IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.07.2023

CORAM:

THE HON'BLE MR. JUSTICE S. VAIDYANATHAN

and

THE HON'BLE MR. JUSTICE K. RAJASEKAR

W.A. No. 2459 of 2011 & M.P. No.1 of 2011

A & F Overseas Trade Ltd.
No.96, 3-B, III Floor
II Main Road
Gandhi Nagar
Adyar
Chennai 600 020 Appellant

v

The Regional Provident Fund Commissioner
Employees' Provident Fund Organisation
37 Royapettah High Road
Chennai 600 014 Respondent

Writ Appeal filed under Clause 15 of the Letters Patent challenging the order dated 05.08.2011 passed in W.P. No.11733 of 2004.

For appellant	Mr. Anand Gopalan for M/s. T.S. Gopalan & Co.
For respondent	Mr. P.K. Panneerselvam

JUDGMENT

(delivered by S. VAIDYANATHAN, J.)

To avoid verbosity, the parties are adverted to as per their rank in this writ appeal.

2 The appellant employer is covered by the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (for brevity "the Act") under Code No.PC/364. They failed to remit the Provident Fund, Pension Fund and Insurance Fund contributions and administrative charges in respect of trainees. The appellant employer was afforded an opportunity by the Provident Fund authorities and the enquiry was posted to 14.06.2002, 08.07.2002 and 27.06.2002. There were no standing orders applicable and the appellant employer was afforded an opportunity to produce the Certified Standing Orders for perusal on 26.07.2002, but, the same was not produced. There was an amendment to Section 2(f) of the Act effective 01.08.1988 and the said amendment reads thus:

> "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 an establishment, and who gets his wages directly or indirectly from the employer and includes any person:
>
> 1) employed by or through a contractor in or in connection with the work of the establishment
> 2) 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.

Within 6 months from the date of applicability of the Act, the establishment has to submit the draft standing orders for certification in terms of Section 3 of the Industrial Employment (Standing Order) Act, 1946. The appellant employer did not submit the draft standing orders even after a period of 10 years. The stipend given to the trainees is termed as "basic wages" in terms of Section 2(b) of the Act which reads thus:

(b) “basic wages” means all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include—

(i) the cash value of any food concession;

(ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;

(iii) any presents made by the employer;

3 Since trainees have to be enrolled into the Provident Fund from the date of engagement in the establishment, the respondent authority has passed an order dated 17.09.2002 under Section 7-A of the Act ordering that belated remittances will attract penal damages in terms of Section 14-B of the Act. Section 7-A of the Act reads thus:

"7-A. Determination of moneys due from employers.—

(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,—

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

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.

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

(a) enforcing the attendance of any person or examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavit;
(d) issuing commissions for the examination of witnesses,

and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).

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

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

(4) Where an order under sub-section (1) is passed against an employer *ex parte*, he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show-cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry:

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

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

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

4 Aggrieved, the appellant employer preferred a review under Section 7-B of the Act. Section 7-B of the Act reads thus:

"7-B Review of orders passed under Section 7-A:

(1) Any person aggrieved by an order made under sub-section (1) of section 7-A but from which no appeal has been preferred under this Act, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of such order may apply for a review of that order to the officer who passed the order:

Provided that such officer may also on his own motion review his order if he is satisfied that it is necessary so to do on any such ground.

(2) Every application for review under sub-section (1) shall be filed in such form and manner and within such time as may be specified in the Scheme.

(3) Where it appears to the officer receiving an application for review that there is no sufficient ground for a review, he shall reject the application.

(4) Where the officer is of opinion that the application for review should be granted, he shall grant the same:

Provided that,--

(a) no such application shall be granted without previous notice to all the parties before him to enable them to appear and be heard in support of the order in respect of which a review is applied for, and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be produced by him when the order was made, without proof of such allegation.

(5) No appeal shall lie against the order of the officer rejecting an application for review, but an appeal under this Act shall lie against an order passed under review as if the order passed under review were the original order passed by him under section 7-A."

