IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD

WRIT PETITION NO.12192 OF 2016

1 The Manager,
SMK Global Security Solution
India Pvt.Ltd.,
Shop No.10/11, Anand Plaza,
Jalna Road, Opp. Government
Milk Scheme, Aurangabad.

2 The Operation Manager,
SMK Global Security Solution
India Pvt.Ltd.,
Opp.Punjab National Bank,
Bhokardan Naka, Jalna.

...PETITIONERS

-VERSUS-

Kailash s/o Laxman Borkar,
Age : 40 years, Occupation : Private Service,
R/o P.No.10, Main Road, Shankar Nagar,
Old Jalna, Taluka and District Jalna.

...RESPONDENT

...
Advocate for Petitioners : Shri Jaybhay Bibhishan R.
Advocate for Respondent : Shri Shinde Prakash M..
...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 27th February, 2017

Oral Judgment :

1 Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2 The Petitioner is aggrieved by the judgment of the Labour Court dated 29.09.2015 in Application (IDA) No.12/2015 by which the Petitioner is directed to pay Rs.1,23,400/- along with 18% interest to the Respondent/ Worker towards provident fund accumulations, amount towards security deposit and amount of labour welfare fund deducted at the rate of Rs.50/- per month in 112 months.

3 Shri Shinde, learned Advocate for the Respondent, has strenuously defended the impugned judgment. Insofar as the maintainability of the application under Section 33-C(2) of the Industrial Disputes Act, 1947 is concerned, he has placed reliance upon the judgment of the learned Division Bench of this Court in the matter of *Central Railways Employees Cooperative Society Limited vs. Y.M.Patil*, **2001 CLR (3) 1086 : 2002 FLR (92) 318**. He submits that the learned Division Bench has held that the claim under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 is maintainable under Section 33-C(2) of the Industrial Disputes Act, 1947.

4 He has then supported the judgment regarding the amount towards the dress that was deposited and the amount towards labour welfare fund that the Petitioner has deducted at the rate of Rs.50/- per month in 112 months.

5 Insofar as the maintainability of the claim for provident fund accumulations is concerned, reliance placed by the Respondent on the *Central Railways Employees Society case (supra),* is misplaced. The facts in the said case are totally different. In the said case, as observed in paragraphs 2 and 3 of the judgment, the Appellants had created a separate fund for provident fund in the year 1943 for the benefits of their employees. The fund was vested in the trustees of the Trust which was created to manage the provident fund and was known as Central Railways Employees Cooperative Bank Limited Staff Provident Fund. Every member was required to subscribe and contribute to the fund at the rate of 8% of his salary with a matching contribution payable by the Appellants. The contributions were to be held in separate account, namely, Staff Provident Fund Account and were to be invested only in specified securities. Besides this, under Rule 1209 of the Staff Provident Fund Rules provided special contribution to be paid to the members on retirement or on their termination. It was further observed that the special contribution payable

under the Staff Provident Fund was not paid to the Respondents on retirement. Therefore, the Respondents filed separate applications under Section 33-C(2) of the Industrial Disputes Act, 1947 seeking recovery of the additional amount of special contributions held by the said Bank. No role was to be played by the Authorities under the Employees Provident Fund and Miscellaneous Provisions Act, 1952. The entire claim was against the Appellant Society which held the money with them.

6 In the instant case, the facts are totally different and distinct than those appearing in the *Central Railways Employees Case (supra)*. The instant case is purely based on an apprehension of the Respondent that his provident fund contribution has not been deposited by the Petitioner with the Provident Fund Authorities and matching contribution of the Petitioner/ Employer is also not deposited. The said amount, therefore, has to be recovered from the Petitioner. In such circumstances, Section 7-A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 would take care of the grievance of the Respondent.

7 Section 7A reads as under:-

"*7A. Determination of moneys due from employers.*
(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional

Provident Fund Commissioner or any Assistant Provident Fund Commissioner may, by order,

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be,

and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.

