

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on :22.09.2017

Date of decision:23.05.2019

W.P.(C) 6435/2011

ANSAL HOUSING & CONSTRUCTION LIMITED Petitioner

Through Mr. N.K. Kantawala, Mr. Tapas
Tyagi & Ms. Akanksha Jain,
Advocates.

versus

REGIONAL PROVIDENT FUND COMMISSIONER-II, DELHI

..... Respondent

Through: Mr. Keshav Mohan and Mr.
Piyush Chaudhary, Advocates.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. Vide the present petition, the petitioner M/s Ansal Housing & Construction Limited seeks the setting aside of order dated 26.08.2011 of the learned Employees Provident Fund Appellate Tribunal in ATA No.723(4)/2009 and order No. Damages Cell/C-2/DL/8493/12928 dated 30.09.2009 passed by the learned RPFC i.e. the respondent arrayed to the present petition under Section 14B & 7Q of the Employee's Provident Funds and Miscellaneous Provisions Act,1952 (hereinafter referred to as the 'Act').

2. Vide the impugned order dated 30.09.2009 of the respondent No.2 under Section 14B of the 'Act', it was ordered that the petitioner/employer to whom the 'Act' applies and who was required to pay:-

- (i) The Provident Fund Contribution under Section 6 of the EPF and MP Act, 1952
- (ii) The Employees Pension Fund Contribution under Section 6A of the EPF and MP Act, 1952 read with Para 4 of the Employees Pension Scheme 1995
- (iii) The Administrative Charges under Para 38 of the Employees Provident Fund Scheme 1952 and
- (iv) The Employees Deposit Linked Insurance Contribution/ Administrative Charges under Section 6C of the EPF and MP Act, 1952,

had failed to pay:-

- (i) The Provident Fund Contributions;
- (ii) The Employees Pension Fund Contributions;
- (iii) The Administrative Charges towards Provident Funds
- (iv) The Employees Deposit Linked Insurance Contributions and Administrative Charges towards insurance Funds,

as required by law for the period from 06/1994 to 03/2006 within the due date and thus a notice vide letter No. DL/CPM/ Circle:10/ Damages/DL/8493/CA/8337 dated 15/07/2008 was issued to the petitioner/employer to show cause within 7 days as to why damages as envisaged under Section 14B of the 'Act' be not levied/ recovered

from the employer for the defaults committed and an opportunity of personal hearing was also afforded vide summon No.DL/8493/Enf/C-I/11883 and the petitioner was called for the hearing on 24.09.2008. It is also indicated vide the said order that Sh.S.P. Arora, Advocate appeared for the petitioner along with his power of attorney (vakalatnama) and acknowledged receipt of the Show Cause Notice dated 15.07.2009 along with the statement showing the defaults committed by the establishment for the period of notice and whilst confirming the defaults, he pleaded for further dates to verify the date of the challans and submitted his representation. It is indicated further vide the impugned order dated 30.09.2009 that the advocate for the petitioner appeared for the personal hearings on 24.09.2008, 15.10.2008, 05.11.2008, 26.11.2008, 12.12.2008, 02.01.2009, 23.01.2009, 20.02.2009, 20.03.2009, 14.04.2009, 18.05.2009, 15.06.2009, 29.06.2009 & 10.09.2009 and submitted that interest under Section 7Q of the 'Act' ought not to be charged as it was built-in in the damages structure and the same had to be specified contending that the matter was similar to M/s System Stampings Case and the department apprised the petitioner that the order of this Court in relation to that establishment was in the facts and circumstances of that case which were different and specific to the establishment of M/s System Stampings and that it was clear from the records of the case that the establishment had failed to act in accordance with the provisions of law which expressly imposed an obligation on the petitioner/employer to remit the Provident Fund and other dues on or

before the 15th of the following month and thus the petitioner had incurred the liability to pay damages.

3. The respondent No.2 vide the impugned order imposed a levy of damages in terms of Para 32-A of the EPF Scheme, 1952, para 9(1) of the Employees' Family Pension Scheme, 1971, Para 5(1) of the Employees' Pension Scheme, 1995 and para 8-A of the Employees' Deposit Linked Insurance Scheme, 1976 which prescribed the graded scale of damages to be imposed on an employer for belated remittances pending upon period of delay and as it was held vide the impugned order that the petitioner/employer had failed to make out any case for departing from the provisions of the scheme, damages at the rate of 17% per annum for delay in payment of dues up to 2 months, 22% p.a. for the delay exceeding two months but less than 4 months, 27% per annum for the delay exceeding 4 months but less than six months and 37% p.a. for the delay exceeding six months in terms of Section 14B of the 'Act' were imposed with the amount of damages having been payable by the petitioner/ employer/ establishment for defaults committed at prescribed rates in respect of each account being computed to the effect:-

Sl. No.		Amount	Account No.
i.	Provident Fund	Rs.2839785/-	01
ii.	Administrative Charges(PF)	Rs.194900/-	02
iii.	Pension Fund	Rs.1662023/-	10
iv.	Deposit Linked Insurance Scheme	Rs.99800/-	21
v.	Administrative Charges	Rs.1997/-	22

**(EDLI)
Total**

Rs.4798505.00/-

4. Furthermore, vide the impugned order dated 30.09.2009, the petitioner/establishment was further held liable to remit a sum of Rs.18,79,535/- towards interest payable under Section 7Q of the 'Act' at the rate of 12% per annum on the defaulted amount which was also quantified and reflected in the statement annexed to the said order qua the account with details of the amount payable under Section 7Q of the 'Act' being to the effect:-

Account No.	Amount
01	Rs.1147348/-
02	Rs.78573/-
10	Rs.615898/-
21	Rs.36980/-
22	Rs.736/-
	
Total	Rs.1879535/-

5. Apart from the same, it was also stipulated vide the said impugned order dated 30.09.2009 that the amount of damages and interest would be paid by the petitioner/employer into the respective Employee's Provident Fund Account maintained at the State Bank of India within 15 days of the receipt of the order, failing which action would be taken under Section 8 of the 'Act' to recover the amount in the same manner as laid down under Section 8B to 8G of the 'Act'

and that the failure to remit the said damages/interest within the stipulated time would attract interest at the rate of 12% per annum from the due date to the date of remittance as prescribed under Section 7Q of the 'Act'.

