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

+ **W.P.(C) 6398/2011**

NTPC LIMITED

..... Petitioner

Through: **Mr.Rajesh Gupta, Mr.Harpreet Singh
and Mr.Sumit, Advocates**

versus

REGIONAL PROVIDENT FUND COMMISSIONER-II AND ORS

..... Respondents

Through: **Mr. B.B. Pradhan, Advocate for R-1.
Mr.Sumit R.Sharma, Advocate
for R-2.
Mr. Om Prakash Gupta, Advocate for
R-3.**

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Date of Decision: 16.11.2022

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

1. Present writ petition has been filed challenging the order dated 13.07.2011 passed by the Employees provident Fund Appellate Tribunal (hereinafter referred to as 'the learned Tribunal) in ATA No.869 (4)09 under Section 7-I of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 wherein the learned tribunal *inter alia* held that NTPC being the principle employer is liable to pay provident fund contribution to the claimant/workman. The petitioner has assailed this finding that this finding of the learned tribunal as well

the finding of the Regional Provident Fund Commissioner (RPFC) on the ground that they are contrary to the record and orders of the CGIT passed in ID No.25/2009 titled as Umesh Kumar Mishra vs. General Manager, BTPS.

2. The facts in brief compass are that initially an industrial dispute was raised by the claimant/workman on 11.02.2008 and reference was made by the appropriate authority on 06.02.2009, which is as follows :

"Whether the action of the management of the Badarpur Thermal Power Station, New Delhi in terminating the services of their workman Umesh Kumar Mishra w.e.f January, 2008 is legal and justified? If not, to what relief the workman is entitled to?"

3. The NTPC being aggrieved by said reference filed W.P.(C) 8531/2009. The writ petition was disposed of vide order dated 28.04.2009. Pursuant to the order passed in the writ petition, the Central Government modified and sent the reference dated 20.05.2009 to the learned CGIT for adjudication. The modified reference is as follows:

*"Whether the applicant (Umesh Kumar Mishra) is an employee of BTPS or BTPS Club?
Whether the action of management in terminating the services of Umesh Kumar Mishra w.e.f. September 2008 is just, fair and legal? If not, to what relief the workman concerned is entitled to and from which date?"*

4. The CGIT on the basis of this reference, returned a finding vide its award dated 07.03.2011, in which, as per the appellant, it was inter alia held that the claimant/workman is an employee of BTPS Club and not the NTPC. However, learned CGIT further held that since the

claimant/workman is an employee of the club, the appropriate authority would be the state government and not the central government.

5. Against the award, the claimant/workman filed a writ petition being W.P.(C) 7622/2011 before this Court. This court remanded the matter back to the learned CGIT for adjudication of the remaining part of reference i.e. *"Whether the action of management in terminating the services of Umesh Kumar Mishra w.e.f. September 2008 is just, fair and legal and the grant of consequential relief"*. It was also directed that since BTPS Club was held to be the employer and was not represented before the learned CGIT, a notice may be issued to the club for participating in the proceedings before the learned CGIT. These proceedings are still pending before the CGIT.
6. While the matter rested thus, the claimant/workman Umesh Kumar Mishra filed a complaint under Section 14 read with Section 14 (AB) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 before the Regional Provident Fund Commissioner, New Delhi. The claimant/workman has also impleaded the club in the said complaint. This complaint came to be disposed of by the Regional Provident Fund Commissioner vide order dated 11.12.2019, wherein Regional Provident Fund Commissioner *inter alia* held as under:

Analysing and examining the contents of the submissions of all the parties involved, including that of the complainant and on application of my mind, I am effectually convinced that the BTPS Club and the BTPS/NTPC are the one and the same establishment within the meaning of Section 2 -A of the Act. and as a natural corollary which follows the proposition established thereby, I am also convinced that Sh. Umesh Kumar Mishra, the complainant is eligible for the membership

