IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5154 of 2016

==

Central Board Of Trustees, Employees Provident Fund Organization through the Assistant Provident Fund Commissioner (Legal), Regional Office, Patna having his office at R. Block, Road No.6, P.S.- Sachivalay, District- Patna.

... ... Petitioner

Versus

Katihar Medical College through its Chairman-cum-Managing Director, Ahmad Ashfaque Karim, Karimbagh, P.S.- Katihar Mufassil, P.O.- BMP Katihar, District- Katihar.

... ... Respondent

==

Appearance :
For the Petitioner/s : Mr. Prashant Sinha, Advocate
For the Respondent/s : Mr. M.P. Srivastava, Advocate

==

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT
Date : 18-02-2019

Heard learned counsel for the petitioner and learned counsel for the respondent.

2. In this case, the petitioner has sought the following reliefs:-

"(i) For issuance of writ in the nature of certiorari for quashing of the order dated 14.11.2014 passed in ATA No.527 (3) of 2011 passed by the Employees Provident Fund Appellate Tribunal, New Delhi (hereinafter to be referred to as Tribunal only) whereby the appeal preferred by the respondent against the order dated

30.06.2011 passed by the Regional Provident Fund Commissioner-II, Bhagalpur, has been allowed.

(ii) For issuance of writ in the nature of certiorari for quashing of the order dated 13.08.2012 passed by the Tribunal in ATA No.527 (3) / 2011, whereby the appeal was restored to its original file, while actually the Tribunal had dismissed the appeal on 11.04.2012 holding that it is not maintainable and also dismissed the restoration application vide order dated 02.07.2012.

(iii) For holding that the Tribunal has got no power or jurisdiction to review/recall its own order, as such, once the Tribunal held that the appeal is not maintainable, it was beyond the jurisdiction of the Tribunal to review/recall its order and hear the appeal on merit.

(iv) For issuance of writ in the nature of certiorari for quashing of the order dated 04.11.2010 passed by the Assistant Provident Fund Commissioner (Compliance), Bhagalpur, whereby in exercise of powers under Section- 7C, he has exonerated the respondent from its liability to pay the Provident Fund dues with regard to certain workers regarding whom earlier a different authority assessed liability on the basis of

cogent material. The Assistant Provident Fund Commissioner, Bhagalpur, without adhering to the procedure of enquiry and relying upon a superficial report of the Enforcement Officer, exonerated the respondent from its liability.

(v) For any other order, which your Lordship may deem fit and proper in the facts and circumstances of the case.

3. Basically, the petitioner has challenged the order dated 14.11.2014 passed by the Employees Provident Fund Appellate Tribunal, New Delhi, in A.T.A. No.527 (3) /2011 and also challenged the order dated 04.11.2010 passed by the Assistant Provident Fund Commissioner (Compliance), Bhagalpur, under Section 7C of the Employees' Provident Fund and Miscellaneous Provisions Act (hereinafter referred to as "the Provident Fund Act"), whereby and whereunder he has not assessed the amount under the category of escape assessment. The petitioner has also challenged the order dated 13.08.2012 passed by the Tribunal in A.T.A. No.527 (3) / 2011, whereby and whereunder the Tribunal has restored the original appeal filed by the Katihar Medical College.

4. The short facts of this case are that the respondent

-Katihar Medical College (hereinafter referred to as “the Medical College”) has been established and registered under the Societies Registration Act, 1860. The Provident Fund Act was made applicable to the Medical College and it was allotted the Code vide P.F. Code No. BR/6351. The assessment was made under Section 7A of the Provident Fund Act for the period from July, 1992 to December, 1994 for an amount of Rs.1,27,413/-, which was deposited by the Medical College. In the meantime, the Medical College was affiliated by the B.N. Mandal University, Madhepura and whereafter, the Governing Body resolved to open the account of Provident Fund for individual employees in the Punjab National Bank, taking a pea that they will be treated to be an exempted establishment under Section 16(1)(C) of the Provident Fund Act, but the Employees’ Provident Fund Organization was not agreeable to the stand taken by the Medical College, a proceeding under Section 7A of the Provident Fund Act was initiated, which was challenged before this Court in C.W.J.C. No.5159 of 2001 and this Court vide order dated 09.05.2011 remanded back the matter giving direction to the Assistant Provident Fund Commissioner first decide the applicability of the Act and if it is found that the Act is applicable, then he can proceed under Section 7A of the