6. Vide the impugned order dated 26.08.2011 of the learned Employees' Provident Fund Appellate Tribunal, New Delhi in ATA No.723(4)/2009, the appeal of the petitioner/employer against the said order dated 30.09.2009 of the respondent No.2 was dismissed, it having been held that there was no infirmity in the order of the authority i.e. the respondent No.2. The Employees' Provident Fund Appellate Tribunal vide para 6, 7 & 8 of its impugned order observed to the effect:-

“6. It is stated in the appeal memo that the dues were paid when the order was passed by the Authority directing the appellant to do so. So, admittedly the appellant had not deposited the contribution until the order was passed to that effect. In the case of M/s Gram Sewa Samiti Vs. Regional PF Commissioner reported in 1997 Vol. II LLJ at page 1202, the Hon'ble High Court of Madhya Pradesh held that, “the employer bonafide disputing the applicability of the Act is not absolved of his liability to pay the contribution and consequent damage for its default”.

7. It is contended that the proceedings are not maintainable as no arrear was pending when the proceeding was initiated. The notice issued to the appellant shows the details of the period when the appellant has not paid the dues in time. Also, the Hon'ble High Court of Delhi in the case of M/s Hi-tech Vocations Training Centre Vs. Assistant PF Commissioner reported in 2011 LLR at page 231, held that, “the mere default or delay in payment does not amount to arrear.” However, on the other hand in the case of M/s V.V. Food Corporation Ltd. Vs. Regional

PF Commissioner reported in 1995 Vol. 70 FLR at page 1012 the Hon'ble High Court of Bombay held that, "the moment there is default in other words failure to pay contribution provisions of Section 14B of the Act is attracted". Also, in the case of M/s Bharat Heavy Electrical Ltd. Vs. Regional PF Commissioner reported in 1985 LIC at page 282, the Hon'ble High Court of Andhra Pradesh held that, "failure to pay within the time stipulated would also be default in the payment as the delay in payment means non-payment at the time and place". Also, in the case of M/s Popular Saw Mill Vs. Regional PF Commissioner, reported in 1996 LLR at page 357, the Hon'ble High Court of Gujarat held that, "the expression makes default is synonymous with failure to pay." The perusal of the decisions makes it clear that the Hon'ble High Courts are not unanimous on this point and in the case of M/s Jadhav Chandra Pradhan Vs. Kaushalya Pradhan" reported in 1995 Criminal Laws Orissa at page 256, the Hon'ble High Court held that, "the single judge cannot take a view different from an earlier single judge decision if however he doubts the correctness of such earlier single decision he should refer the matter to a larger bench for consideration of the correctness of the earlier single judge decision. If such a step is not taken and divergent views are prevalent the subordinate court should follow the earlier view in preference to the later view". In this case, admittedly the appellant has not deposited the dues in time.

8. Thus, in view of the discussion held above, no infirmity is noticed in the order of the Authority. Hence ordered, the appeal is dismissed. The order of the Authority is hereby upheld. Copy of order be sent to the parties and the file be consigned to record room."

7. Vide the present petition, the petitioner submits that as there were no arrears on the date when the show cause notice was issued to

the petitioner, even if there had been a delay in payments, no damages or interest whatsoever could have been levied on the petitioner under Section 14B & 7Q of the 'Act' submitting to the effect that it has been held in W.P.(C) No.10387/06 vide judgment dated 28.01.2011 of this Court in "Hi-tech Vocational Training Centre vs. APFC" that the proceedings of imposing a penalty can be initiated only if there are arrears and then maximum damages on the arrears can be recovered and further that the proceedings cannot be commenced if there are no arrears on that date, even if there has been a delay in payments.

8. The petitioner has submitted that it is a public limited company incorporated under the Companies Act, 1956 with its registered Head Office at 15, UGF Indraprakash, Building 21, Barakhamba Road, New Delhi, 110001 and has *inter alia* engaged in the business of real estates, developing and promoting of buildings, constructing of shopping malls and housing complexes and commercial business centres throughout the country and that it applied for coverage under the EPF and MP Act, 1952 for the benefit of its employees and consequently was allotted provident fund code No.DL/8493 and ever since then has been scrupulously paying the dues regularly and punctually to its employees. The petitioner has submitted that it awards contract and severs contracts on the basis of open tenders to the successful tenderers for accomplishing the work of constructions, development, laying electric cables, providing security to premises and equipment, supplying of vehicles and various related works for development and constructions and that the contractors execute the works as per specifications in the tender by employing their own work

force and expertise.

9. It has been submitted by the petitioner that the workmen employed by the contractors are neither under the control nor supervision of the petitioner nor do they have any lien of any sort with the petitioner and that the petitioner does not employ labour through the contractors and that the labour as engaged by the contractors for their establishment which are distinct and different from the establishment of the petitioner. It has been stated through the petition further that the payment for executing the work under the contract is made in accordance with the terms and conditions entered into between the petitioner and the respective contractors and that the petitioner was neither required under law to keep the details of the workmen employed in the contractor's establishment nor the petitioner had any need to maintain the records of the contractor's employees.

10. As per the petition, a team of Provident Fund Enforcement Officers conducted an inspection at the office of the petitioner's establishment between 16.11.1999 to 30.11.1999 and after thorough inspection of the records, according to the petitioner found no irregularity in the payment of the EPF dues in respect of its own employees but pointed out that the PF dues on account of the contractor payment for the period 1995-96, 1996-97, 1997-98, 1998-99 to the tune of Rs.16,83,759/- was payable by the petitioner's establishment which the petitioner submitted was a demand contrary to the admitted position of the respondent that the contractors have their own EPF code and so the amount had to be demanded straightaway from the contractor.

11. *Inter alia* the petitioner submits that the said dues pointed out by the Provident Fund Enforcement Officer were not payable by the petitioner/establishment inasmuch as the employees/contractors/labourers for whom the calculation was made were not identified and even the employees share of PF contribution for the retrospective period was never deducted and which could not be deducted by the petitioner/establishment was deliberately got included in the said calculation and that the office of the respondent did not determine the said amount under the provisions of Section 7-A and although the dues were not duly payable without determination under Section 7-A, the office of the respondent under coercion allegedly compelled the petitioner to pay the said amount which was paid in August 2001 and partly in October 2001. The petitioner has submitted that the amount which was got deposited at the office of the respondent without identification of employees was still lying undisbursed and that the respondent was earning interest and profits out of it which was causing willful prejudice to the petitioner/establishment. It has been submitted further by the petitioner that a team of Provident Fund Enforcement Officers again carried out a subsequent inspection for the period 2002-03, 2003-04, 2004-05 and an amount of Rs.21,02,933/- was allegedly found payable after their inspection on 16.02.2006 & 18.02.2006 which alleged calculation was on account of labour charges/ labour wages without identification of the labourers/employees and also included the employees share of contribution and that the petitioner establishment had never deducted any PF contribution from the labourers nor did they have any opportunity to

do the same inasmuch as the Provident Fund Enforcement Officers has themselves observed:-

“The Establishment is executing the work through various contractors which are independently covered under EPF & MP Act, 1952 separately. The Establishment produced the PF Challans of various months before the undersigned in respect of the contractors.”

