

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WP (C) 8466/2017 and CM No. 34859/2017

**Judgment reserved on : 22.09.2017**

**Date of decision : 07.01.2019**

PARTHA SARATHI SAHA ..... Petitioner  
(Proprietor of M/s Sri Krishna Automobiles)

Through: Mr. Abheek Saha, Advocate.

versus

ASSISTANT PROVIDENT FUND COMMISSIONER  
.... Respondent

Through: Mr. Satpal Singh, Advocate

**CORAM:**  
**HON'BLE MS. JUSTICE ANU MALHOTRA**

**JUDGMENT**

**ANU MALHOTRA, J.**

1. The petitioner Mr. Partha Sarathi Saha, proprietor of M/s Sri Krishna Automobiles vide the present petition seeks the setting aside of the order dated 09.05.2017 of the Ld. Employees Provident Fund Appellate Tribunal, New Delhi in ATA No.480 (2) 2013 vide which the appeal ATA No.480 (2) 2013 filed by the petitioner herein against the order dated 01.07.2013 passed by the APFC, SRO, Agartala in Order No.NE/AGT/ENF/8209/7a/2012/13/3698 in proceedings under Section 7A of the Employees' Provident Funds and Miscellaneous

Provisions Act, 1952 (hereinafter referred to as the 'Act'), - was dismissed.

2. The facts put forth through the impugned order are to the effect:

*“The Appellant establishment was brought under the purview of the Act w.e.f. 01.10.2012. The appellant being aggrieved, filed a Review Petition dated 06.11.2012 before the Assistant PF Commissioner, SRO, Agaratala, which was rejected. Thereafter, the appellant filed an application on 27.02.2013 before the APFC, Agaratala praying for initiation of inquiry under Section-7A of the Act and also to decide the applicability of the provisions of the Act to the appellant establishment. Accordingly 7-A Inquiry was initiated. The appellant contended before the APFC that the establishment was employing 17 persons and two security personnel from M/s Brave Security Private Service which was subsequently re-named as M/s New Brave Security Private Service. It was contended that the Security personnel were out sourced from M/s New Brave Security and their salaries were not being paid from the appellant establishment. Therefore, they should not be considered as employees of the establishment.*

*The EO representing the department submitted that the establishment was employing 17 employees, three security personnel and one Sweeper.*

*The EO submitted that as per the Profit & Loss Account and Balance Sheet of the establishment for the year 2010-11, the Security personnel were being paid from the appellant establishment and therefore, they should be considered as employees of the appellant establishment.*

*Upon consideration of the submissions and depositions made on behalf of the appellant-establishment and the EC's submissions and after perusing the documents produced by the parties, the APFC came to a finding that the establishment*

*employed 17 persons directly and three security personnel indirectly through M/s New Brave Security Private Service during October 2010. Therefore, the establishment employed 20 persons and thus provisions of the EPF & MP Act 1952 will apply to the appellant establishment w.e.f. 01.10.2010 under Section-1 (3)(b) of the Act.*

3. The order dated 01.07.2013 of the Assistant Provident Fund Commissioner, SRO, Agaratala in relation to the enquiry conducted in terms of Section 7A (a) of the 'Act', in respect of the petitioner through Sri Krishna Automobiles indicates that a notice no.NE/AGT/ENF/8209/7A/12-13/3730 dated 05.03.2013 was issued to the petitioner establishment directing the employer to appear in person or through an authorized representative on 19.03.2013 and present the case in as much as the petitioner disputed the applicability of the 'Act' to the establishment Sri Krishna Automobiles and moved an application dated 27.02.2013 to decide the applicability of the 'Act' to the establishment under Section 7A (a) of the 'Act'.