to the Provident Fund and allied Schemes as envisaged in the Act for the period 07/ 2002 to 12/2007 w.e.f. 01.07.2002 as he is an employee within the meaning of Section 2(f) of the Act of the NTPC(DL/4070), while the NTPC is the employer as on date in view of the complete takeover of the BTPS by the NTPC w.e. f. 01.06.06 and management of the former by the latter prior thereto and within the meaning of the Section(s) 2(e) and 2A of the Act to be read with the express provision of Condition 3 of APPENDIX 'A' [Revised Conditions for Grant of Exemption under Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952] to Paragraph 27AA of THE EMPLOYEES' PROVIDENT FUNDS SCHEME, 1952. It has been claimed by the BTPS Club that for the period 09/2007 to 12/2007 (23.12.2007 to be exact) wages have been paid by the contractor/sub-contractor to the complainant. But the complainant has stated in his application dated 24.08.09, that no wages has been received by the complainant from any source whatsoever. In light of such denial, determination of Provident Fund and allied dues would be inappropriate for the period 09/2007 to 12/2007 at this juncture because the amount is still purportedly due to be paid to the complainant. Thus, the period for determination of Provident Fund and allied dues is strictly restricted to the period 07/2002 to 08/2007 and to that period alone. The NTPC Ltd. has informed the 7A Authority that the matter of employment of the complainant is sub judice in different fora. But neither the BTPS nor the Club nor the NTPC could produce any order passed by any competent Court of Law restraining the quasi-judicial Authority from passing an order of determination of amount due from the employer on account of the Provident Fund and allied dues under Section 7A of the Act.

7. Aggrieved by this, the petitioner herein invoked the jurisdiction of Employees Provident Funds Appellate Tribunal (EPFAT). The EPFAT vide order dated 13.07.2011 dismissed the appeal and *inter alia* held as under:

6. The fact not disputed is that the club is called the Badarpur Thermal Power Station Club and located in the premises of the appellant and the permanent employee of the Badarpur Thermal Power Station are the only member of the club. Sh. Umesh Kr. Mishra was working in the club. The constitution of the Badarpur Thermal Power Station Club mentioned under the Article 21 to 28 show that one of the object of the club was to promote the interest and welfare of employees of National Thermal Power Station and the well being of the employees. So, the object of the club was the welfare of the employees of National Thermal Power Station.

8. The petitioner has challenged the order dated 13.07.2011 by way of the present writ petition. Learned counsel for the petitioner has submitted that the finding as reached by the Regional Provident Fund Commissioner and the appellate tribunal are contrary to the material on record. It has been submitted that these findings are also contrary to the order of the learned CGIT in ID No.25/2009 dated 07.03.2011 which have been reaffirmed by this court in W.P.(C) 7622/2011 dated 16.01.2013. Learned counsel for the petitioner submits that since it has conclusively been held that Umesh Kumar Mishra is an employee of the BTPS club, NTPC cannot be burdened with the provident fund dues.
9. Mr.B.B.Pradhan, counsel for the Regional Provident Fund Commissioner has submitted that the order of the Regional Provident Fund Commissioner and the EPFAT cannot be interfered with as the same has been passed on the proposition that the NTPC is a principal employer.
10. The attention of the court has been drawn to para 36 of the employees provident fund scheme, 1952 and it has been submitted that even if the

claimant is not an employee of the NTPC, the NTPC under the law is bound to make the payment of the provident fund as a principal employer.

11. Learned counsel for the RPFC has also submitted that in view of Section 2A of the Act, the NTPC is liable to make the provident fund dues. In support of his contentions, learned counsel has relied upon *M/s L.N.Gadodia & Sons and Anr. vs. Regional Provident Fund Commissioner*, 2011 (11) SCALE.
12. Mr.Om Prakash Gupta, learned counsel for the claimant/workman has submitted that the findings of the learned CGIT will not be in the present set of facts. Learned counsel submits that the area of jurisdiction of the Regional Provident Fund Commissioner and EPFAT are entirely different in nature. The jurisdiction of the CGIT is only to decide about the reference on the industrial dispute being raised. Learned counsel has further submitted that there is concurrent finding of the Regional Provident Fund Commissioner and EPFAT and therefore this court in writ jurisdiction may not interfere in the present proceedings. Learned counsel submits that even otherwise the proceedings before learned CGIT are still pending and he reserves his right to challenge the same till after final award is passed.
13. The jurisdiction of the court under Article 226 is very well settled. The jurisdiction though may be wide but has to be exercised with due circumspection. The courts can certainly interfere with the order of tribunal below, if the same suffers from any illegality or perversity. The term 'perversity' may include passing of any direction and order which is either without any evidence or contrary to the

evidence/material on record. This court is conscious of the fact that in the writ jurisdiction, this court cannot substitute its own opinion with the opinion arrived at by the tribunal on the basis of material on record. However, this court has to reach justice while exercising its jurisdiction.