12. The petitioner submitted that the respondent inflicting threat and coercion compelled the petitioner to deposit the said amount on 9-11.03.2006 and thereafter initiated Section 7-A EPF proceedings against the petitioner in respect of the contractor's employees and recorded a clear finding that a sum of Rs.21,02,933/- was paid on account of contractor employees and an additional amount of Rs.3,37,595/- was deposited by the petitioner on 11.08.2006 under compulsion without identification of the employees/labourers and including employee share of contribution for the alleged default, despite there being no employees nor deductions on account of employee's share of contribution made for the said period. It has been submitted by the petitioner further that similarly the respondent through its inspectorate staff assessed an amount of Rs.3,47,613/- for the period 1999-2000, Rs.3,31,288/- for the period 2000-01, Rs.5,15,183/- for the period 2001-02 and Rs.5,04,213/- for the period 2005-06 on 14.11.2006 allegedly payable by the petitioner and that the said amounts were also on account of labour charges/ labour payments without identification of employees/ labourers and also included the employee's share of PF contribution which the petitioner/

establishment/ employer had no occasion to deduct and that the said payment of employees PF share was got deposited from the employer against the express provisions of Section 6 of the 'Act'.

13. The petitioner has thus submitted that the total amount of Rs.58,22,584/- was got deposited by the respondent under threat and coercion of attachment of bank accounts based on theoretical calculation on account of contract labour charges/ labour wages except for Rs.3,37,595/- which was determined under Section 7A of the 'Act' through a *quasi judicial* inquiry. The petitioner has further submitted that the said amount is all lying unclaimed with the office of the respondent in the absence of any claimant/ beneficiary and that the respondent's office/ department is earning profits and interests on the same in an unjust manner deliberately causing thus prejudice to the petitioner/ establishment. The petitioner has further submitted that the office of the respondent vide its demand communication dated 15.07.2008 includes an erroneous statement of damages under Section 7Q and Section 14B of the 'Act' and asked the petitioner to deposit Rs.47,98,505/- as damages under Section 14B and Rs.18,79,535/- towards interest under Section 7Q of the 'Act' for the period from July 1994 to March 2006 and that in the alleged letter dated 15.07.2008 also stated that the failure to remit and/ or respond by the petitioner within a week would result into initiation of action under Section 8 and Section 14B by the respondent authorities despite the factor that there were no EPF dues as on the said date admittedly payable by the petitioner or the concerned contractors.

14. *Inter alia* it has been submitted by the petitioner that the letter

dated 03.09.2008 received from the respondent for ascertainment of the liability towards alleged delay in making EPF contribution and attracting damages under Section 14B of the 'Act' received by the petitioner made no mention of any period whatsoever in the said notice for which the alleged delay in the EPF dues were proposed to be determined and that the petitioner had only been directed to appear before the respondent on 24.09.2008. *Inter alia* the petitioner has submitted that no notice under Section 7Q to levy interest was served on the petitioner/ establishment and that the notice/ summons dated 03.09.2008 were only to set an inquiry into determination of damages for the delay as allegedly held by the respondent and not to levy any interest under Section 7Q of the 'Act'. The petitioner has submitted that through its representative on various dates of hearing before the respondent, it was brought to the notice of the respondent that Section 2(f) of the 'Act' was not applicable in the case of such contractors and that the petitioner was not a principal employer as it was not employing any regular or casual labour for the works done by the contractors and that the contract between the petitioner and the contractor was a works contract in relation to the execution of the work under the contract.

15. *Inter alia* the petitioner has submitted that it also placed reliance on the verdict of the Hon'ble Supreme Court in "***FCI Vs. Provident Fund Commissioner and others***" reported as **JT 1989(4) SC 830** that it is the legal duty of the Commissioner to collect all evidence and put all material before coming to a proper conclusion and the petitioner thus contended that the respondent was bound to summon

the contractors and their records after particulars of the contractors were made available to them. The petitioner further submitted that it does not owe any liability whatsoever of the EPF qua the workers engaged by the contractors as it does not consider those workers to be its own workers and thus did not own any responsibility and that the respondent was requested to issue notice to the contractors whose list had been submitted and to arrange to collect both employees and employer's share of provident fund from the concerned contractors and also to arrange for allotment of a separate code number to them if not already allotted but that the respondent instead of acceding to the request of the petitioner, put the responsibility on the petitioner to get the EPF dues of the contractors deposited by the contractors with the respondent. It was further submitted by the petitioner that the PF deposits were still lying unclaimed, as necessary particulars with regard to the names, father's names, addresses, salary particulars, duration of service of the beneficiaries were neither provided nor were available with the PF squads; which was important and essential requirement for identification of the beneficiaries and that the said PF deposits extracted from the petitioner establishment could not be assigned to any one and the amounts so deposited remain unclaimed and unapportioned to any employee and was, therefore, lying as a surplus with the respondent PF department and that the respondent PF department, to add insult to the injuries, proposed to levy damages and charge interest on the said deposits.

16. The petitioner has further submitted that it took all possible measures so that the PF dues payable by the contractors (or their

labourers) be deposited by them and as the contractors had their separate EPF code in which account they were liable to deposit the EPF dues, it was obligatory on the part of the respondent to utilize its process to enforce the payments of the EPF dues by the contractors who had defaulted. The petitioner has thus submitted that the dues did not pertain to the petitioner even in the terms of order dated 11.10.2006 under Section 7A and that the same pertained to the labour of the contractors except to the extent of Rs.3,37,595/- which the petitioner was additionally compelled to deposit without identification of employees/ labourers. The petitioner has thus submitted that the damages and interest computed by the respondent are wholly arbitrary and that the levy of penalty also is misconceived.