Provident Fund Act. Accordingly, the Assistant Provident Fund Commissioner has decided both the issues viz. applicability of the Act and assessment of amount that come to Rs. 1,15,08,866/-, which was challenged before this Court in C.W.J.C. No.8717 of 2002. However, the said writ petition was withdrawn, claiming that they will avail the remedy as available under Section 7B of the Provident Fund Act. Accordingly, an application under Section 7B of the Provident Fund Act was filed, but the amount was reduced to Rs.29,12,363/- having held that in earlier proceeding some persons, who were exempted employees, they were also taken into consideration for assessment and certain persons, who have joined the College after the retirement from the Government service, their salaries were also taken wrongly for the purposes of the assessment of the amount under the Provident Fund Act, but it has come to the notice of the Regional Provident Fund Commissioner, Patna, who started the proceeding under Section 7C of the Provident Fund Act, that was challenged before the Appellate Tribunal in A.T.A. No. 183(3)/2006 and the Appellate Tribunal has held that the Regional Provident Fund Commissioner, Patna, did not have jurisdiction to initiate a proceeding under Section 7C of the

Provident Fund Act, only the authority passed the order under Section 7A of the Provident Fund Act, will have jurisdiction to proceed and start a proceeding under Section 7C of the Provident Fund Act, accordingly, the order of the Regional Provident Fund Commissioner was quashed and the matter was remanded back to the competent authority.

5. After the remand, the Assistant Provident Fund Commissioner, Bhagalpur, on the basis of the report of the Inspector, Provident Fund, examined the matter and found that nothing wrong has been done in the assessment and there was no escape liability to the Medical College and closed the proceeding in favour of the Medical College. The Regional Provident Fund Commissioner, Bhagalpur, found fault with the order of the Assistant Provident Fund Commissioner and he himself initiated a proceeding under Section 7C of the Provident Fund Act and held that the order passed by the Regional Provident Fund Commissioner, Patna, is correct and assessed the amount against the Medical College. The aforesaid order was challenged before the Employees Provident Fund Appellate Tribunal, New Delhi, in A.T.A. No.527(3)/2011 and the Appellate Tribunal directed to deposit 30% demanded amount. This order was challenged before this Court in

C.W.J.C. No.19718 of 2011 and this Court vide order dated 02.04.2012 dismissed the writ petition, which was challenged in Letters Patent Appeal No.689 of 2012, the same was disposed of giving liberty that if the appellant, present petitioner, deposits 30% of demanded amount, as directed by the Tribunal, by 31.07.2012, the Tribunal will hear and decide the appeal preferred by the petitioner in accordance with law. But during the pendency of the Letters Patent Appeal, the appeal filed by the petitioner was rejected vide order dated 11.04.2012 on the ground of failure to deposit 30% amount. Against that order, the petitioner has filed a restoration petition, but in view of the order passed in C.W.J.C. No.19718 of 2011 and its non-compliance of the order of depositing 30% of demanded amount, refused to restore the appeal and rejected the restoration petition vide order dated 02.07.2012.

6. After depositing 30% demanded amount, the petitioner again filed a restoration petition. The Appellate Tribunal vide order dated 13.08.2012 allowed the restoration petition and restored the appeal to its original file, heard the appeal on merit and ultimately vide impugned order allowed the appeal on two counts viz. on merit as well as on technical ground of jurisdiction of the Regional Provident Fund

Commissioner, Bhagalpur, that he could not have initiated a proceeding under Sections 7C and 7B of the Provident Fund Act.

7. Learned counsel for the petitioner has raised the point that the restoration of the appeal, second time on dismissal for default is bereft of jurisdiction of the Tribunal as he submitted, if the Appellate Tribunal has exercised the jurisdiction of restoration of appeal, which has been dismissed for default, is nothing but reviewing the earlier order, barred on the principle of *re-judicata*, in support of his submission, he has placed reliance on the order passed by this Court in the case of ***M/s. Janta Cold Storage vs. The Employees Provident Fund Organization through the Assistant Provident Fund Commissioner and Anr.*** reported in ***2018 (4) PLJR 811***, whereby the Division Bench has affirmed the view of the learned Single Judge, reported in ***2015 (3) PLJR 652 (The Employees Provident Fund Organization vs. M/s. Janta Cold Storage and Anr.)***

8. Another point has been taken that the order passed by the Appellate Tribunal is not based upon the consideration of fact that in reality, it was a case of escape assessment as the Assistant Provident Fund Commissioner has illegally ignored certain salaries which will not fall under the purview of excluded employees and refused to take into consideration, is nothing but committing an error of fact as well as error of law. He has further submitted that the Assistant Provident Fund Commissioner has equally committed a wrong in refusing to take into consideration the materials which he was required to look into as the excluded employees will be those whose salary are more than 5000/- and above, if their salary is reduced then excluded employees will come under the coverage of Employees Provident Fund, in such event, there will be a proper deduction and matching amount to be deposited by the management to the Employees Provident Fund.