4. Documents received during the enquiry by the APFC/SRO/Agaratala were to the effect:

- i. Investigation Report for applicability dated 30.08.2012;*
- ii. Letter of Enforcement Officer dated 11.04.2012 and 01.06.2012 issued to Shri Partha Sarathi Saha.*
- iii. List of employees of Sri Krishna Automobiles for Sep, 2010 to Oct, 2010;*
- iv. Letter from the proprietor of New Brave Security Pvt. Services issued to Regional P.F. Commissioner dated 28.08.2012 intimating the employment of 3 (three) employees;*
- v. Letter of Shri Partha Sarathi Saha issued to the Enforcement Officer dated 17.04.2012;*

- vi. *Letter of Shri Partha Sarathi Saha issued to Employees' Provident Fund Organisation dated 18.04.2012;*
- vii. *Audited balance sheet of Sri Krishna Automobiles ending March 2010 and 2011;*
- viii. *Copy of Coverage letter dated 04.09.2012;*
- ix. *Review Petition submitted by Shri Partha Sarathi Saha before the Asst. P.F. Commissioner dated 06.11.2012;*
- x. *Letter of APFC issued to Shri Partha Sarathi Saha dated 19.11.2012;*
- xi. *Prayer before the APFC submitted by Shri Bhabatosh Debnath, Ld. Advocate dated 19.03.2013;*
- xii. *Prayer before APFC submitted by Shri Partha Sarathi Saha dated 27.02.2013 along with enclosures;*
- xiii. *Vakalatnama dated 27.02.2013;*
- xiv. *Certificate issued by Pradhan, Singerbil Gram Panchayat dated 27.04.2013;*
- xv. *Certificate issued by Officer-in-Charge, Airport Police Station, dated 29.04.2013;*
- xvi. *Newspaper dated 30.04.2013 namely Daily Desher Katha;*
- xvii. *Affidavit dated 30.04.2013;*
- xviii. *Notice under Section 7A of the EPF and MP Act, 1952 dated 05.03.2013.*

5. The order of the said enquiry under Section 7A of the 'Act' indicates that Shri SR De, Enforcement Officer in his deposition adverted to Section 2(f) of the 'Act' which reads to the effect:

*"(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.”,*

and the said Enforcement Officer Shri SR De also submitted that vide letter dated 11.04.2012, the proprietor of the establishment Shri Partha Sarathi Saha was intimated that on verification of wages/salary register of the establishment, the employment strength was found to be 17 (seventeen) and 3 (three) security guards from New Brave Security Pvt. Services were engaged in the establishment and further Shri SR De submitted that in reply Shri Partha Sarathi Saha vide his letter dated 17.04.2012 affirmed the engagement of 17 (seventeen) workers in his establishment and did not deny the engagement of 3 (three) security guards through New Brave Security Pvt. Services. The said order of the APFC, SRO, Agaratala indicates that the Advocate appearing on behalf of the petitioner on 12.04.2013 was advised to submit the list of employees engaged in Sri Krishna Automobiles and also the security personnel engaged since October, 2010 to September, 2012 on the next date of hearing i.e. 22.04.2013.

6. It was further recorded through the order of the APFC that Shri Bhabatosh Debnath and Shri Amrit Lal Saha, Advocates for the establishment deposed that the petitioner was the absolute owner of Sri Krishna Automobiles and also submitted that since its security personnel were not being paid for their services from the business of the owner's establishment i.e. Sri Krishna Automobiles, they should not be included as employees of the establishment. **The Enforcement**

**Officer Shri SR De appearing on behalf of the Department submitted that as per profit and loss account and balance sheet of the establishment for 2010-11, the security personnel were being paid from the expenditure of Sri Krishna Automobiles and not from the owner's/proprietor's personal pocket.**

7. The Department also called upon the petitioner to make submissions in relation to the appeal filed by it. The petitioner was also called upon to provide copies of the contract of agreement between Sri Krishna Automobiles and New Brave Security Pvt. Services in relation to which Shri A.L. Saha made a request to submit the list of employees of the establishment and vouchers pertaining to New Brave Security Pvt. Services on the next date of hearing i.e. 30.04.2013.

8. During the course of hearing before the APFC, SRO, Agartala, the proprietor of Sri Krishna Automobiles (Shri Partha Sarathi Saha) appeared along with Shri Amrit Lal Saha and deposed that the green colour file containing the bills of New Brave Security Pvt. Services had been lost on 29.04.2013 at 9 am from his motor cycle on his way to Usha Bazaar which was published in the local newspaper i.e. Daily Desher Katha dated 30.04.2013 and a copy of the newspaper was also submitted. The petitioner also submitted an affidavit dated 30.04.2013 and certificate each issued by the Officer-in-Charge of the Airport Police Station, Agartala, West Tripura and Pradhan of Singerbil Gram Panchayat testifying that Shri Partha Sarathi Saha was the sole owner of Sri Krishna Automobiles and that he and his family were residing at the 1<sup>st</sup> Floor of his business premises since April, 2009 and he was

engaging necessary staff and security personnel for his domestic service as well as his business establishment and also then deposed that there was no written agreement between his establishment and New Brave Security Pvt. Services and that he was also the partner of M/s Rama Krishna Engineering Works bearing PF Code No.NE/AGT/2251.