17. It has been submitted on behalf of the petitioner further that the impugned order of the learned EPFAT is wholly erroneous and is liable to be set aside in view of the judgments in “(i) ***Snap Tap Machine Accessories (India) Pvt. Ltd. Vs. Regional Provident Fund Commissioner***, 90, Factories Journal Reports, 220 (Madras), (ii) ***Pioneer Sports Works Pvt. Ltd. Vs. State of Punjab***, 34, Factories Journal Reports, 140 (Punjab & Haryana), and the judgment dated 28.01.2011 in W.P.(C) No.10387/2006 titled; ***Hi-Tech Vocational Training Centre Vs. Assistant Provident Fund Commissioner***.” *Inter alia* the petitioner has submitted that the impugned order passed by the learned EPFAT is casual and mechanical without taking note of the computation of damages along with the order dated 30.09.2009 of the Regional Provident Fund Commissioner as to in which column the

period of delay had been taken note of and that in the said order of the Regional Provident Fund Commissioner, there was no clear cut basis as to how the amount levied by way of damages had been computed. The petitioner has thus submitted that the impugned order of the EPFAT is contrary to the view of this Court in W.P.(C)10387/06 vide judgment dated 28.01.2011 in “**Hi- Tech Vocational Training Centre Vs. A.P.F.C**” whereby this Court had appreciated that the Hon’ble Supreme Court in “**Employees’ State Insurance Corporation Vs. HMT Limited and Another**” (2008) 3 SCC 35 whilst considering *pari materia* provisions of the Employees’ State Insurance Act, 1948 and after noting the judgment in **M/s Hindustan Times Ltd. Vs. Union of India, AIR, 1998, SC, 688**, held that the statute itself does not say that penalty has to be levied only in the manner prescribed-it is also not a case where the authority is left with no discretion; the legislation does not provide that adjudication for the purpose of levy of penalty proceedings would be a mere formality of imposition of penalty as also computation of the quantum thereof became a foregone conclusion and that it was held that ordinarily such provision would not be held to be providing for mandatory imposition of penalty and if the proceeding is an adjudicatory one, imposition of penalty cannot be mandatory. It has further been submitted by the petitioner that the Supreme Court therein held that the existence of *mens rea* or *actus reus* to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or quantum thereof and that relying upon the earlier judgment in **Prestolite (India) Ltd. Vs. Regional Director AIR, 1994, SC, 521**, it was held that even if the

regulations have prescribed general guidelines and upper limits at which the imposition of damages can be made, it cannot be contended that in no case the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter, as the adjudicating authority is not bound to act mechanically in applying the uppermost limit of the table. The petitioner further submitted that the impugned order in the present case unjustifiably and illegally imposed maximum damages without disclosing any reason therefor.

18. The petitioner has further submitted that the impugned order of the EPFAT apart from being contrary to the view of this Court in W.P.(C)10387/06 in “*Hi- Tech Vocational Training Centre Vs. A.P.F.C*” was also against the observations of the Hon’ble Supreme Court in “*Organo Chemical Industries vs. Union of India*” AIR 1979 SC 1803 whereby it had been held that the power to impose damages under Section 14B is a *quasi judicial* function and must be exercised after notice to the defaulter and after giving him a reasonable opportunity of being heard and that the order under Section 14B must be a speaking order and that the Provident Fund Commissioner is required to take into consideration various factors i.e. the number of defaults, the period of delay, the frequency of defaults and the amount involved and that the order ought to have been objective.

19. *Inter alia* the petitioner has submitted that it had repeatedly taken the initiative to deposit the amounts as and when directed by the respondent which itself indicates that there was an inclination on the part of the petitioner to deposit the same and no damages ought to

have been levied as levied malafidely. *Inter alia* the petitioner submitted that the purpose of Section 14B is to recover compensation and not to impose penalty as laid down by the Hon'ble High Court of Madras in ***“South India Flour Mills (P) Ltd. Vs. Regional P.F. Commissioner, Madras” 1978 I LLJ 101.***

20. The petitioner has further submitted that the order of the respondent is erroneous as it does not disclose the basis of assessment of damages. The petitioner has submitted that the inquiry under Section 7A of the 'Act' was closed on 11.10.2006 and the misconceived summons of the show cause notice issued on 03.09.2008 under Section 14B of the 'Act' had been issued mechanically instead of finding out contractors labourers or finding out the beneficiaries and without any basis, the respondent had started proceedings under Section 14B of the 'Act' against the petitioner for dues of the year as early as of the year 1994. *Inter alia* the petitioner submitted that factors beyond the control of the employer which resulted into late payment of contribution ought to have been considered by the EPFAT whilst upholding the imposition of damages under Section 14B of the 'Act'.

21. *Inter alia* it had been submitted by the petitioner that the EPFAT has failed to appreciate the fact that under Section 14B of the 'Act', the imposition of the damages can only be upto the extent of arrears and no basis had been shown as to which and upto what extent the damages were to be imposed nor have any circumstances been spelt out in the order dated 30.09.2009 as to why the maximum damages were imposable and not on a lesser scale and as also in view

of the proceedings having been initiated in respect of the period extending to the past 14 years. *Inter alia*, it has been submitted by the petitioner that the impugned order dated 30.09.2009 did not reflect consideration of the extenuating circumstances for imposition of damages at a scale lesser than at the rate at which damages have been levied nor did it consider that the Commissioner had unjustifiably levied the damages on the basis of the show cause notice dated 15.07.2009 and that the order of assessment dated 30.09.2009 was itself illegal, arbitrary, unreasonable, unjustified and unconstitutional.

22. The petitioner has further submitted that EPFAT did not consider that the Commissioner was not only required but was bound to conduct an independent inquiry for determination of the amount due against an employer and that for this, it was conferred with the powers to enforce the presence of any person for examining him on oath for requiring the discovery and production of documents receiving evidence on affidavit issuing commission for the examination of witnesses and that the respondent had not conducted an independent inquiry against the actual employers i.e. the contractors as brought forth through the order dated 30.09.2009 itself. The petitioner has further submitted that the order dated 30.09.2009 of the Commissioner, which has been held by EPFAT was without consideration of the question of eligibility as provided under Para-26 of the scheme. It has further been submitted by the petitioner that the order of the Commissioner did not disclose in respect of how many employees the calculation had been made and on the basis of what wages, the calculation had been made and did not speak in relation to

whom the same had been determined. It has further been submitted by the petitioner that it was incumbent on the Commissioner to call for production of oral and documentary evidence by both the parties instead of passing of the final order, which fastened financial liability against any party on the basis of an ex-parte report / opinion on an Inspector on the basis of inspection of the records, which is not sufficient as legal evidence admissible in the eyes of law in as much as the report of the Inspector is always subject to rebuttal and it would be a farce of holding an enquiry under Section 7A of the 'Act' which confers powers / jurisdiction upon the Commissioner to pass an order of assessment without any legal evidence on record and that the order in the instant case is perverse and cannot be given effect to and cannot be enforced and is wholly arbitrary and has been made without application of mind in as much as no attempt has been made by the respondent to determine the contractors wise dues.