9. Whereas, learned counsel for the other side submits that the present writ petition is not maintainable as the same has been filed through the Assistant Provident Fund Commissioner (Legal) as he cannot represent the Central Board of Trustees on account of fact that paragraph no.24-A of the Employees Provident Fund Scheme, does not give such prescription to delegate the power to pursue or to take action and contest the case before any Court as because he is not an aggrieved party, placing reliance on the judgment of the Calcutta High Court in the case of ***Central Board, Employees'***

Provident Fund Organization vs. Employees' Provident Fund Appellate Tribunal and another reported in ***2017 LLR, 767*** and also submitted that the Regional Provident Fund Commissioner cannot be said to be a proper authority, who could have exercised the power under Section 7C of the Provident Fund Act, only the Assistant Provident Fund Commissioner, who has passed the order under Section 7A of the Provident Fund Act, will have jurisdiction to proceed and start a proceeding under Sections 7B and 7C of the Provident Fund Act. So, the order of the Regional Provident Fund Commissioner, Bhagalpur, is completely an illegal order and without jurisdiction, same cannot be sustained in the eye of law in view of the fact that earlier the same issue came before the Appellate Authority challenging the order passed by the Regional Provident Fund Commissioner, Patna, which was set aside on the ground of having no jurisdiction to the Regional Provident Fund Commissioner, Patna.

10. It has further been submitted that the provision of Section 7C of the Provident Fund Act is very much clear, who could have started a proceeding under Section 7 of the Provident Fund Act and the statutory provision makes it very clear that the authority who has proceeded under Section 7A of the Provident Fund Act will be the only authority to start the proceeding under Sections 7B or 7C of the Provident Fund Act.

11. In reply, learned counsel for the petitioner submits that under the Employees Provident Fund Act has been enacted by the Parliament and Section 5A, has come by way of amendment, prescribes that the Central Government by a notification in Official Gazette constitute with effect from the date, as may be specified, the Board of Trustees for the territories to which this Act stand and it has been made juristic person as per the provisions stipulated under Section 5C of the Provident Fund Act, which makes it very much clear that the Board of Trustee constituted under Section 5A or under Section 5B shall be body corporate and can sue and be sued in the name and seal of the Board of Trustee and also submitted that in Section 5E the Central Board has been conferred the power to delegate to the Executive Committee or to the Chairman of the Board or to any of its Officer and the State Board may delegate to its Chairman or to any of the Official subject to such condition and limitation, if any, as it may specify such power and function under this Act, as it may deem necessary, for efficient administration of the scheme, the Pension scheme and Insurance scheme. The learned counsel for the petitioner submits that the provision of Section 5E of the Employees Provident Fund Act has been formulated in wide amplitude comprehend the power of delegation to act on behalf of the Board of Trustees in pursuing Court cases, and submits, when power has been conferred in such a wide term its interpretation cannot be construed narrowly and further submits the power has been delegated to the Assistant Provident Fund Commissioner to file this case on behalf of the Board of Trustees, has placed reliance on the decision of this Court in the case of ***M/s. S.K. Nasiruddin Biri Merchants Pvt. Ltd. vs. Assistant Provident Fund Commissioner, Regional Office, Employees Provident Fund Organization and Anr.*** reported in ***2016(4) PLJR 499***, in which it has been held that the delegation of power conferred upon the Assistant Provident Fund Commissioner (Legal) is a valid delegation, he can prosecute and file a case before any Court or authority or take legal action as per the law.

12. Having considered the rival contentions of the parties, it will be relevant to decide the objection about the maintainability of the writ petition, as has been raised by the learned counsel for the respondent, that the Assistant Provident Fund Commissioner (Legal) through whom the petition has been filed is not maintainable as the Employee's Provident Fund Act or the Scheme framed thereunder does not postulate conferment of delegation of power for the purposes of representing the Central Board of Trustees as paragraph no.24 of the Employees Provident Funds Scheme, 1952 may not be construed so widely comprehensibly the power of delegation of such Power by the Central Board to any such Officer to file suit, writ or proceeding for and on behalf of the Central Board.

13. Learned counsel for the respondent has given much emphasis on construing the provision of paragraph-24-A of the Employees' Provident Fund Scheme, 1952, would not be interpreted in such manner to give such power of delegation to litigate on behalf of the Central Board of Trustees, but is confined to dealing with the nature of capital expenditure or revenue expenditure. In support of his submission, he placed reliance on the judgment of the Calcutta High Court in the case of ***Central Board, Employees' Provident Fund Organization vs. Employees' Provident Fund Appellate Tribunal and another*** reported in ***2017 LLR 767***.