9. The Ld. APFC, Agartala further held to the effect that from all the documents placed on record which were perused and verified thoroughly and the depositions made by both the establishment's and department's representative, it was found that at the initial stage of hearing Shri Bhabatosh Debnath, Advocate for the establishment was of the opinion that Sri Krishna Automobiles which was directly employing 17 (seventeen) employees and also engaging security personnel indirectly from New Brave Security Pvt. Services was not coverable under the 'Act', however, consequent upon the depositions made by Shri SR De, Enforcement Officer of the department according to Section 2(f) of the 'Act', which construes that an 'employee' includes both direct employees of the establishment as well as indirect employees employed through a contractor in connection with the work of the establishment, it was apparently clear even to the Advocates of the petitioner that the security personnel engaged from New Brave Security Pvt. Services were employed in connection with the work of Sri Krishna Automobiles.

10. As per the order dated 01.07.2013 of the APFC, Agartala it was observed that on 12.04.2013, 22.04.2013 & 30.04.2013 in relation to the letter dated 17.04.2013 issued to the Enforcement Officer and

prayer dated 27.02.2013 submitted before the Assistant P.F. Commissioner, the proprietor and the advocate of Sri Krishna Automobiles contended that the security personnel in the instant case were outsourced from Brave Security Pvt. Services and New Brave Security Pvt. Services and salaries were not paid to them from the business of Sri Krishna Automobiles but by the outsourced agency.

11. Shri SR De, Enforcement Officer in his deposition on 22.04.2013 as observed by the order dated 01.07.2013 stated that the security personnel were being paid by the establishment as per the balance sheet of the establishment and it was found that in contradiction to the submissions made by the establishment's representatives that an amount of Rs.64,640/- and Rs.97,239/- had been paid against security service from the profit & loss accounts of the balance sheet ending March, 2010-11 respectively. The order dated 01.07.2013 of the APFC, Agartala also states that it was surprising to learn that on 29.04.2013 one day prior to the date of hearing on 30.04.2013, the bills pertaining to New Brave Security Pvt. Services had been lost making it obvious that the details of the payment made to the security personnel were available. It was also observed vide the said order dated 01.07.2013 that in the reply dated 17.04.2012 of the proprietor of Sri Krishna Automobiles and in the depositions made during the Section 7A hearings and prayers submitted, there had been no dispute aired by the establishment's advocate and the proprietor that they had not engaged 3 (three) security personnel outsourced through New Brave Security Pvt. Service and it was thus concluded during the said enquiry that the



documents and depositions made before the Ld. APFC were sufficient material to conclude the Section 7A proceedings.

12. The said order dated 01.07.2013 also took into account the provision of Para-30 of the Employees' Provident Fund Scheme, 1952 which reads to the effect:

*“(1) The employer shall, in the first instance, pay both the contribution payable by himself (in this scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in the Scheme referred to as the member's contribution). (2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this Scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer's contribution) and also administrative charges. (3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees employed by or through a contractor and also administrative charges.”*

13. It was thus concluded by the Ld. APFC, Agartala under Section 7A(a) of the 'Act' that the establishment Sri Krishna Automobiles had employed 17 (seventeen) persons directly and 3 (three) security personnel indirectly through New Brave Security Pvt. Service during October, 2010 i.e. 20 (twenty) persons altogether and payment made to the security personnel through the outsourced agency i.e. New Brave Security Pvt. Service fell within the purview of the 'Act' w.e.f. 01.10.2010 under Section 1 (3)(b) of the 'Act' which mandated to the effect that:-

***“Subject to the provisions contained in Section 16, it applies to any other establishment employing 20 (twenty) or more persons or class of such establishment which the Central Government may, by notification in the Official Gazette, specify in this behalf....”***

and thus the APFC ordered that Sri Krishna Automobiles bearing EPF Code No.NE/AGT/8209 shall comply with the provisions of the ‘Act’ and the three Schemes framed thereunder and deposit the Employees’ Provident Fund and Allied Dues w.e.f. 01.10.2010 within 15 (fifteen) days from the date of the receipt of the order.

