the relevant records/documents. Following the directions, a second notice was issued on 08.12.2003 fixing 26.12.2003 as the date of hearing. In response to the notices aforementioned, the petitioner vide letter dated 26.12.2003 addressed to the Provident Fund Commissioner, Bihar, Patna raised an objection as to the applicability of the Act on the grounds that the establishment did not have more than 20 employees. Subsequently, vide letter dated



15.09.2004, the petitioner informed the Assistant Provident Fund Commissioner that the unit had closed its operations by reason of a fire which had taken in the establishment in 1998. It also taken a plea that due to fire in the establishment on 10.10.1998, the entire establishment, including wage registers, attendance registers together with the audited accounts, had been gutted. Hence, the provisions of the Act would not be applicable.

4. However, the respondents proceeded with the proceeding. Though, initially, the petitioner had participated in the proceeding, subsequently it chose to abstain from it.

5. Under such circumstances, the Assistant Provident Fund Commissioner concluded the proceedings and by an ex-parte order dated 23.11.2004 held that the Act is applicable on the petitioner with effect from November, 1997 to March, 2001. The assessment order was passed against the petitioner's establishment whereby an amount of Rs.7,37,590/- was found outstanding against the establishment. In addition to the above determined dues payable in accordance with Section 7-Q of the Act, the petitioner's establishment has also been made liable to pay interest on the dues amount under the Act from the date on which the amounts became due till the date of their actual payment.

6. The petitioner challenged the aforesaid order



dated 23.11.2004 passed by the Assistant Provident Fund Commissioner, Bihar, Patna under Section 7-A of the Act by filing a writ application vide CWJC No. 3635 of 2010. In the said application, a plea was taken that the establishment was exempted from the application of the Act for three years i.e. up to 1998. It further pleaded that no inquiry was conducted by the Enforcement Officer or any other authority of the Employees' Provident Fund Organization (for short 'EPFO'). It pleaded that the establishment had never employed more than 20 employees. The writ court vide order dated 19.09.2011 set aside the assessment order dated 23.11.2004 made under Section 7-A of the Act by holding that the establishment was entitled to exemption up to 24.12.1998 and for the period after December, 1998 also. The order could not be sustained because the establishment had taken a plea that it had employed less than 20 persons.

7. The order passed by the writ court was challenged by the respondents preferring intra-court appeal vide LPA No. 638 of 2012. After hearing the parties, vide order dated 21.08.2014, LPA No. 638 of 2012 was allowed by the Division Bench and the order dated 19.09.2011 passed by the learned Single Judge in CWJC No. 3635 of 2010 was set aside. Consequently, CWJC No. 3635 of 2010 was dismissed. The Division Bench, in



LPA No. 638 of 2012, allowed the appeal preferred by the respondents on the following grounds :-

(a) The establishment had been given ample opportunity before the order was made under Section 7-A of the Act;

(b) The establishment had a statutory alternative remedy under Section 7-D of the Act;

(d) The establishment did not explain why it did not avail the remedy of appeal; and

(e) The writ application deserved to be dismissed on the ground of delay, laches and acquiescence.

8. It is submitted by Mr. Ashok Chaudhary, learned advocate appearing for the petitioner that it is incumbent upon the respondents to give name and address of the persons employed in the petitioner's establishment. He submitted that the proceeding under Section 7-A of the Act was uncalled for and when it is the definite case of the petitioner that he had never ever employed 20 or more workers under it, no liability under the Act could have been fastened upon the petitioner as the Act itself was not applicable to the petitioner's establishment. He submitted that the Enforcement Officer has not mentioned the name of the workers employed in the petitioner's establishment. According to him, the determination of strength in establishment is *sine qua non* to the applicability of the Act and it is manifestly missing in the



present proceeding. He submitted that that a proceeding conducted under the provision of 7-A of the Act is a *quasi*-judicial proceeding and has to be conducted in judicious manner and not in a whimsical manner.

9. Mr. Chaudhary, learned advocate for the petitioner submitted that the only basis for passing the aforementioned order dated 23.11.2004 under Section 7-A of the Act is a confidential report which was outcome of the table work done by the authority under the Act. The petitioner's establishment was never visited by the reporting officer and the copy of the confidential report was never served upon it and no opportunity was given to it to rebut the contents mentioned thereunder and thus rendering the said report farce and meaningless.

10. *Per contra*, Mr. Ram Shanker Pradhan, learned Senior Advocate for the respondents submitted that the present writ application is nothing but an appeal against the order passed by the Division Bench in LPA No. 638 of 2012. He submitted that the order dated 21.08.2014 passed in LPA No. 638 of 2012 has attained finality as the petitioner has not challenged the said order before the Supreme Court. He submitted that the petitioner's establishment was covered under the Act with effect from 15.10.1997 upon the confidential report by the Area Enforcement Officer on 13.04.1998.