14. In contra, learned counsel for the petitioner has submitted that Section 5(A), 5(C) and 5(E), itself adumbrate that the Board of Trustees is the Body Corporate can sue and can be sued. Section 5(E) itself postulates the empowerment by the Central Board to appoint any officer for efficient administration of the scheme and further submitted that paragraph no.24 or 24-A of the Employees' Provident Fund Scheme, 1952, operate in a different field and does not deal with the providing authority to any officer to fight the litigation for and on behalf of the Central Board and further submitted that this issue is no longer *res integra* in view of the judgment of this Court in the case of ***M/s. S. K. Nasiruddin Biri Merchants Pvt. Limited vs. Assistant Provident Fund Commissioner, Regional Office, Employees Provident Fund Organization and Anr.*** reported in ***2016(4) PLJR 499***.

15. Before dealing with the issue, it will be relevant to forensically examine the scheme of the Employees Provident Fund Act and the Scheme framed thereunder. The Employees Provident Fund Act has been created for grant of social security to the employees working in an organized and unorganized sector by making certain deduction from the wages of employees and matching contribution from the employer in order to grant social security at the end of the tenure of service of the employee and especially those establishments having no provision of grant of pension. This social security measure has been taken in furtherance of guidelines provided in directive principle of State Policy embodied in the Constitution of India for better social security to the working class with a goal to provide sense of security after retirement from the service.

16. To understand the working of the Central Board of Trustees, it will be necessary to quote Section 5(A), 5(C) and 5(E) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, which basically gives the glimps in what manner the Central Board exercises the power and function and operates the scheme framed under and operation of paragraph no.24 and 24-A of the Employees' Provident Fund Scheme, 1952, which is also necessary to be looked into as the thrust has been given by the respondent that granting power of delegation to Assistant Provident Fund Commissioner (Legal) to litigate cannot be said to have been envisaged in that paragraph, which are as follows:-

> *"**5-A**. **Central Board-** (1) The Central Government may, by notification in the Official Gazette, constitute with effect from such date as may be specified therein, a Board of Trustees for the territories to which this Act extends (hereinafter in this Act referred to as the Central Board) consisting of the following [persons as members], namely:-*

(a) [a Chairman and a Vice Chairman to be appointed by the Central Government;

(aa) the Central Provident Fund Commissioner, Ex officio;

(b) not more than five persons appointed by the Central Government from amongst its officials;

(c) not more than fifteen persons representing Governments of such States as the Central Government may specify in this behalf, appointed by the Central Government;

(d) [ten persons] representing employers of the establishments to which the Scheme applies, appointed by the Central Government after consultation with such organisations of employers as may be recognised by the Central Government in this behalf; and

(e) [ten persons] representing employees in the establishments to which the Scheme applies, appointed by the Central Government after consultation with such organizations of employees as may be recognized by the Central Government in this behalf.

(2) The terms and conditions subject to which a member of the Central Board may be appointed and the time, place and procedure of the meetings of the Central Board shall be such as may be provided for in the Scheme.

(3) The Central Board shall [subject to the provisions of section 6 and section 6C] administer the Fund

vested in it in such manner as may be specified in the Scheme.

(4) The Central Board shall perform such other functions as it may be required to perform by or under any provisions of the Scheme, [the Pension Scheme] and the Insurance scheme.

(5) The Central Board shall maintain proper accounts of its income and expenditure in such form and in such manner as the Central Government may, after consultation with the Comptroller and Auditor General of India, specify in the Scheme.

(6) The accounts of the Central Board shall be audited annually by the comptroller and Auditor General of India and any expenditure incurred by him in connection with such audit shall be payable by the Central Board to the Comptroller and Auditor General of India.

(7) The Comptroller and Auditor General of India and any person appointed by him in connection with the audit of the accounts of the Central Board shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor General has, in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers, documents and papers and inspect any of the offices of the Central Board.

(8) The accounts of the Central Board as certified by the Comptroller and Auditor General of India or any other person appointed by him in this behalf together

with the audit report thereon shall be forwarded to the Central Board which shall forward the same to the Central Government alongwith its comments on the report of the Comptroller and Auditor General.

(9) It shall be the duty of the Central Board to submit also to the Central Government an annual report of its work and activities and the Central Government shall cause a copy of the annual report, the audited accounts together with the report of the Comptroller and Auditor General of India and the comments of the Central Board thereon to be laid before each House of Parliament.