14. Furthermore, the said order dated 01.07.2013 was made without prejudice to any action that could be taken by the Department under Sections 7Q, 7Q 8, 14 and 14B of the ‘Act’ against the employer/establishment.

15. The impugned order dated 09.05.2017 of the Ld. EPFAT taking into account the provision of Section 2(f) of the ‘Act’ which defines the word ‘Employee’ vide which it is provided as follows:

*“(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, [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.”*

held that any person who is employed for wages in any kind of work, manual or otherwise in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer is an 'employee'.

16. The EPFAT, New Delhi thus upheld the order dated 01.07.2013 of the APFC, Agartala and has taken into account the factum that the petitioner herein as appellant before the EPFAT had been directed to produce copies of the contract agreement between the appellant and M/s New Brave Security Pvt. Service and to submit a list of employees of the establishment and vouchers pertaining to New Brave Security Pvt. Service but the proprietor of the appellant/ establishment Shri Partha Sarathy Saha deposed on 30.04.2013 that the green colour file containing the bills of M/s New Brave Security Pvt. Service was lost on 29.04.2013 and the APFC taking note of the said aspect and considering the other material on record came to a finding that the appellant establishment had engaged 20 persons i.e. 17 persons directly and 3 security persons indirectly through M/s New Brave Security Private Service and therefore held that the appellant/establishment comes under the purview of the EPF & MP Act, 1952 and held that there was no infirmity in the order dated 01.07.2013 of the APFC and thus dismissed the appeal.

17. The petitioner thus now prays through the present petition that the communication dated 11.04.2012, communication dated 04.09.2012 sent by the EPFO, North-East Region, the order dated 01.07.2013 passed by the APFC, SRO, Agartala and the order dated

09.05.2017 passed by the EPFAT, New Delhi in ATA No.480(2)/2013 be quashed and also seeks directions/orders that the Employees' Provident Fund and Miscellaneous Provisions Act was not applicable to the petitioner.

18. The petitioner has submitted through the present petition that he is running his own business concern w.e.f. August, 2008 and had not been running the same before the same and that he had never engaged more than 17 employees in his business concern and that there were three security guards working in addition to those 17 employees in his establishment. The petitioner further submitted that the security guards were employees of the petitioner but that the security guards were outsourced from security service providers i.e. Brave Security Private Service and M/s New Brave Security Private Services under a contract and payment in respect of the services was made to the security agency and not to the security guards themselves and that the security guards were employees of the petitioner.

19. Written arguments and oral arguments were submitted on behalf of either side. Whereas on behalf of the petitioner, it was reiterated that the security guards employed by the petitioner were outsourced from security service providers namely M/s Brave Security Private Services and M/s New Brave Security Private Services and that M/s New Brave Security Private Services vide letter dated 04.08.2012 had mentioned that they were already paying PF for its employees and providing security services at petitioner's premises and had also mentioned the EPF registration number for its employees in the same letter, and that the petitioner had one sweeper/cleaner for the purposes

of his household and the three security men were employed inasmuch as extra security for the family was required at the residence of the petitioner which was situated a little at the outskirts of the main city. The petitioner further contended that the Employees Provident Fund Appellate Tribunal, New Delhi had erroneously concluded that the three security guards working in the petitioner's establishment were employees of the petitioner and working for his proprietorship concern.

20. *Inter alia* the petitioner placed reliance on the verdict of this Court in “***Suppliers v. Regional Provident Fund Commissioner in W.P. No.508/1982***” to contend that inquiry under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 is in the nature of *quasi judicial* proceedings and that the employer has to be given sufficient opportunity to represent his case. *Inter alia* the petitioner submitted that the three security guards who were working were not working exclusively for the petitioner but could be engaged by other persons/establishments also and did not have to work exclusively for the petitioner but could be engaged by other persons/establishments also, if directed by their employer, viz. M/s New Brave Security Pvt. Services and that when M/s Brave Security Private Services (M/s New Brave Security Private Services) was paying the EPF contribution for them, it proved the casual and temporal nature of the engagement with the petitioner organisation indicating that the security guards had been hired only to address the passing necessity and that there was no relationship of an employer and employee between the petitioner and the three security guards

whose terms of employment were not governed by the petitioner, but by M/s New Brave Security Private Services and that the work undertaken by the security guards was not connected with the principal work undertaken by the petitioner's establishment.

