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

Judgment reserved on: 02.08.2023
% **Judgment delivered on: 24.08.2023**

\+ **<u>LPA 597/2019</u>**

M/S NAVEEN VIDYA BHARTI PUBLIC HIGHER SECONDARY SCHOOL ..... Appellant

Through: Mr. Ramesh Kr. Mishra, Mr. Shivam Tiwary, Mr. Kumar Abhinandan and Ms. Kirti Paliwal, Advocates.

Versus

ASSISTANT PROVIDENT FUND COMMISSIONER & ASSESSING OFFICER ..... Respondents

Through: Mr. Kamaldeep, Proxy Advocate for Mr. A.K. Dey, Advocate for R-1.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJEEV NARULA

<u>J U D G M E N T</u>

<u>SATISH CHANDRA SHARMA, C.J.</u>

1. The present LPA arises out of a judgment dated 22.07.2019 passed by the learned Single Judge in W.P.(C.) No. 11075/2016 titled ***M/S Naveen Vidya Bharti Public Higher Secondary School Thr Its Director Vs. The Assistant Provident Fund Commissioner, Bhopal***, by which the learned Single Judge has upheld the order passed by the Employees Provident Fund Appellant Tribunal (the "**EPFAT**") dated 22.11.2013 (the "**Writ Petition**").

2. The facts of the case reveal that M/s Naveen Vidya Bharti Public Higher Secondary School, bearing Code No. MP/21897 (the "**Appellant Establishment**") was not complying with the statutory provisions as contained under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (the **"Act**").

3. The Appellant Establishment was subjected to the rigors of the Act from 01.01.2010. Subsequently, proceedings were carried out under Section 7A of the Act and the Enforcement Officer (*as defined under the Act*) (the "**EO**") appointed under Section 13(1) of the Act submitted his inspection report on 09.09.2011 in relation to compliance under the Act qua the Appellant Establishment (the "**Report**").

4. The Appellant Establishment agreed with the Report to the extent that Employee Provident Fund ("**EPF**") liability fastened upon them from the year 2011 onwards. However, the dues for the period from April 2008 to March 2011 were disputed by them.

5. The Assistant Provident Fund Commissioner (the "**APFC**") after hearing the Appellant Establishment at length, and subsequent to verifying the documents on record as well as the Report arrived at a conclusion *vide* an order dated 28.09.2011 that the Appellant Establishment would be covered under the Act with effect from a prior date i.e., 01.04.2008 as it was observed that the Appellant Establishment had 20 employees as on 01.04.2008. The APFC directed the Appellant Establishment to remit the dues within 15 days of receipt of order.

6. The Appellant Establishment aggrieved by the order passed by the APFC under Section 7A of the Act, 1952 preferred an appeal before the EPFAT. *Vide* an order dated 22.11.2013, the EPFAT arrived at a conclusion that no material evidence was brought on record to contradict the Report. In this context, Appellant Establishment was liable to remit the provident fund dues as determined by the APFC.

7. The Appellant Establishment, thereafter, preferred a Review Petition under Section 7-L (2) of the Act and the same was dismissed by the EPFAT on 07.10.2016. Thereafter, the Appellant Establishment preferred the Writ Petition before this Court challenging the order passed by the APFC as well as the order of the EPFAT. The learned Single Judge dismissed the Writ Petition preferred by the Appellant Establishment *vide* a judgment dated 22.07.2019. The operative paragraphs of the judgement passed by the learned Single Judge as contained in Paragraph Nos. 6 to 13 reads as under:

> "*6. Learned counsel for the petitioner urged at the time of the hearing that the bus of the school was operated by an independent contractor who employed a driver and a conductor. Learned counsel for the petitioner submits that the school has not made any payment to the contractor for the driver and conductor. The driver and conductor were not the employees of the school and have been wrongly included by the department as the school employees. Reliance is placed on Springdales School and Ors. v. Regional Provident Fund Commissioner & Anr., 2005 SCC OnLine Del 1457, International Airport Authority of India v. International Air Cargo Workers Union, (2009) 13 SCC 374 and Katari Coloring Factory v. Regional Provident Fund Commissioner, 1999 SCC OnLine Del 537. It is further submitted that the Chairman of the School has been included as an employee of the school on*

the ground that he was drawing a salary. It is submitted that the Chairman of the school cannot be treated as an employee.

Reliance is placed on Regional Director, E.S.I. Corporation v. Sarathi Lines (P) Ltd., 1997 SCC OnLine Ker 21, Employees' State Insurance Corporation v. Ashok Plastics (P) Ltd., 1987 SCC OnLine Cal 333 and Summer Fields School v. Regional Provident Fund Commissioner, 2016 SCC OnLine Del 1709.

7. Learned counsel for the respondent urged at the time of the hearing that EPF Act is applicable to every establishment in which 20 or more persons are employed. It is submitted that the payment register of the petitioner for the month of April, 2008 records the name of 18 employees including the Chairman and the Principal of the School. The balance sheet of the school for the year 2008-2009 reflected payment of Rs.36,960/- towards bus maintenance and Rs.1,26,095/- towards fuel expenses. The petitioner claims to have an agreement with a contractor who employed the driver and the conductor. Section 2(f) of the EPF Act is wide enough to cover the persons employed through the contractor. It is submitted that Section 2(f) of the EPF Act "includes any person employed by or through a contractor, in or in connection with the work of an establishment." Reliance is placed on BASF India Limited & Anr. v. M. Gurusamy & Anr., (2004) 101 FLR 724, M/s P.M. Patel and Sons v. UOI, (1986) 1 SCC 32 and Royal Talkies v. ESI Corporation, (1978) 4 SCC 204. With respect to the petitioner's submissions that the Chairman of the School cannot be treated as an employee, it is submitted that Section 2(f) of the EPF Act is wide enough to include any person who is getting wages from the employer. It is submitted that the Chairman was admittedly receiving wages and was shown in the payment register of the employees of the school. Reliance is placed on Employee State Insurance Corporation v. Apex Engineering Pvt. Ltd.,(1998) 1 SCC 86, Saheli Marbles Private Limited v. APFC, 2015 SCC OnLine Del 11797 and State of Maharashtra v. Ramdas Shrinivas Nayak, AIR 1982 SC 1249.