23. *Inter alia* the petitioner has submitted that the 'Act' contemplates the scheme of PF for the benefit of individual employees and thus the identification of the employees is a precondition for determining the dues in their account and the learned RPFC was duty bound to enquire and ascertain the full particulars of beneficiaries by exercising powers under Section 7A of the 'Act' and that the learned RPFC has determined the dues on the basis of the amount paid to the contractors without ascertaining as to whether any worker had been employed by them and to what extent and without first identifying the beneficiary employees, which was contrary to the law laid down on

the following decisions : -

- 01. FCI Vs. The Provident Fund Commissioner and Others [JT 1989(4) S.C. 380]**
- 02. BSNL Vs. APFC, Cuddapah [Order dated 07.10.2004 in W.P. No. 17548 of 2004 by Hon'ble High Court of Andhra Pradesh]**
- 03. Tata Chemicals Ltd., Mithapur Vs. Regional Provident Fund Commissioner-II, Rajkot [2004 LAB I.C. 2890]**
- 04. Gujarat State Civil Supplies Corporation Ltd. Vs. Regional P.F. Commissioner & Others [1999 (2) LLJ – 844 -Guj]**
- 05. N.T.P. Corporation Ltd. Vs. Regional Provident Fund Commissioner & Another [1999 (2) LLJ -330 - Cal]**
- 06. Assistant Provident Fund Commissioner Vs. Bharat Sanchar Nigam Ltd. & Anr. [Order dated 28.08.2006 passed by Hon'ble High Court of Rajasthan at Jodhpur in SB Civil Writ Petition No. 5104 of 2005]**
- 07. Emp. State Insurance Corporation Vs. H.M.T. Ltd. [AIR 2008 SC 1322] passed by Supreme Court of India in Civil Appeal No. 340 of 2008.”**

24. The petitioner has further submitted that the EPFAT did not consider that the order dated 30.09.2009 of the learned RPFC was without notice under Section 7Q of the 'Act' but despite the same, a misconceived amount of Rs.18,79,535/- towards interest @12% p.a. had been ordered to be paid.

25. The petitioner has further submitted that in terms of the verdict of the Hon'ble Supreme Court in *Christian Medical College and Brown Memorial Hostel, Haryana & Anr. Vs. RPFC, Chandigarh & Anr. (1989 Supp. (2) SCC (95)*, no damages could be levied and that the facts of the case were in *pari materia* to the said case as there were

no arrears pending and the conduct of the petitioner has been proved to be good beyond doubt. The petitioner has thus sought the setting aside of the order dated 26.08.2011 of the EPFAT in ATA No.723(4)/2009 and the setting order of order No. Damages Cell/C-2/DL/8493/12928 dated 30.09.2009 passed by the learned RPFC i.e. the respondent arrayed to the present petition under Section 14B & 7Q of the Employee's Provident Funds and Miscellaneous Provisions Act,1952.

26. Through its counter affidavit, the respondent submitted that the petition was liable to be dismissed it being on disputed facts and that the Employee's Provident Funds and Miscellaneous Provisions Act,1952 (hereinafter referred to as the 'Act') is a legislation to provide social security to employees working in any establishment engaging 20 or more persons on any day and provides for compulsory deduction of Provident Fund from employees and a contribution from the employer which is deposited in the respective EPF account within the office of the EPFO Office on account of the EPF subscribers and the 'Act' also provides for providing insurance and pensionary benefits to the employees. It has further been submitted on behalf of the respondent through its counter affidavit that the Provident Fund and other contributions have to be deposited by the employer by the 15th of the next month in which the employee had worked in the establishment and the dues became payable to him, because the worker had already performed the employment up to the last day of the previous month and that the contributions have to be deposited by the employer/establishment only after the beneficiary worker has

already worked and thus earned this amount in terms of the contract of employment and the provisions of the 'Act'. It has *inter alia* been submitted by the respondent that any effort by the employer to deny employees the legitimate dues which they have rightfully earned in terms of the provisions of the 'Act', needs to be looked upon with suspicion, whatever the reason given by such employer/establishment. The respondent has further submitted that in the event of failure to deposit the legitimate dues of workers, the EPFO under Section 7A of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act') may initiate recovery action for the purpose of compelling the employer to deposit the legitimate dues of the worker and through a quasi-judicial process, the dues of the workers under Section 7A of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act') are assessed and the employer/establishment is asked to deposit the amount and after deposit of the principal amount, action is initiated to levy penalty and damages under Section 7Q and Section 14 of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act') to provide for the interest on the delayed payment by the employer.

27. The respondent has further submitted that the petition has been filed only to defeat the object of the social security legislation, which provides for a lump-sum payment to the employees on their retirement so that they can spend their retired life with some element of comfort. *Inter alia* it was submitted on behalf of the respondent through the counter affidavit filed by Shri Raju, Asstt. Provident Fund

Commissioner (Legal), that the reliance that had been placed on behalf of the petitioner on the verdict of this Court in W.P.(C) 10387/2006 a verdict dated 28.01.2011 titled as ***“Hi-Tech Vocational Training Centre Vs. Assistant Provident Fund Commissioner”***, cannot in any manner assist the petitioner, in as much as the department i.e. the respondent had challenged the said order by filing an appeal i.e. LPA 629/2011 and the operation of the judgment dated 28.01.2011 in W.P.(C) 10387/2006 had been stayed, which stay order had been made absolute vide order dated 13.10.2011.

28. It is essential to observe that vide judgment dated 21.09.2015 of the Hon'ble Division Bench of this Court, LPA 629/2011 has been disposed of. Vide the said judgment, it was observed to the effect that the authorities of the respondent under Section 7A of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act') have the discretion to determine the quantum of damages which are levied, and that Para 32A of the Employees Provident Fund Scheme, 1952 fixes the upper limit and that in terms of Para 32A of the Scheme, the damages indicated in the table of the said paragraph fix the upper limit and leave it to the discretion of the authority to determine in each case as to whether or not the damages have to be levied.

29. However, the findings of the learned Single Judge in the said case, which were assailed in the LPA to the effect that if the proceedings under Section 14B were initiated and if on that date, the arrears in making contribution to the fund had been deposited, the order of the EPF Authorities could not survive, were set aside

observing to the effect that where an employer makes default in the payment of any contribution to the fund, what triggers Section 14B is the default in the payment of the contribution to the fund, and the default would be in not making the contribution to the fund and that if there is a default in making contribution to the fund, notwithstanding belated contribution being made to the fund the Commissioner is within his power to initiate proceedings under Section 14B in as much as Section 14B is to the effect “*Where an employer makes default in the payment of any contribution to the fund.*” and that Section 14B is not worded “*Where an employer continues to be in default in the payment of any contribution to the fund*”.