5C. Board of Trustees to be body corporate:- *Every Board of Trustees constituted under section 5A or section 5B shall be a body corporate under the name specified in the notification constituting it, having perpetual succession and a common seal and shall by the said name sue and be sued.*

5-E- Delegation *- [The Central Board may delegate to the Executive Committee or to the Chairman of the Board or to any of its officers and a State Board may delegate to its Chairman or to any of its officers], subject to the conditions and limitation, if any, as it may specify, such of its powers and functions under this Act as it may deem necessary for the efficient administration of the Scheme, the pension scheme and the Insurance Scheme-.*

24. Administrative and financial powers of a Commissioner *(1)A Commissioner may, without reference to the [Central Board], sanction expenditure* *on contingencies, supplies and services and purchase of articles required for administering the Fund subject to financial provision in the budget and subject to the limits up to which a Commissioner may be authorized to sanction expenditure on any single item from time to time by the Central Board.*

(2) A Commissioner may also exercise such administrative and financial powers other than those specified in sub-paragraph (1) above, as may be delegated to him from time to time by the Central Board.

(3)A Commissioner may delegate from time to time the administrative and financial powers delegated to him by the Central Board to any officer under his control or superintendence to the extent considered suitable by him for the administration of the Scheme. A statement of such delegation shall be placed before the next meeting of the Central Board for information.

24-A*. *Delegation of power by the Central Board- *(1)The Central Board may, by a resolution, empower its Chairman to sanction expenditure on any item, whether in the nature of capital expenditure or revenue expenditure, as it may deem necessary for the efficient administration of the Fund, subject to financial provisions in the Budget, where such expenditure is beyond the limits upto, which the Commissioner is authorised to sanction expenditure on any single item"*

(2) The Central Board may also, by a resolution, empower it Chairman to appoint such officers and employees other than those mentioned in sub-sections

(1) and (20 of Section 5-D of the Act, as he may consider necessary for the efficient administration of the Scheme.

(30 All sanctions of expenditure made by the Chairman in pursuance of sub-paragraph (1) shall be reported to the Central Board as soon as possible after the sanction of the expenditure."

17. From a perusal of the aforesaid provisions, it appears that the Central Government in exercise of power under Section 5A, by notification in the Official Gazette, would constitute the Central Board of Trustee. Section 5(B) provides, the Central Government may, after consultation with the State Government or any State, by notification in the Official Gazette would constitute the State Board of Trustee as provided under the Scheme. Section 5(D) stipulates that the Central Government shall appoint a Central Provident Fund Commissioner, who shall be the Chief Executive Officer of the Central Board and also prescribed the appointment of Financial Adviser and the Chief Accounts Officer to assist Central Provident Fund Commissioner in the discharge of his duties. Clause-3 of Section 5(D) provide certain number of Officers to assist in operating and securing the goal provided in the Act and also for efficient administration of the Scheme. Section 5(E) dealing with the power of delegation, which makes it clear that the Central Board may delegate to the Executive Committee or the Chairman of the Board or to any Officer and the State Board may delegate to its

Chairman or to any Officer such of its power and functions under this Act as it deemed to be necessary for efficient administration of the Scheme and in the Insurance Scheme with condition as may be specified. The clause has been inserted “such of its power and function” itself indicates Central Board or State Board may delegate “all or any power” postulates under the provisions of the EPF, but with rider of condition and limitations fixed by the Board. Section 5E of the Act has been couched with widest term, in view of the beneficial legislation, comprehend widest possible manner of delegation of power. Section 5(E) of the Act has to be given full effect for efficient administration of the Provident Fund Act, has to be given a liberal interpretation, cannot be restrictive and destructive meaning. The scheme cannot control the statutory provision, but the Scheme is to be interpreted in consonance with the provisions of the Employees Provident Act.

18. Paragraph no.24(A) basically deals with the power of delegation with a restrictive circle dealing with the capital expenditure and the revenue expenditure. This provision does not deal with the entire working of the Central Board, but is confined to certain purposes of dealing with the power and function on the issue of capital expenditure and the revenue expenditure.

19. In the judgment of the Calcutta High Court, it has been held that delegation of power must be interpreted only in respect of the power that the statute has conferred upon the Central Board.

Delegating an authority to some officials to institute or conduct legal proceedings by or against the Central Board does never mean that the power which the Central Board enjoys may ever be exceeded. There is no quarrel with regard to interpretation of provision of paragraph no.24(A) of the Scheme. It will be relevant to quote paragraph nos. 33 and 34 of the judgment rendered in the case of ***Central Board, Employees' Provident Fund Organization (supra),*** which read as under:-