14. The facts as narrated above would show that the genesis of the dispute between the parties that whether the claimant Sh. Umesh Kumar Shukla is an employee of NTPC or BTPS Club. This issue was discussed by the learned CGIT in its order dated 07.03.2011 and the issue as to the employer and employee relationship was considered by the learned CGIT and it was *inter alia* held as under:

51. Onus is there on the claimant to establish that he is an employee of the Power Station. To discharge that onus he filed his affidavit Ex. WW 1/A wherein self serving words are detailed. Contents of his affidavit do not get support from any evidence either documentary or circumstantial. Even otherwise documents Ex. WW 1/ 12 and Ex. WW 1/13 highlight that his wages were being paid by the Club. At no point of time the claimant raised an objection that when he was an employee of the Power Station why his wages were being paid by the Club. He never questioned this proposition either before the authorities of the Power Station or before the authorities constituted under the Act. The Club was constituted in the year 1990 and running as such an independent entity since then. It maintains its bank account, prepares balance sheets and files it before the authorities. The claimant was admittedly engaged in the year 2002. It cannot be said that the Club was a camouflage or a smoke screen to evade benefits of the claimant. Consequently the circumstances detailed above constrained me to conclude that the claimant has not been able to establish that he was an employee of the Power Station. What emerges out of his testimony is that as per his own case he received his wages from the Club for long six years. He admits in his testimony that his real elder brother was working as an officer with the Power Station. He never made any compliant to him, when his wages were

offered by the Club. All these aspects made it clear that the claimant was an employee of the Club.

52. A case has been projected by the claimant that he worked as a caretaker for Yugantar Complex. It is an admitted case that after erection of Yugantar Complex in 2001-2002 the Club was allowed to book Yugantar Hall for private purposes and receive booking amount for maintenance of Yugantar Complex and for running its activities. These facts give an inference that certain responsibilities, such as maintenance of Yugantar Complex were entrusted by the Power Station to the Club and in turn the Club was allowed to retain booking amount of Yugantar Hall and use it for maintenance of the complex as well as for running its activities. Performance of this obligation by the Club was for a consideration. The Club made its employee, namely, the claimant to take care of maintenance of Yugantar Complex. When these obligations were discharged by the claimant, his status of an employee of the Club never changed, since Yugantar Complex was to be maintained by the Club, in pursuance of obligation referred above. It cannot be said that the claimant became an employee of the Power Station. Consequently contention of the claimant that he was also working as caretaker of Yugantar Complex would not bring any accolade for him. He was and remained an employee of Club till he served it. In view of these reasons it is concluded that the claimant was an employee of the Club and not of the Power Station.

(emphasis supplied)

15. These proceedings were brought to this court by the claimant/workman vide W.P.(C) 7622/2011. This court on this issue *inter alia* held as under:

14. Since the BTPS Club has been held to be the employer and they are not represented before the Industrial Tribunal, notice shall be issued by the Industrial Tribunal to the BTPS Club to afford them an opportunity to defend the claim of the petitioner.

16. Thus, the finding of the tribunal that claimant workman is an employee of BTPS club has been reaffirmed by this court. Therefore, the finding of the Regional Provident Fund Commissioner and EPFAT are

certainly in teeth of the same. Thus, these findings cannot sustain in the eyes of law and the same are set aside.

17. The petition is allowed. However, as has been rightly been put by the learned counsel of Sh.Umesh Kumar Mishra, claimant/workman that his right to challenge the award will remain open and he may also agitate for his dues, if any, as per law in accordance with the final order of CGIT in ID No.25/2009.
18. The petition stands disposed of.

DINESH KUMAR SHARMA, J

NOVEMBER 16, 2022

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