30. Thus, it is apparent that the reliance placed on behalf of the petitioner on the verdict of this Court in W.P.(C) 10387/2006 a verdict dated 28.01.2011 titled as “***Hi-Tech Vocational Training Centre Vs. Assistant Provident Fund Commissioner***”, does not assist the petitioner.

31. *Inter alia* it has been submitted on behalf of the respondent that the writ petition was filed only against the order passed under Section 14B of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the ‘Act’) which thus implied that the order under Section 7A of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the ‘Act’) had not been assailed by the petitioner and that the same has attained finality and that the liability and responsibility under Section 14B of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the ‘Act’) comes into existence for

the compliance of the said order.

32. The respondent has further submitted that it had forwarded the computation of proposed damages vide letter dated 15.07.2008 and the proposed damages were accordingly informed to the petitioner prior to the initiation of damages proceedings by the Competent Authority of the respondent u/s 14-B of the 'Act'. The respondent has further submitted that whatever amount is deposited with the EPF Office has to be paid with interest to its rightful person/employee as and when the same is claimed in accordance with the prescribed procedure under various schemes of the 'Act'. The respondent has further submitted that as per the provisions and paragraphs of the 'Act' and its Scheme, it is the responsibility and liability of the principal employer to ensure the deposit of PF contribution of the employees of his contractors to the EPF Officer irrespective of whether the contractor is also covered under the EPF Act and that the principal employer either deposits the PF contribution of the employees of the contractors or ensures by filing documentary proof that the contractor had deposited the PF contribution of his employees and that admittedly in the instant case, the employees of the contractors were engaged in connection of the work of the Principal Employees. It has been thus, submitted on behalf of the respondent that there was no infirmity whatsoever in the impugned order.

33. Written submissions were submitted on behalf of either side.

34. Through its written submissions, the petitioner has reiterated the contentions raised through the petition and placed reliance on the verdict of the Hon'ble Supreme in "*Siemens Engineering and*

Manufacturing Co. of India Ltd. V. Union of India” 1976 Supp SCR 489, to contend that the respondent had in a mechanical manner imposed damages on the petitioner capriciously and arbitrarily and that the respondent which was exercising a quasi-judicial function ought to have recorded its reasons in support of the orders it makes and could not have imposed the damages as imposed mechanically. Reliance was also placed on behalf of the petitioner on the verdict of the Hon’ble Supreme Court in ***“Oregano Chemical Industries V. Union of India” AIR 1979 Supreme Court 1803***, qua observations therein to the effect:-

“The Regional Provident Fund Commissioner has not only to apply his mind to the requirements of Section 14B but is cast with the duty of making a ‘speaking order’ after conforming to the rules of natural justice.”

The petitioner has thus submitted that the respondent had not passed a speaking order and thus it suffered from grave infirmity and non-application of mind.

35. Reliance was also placed on behalf of the petitioner on the verdict of the Hon’ble Supreme Court in ***“Employees State Insurance Corporation V. HMT Ltd. and Anr” (2008) 3 SCC 35***, which relates to Section 85-B of the Employees State Insurance Act, 1948 to submit that the existence of *mens rea* is an essential ingredient for the levy of penalties in case of breach of statutory provisions. The petitioner has thus, submitted that the respondent had overlooked the fact that there was no culpable *mens rea* in the instant case of the petitioner, in as much as the petitioner was under the bonafide belief that the

contractors had a separate EPF Code and would submit the contributions vis a vis the workers and the impugned orders being silent on this aspect were liable to be quashed.

36. *Inter alia* the petitioner has submitted that the respondent had through its inspection report dated 18.02.2006 observed to the effect that the petitioner was executing the work through various contractors which were independently covered under the 'Act' and there existed no master servant relationship between the petitioner and its contractors and thus the contractors could not be termed as 'Employees' within the meaning of Employees' Provident Fund and Miscellaneous Provisions Act, 1952 and no liability could be fastened upon the petitioner to make contributions towards the PF and that the petitioner had been coerced and threatened by the office of the respondent to deposit the same.

37. The petitioner has further placed reliance on the verdict of this Court in "***Summer Field School V. Regional Provident Fund Commissioner***" 229(2016) DLT 751, wherein it was observed to the effect:-

"an employee, under Section 2(f) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 needs to discharge his duties exclusively related to the work of establishment..... For a person to be an employee of an employer there needs to exist a relationship of a master and a servant between the parties, which was not the case in the instant matter. Furthermore, there existed no establishment of the petitioner to keep any supervisory control on the drivers and conductors."

38. Reliance was also placed on behalf of the petitioner on the

verdict of the Hon'ble High Court of Madras in W.P.No.391 of 2014 titled as *"M/s Brakes India Ltd. Vs. The Employees Provident Fund Organisation"*, to contend to similar effect.

39. The petitioner has further submitted that a bare reading of the 'Act' and in particular of Section 14B of the same would reveal that, assuming though not admitting, that there was default committed by the petitioner, even then, the penalty amount cannot exceed the amount of arrears and that in the present case, the arrears alleged against the petitioner were Rs.58,22,584/- and the respondent had levied a sum of Rs.66,78,040/- as penalty upon the petitioner and the respondent could not have levied more than Rs.58,22,584/-.

40. On behalf of the respondent through the written submissions submitted on record, it was urged to the effect that **an inspection was conducted by Enforcement Officers (EO) at the petitioner's office** to detect PF evasion for the period April 1995 to March, 1999 and that through the inspection conducted, it was found that the petitioner was not reflecting the number of contractor's employees in their monthly returns in Form-12A and that as per the ledger/cash book/ salary register/ muster roll, the petitioner was liable to pay PF dues on contractor payment/ labour charges and that the PF dues were calculated as Rs.16,83,759/-, which amount was deposited by the petitioner without protest. The respondent has further submitted that a second inspection was conducted by the Enforcement Officer (EO) for detecting PF evasion for the period 2002-03, wherein it was found that:-

(a) 531 employees were engaged by the petitioner through

contractors, who were not covered under EPF Act.

- (b) PF dues deposited by petitioner and the contractors does not commensurate with the salary/wages disbursed by petitioner/contractor.

and thus, the PF dues were calculated as Rs.21,02,933/-, which amount was also paid on 11.03.2006 by the petitioner without protest and that the petitioner further paid a sum of Rs.3,37,595/- on 11.08.2006.