> *"**33**. I have carefully examined the resolution and find that certain classes of officers have been authorized and empowered to institute, conduct, prosecute and defend civil and criminal proceedings by or against the Central Board or the Central Provident Fund Commissioner and or Regional Provident Fund Commissioner and to appear for and on behalf of the Central Board of Trustees.*
>
> ***34.** This delegation of power must be interpreted only in respect of the power that the statute has conferred upon the Central Board. Delegating an authority to some officials to institute or conduct legal proceedings by or against the Central Board does never mean that the power which the Central Board enjoys may ever be exceeded. A delegate may exercise power only in respect of the subject matter failing within its jurisdiction. Moreover, in view of the specific limits set in Paragraph 24A of the Scheme the so-called delegation of the Central Board must be help to be beyond the statutory bounds in all respects. Whereas is the scope of the Central Board to delegate the right*

relating to prosecution and defence of cases upon certain classes of officials mentioned? Even if, the subject matter of any proceeding falls within the exclusive domain of the Central Board of Trustees, such delegation is impermissible in view of paragraph 24A of the Scheme. It suffers from the vice of excessive delegation and that too in favour of officials not contemplated by the Statute."

20. In this judgment, the Hon'ble Judge of Calcutta High Court has not dealt with the power and functions stipulated in Section 5(A), 5(B) and 5(E) of the Provident Fund Act and on conjoint reading of all the aforesaid Sections of the Employees Provident Fund Act, it appears that the power to act on behalf of the Central Board in legal proceeding cannot be read in exclusion of such power of the Board to authorize any of its officers to sue on its behalf as Section 5(C) itself mentions that the status of the Board of Trustees will be treated to have been incorporated is a Body Corporate, has a power to sue and be sued for and on behalf of the Central Board of Trustees. In the case of *M/s. S. K. Nasiruddin Biri Merchants Pvt. Limited (supra)* specifically the issue has been dealt with and it has been held that the Assistant Provident Fund Commissioner (Legal) cannot be held having no power to pursue the legal battle as he never acts as an adjudicating authority, he has been given power by the Central Board to assist the Body Corporate in the legal battle. The juristic person cannot act or function without the intervention of human assistance. The Division Bench has an occasioned to examine the power of delegation would be conferred to Law Officer of Regional Provident Fund and all Assistant Provident Fund Commissioners (Legal) by the Central Board of Trustess to file and conduct/defend legal proceeding and the Resolution has been quoted in extenso in the said judgment and the Court has held that if a person is not an adjudicating authority, his authority to pursue the legal battle cannot be said to be having bereft of power as he is not a quasi judicial authority, who has discharged the function of adjudication and assessment, but has been authorized to deal with the legal issue before the Court or the proceeding before the competent authority and finally the Court has held that the statutory provision and the resolution, by which the Assistant Provident Fund Commission (Legal) has been authorized by the Central Board to represent on behalf of the Central Board in legal battle. So this Court has rejected the submission of bereft of power to confer delegation to represent Central or State Board of Trustees.

21. It will be relevant to quote paragraph nos. 8 and 20 of the said judgment, which are as follows:-

*“**8.** In the present Letters Patent Appeal, learned*

counsel for the appellant argued that the Assistant Provident Fund Commissioner, who has filed the writ application before this Court, was not competent to file the same being an Adjudicating Authority. He relies upon an order passed by the Hon"ble Supreme Court reported as Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and another, (2007) 8 SCC 254. In the aforesaid case, in proceedings under Foreign Exchange Regulation Act, 1973, a question arose whether a Special Director, who was the Adjudicating Authority, can prefer an appeal before the High Court against an order passed by the Foreign Exchange Regulation Appellate Board. The Court held that an Adjudicating Authority exercises a quasi judicial power and discharges judicial functions. When its order had been set aside by the Board, ordinarily in absence of any power to prefer an appeal, it could not do so. Reliance is also placed upon Regional Provident Fund Commissioner Vs. Employees" Provident Funds Appellate Tribunal, and Another, 2014 LLR 1242(Calcutta), Asstt. Provident Fund Commissioner, Visakhapatnam Vs. E.P.F. Appellate Tribunal, New Delhi and Another, 2013 LLR 437 (Andhra Pradesh) and Administrator, Cosmopolitan Hospitals (P) Ltd., Murinjapalam Vs. Regional Provident Fund Commissioner, 2016 LLR 148(Kerala), wherein the judgment in Mohtesham Mohd. Ismail (supra) was relied upon to hold that the quasi judicial authority who has determined the liability cannot challenge the order passed by it.

20. *In view of such statutory provisions and the resolution, the Assistant Provident Fund*

Commissioner (Legal) is the person authorized by the Central Board to institute proceedings for and on behalf of the Central Board of Trustees who represent the Statutory Body. Therefore, the writ application has been filed not by the Adjudicating Authority but by a delegatee of the Central Board of Trustees, which is, thus, a competent writ application."

22. In such view of the above discussions, the point that has been raised by the respondent about the maintainability of the writ petition, is hereby rejected.

