

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-4912-2011 (O&M)
Date of Decision: 13.10.2023

M/S HOTEL VIKRANT

...Petitioner

Versus

PRESIDING OFFICER, EMPLOYEES PROVIDENT FUND,
APPELLATE TRIBUNAL 60, SKYLARK BUILDING, 7TH FLOOR,
NEHRU PLACE, NEW DELHI AND ANOTHER

...Respondents

CORAM: HON'BLE MR. JUSTICE HARSH BUNGER

Present : Mr. Sumit Bajaj, Advocate
for the petitioner.

Mr. Sandeep Goyal, Advocate
for the respondents.

HARSH BUNGER, J. (ORAL)

1. Petitioner (M/s Hotel Vikrant) has filed the instant writ petition under Articles 226/227 of the Constitution of India, seeking a writ in the nature of *certiorari* for quashing the order dated 17.06.2005 (Annexure P-5) passed by the Assistant Provident Fund Commissioner (in short 'the APFC') under Section 7-A of the Employees' Provident Fund and Miscellaneous Provision Act, 1952 (in short 'the 1952 Act').

Petitioner further seeks quashing of order dated 06.01.2011 (Annexure P-7) passed by the Employees' Provident Fund Appellate Tribunal (in short 'the Appellate Tribunal'); whereby the appeal filed by the petitioner against order dated 17.06.2005 (Annexure P-5) was dismissed.

2. Briefly, the Area Enforcement Officer from the Office of Regional Provident Fund Commissioner, Karnal visited the premises of the petitioner on 20.01.1999 and he found that 20 employees were working in the petitioner-establishment. Accordingly, the Area Enforcement Officer made a list of the employees, who were found working at the spot in the petitioner's premises and the said list was got signed from the Manager of the petitioner-establishment. Thereupon, the Area Enforcement Officer recommended that the petitioner-establishment be covered under the 1952 Act as 20 workers were found working at the time of inspection of the petitioner's premises. In this regard, the petitioner-establishment was informed vide letter dated 27.05.1999 and the proceedings under Section 7-A of the 1952 Act were initiated.

3. The petitioner submitted a reply (Annexure P-2) to the notice under Section 7-A of the 1952 Act, wherein a stand was taken that from the date of inception of the petitioner-establishment, they had never employed 20 or more than 20 employees and therefore, the petitioner-establishment was not covered under the 1952 Act. It was further stated that the petitioner-establishment came into existence and started its business w.e.f. 01.01.1999 and in terms of Section 16(1)(d) of the 1952 Act, the application of the provisions of the Act are exempted for a period of three years, from the date when the such establishment is or has been set up.

4. As per the petitioner, Hotel-Vikrant (petitioner-establishment) is situated in Village Rally, which is now Sector 12-A, Panchkula and the said hotel is constructed on a plot of 100 sq. yards and it is not possible to employ 20 persons in such a small place; more so, the hotel was catering only to local people. Petitioner claims that it was never supplied with the list

of employees during the proceedings under Section 7-A of the 1952 Act. It is submitted that an order to arrive at a conclusion that the petitioner-establishment is covered under the 1952 Act, it was incumbent upon the authorities to collect relevant material by examining the books of accounts and/or other records of the establishment and then base its finding on the evidence/relevant material. Petitioner maintains that during the proceedings under Section 7-A of the 1952 Act, it had supplied copies of balance sheets for the year 1998-99 upto 2003-04 and in case, the total salary/wages paid by the establishment during these years is divided by minimum wages, then the strength of establishment would not go beyond 5-6 employees.

5. The learned APFC, upon considering the material available on the record, passed an order dated 17.06.2005 (Annexure P-5) holding that the 1952 Act is applicable to the petitioner-establishment w.e.f. 20.01.1999 and the petitioner was directed to report compliance under the various provisions of the 1952 Act as well as the schemes framed thereunder w.e.f. 20.01.1999.