5 The reviewing authority passed a detailed order dated 02.04.2004 rejecting the request of the appellant employer and the relevant paragraphs are scanned below:

As per the signed agreement between the employer and the so called trainees, the period of apprenticeship is upto a maximum of 2 ½ years, during which period they will be paid a consolidated sum of Rs.600/- p.m. The quantum of the stipend is not discussed in the draft order. As per agreement, a consolidated amount of Rs.600/- (based on attendance) is payable p.m during the training period and the period of training is also mentioned as 2 ½ years. As per this agreement, the employer is not liable to pay more than Rs.600/- p.m during the period of training of 2 ½ years. But a perusal of the payments made to the trainees shows that the payment of stipend varies from 700/-, 800/- 925/- and so on as seen from the stipend list for the month of 4/2003.

In the draft scheme submitted to the Government, a statement of persons employed under each category, as per Rule 5 of the Industrial Employment (Standing Order) Central Rules, 1946 is enclosed. The statement reads as follows:

Total no. of employees	: 120
No.of permanent workmen	: 60
No.of temporary workmen	: 20
No.of casual workmen	: 10
No. of trainees/trainees	: 30
Name of the trade union if any to which the workmen belong	: Nil

A perusal of the above statement (which is part of the draft scheme) shows that the employer has informed the Labour Department under Rule 5 that when he employees 120 workmen, he proposes to employ 30 trainees which is in the ratio of 4:1.

The no.of trainees actually employed by the establishment during 2003 as furnished by employer is:

Period	Trainees	Staff/ CPW	Temporary	Total	Ratio Trainee:Others
Jan,2003	63	80	48	191	63:96
Feb,2003	63	77	19	159	
March,2003	63	78	15	156	
April,2003	56	76	15	147	60:90
May,2003	60	75	15	150	
June,2003	63	81	15	159	
July,2003	63	78	15	156	
August,2003	63	76	15	154	
September,2003	63	78	15	156	
October,2003	63	78	15	156	61:91
November,2003	61	76	15	152	
December,2003	57	73	30	160	

Though he has declared in the draft scheme submitted to Govt. for certification, his intention of employing 30 trainees and 90 other employees per month, in reality he has employed double the no. of trainees (63:128) (60:90).

The no. of trainees and regular employees conform to the ratio of 1:7, in leather goods and 1:4 in footwear makers. In the draft order, he has also quoted the ratio 1:4 whereas in practice, he has employed 1:2, 1: 1 ½ etc.

It is also observed that the establishment is a sick establishment registered under BIFR vide BIFR case no.359/2000. A detailed analysis of the functioning of the establishment reveals that the establishment has started delaying the payment of PF dues from the year 1998 onwards (Dues from 4/98 to 3/99 was paid only on 2.7.99). The establishment in its letter dt.18.9.2000 while explaining the inability to pay the dues from April,1999 to July,2000 has stated that the financial position is very bad due to non-receipt of export orders, vide letter dt.28.6.03, the employer admits that the unit is a sick industrial unit under 22(1) of the Sick Industrial Company Special Provisions Act, 1985.

It is obvious that the establishment's financial position is very weak and this sickness has made them to register with BIFR. It is also pertinent to note that only from 3/2000 onwards, the establishment has started appointing trainees.

The trainees are not eligible for bonus either festival or profit sharing, conventional or attendance. The employer in his representation dt.3.3.04 has admitted that "the persons recruited as trainees are not employees attracting the provisions of EPF & MP Act, 1952, entitling them to PF benefits as they are squarely falling under the definition of "excluded employee". On the analogy the so called trainees are not given the benefit of ESI scheme also. As the trainees declared as Trainees as per the standing order and so enjoys all the advantages and disadvantages conformed under the ID Act 1947 as the definition therein of a workman includes an trainees as well".

He has also stated that "the trainees are not entitled to any fringe benefits such as bonus, leave and allowances which are eligible for regular workmen. Service rendered as trainee is also not commuted for gratuity and other statutory benefits under the State Labour Enactments".

Taking the shelter under the ID Act, 1947, the employer has employed these trainees for production and not to give the above benefits and allowances.

Moreover, a sick establishment which was registered under BIFR cannot engage such a high number of Trainees as much of the manpower of regular employees has to be spent in giving training to the trainees except to avoid PF liability without affecting the production.