21. Reliance was also placed on behalf of the petitioner on the verdict of the Hon'ble Supreme Court in ***"The Regional Provident Fund Commissioner, Andhra Pradesh vs. T.S. Hariharan"*** AIR 1971 SC 1517 with specific observations therein to the effect:-

*"With great respect, we are unable to subscribe to the rule stated therein. It is true that this legislative measure is an ameliorative one. All the same, it cannot be overlooked that benefits are intended to be conferred on workmen in establishments that are in a position to employ twenty or more persons. It may be incidentally mentioned here that originally, i.e., prior to the Amendment Act. 46 of 1960 the number of employees in the establishment that would be brought within the scope of Section 1 (3) was fixed at fifty ....*

*"We find it difficult to agree with the view that twenty or more persons can be said to be employed or that an establishment employs twenty or more persons merely because on one day or two days the services of twenty or more persons were engaged for a particular purpose. To accept this contention would be to unduly enlarge the content of the Section. To attract the applicability of Section 1(3) the number of persons should come upto minimum of twenty. The underlying idea seems to be that the establishment should have twenty persons on its muster rolls and working regularly. "*

*"Section 19-A also seems to strengthen our view. A doubt as to the number of persons employed in an establishment could arise only if the employment of twenty persons in the establishment were a normal feature. A legitimate doubt*

*cannot be said to arise if the condition as to the number is satisfied if twenty persons work in the establishment even for a day or two. It is not necessary for us to labour this point any further as we feel that the provisions of the Act are inapplicable to establishments which do not employ twenty or more persons to work therein for a period of one year. It follows that 'casual labour' falls outside the scope of Section I (3). The fact that the casual labour is engaged by or through a contractor does not make any difference for the decision of the question, the only criterion being whether they were casual labourers or not. On this discussion, it follows that the establishments whose employees do not come upto twenty, excluding casual labourers, do not fall within the purview of Section I (3) and so the provisions of the Scheme cannot be applied to them. The respondents will, therefore examine this question in the light of these observations and decide whether the Scheme should be applied to any of these establishments excluding casual labour."*

22. It was also submitted on behalf of the petitioner that the Enforcement Officer conducting the inquiry in the instant case had adopted a hurried approach to bring the petitioner's business within the ambit of EPF & MP Act, 1952 and that even if the security employed at the residence of the petitioner is to be calculated with the strength of the employees of the business M/s Shri Krishna Automobiles, the said strength should be there for a considerable time of one year or six months or at least for such considerable time for bringing it within the ambit of the 'Act' and ought to be in line with the objectives of the 'Act'.

23. Reliance was thus placed on the observations in Para 7, 8 & 10 of the verdict of the Hon'ble Supreme Court in ***"The Regional***

*Provident Fund Commissioner, Andhra Pradesh vs. T.S. Hariharan*" (*supra*) which read to the effect:-

**Para 7:** *"The narrow question which directly arises for our consideration is whether Clause (b) of Sub-section (3) of Section 1 when it speaks of the establishment employing 20 or more persons means that the person so employed may be employed by the establishment for any purpose whatsoever and for however short a duration or that the employment must be for some minimum period in the establishment. The language used in the clause does not give any clear indication. We have, therefore, to construe this word in the light of the legislative scheme, the object and purpose of enacting this clause and the ultimate effect of adopting one or the other construction. The relevant sections of the statute have already been reproduced"*

**Para 8:** *"Section 16 which has already been set out in extenso seems to us to throw considerable light on the point raised. It may be recalled that this section excludes from the applicability of the Act establishments belonging to the Government and to local authorities and infant establishments. It is, therefore, obvious that this Act is intended to apply only where an establishment has attained sufficient financial stability and is prosperous enough to be able to afford regular contribution provided by the Act. Contribution by the employer is an essential part of the statutory scheme for effectuating the object of inducing the workmen to save something regularly. The establishment, therefore, must possess stable financial capacity to bear the burden of regular contribution to the Fund under the Act. **In this connection it may be recalled that by virtue of Section 1 (5) an establishment to which the Act is applied continues to be governed by the Act notwithstanding that the number of persons employed by it at any time falls below the required number. This liability to be governed by the Act ceases only if the terms of the Proviso to Section***