6. Being aggrieved against the aforesaid order, the petitioner preferred an appeal before the Appellate Tribunal; however, the same was dismissed vide its order dated 06.01.2011 (Annexure P-7).

7. In the afore-mentioned circumstances, the petitioner has filed the instant writ petition before this Court.

8. Learned counsel for the petitioner has primarily raised two submissions before this Court. Firstly, it is submitted that from the date of inception of the petitioner-establishment, they had never employed 20 or more than 20 employees and the list of employees has been prepared by the Area Enforcement Officer on its own by including employees of adjoining

shops and the same cannot be relied upon. It is submitted that in order to arrive at a conclusion that the petitioner-establishment is covered under the 1952 Act, it was incumbent upon the authorities to collect relevant material by examining the books of accounts and/or other records of the establishment and then base its finding on such evidence/material, however, no such exercise was carried out in this case.

Secondly, it is submitted that since the petitioner-establishment came into existence and started its business w.e.f. 01.01.1999; therefore, in terms of Section 16(1)(d) of the 1952 Act, the application of the provisions of the Act are exempted for a period of three years, from the date when the such establishment is or has been set up. It is, therefore, contended that the petitioner-establishment was not covered under the 1952 Act. Accordingly, it is prayed that the impugned orders be set aside.

9. On the other hand, learned counsel appearing for the respondent No.2 has opposed the afore-said submissions made on behalf of the counsel for the petitioner. It is submitted that the 1952 Act is a beneficial legislation for the benefit of the employees and in case, an establishment/employer is not covered under the 1952 Act, then it is for the said employer/establishment to place on record sufficient material before the concerned authority in the proceedings under Section 7-A of the 1952 Act to satisfy the authority regarding non-applicability of the Act. It is submitted that the petitioner had availed various opportunities before the concerned authority in the proceedings under Section 7-A of the 1952 Act; however, it failed to bring on record sufficient material to show that the 1952 Act was not applicable to it. Learned counsel for respondent No.2, while referring to Annexure P-3, more specifically profit and loss account statement for the

year ending 31.03.1999 indicated that the petitioner-establishment has reflected in the afore-said statement that an amount of Rs.60,380/- were paid towards salary and wages; however, the establishment had failed to show as to whom all the afore-said salary was paid.

As regards the second submission of the petitioner that in terms of Section 16(1)(d) of the 1952 Act, the provisions of the Act were not applicable to an establishment for a period of three years from the date of its establishment or the date when it was set up (which in the instant case, is stated to be 01.01.1999), it is submitted that the afore-said provisions contained in Section 16(1)(d) of the 1952 Act, already stands deleted w.e.f. 22.09.1997 vide an Amendment Act 10 of 1998. Accordingly, prayer for dismissal of the writ petition has been made.

10. I have heard learned counsel for the respective parties and perused the paper book with their able assistance.

11. The Employees Provident Fund and Miscellaneous Provisions Act, 1952 is a beneficial piece of legislation for the benefit and betterment of the employees and it is a statutory obligation of every employer to ensure that their employees and workers are not deprived of the benefits of the said statutory scheme.

12. Here it would be relevant to reproduce Section 7-A of the 1952 Act, which reads as under :-

"7A. 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 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 judicial proceeding within the meaning of sections 193 and 228 and for the purpose of Section 196 of the Indian Penal Code.

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

(3A) 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 enquiry 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 office 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."

13. It would be manifest from the above extracted provision that whenever an employer raises a dispute regarding the applicability of the said 1952 Act, a detailed enquiry has been envisaged and the officer conducting the enquiry has been given all the powers to enforce the attendance of the witnesses, receive evidence on affidavit and even to issue commissions for examination of the witnesses. Under Sub Section 3 of the said section, the officer cannot make any order under Sub-Section 1 unless a reasonable opportunity of hearing has been afforded to the employer.