The Asst.P.F.Commissioner who was deputed to the establishment has stated that Trainees are engaged for quality control work, inspection control which is a job of skilled employee.

During the course of the enquiry, the employer has requested that before deciding the issue under para 26B, all the employees should also be called and enquired. As the issue of non-enrolment of these trainees were unearthed by this department while inspecting the records and, as no complaints has been received from the members, which may be due to fear of losing their job, I do not consider it necessary to call the employees and get their opinion, as in my view the question whether the employer is empowered to engage these trainees, is to be decided prima facie.

Thus, it is seen that the employer has been employing persons as trainees without any approved order or even draft standing orders from 98 to 2002. Even after the formation /submission of draft standing orders in August,2002, they employed trainees more than the prescribed ratio as submitted in the draft standing order. During the second subsequent years, he has paid more than what is entered in the agreement as stipend.

It is also a valid point to note that only after the direction from this office in January.2002 to pay the P.F. dues of these trainees, the establishment has submitted the draft scheme for certification. The scheme was not filed by the employer on his own within the stipulated period, but only after the office has taken action to extend the social security benefits to these employees. It is obvious only to escape from the liability of paying P.F.contribution to these employees, the draft scheme has been formed and submitted by the employer.

All the above fact shows that the employees are not trainees as claimed by the employer, but regular employees employed under the head "Trainees" to avoid PF, ESI and to deny other legitimate rights to which the employee is otherwise entitled to and saved the salary and other emoluments which, as regular employees they are entitled to receive.

Now, therefore, I, Kousalya Ganapathy, Regional P.F.Commissioner-II in exercise of the powers conferred under para 26B of the Employees Provident Fund Scheme, 1952 having regard to the facts of the case, documents on file and record hereby decide that all the persons employed under the head trainees should be enrolled as PF members from the date of their joining the establishment. The determination of dues in respect of these employees will be taken up separately under section 7A of the Act.

Issued under my seal and signature on the day of 2nd April 2004.

(KOUSALYA GANAPATHY)
REGIONAL P.F.COMMISSIONER-II(CC.I)

TO
M/s.A&F Overseas Trade Ltd.,
Urruvaiyur Village,Mangalam Road,
Mangalam Post,Pondicherry – 605 110

Copy to:
1.A/cs.Group 1

2.AC(CC.III) : To initiate action under section 7A to assess the dues in respect of trainees from the date of employment in M/s.A&F Overseas Trade Ltd., Pondicherry

6 From the above discussion of the reviewing authority, it is crystal clear that the appellant employer has avoided to pay the Provident Fund amount due to the trainees even though they are covered by the definition of Section 2(f) of the Act. That apart, against the order of the reviewing authority under Section 7-B of

the Act, the appellant employer has got an alternative remedy of appeal under Section 7-I of the Act.

7 Since the matter has been pending for nearly two decades, we are not inclined to remit the matter on the ground of availability of alternative remedy, more so, when it is the admitted case that the appellant employer has failed to comply with the mandatory provisions.

8 In such view of the matter, we hold that the order of the Single Bench confirming the order of the respondent/original authority passed under Section 7-A of the Act and the order of the reviewing authority passed under Section 7-B of the Act is perfectly in order warranting no interference.

9 Further, a Single Bench of this Court had an occasion to deal with a similar issue in **The Managing Director, A & F Overseas Trade Ltd. v The Regional P.F. Commissioner, Puducherry and others [(2020) 1 LLJ 185 (Mad)],** wherein also, incidentally, the appellant is none other than the appellant employer herein, the difference being, the issue involved therein is for the subsequent period. Even in the said judgment, the Single Bench has held against

the employer and also observed that the employer has not availed of the appellate remedy.

In view of the foregoing, this writ appeal stands dismissed, however, sans costs. The appellant employer is expected to comply with the order passed by the respondent/original authority within a period of four months from the date of receipt of a copy of this judgment. Connected M.P. stands closed.

(S.V.N., J.) (K.R.S., J.)
31.07.2023

cad

S. VAIDYANATHAN, J.

and

K. RAJASEKAR, J.

cad

To

The Regional Provident Fund Commissioner
Employees' Provident Fund Organisation
37 Royapettah High Road
Chennai 600 014

W.A. No. 2459 of 2011

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