(2) The officer conducting the inquiry under sub-section 1 shall, for the purposes of such inquiry have the same powers as are vested in a court under the code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect of the following matters, namely:-

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses,

and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196 of the Indian Penal Code 45 of 1960.

(3) No order shall be made under sub-section 1, unless the employer concerned is given a reasonable opportunity of representing his case.

(3A) Where the employer, employee or any other person required to at tend the inquiry under sub-section 1 fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.

(4) Where an order under sub-section 1 is passed against an employer ex-parte, he may, within three months

from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry:

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Explanation -Where an appeal has been preferred under this Act against an order passed ex parte and such appeal has been disposed of otherwise than on the ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the ex parte order.

(5) No order passed under this section shall be set aside on any application under sub-section 4 unless notice thereof has been served on the opposite party."

8 As such, the Respondent can raise a dispute under clause (a) of sub-section (1) of Section 7A. He can also participate in the hearing before the Provident Fund Authorities. Whether, the provident fund contributions in the nature of the employees' share as well as the employer's share have been deposited with the Provident Fund Authorities or not, is a disputed and contentious question which cannot be gone into by the Labour Court under Section 33-C(2) of the Industrial Disputes Act, 1947. This issue can be considered only by the competent Provident Fund Authority at Aurangabad under Section 7A of the 1952 Act. For this

purpose, the Respondent should have approached the Provident Fund Authority at Aurangabad.

9 Insofar as the security amount towards dress is concerned, there was no evidence before the Labour Court as to whether, the said amount has not been paid by the Petitioner. The Respondent produced the receipt at Exhibit U/8 indicating that he had returned his dress to the Petitioner. It is claimed that the said deposit amount has not been paid to the Respondent. There was no document before the Labour Court to indicate that the Petitioner had deposited Rs.5800/- as security deposit for the said dress. In the absence of any evidence, the Labour Court could not have granted the said amount.

10 Insofar as the contribution towards the labour welfare fund is concerned, besides an oral statement, the Respondent has not led any documentary evidence which would indicate the deduction of Rs.50/- per month in 112 months by the Petitioner. In paragraphs 10 and 11 of the impugned judgment, the Labour Court has only concluded that the claimant has filed an affidavit and the said amount must be paid by the Petitioner. If any evidence was produced to indicate such deductions, the Petitioners would be liable to repay the said amount. Absence of evidence would not sustain the view taken by the Labour Court.

11 In the light of the above, this Writ Petition is partly allowed. The impugned judgment of the Labour Court to the extent of the security amount and labour welfare fund amount is quashed and set aside. The claim for Rs.11,400/- is, therefore, disallowed.

12 Insofar as the claim for provident fund accumulations is concerned, the direction of the Labour Court is set aside, but by granting liberty to the Respondent/ Employee to file a complaint to the Provident Fund Authority at Aurangabad against the Petitioner indicating the provident fund accumulations that are due. The Respondent would be at liberty to set out in his complaint as regards failure of the Petitioner to deposit the employees' share as well as the employer's share.

13 In the event such a complaint is filed within FOUR WEEKS from today, the Provident Fund Authority at Aurangabad shall issue notice to the Petitioner and shall decide the said claim within a period of SIX MONTHS from the date of issuance of notice. Needless to state, the Provident Fund Authority would be entitled to invoke Section 7A including such other provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 as may be necessary for the recovery of penalty and damages from the Petitioner, if so noticed that the

Petitioner is guilty of failing to deposit the provident fund contributions.

14 Rule is made partly absolute in the above terms.

15 The amount of Rs.1,25,000/- deposited by the Petitioner shall be withdrawn by it along with accrued interest. The Petitioner shall authorize its representative for such withdrawal who shall present his identity proof and authorization bearing the official stamp of the Petitioner.

kps **(RAVINDRA V. GHUGE, J.)**