*1 (5) are complied with. The financial capacity of the establishment to bear the burden must, therefore, have some semblance of a reasonably long term stability. In other words, the employment of requisite number of persons must be dictated by the normal regular requirement of the establishment reflecting its financial capacity and stability. It, therefore, follows from this that the number of persons to be considered to have been employed by an establishment for the purpose of this Act has to be determined by taking into account the general requirements of the establishment for its regular work which should also have a commercial nexus with its general financial capacity and stability. This seems to us to be the correct approach under the statutory scheme.*

***Para 10*** *"Considering the language of Section 1 (3)(b) in the light of the foregoing discussion it appears to us that employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the establishment and which does not reflect its business prosperity or its financial capacity and stability from which it can reasonably be concluded that the establishment can in the normal way bear the burden of contribution towards the provident fund under the Act would not be covered by this definition. The word "employment" must, therefore, be construed as employment in the regular course of business of the establishment; such employment obviously would not include employment of a few persons for a short period on account of some passing necessity or some temporary emergency beyond the control of the company. This must necessarily require determination of the question in each case on its own peculiar facts. The approach pointed out by us must be kept in view when determining the question of employment in a given case."*

24. *Inter alia* the petitioner has submitted that the Regional Provident Fund Commissioner fell in error in clubbing the employees of the petitioner's business premises with that of his office residence.

25. The respondent refuted the contentions made on behalf of the petitioner and submitted that the findings recorded by the Assistant Provident Fund Commissioner did not suffer from any perversity and are based on the Enforcement Officer's report which brings forth that the counsel appearing for the establishment had been asked to provide the copy of the contract of the agreement between M/s Shri Krishna Automobiles and M/s New Brave Security Private Service and also requested to provide the list of employees or any vouchers pertaining to the M/s New Brave Security Private Service but the proprietor failed to produce the same and stated that the green file of M/s Shri Krishna Automobiles containing the bill of M/s New Brave Security Private Service had been lost and failed to produce the documents despite several opportunities and that thus provisions of the 'Act' were squarely applicable to the establishment of the petitioner which employed more than 20 persons. It was further contended on behalf of the respondent that there was no ground for any interference in the findings of the Regional Provident Fund Commissioner in the instant case as it suffered from no perversity and thus called for no interference and reliance was thus placed on behalf of the respondent on the verdict of the Hon'ble Supreme Court in "***Management of Mandurantakam Co-operative Sugar Mills Ltd. V. S. Vishwanathan***" reported as (2005) SLT 342=(2005) 3 SCC 193 wherein it was observed to the effect:-

***“12. Normally, the Labour Court or the Industrial tribunal, as the case may be, is the final Court of facts in these type of disputes, but if a finding of fact is perverse or if the same is not based on legal evidence the High Court exercising a power either under Article 226 or under Article 227 of the Constitution of India can go into the question of fact decided by the Labour Court of Tribunal.”***

26. Reliance was also placed on behalf of the respondent on the verdict of this Court in “ ***Saraswati Construction Company Vs. Central Board of Trustees/EPFO***” reported as ***171 (2010) Delhi Law Times 3***, wherein it was laid down to the effect that unless there is a perversity or illegality in the findings, the writ Court would be hesitant to re-appreciate findings of fact and despite opportunities, the establishment had failed to rebut the inspection report and the specific reliance was placed in para 11 of the said verdict which reads to the effect:-

***“11. It is a settled legal position that if any establishment or employer claims that it is not covered under the said Act, then it is for the employer to place sufficient cogent and convincing material before the designated authority in an inquiry under Section 7A so as to satisfy the authority with regard to the non-applicability of the Act and on failure to place any such material, the onus cannot be shifted on the EPF authorities to prove the applicability of the Act.....”***

27. Reliance was also placed on behalf of the respondent on the verdict of this Court in “***M/s Autocrat tours Vs. Regional Provident Fund Commissioner***” in ***CW No.165 of 1978*** decided on 15.04.2004 with specific reliance on the observations made in para 22 of the said verdict to the effect:-

***“the petitioner was called for a hearing but was not able to prove that its employee strength had fallen below 20. In fact, on some of these occasions, the Petitioner did not even attend the hearing, or if it did, it did not produce the relevant records. Regularly employing such ‘casual workers’ month after month and year after year cannot be due to some abnormal contingency or emergency as explained by the Supreme Court in Hariharan. Consequently, it is not possible to hold that the provisions of the Act do not apply to the petitioner.”***

28. It was thus submitted on behalf of the respondent that the petition deserves to be dismissed with exemplary costs in the interest of justice.