23. Now, coming to the points raised by the petitioner; first that the order dated 14.11.2014 passed by the Appellate Tribunal in A.T.A. No.527 (3) of 2011, is completely bad in law having taken plea that preceding two times the appeal itself was dismissed for default and third time the Appellate Tribunal has restored the appeal, which is nothing but amounts to reviewing the earlier orders as well as it will operate as *res judicata* against the respondent to restore the case and adjudicate the same on its merit, as has been submitted that the appeal filed by the respondent authority was first time rejected on 11.04.2012 as it failed to deposit 30% amount, as directed by the Tribunal, and filed restoration petition, the same was also rejected vide order dated 2nd July, 2012, but in third time the authority has restored the appeal to its original number vide order dated 13.08.2012.

24. Learned counsel for the petitioner submits that once the appeal was dismissed followed by dismissal of restoration petition, the filing of restoration petition second time is not maintainable in law as there is no provision to entertain such restoration petition as the same is barred by the *res judicata* as well as the Appellate Authority does not have power to review its own order as review is the creation of the statute, in absence of specific provision it has no jurisdiction to exercise the same and placed reliance on the judgment rendered in the case of ***The Employees' Provident Fund Organization vs. M/S Janta Cold Storage and Anr. r***eported in ***2015(3) PLJR 652***, having held that in the garb of clarification or modification, the Appellate Authority does not have power and jurisdiction to review the case, which has already been concluded on merit, rejected the contention of invocation of power stipulated under sub-Section (2) of Section 7-L of the Act. As Section 7-L of the Act only empowers the Tribunal to rectify the mistake which are apparent on the face of the record and the applicability of res judicata has been considered in paragraph no.23 of the said judgment. Ultimately, the Court has lucidly held that second time the appellate authority cannot exercise the power of restoration.

25. It will be relevant to quote paragraph no.23 of the said judgment, which is as follows:-

> *"**23**. A question regarding application of res judicata has been raised on behalf of the petitioner. The plea of the petitioner has been refuted by learned counsel for the respondent arguing that the principle of res judicata is applied only when the previous matter is decided on merit. The submission of learned counsel for the petitioner appears to be correct because in the present case, Tribunal dismissed restoration petition on merit observing that there was no sufficient explanation for non-appearance and, therefore, it can not be said that first restoration petition filed on behalf of the respondent was not decided on merit and, therefore, principle of res judicata is also applicable in this matter."*

26. The aforesaid judgment has been affirmed by the Division Bench in the case ***M/s. Janata Cold Storage vs. The Employees' Provident Fund Organization through the Assistant Provident Fund Commissioner and Anr.*** reported in ***2018(4) PLJR 811***. It will be relevant to quote paragraph nos. 8, 9 and 10 of the said judgment, which are as follows:-

> ***"8.*** *If this is what the Hon'ble Apex Court has had to say with regard to applicability of principles of res judicata even in matters of interlocutory orders, then there is no way the Tribunal's decision to restore already dismissed restoration application a second time over can be justified in law.*
>
> ***9***. *If the decision dated 5.5.2009 is held to be bad in*

> *law and against the settled principles, then obviously the consequential order on the merits passed on 15.6.2009 also cannot be sustained and for which the learned Single Judge has also given the additional reasons thereof.*
>
> ***10.*** *In totality therefore, the appeal has no merit and is required to be dismissed as no part of the order of the learned Single Judge suffers from any infirmity which is required to be rectified in appeal."*

27. The view taken by the Division Bench is binding precedent to this Court and irresistible conclusion can be drawn that the Appellate Authority has wrongly exercised the power, thereby restored the appeal, which has been dismissed for default in earlier two times and set aside its earlier order. The Appellate Authority has also committed a wrong that when he has quashed the order of the Regional Provident Fund Commissioner-II, Bhagalpur, on the ground that Regional Provident Fund Commissioner-II, Bhagalpur, has reiterated the order passed by the Regional Provident Fund Commissioner-II, Patna, in such circumstances, he was to give its reason for his interference, but in an ipsi dixit manner allowed the appeal without dealing with the issue involved in the case and passed the order in favour of respondent that too without proper adjudication of the case, inasmuch as, without giving direction for fresh consideration.