41. The respondent has submitted that in as much as the petitioner had deposited the amount of Rs.21,02,933/- without protest and also paid a further sum of Rs.3,37,595/- on 11.08.2006 and that since the petitioner has deposited the PF dues, as assessed by the EO without protest, the Enquiry under Section 7A of the 'Act' was dropped by the respondent. It was further submitted on behalf of the respondent that on 14.11.2006, the Enforcement Officer further assessed the following dues to be paid by the petitioner:-

- (a) Rs.3,47,613/- for the period 1999-2000.
- (b) Rs. 3,31,288/- for the period 2000-2001.
- (c) Rs.5,15,183/- for the period 2001-2002.

The aforesaid amount was also deposited by the petitioner without protest as contended on behalf of the respondent, whereafter, the respondent sent a notice to the petitioner on 15.07.2008 for payment of damages under Section 14B and interest under Section 7Q of the 'Act' on account of belated remittance of PF dues for period 1994-2006 along with Statement of Delay and the damages and interest under Section 14B and 7Q of the 'Act' were worked out to

Rs.47,98,505/- and Rs.18,79,535/- respectively.

42. On 30.09.2009, the respondent passed an order under Section 14B and 7Q of the 'Act', computing damages and interest payable by the petitioner as Rs.47,98,505/- and Rs.18,79,535/- respectively, which was challenged by the petitioner. **The respondent has thus, submitted that the petitioner had admittedly committed default in payment of PF dues for the period June, 1995 to March, 2006 and that it was its liability to pay damages and interest under Section 14B and 7Q of the 'Act', respectively.**

43. *Inter alia* it has been submitted on behalf of the respondent that in terms of Section 6 of the EPF Scheme, the Establishment is required to contribute 10% of the basic wage, dearness allowance with respect to its employees, whether employed by it or through the contractor and that the said contribution was required to be made within 15 days of the close of every month. Para 38 of the EPF Scheme was relied upon on behalf of the respondent in relation thereto.

44. The respondent has further submitted that the petitioner has admittedly committed default in payment of PF dues with respect to its employees engaged through contractors and even no details of such employees were furnished by establishment in Form 12A. The respondent has further submitted that what triggers Section 14B is the default in the payment of the contribution to the fund. *Inter alia* it was submitted on behalf of the respondent that the contention raised by the petitioner to the effect that on the date of the inspection conducted, there were no arrears of PF and thus, the penalty and damages could

not be imposed was erroneous qua which reliance has been placed on behalf of the respondent on the verdict of the Hon'ble Division Bench of this Court in "***Assistant Provident Fund Commissioner Vs. Hi-Tech Vocational Training Centre***" in LPA 629/2011, as already adverted to elsewhere hereinabove.

45. The respondent has further contended that there is no limitation provided under the 'Act' for initiation of proceedings under Section 14B and 7Q of the 'Act' and thus, there is no question of limitation that can be read into Section 14B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. *Inter alia* the respondent has contended that the Enforcement Officer during inspection has identified the beneficiaries and recorded a clear finding that the list of 531 employees had been obtained, who had not been granted PF benefits and nothing was brought on record to rebut the inspection report and that the onus was on the establishment to rebut the inspection report as held in "***Saraswati Construction Company Vs. CBT***" in W.P.(C)5625/2007, which judgment was upheld. *Inter alia* it was submitted on behalf of the respondent that even the assessment had been done on the basis of the inspection report which was not challenged and no issue with respect to identification of beneficiaries had been raised at the time of assessment and thus, the same had attained finality.

46. *Inter alia* the respondent has submitted that even otherwise, it was the duty of the petitioner to identify the employees and in case the employees were unidentifiable presently, then also contribution was payable. Reliance was thus, placed on behalf of the petitioner on the

verdict of the Hon'ble Supreme Court in ***“Regional Director, ESI Vs. Kerala State Drugs & Pharmaceuticals Ltd.”*** 1995 Supp (3) SCC 148 & ***“ESIC Vs. Harrison Malayalam Pvt. Ltd.”*** (1993) 4 SCC 361.

47. *Inter alia* the respondent denied that the petitioner had not been served with the notice under Section 7Q of the ‘Act’ and denied that no notice had been issued to the petitioner in relation to the computation of damages and interest. The respondent has further submitted that the damages and interest were levied in terms of Para 32B of the EPF Scheme and there was no infirmity in the imposition of damages.

ANALYSIS

48. On a consideration of the rival submissions made on behalf of either side, it is apparent that in view of the verdict of the Hon'ble Division Bench of this Court in ***“Assistant Provident Fund Commissioner Vs. Hi-Tech Vocational Training Centre”*** in LPA 629/2011, a verdict dated 21.09.2015, the contention raised on behalf of the petitioner that in as much it was not in any arrears of deposit of the EPF amount on 30.09.2009, there could be no damages imposed in terms of Para 32A of the Employees' Provident Fund Scheme, cannot be accepted for as laid down in LPA 629/2011, what triggers Section 14B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, which is the power to recover damages in the event of an employer making default in the payment of any contribution to the EPF fund, the Pensionary fund or the Insurance fund, is the default in the making of such payment and thus, once a default takes place, the respondent would be within its power to initiate proceedings under

Section 14B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952.

49. The other contention raised on behalf of the petitioner is to the effect that the learned EPFAT had failed to consider that the Commissioner in its order had failed to appreciate that the EPF dues did not pertain to the petitioner as brought forth through the order dated 11.10.2006 of the Section 7A proceedings and that the same related to the labourers/employees of the contractors who had separate EPF Codes and thus, no action could have been contemplated under Section 14B of the petitioner/ establishment, in as much as notice could have been served on such contractors, details of which were already available with the respondent. As regards this contention, it is essential to observe that apart from the factum that there is not a whisper of such submission made before the learned EPFAT during the course of the hearing in ATA No.723(4) of 2009, out of which the impugned order dated 26.08.2011 arises, to indicate that the petitioner herein had raised any contention in relation to the non-applicability of the payment of any contribution of PF by the petitioner to the account of the 531 employees of the contractors separately registered with EPF Numbers, it cannot be overlooked that the inspection report of the period during 2002-03, 2003-04, 2004-05 categorically states vide para 6 thereof to the effect:-

“6. It has been observed during the course of inspection that the Estt. Has engaged several numbers of labourers/ workers through contractor at its work sites, who are not covered under the EPF Act. A list of 531 such employees have been obtained, the Estt. Is directed

to enroll all such employees for PF benefits since their date of joining and deposit the dues in r/o these employees immediately and also submit their PF A/c number to this office.”

to bring forth that 531 employees had not been enrolled for PF benefits from the date of their joining, though they had been engaged through contractors at the work sites.