29. On a consideration of the averments made in the petition, the response of the respondent, written submissions made on behalf of either side and oral submission addressed on behalf of either side by their learned counsel, it is apparent that the impugned order dated 09.05.2017 of the learned Employee Provident Fund Appellate Tribunal, New Delhi i.e. EPFAT in ATA No.480(2)/2013 is based on the proceedings before the APFC, Agartala, Tripura as observed vide order dated 01.07.2013 of the Assistant Provident Fund Commissioner, SRO, Agartala which in turn is based on the inquiry conducted under Section 7A of the ‘Act’. The proceedings before the Enforcement Officer as reflected in the order dated 01.07.2013 of the learned Assistant Provident Fund Commissioner categorically indicate that the Enforcement Officer had deposed that in terms of Section 2(f) of the Act ‘employee’ includes both direct employees of the establishment as well as indirect employees employed through a contractor in or in connection with the workmen of establishment and

that it was apparent that the security personnel had been engaged from M/s New Brave Security Private Service and were employed in or in connection with the work of M/s Shri Krishna Automobiles and that during the hearings on 12.04.2013, 22.04.2013, 30.04.2013, letter dated 17.04.2012 issued to the Enforcement Officer and prayer dated 27.02.2013 submitted before the Assistant Provident Fund Commissioner, the proprietor and the learned Advocates of M/s Shri Krishna Automobiles had contended that the security personnel in the instant case are outsourced from Brave Security Private Service and New Brave Security Private Service and salaries were not paid to them from the business of Shri Krishna Automobiles but by the outsourced agency and that Shri. S.R. De, Enforcement Officer in his deposition on 22.04.2013 had stated that the security personnel were being paid by the establishment as per the *balance sheet* of the establishment and that in contradiction to the submissions made by the establishment's representatives, an amount of Rs.64,640/- and Rs.97,239/- had been paid against security service from the profit & loss accounts as per the balance sheet ending March 2010-2011 respectively and that with the date of hearing being 30.04.2013, the petitioner had strangely submitted that on 29.04.2013, the bills pertaining to New Brave Security Private Service had been lost making it obvious that the details of the payment made to the security personnel were thus available.

30. As also observed elsewhere hereinabove the Assistant Provident Fund Commissioner had also taken into account that no dispute in relation to the three security personnel having been outsourced

through New Brave Security Private Service had been raised earlier on behalf of the petitioner at any stage and it was thus concluded that there was sufficient material to conclude that the petitioner fell within the ambit of the 'Act' having employed 17 persons directly through Shri Krishna Automobiles and 3 security personnel indirectly through New Brave Security Private Service during October 2010 and that the payment had been made to the security personnel through the outsourced agency. The available record in the instant case thus makes it apparent that there is no infirmity in the order dated 01.07.2013 of the EPFC nor in the order dated 09.05.2017 of the learned Employees' Provident Fund Appellate Tribunal, New Delhi i.e. EPFAT in ATA No.480(2)/2013. The available record also indicates that despite ample opportunities having been granted to the petitioner to produce its evidence in support of its contention that the three security personnel to deploy at the residence of the proprietor of Sri Krishna Automobiles were not employed by M/s Shri Krishna Automobiles despite the *balance sheet* showing to the contrary to the effect that the security personnel were being paid through the expenditure of M/s Shri Krishna Automobiles, reliance thus placed on behalf of the petitioner on the verdicts relied upon referred to hereinabove is misplaced as the facts of the instant case are not in *pari materia* with the facts of the cases relied upon by the petitioner.

31. The petition and the accompanying application CM No. 34859/2017 are thus dismissed.

**ANU MALHOTRA, J.**

**JANUARY 07, 2019/vm/NC**