28. The facts of the case show that Katihar Medical College right from the beginning has been resisting the applicability of the employees Provident Fund Act. They were called upon to implement the provisions of Employees Provident Fund Act as in a proceeding initiated under Section 7A the assessed amount was deposited by the Medical College, but after its affiliation with B.N. Mandal University, Madhepura, the Governing Body passed a Resolution to open the individual Provident Fund Accounts of its employees and started depositing the same, which was objected by the Employees Provident Fund Organization, but they have taken plea that after affiliation they will be treated to have been excluded from the provisions of the Employees Provident Fund Act, that compelled the authority to initiate a fresh proceeding under Section 7A of the Provident Fund Act and for that a show-cause was issued on 29.09.2000, which was challenged by the establishment of the Medical College in C.W.J.C. No. 5159 of 2001, which was disposed of by this Court vide order dated 09.05.2011 and remanded back the matter, giving direction to the Assistant Provident Fund Commissioner to decide the applicability of the Act prior to assessing the dues.

Accordingly, the Assistant Provident Fund Commissioner decided the issue vide order dated 27.05.2002 and held that Employees Provident Fund Act is applicable and assessed the amount to the tune of Rs.1,15,08,866/-, which was challenged in C.W.J.C. No. 8717 of 2002, but in the mid-way it was withdrawn taking a plea that they will file a review under Section 7B of the provident Fund Act, in 7B proceeding, vide order dated 28.08.2003 uphold the applicability of the Act over the establishment and assessed the amount to Rs.29,12,363/-, in addition the interest amount of Rs.13,78,237/- and thus total amount was reduced to the tune of Rs.42,90,600/-. The matter was again examined by the Regional Provident Fund Commissioner, Patna, who found that large number of employees eligible for the membership under the Scheme have been left out and in order to cover them, started an escape assessment proceeding as provided under Section 7-C of the Employees Provident Fund Act and reopened the case in order to determine the contribution of left out employees and assessed an amount of Rs.33,04,372/-, the same was challenged before the Appellate Tribunal in A.T.A. No.183(3) of 2006 having held that the Regional Provident Fund Commissioner, Patna, does not have jurisdiction to initiate escape assessment proceeding as only the authority who has passed the order under Section 7A and 7(B) of the Provident Fund Act will have jurisdiction to initiate the proceeding under Section 7-C of the Provident Fund Act. The matter was remanded back to the Assistant Provident Fund Commissioner, Bhagalpur, but was promoted to the post of Regional provident Fund Commissioner-II, whereafter the proceeding was initiated by another Assistant Provident Fund Commissioner, Bhagalpur, notices were issued to the establishment on 27.08.2009 and the Medical College appeared in the proceeding and challenged the allegation of escape assessment. In the meantime, the Enforcement Officer submitted his report dated 21.11.2010, wherein recorded, on perusal of the record it does not disclose or reflect any item has been left out from assessment and accordingly, the Assistant Provident Fund Commissioner, Bhagalpur dropped the proceeding. Again the proceeding was initiated by the Regional Provident Fund Commissioner-II, Bhagalpur and passed the order on 30.06.2011 and reiterated the amount which was assessed by Regional Provident Fund Commissioner-2, Patna.

29. So, from the factual matrix as stated hereinabove, it appears that the Appellate Authority has set aside the order of the Regional Provident Fund Commissioner, Bhagalpur, on the score that the order which has been passed is without reason, without giving his own finding with regard to the items left out from the assessment of the amount.

30. As this Court has recorded that the Appellate Authority has committed error in restoring the appeal which has already been dismissed for default on two earlier occasions and he has no jurisdiction to revive the proceeding in second time by accepting the restoration petition as has been adumbrated by the Division Bench, in such view of the matter, the order which has been passed by the Regional Provident Fund Commissioner-II, Bhagalpur, also appears to be not a proper order as he has not applied his independent mind rather he has gone in verbatim with the order of the Regional Provident Fund Commissioner, Patna, reiterated the amount which has been assessed by his predecessor, whereas, in exercising the power of quasi judicial, he was supposed to apply his independent mind and should have passed the order with a proper reasons, which is absent.

31. In such view of the matter, the order dated 30.06.2011 passed by the Regional Provident Fund Commissioner-II, Bhagalpur and order dated 14.11.2014 passed in ATA No.527 (3) of 2011 passed by the Employees Provident Fund Appellate Tribunal, New Delhi, are quashed. The matter is remanded back to the Assistant Provident Fund Commissioner, Bhagalpur, to initiate a proceeding under Section 7-C of the Act for escape assessment, would examine the records of the Katihar Medical College meticulously in the backdrop of ceiling of wages of excluded employees varies from time to time and also in consideration of wages varies on different months and years in the background of the Provident Fund Scheme, and pass an appropriate order within a period of three months from the date of receipt/production of a copy of this order.

32. With the aforesaid observations and directions, this writ petition is allowed to the above extent.

(Shivaji Pandey, J)

pawan/-

AFR/NAFR	N.A.F.R.
CAV DATE	N/A.
Uploading Date	02.03.2019
Transmission Date	