50. The said inspection note also indicated that the petitioner was liable to pay the dues as under:-

Year	Wages	I	II	X	XXI	XXII	Total
2002-03	2538234	397741	27921	211435	12691	254	650042
2003-04	2948534	462035	32434	245613	14743	295	755120
2004-05	2724604	426945	29971	226960	13623	272	697771
		1286721	90326	28400	41057	821	2102933

i.e. amounting to Rs.2102933/-, which amount was deposited without protest on 11.03.2006.

51. The contention raised by the petitioner to the effect that the said employees were not the employees of the petitioner but were employed with the contractors and thus, there was no liability of the petitioner in relation thereto, thus cannot be accepted.

52. The verdict of the Hon'ble Supreme Court in ***“Food Corporation of India Vs. Provident Fund Commissioner and Anr.”***

in *Civil Appeal No.4552/1989* reported in *1990 (60) FLR 15*, makes it clear that though undoubtedly, the employer and contractors are **both** liable to maintain registers in respect of the workers/employees, the respondent in that case had not conducted the enquiry in terms of Section 7A(2) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 to identify the workmen to whom the provident fund dues were to be paid qua which aspect, it is essential to observe that vide para 6 of the inspection conducted between 16.02.2006 to 18.02.2006, in the instant case the list of 531 employees had been obtained who were found to be not enrolled for the PF benefits and the petitioner had been directed to enroll all such employees for PF benefits from the date of their joining and to deposit dues in respect of these employees immediately and to submit their EPF Account numbers to the office. In these circumstances, the contention raised by the petitioner that the 531 employees were not identified, cannot be accepted.

53. Furthermore, in terms of Section 6 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, which provides as follows:-

“6. Contributions and matters which may be provided for in Scheme. - The contribution which shall be paid by the employer to the fund shall be 4 [ten per cent.] of the basic wages, 5 [dearness allowance and retaining allowance (if any)] for the time being payable to each of the employees 6 [(whether employed by him directly or by or through a contractor)], and the employee's contribution shall be equal to the contribution payable by the employer in respect of him and may, 7 [if any employee so desires, be an amount exceeding 4 [ten per

cent.] of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section]: 7 [Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words “ 4 [ten per cent.]”, at both the places where they occur, the words 8 [“12 per cent. “] shall be substituted:]

Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for rounding off of such fraction to the nearest rupee, half of a rupee, or quarter of a rupee.” **(emphasis supplied)**

it is apparent that the petitioner is not absolved from liability of making of the payment of its contribution to the EPF of the said 531 employees. It is essential to observe that though, the cases relied upon on behalf of the respondent relate to the Employees’ State Insurance Act, 1948, i.e., **“ESIC Vs. Harrison Malayalam Pvt. Ltd.”** & **“Regional Director, (supra) ESI Vs. Kerala State Drugs & Pharmaceuticals Ltd.”** (supra), nevertheless the contention raised therein are virtually in fact *pari materia* in relation to the aspect of non-payment of insurance contributions by the Corporations concerned on the ground that the employees were engaged by contractors and were not on the pay roll of the corporation concerned and the employees were stated to be ‘unidentifiable’ qua which it was observed by the Hon’ble Supreme Court as under:-

“3. There is thus no quid pro quo between the persons

insured and the benefit available under this Act. As regards the finding that the workmen were unidentifiable, what is forgotten is that under the act, once an establishment comes to be covered by the Act. The employer becomes liable to pay the contribution in respect of the employees in his employment directly or indirectly. The contribution which had become payable for the relevant period has to be paid even if the employees concerned are no longer in employment. Whether the employees are unidentifiable today or not is, therefore, irrelevant so long as the contribution was liable to be paid on their behalf, when they were in employment.”

54. Significantly, under Section 2(f) of the Employees’ Provident Fund and Miscellaneous Provisions Act, 1952, an employee employed by or through a contractor in or in connection with the work of an establishment is included within the definition of an ‘employee’ therein. Section 2(f) of Employees’ Provident Fund and Miscellaneous Provisions Act, 1952 provides as follows:-

“2(f) “employee” means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of 7[an establishment], and who gets, his wages directly or indirectly from the employer, 8[and includes any person,—

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment.

.....

.....”

(emphasis supplied)

55. However, in the instant case as already observed hereinabove, the inspection note of the inspection conducted between 16.02.2006 to 18.02.2006 categorically reflected that there were 531 identified employees who had been engaged by the petitioner through contractors who had not been covered under the EPF Act and that the PF dues deposited by the petitioner and the contractors were not commensurate with the salary/wages disbursed by the petitioner. It is in these circumstances, it is held that the facts of the instant case are not in *pari materia* with the facts and circumstances of the cases relied upon on behalf of the petitioner in ***Siemens Engineering and Manufacturing Co. of India Ltd. V. Union of India***, ***Organo Chemical Industries V. Union of India***, ***Employees State Insurance Corporation V. HMT Ltd. and Anr*** & ***Summer Fields School V. Regional Provident Fund Commissioner***.

CONCLUSION

56. In the circumstances of the instant case thus, the observations of the learned EPFAT, vide the impugned order dated 26.08.2011, cannot be faulted when it observes vide para 6 of its order to the effect that admittedly the petitioner herein had not deposited the contribution until the order was passed in relation thereto.

57. As regards the other contention raised on behalf of the petitioner that the damages imposed were excessive and punitive without consideration of mitigating circumstances, it is essential to observe that it has already been observed vide order dated 30.09.2009 that there was no case set forth by the petitioner to deviate from the

provisions of law in relation to the damages assessed. Taking into account the long period for which the petitioner was well aware of inspection conducted between 16.02.2006 to 18.02.2006 and having been called upon to pay the EPF dues in relation to the said 531 employees, it is apparent that there is no infirmity in the order of the learned EPFAT upholding the order of the learned RPFC. Furthermore, in view of the verdict of the Hon'ble Supreme Court in ***"Syed Yakoob Vs. K.S. Radhakrishnan and Ors."*** AIR 1964 SC 477, it is held that it is not considered appropriate to interfere in the exercise of jurisdiction by the learned EPFAT vide the impugned order.

58. In the circumstances, the petition is declined.

59. The amount deposited during the course of the present proceedings in terms of order dated 02.09.2011 is directed to be released to the respondent for onward payment to the employees concerned. The interim stay of recovery proceedings granted vide order dated 02.09.2011 is also vacated.

ANU MALHOTRA, J

MAY 23rd, 2019
NC