14. In the instant case, as per the inspection report dated 20.01.1999 (Annexure R-2/1), the strength of the petitioner establishment in the year 1999, has been shown to be 20 employees and their names as well as their salary is stated therein. The said list of employees is signed by Sh. Yogesh Thakur as Manager of petitioner-establishment; however, the said list of employees is being disputed by the petitioner by saying that employees of adjoining shops have been shown as employees of petitioner-establishment. However, in my considered view, a mere bald assertion of petitioner to dispute the list of employees cannot advance the cause of petitioner-establishment. In case, the petitioner was disputing the list of employees as prepared by the Area Enforcement Officer by saying that those employees were of adjoining shops; in that eventuality, the petitioner could have given details of so called employees of adjoining shops, who according to the petitioner were wrongly shown as employees of the petitioner. The petitioner would have moved necessary application before the APFC to summon such person or owners of such adjoining shops to show that the employees shown under the petitioner were infact their employees. No such effort was made.

15. It is not in dispute that in the present case, the petitioner-establishment was given several opportunities i.e. on 20.09.2004, 18.10.2004, 16.11.2004, 20.12.2004, 17.01.2005, 11.02.2005, 07.03.2005 and 04.04.2005 but still, it failed to place on record any cogent documentary evidence based on which the learned APFC could have come to the conclusion that the petitioner-establishment was not employing 20 or more employees in their establishment. The petitioner is engaged in the hotel

business and, therefore, deployment of employees for the establishment of the petitioner cannot be ruled out.

16. It is a settled legal position that if any establishment or employer is not covered under the 1952 Act, then it is for the employer to place sufficient cogent and convincing material before the designated authority in an enquiry 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, who under no circumstances, can be in possession of necessary records evidencing the extent of strength of employees in any particular establishment. In this regard, reference can be made to the case of *Saraswati Construction Company v. Central Board of Trustees, 2010(7) S.C.T. 539*.

17. There cannot be any doubt that it is the employer who is the legal custodian of the records, registers, etc. pertaining to the payment of wages, their attendance etc. and in the enquiry under Section 7A of the said Act, necessary documents could have been placed by the petitioner to dispute and dislodge the fact finding report of the Area Enforcement Officer. It is not the case of the petitioner that the petitioner was deprived to place on record any documentary evidence or the documentary evidence placed on record by the petitioner was not considered by the learned APFC or for that matter the Appellate Authority. Therefore, no infirmity can be found with the order of the learned APFC passed under Section 7A of the 1952 Act.

18. So far as the second submission of the petitioner regarding non-applicability of 1952 Act on account of infancy of the establishment in terms of Section 16(1)(d) of the 1952 Act is concerned, evidently, the provisions

contained in Section 16(1)(d) of the 1952 Act, already stands deleted w.e.f. 22.09.1997, therefore no relief can be granted to the petitioner in that regard.

19. In ***Syed Yakoob v. K. S. Radhakrishnan and others, AIR 1964 Supreme Court 477***, a Constitution Bench of the Hon'ble Supreme Court considered the scope of the High Court's power to issue a writ of certiorari and laid down the following propositions :

"A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can, similarly, be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard, to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice.

The jurisdiction of High Court to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, writ of certiorari can be issued if, it is shown that in recording the said finding, the Tribunal had erroneously refused to admit the admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the

impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari.

A finding of fact recorded by the Tribunal cannot, however, be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding being within the exclusive jurisdiction of the Tribunal, the points cannot be agitated before a writ Court.”

20. Considering the totality of circumstances in the light of the legal principles indicated above, there is no scope for any interference in the impugned order dated 17.06.2005 (Annexure P-5) passed by the learned APFC and also the order dated 06.01.2011 (Annexure P-7) passed by the Appellate Tribunal; resultantly, the present petition fails and the same is accordingly dismissed.

21. No other argument has been raised.

22. All pending application/s, if any, shall also stand closed.

October 13, 2023

gurpreet

(HARSH BUNGER)

JUDGE

Whether speaking/reasoned:

Yes/No

Whether reportable:

Yes/No