The said report contained copies of letters served to the Managing Director of the Establishment on 25.03.1998 requesting for production of record, but the petitioner did not pay heed to such request. He did not file any objection. Hence, the establishment was brought under the Act with effect from 15.10.1997 provisionally subject to further verification of records for the past period. A copy of coverage letter vide letter dated 12.06.1998 was sent to the establishment under registered post which returned back with postal remarks "*Registration Nahi Rahne Ke Karan Wapas Kiya Jata Jai*" [returned as there is no registration]. The returned coverage letter was then handed over to the Area Enforcement Officer to serve the employer vide office letter dated 12.11.1998. Since the applicability of the Act was under the knowledge of the establishment, establishment was requested to submit its statutory return for the period November, 1997 to March, 1999. As the matter was vigilantly being monitored by the EPFO, Head Office, New Delhi, the Assistant Provident Fund Commissioner and the Enforcement Officer visited the establishment on 01.03.2001 for compliance of the Act, but the establishment failed to produce any record.

11. He submitted that under the aforesaid circumstances, the respondents initiated proceeding under Section



7-A of the Act and directed the petitioner to produce documents. However, the petitioner disputed the applicability of the Act and did not co-operate in the proceeding initiated under Section 7-A of the Act. Subsequently, the establishment was requested to furnish the return by several letters, but the establishment failed to respond. Since the establishment was adopting the attitude to refuse to receive letter/notice of EPFO as such a request was made to the Officer-in-Charge of Gandhi Maidan Police Station, Patna as well as the Officer-in-Charge of Chowk Police Station on 09.08.2001 to serve the notice to the petitioner's establishment falling under their respective jurisdictions. Upon service of such notice through Officer-in-Charge of the police stations, the establishment filed its response on 29.08.2001 and started disputing the applicability of the Act. He submitted that in order to avoid the responsibility cast upon the employer under the Act, the petitioner took a plea in the earlier writ application while challenging the assessment order made under Section 7-A of the Act that the unit had closed its operations by reason of a fire which had taken place in the establishment in 1998 in which the entire establishment had been gutted. He submitted that once the order passed under Section 7-A of the Act had attained finality and the authority under the Act had held the number of the employees to be more than 20, denial by



employer later on number of employees is not sustainable.

12. I have heard learned advocates for the parties and carefully perused the record.

13. It is an admitted fact that the writ petition filed by the petitioner challenging the assessment order dated 23.11.2004 passed by the Assistant Provident Fund Commissioner in purported exercise of power vested under Section 7-A of the Act has been dismissed and the order passed by the Division Bench in LPA No. 638 of 2012 has not been assailed before the Supreme Court. Thus, the said order has attained finality.

14. By way of the present writ application, the petitioner has tried to reagitate of his pleadings which were made in the earlier writ application vide CWJC No. 3635 of 2010, which is not permissible. The petitioner has made a prayer that the respondents be directed to disclose the names and account numbers of the employees along with their parentage and correct address, who allegedly had worked under it. Hence, I find a clear inconsistency in the stand of the petitioner.

15. Apparently, the petitioner has not complied with its statutory duty to deduct employees' share from their salary and to deposit the same in the provident fund. If the petitioner failed to discharge its statutory duties, it cannot be permitted to take



the benefits of its own fault.

16. It is true that the assessment is to be made with regard to the identifiable employees only. However, it is the duty of the employer to prepare the list of employees engaged by it and if the employer fails to perform its duty, it cannot be allowed to take advantage of its own laches. Further, since the petitioner failed to produce the relevant records, wage register etc. and took a plea that a fire had taken place in the establishment on 10.10.1998 in which the establishment had been gutted, the respondents cannot be asked to supply the name, address and parentage of the employees engaged in the establishment.

17. At this stage, I deem it apposite to refer to Section 106 of the Evidence Act which reads as under :-

“Section 106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

18. In view of the aforesaid provision of the evidence act, since the fact regarding employees working in the establishment was within the special knowledge of the petitioner, the burden of proof can not be shifted upon the respondents.

19. As the petitioner never co-operated with the



respondents during the proceeding, the entire burden of identifying the name, address, parentage, etc. of the employees was upon it and not upon the respondents. In this regard, I may refer to a decision of the Delhi High Court in **J. K. College of Nursing & Paramedicals vs. Union of India and Ors. [2012-I-LLJ-746 (Del)]** whereby the Delhi High Court held as under :-

“9. I am unable to agree with the contention of the counsel for the petitioner that the judgment in *Saraswati Construction company v. Central Board of Trustees (supra)* is 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. ...”

20. For the reasons aforementioned, I see no merit in this writ application.

21. It is dismissed accordingly.

(Ashwani Kumar Singh, J.)

Kanchan/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	06.04.2017
Transmission Date	NA