8. Vide order dated 29th November, 2016, the petitioner was directed to produce the record relating to the contractor *alleged to have been employed by the school and the payment made to the contractor. This Court also directed the petitioner to produce the contractor along with the records with respect to the driver and conductor.*

9. The petitioner filed the copy of the agreement dated 12th October, 2008 as Annexure P-6, according to which the contractor agreed to operate the bus on expenditure of maintenance and fuel and to pay the wages of the driver and conductor. On 09th January, 2017, the petitioner filed the copy of the agreement dated 12th October, 2008 which contains the financial terms.

10. In the present case, the petitioner had a bus since April, 2008. However, the petitioner did not produce any document relating to the driver and conductor of the school bus for the period April to October, 2008 and therefore, it is presumed that the driver and conductor were employed by the school during the said period. With respect to the petitioner's contention that the driver and conductor were employed by the contractor by document dated 12th October, 2008, Section 2(f) of the EPF Act is wide enough to cover the persons employed through the contractor. That apart, the document dated 12th October, 2008 appears to be a sham document created with the dishonest intention of avoiding the liability. There is no merit in the plaintiff contention that the Chairman of the school is not an employee. Section 2(f) of the EPF Act includes all persons drawing wages from the employer.

11. The writ petition is dismissed with cost of Rs.50,000/- to be paid by the petitioner to the respondent.

12. The amount deposited by the petitioner along with interest accrued thereon be released to the respondent.

13. Pending application is disposed of."

8. This Court has heard the learned counsel for the parties and perused the record.

9. The necessary statutory provisions i.e. Section 2 (e) and (f), Section 7A, 7B and 7-I of the Act are relevant for adjudicating the present matter and read as under:

"**2. Definition**.–

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(e) "employer" means— (i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f) of sub-section (1) of section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and (ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent;

(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 [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;

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***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 (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.

(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 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.

7B. Review of orders passed under section 7A.—*(1) Any person aggrieved by an order made under sub-section (1) of section 7A, 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 7A.

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***7-I. Appeals to Tribunal**.—(1) Any person aggrieved by a notification issued by the Central Government, or an order* *passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section (4), of section 1, or section 3, or sub-section (1) of section 7A, or section 7B*

[except an order rejecting an application for review referred to in sub-section (5) thereof], or section 7C, or section 14B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed. "

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10. The aforesaid statutory provisions of law establish that, a person who is receiving wages directly or indirectly from the employer is an 'employee' under the Act.

11. In the present case, it is an undisputed fact that the Chairman of the Appellant Establishment was receiving regular monthly salary from the Appellant Establishment and that his name finds place in the salary register of employees maintained by the Appellant Establishment.

12. In respect of other employees, the orders passed by the APFC, EPFAT and the learned Single Judge reveal that the Appellant Establishment owned a bus since April 2008 but failed to produce any document relating to the driver and the conductor of the school bus for the period between April 2008 and October 2008. In those circumstances, it was rightly assumed that the driver and the conductor were employed during the aforementioned period. Not only this, the document dated 12.10.2008 executed between the Appellant Establishment and an independent

contractor in relation to the contractual employment of the driver and the conductor neither inspires confidence nor displaces the liability of the Appellant Establishment under the Act as contractual employees are included within the definition of employees under the Act.

13. Learned counsel for the Appellant Establishment has vehemently argued that the Chairman of the Appellant Establishment is not an employee as there exists no employer-employee relationship between the parties. In this regard, heavy reliance has been placed on a judgment delivered by the Hon'ble Supreme Court in the case of ***Regional Director***, ***Employees State Insurance Corporation vs. Ramanuja Match Industries,*** (1985) 1 SCC 218. In the aforesaid case, it was held that a partner of a partnership firm, being an agent, cannot be treated as an employee. In the considered opinion of this Court, the aforesaid judgment is certainly distinguishable on facts. In the present case, it remains undisputed that the Chairman was receiving monthly salary from the Appellant Establishment; and that his name was reflected in the list in the salary register maintained by the Establishment in respect of employees receiving monthly salary. Therefore, the aforesaid judgment relied upon by the learned counsel for Appellant Establishment is of no help to the Appellant Establishment considering the peculiar facts and circumstances of the case.

14. Learned counsel for the Appellant Establishment has again placed heavy reliance on a judgment delivered in the case of ***Illachi Devi Vs. Jain Society, Protection of Orphans India & Ors.*** (2003) 8 SCC 413, and he has vehemently argued before this Court that the Appellant Establishment is not a juristic person and has no separate legal entity distinct from that of its

President and/ or its Chairman who exercises ultimate control over the affairs of the Appellant Establishment. He has further argued that the Chairman can never be an employee contrary to the findings of the EPFC / by the High Court. This Court has carefully gone through the aforesaid judgment. It is reiterated that the Chairman was drawing monthly salary from the Appellant Establishment and his name finds place in the salary register. Therefore, in the considered opinion of this Court, the aforesaid judgment also does not help the Appellant Establishment in any manner.

15. Learned Counsel for the Appellant Establishment has also placed reliance upon a judgment delivered in the case of ***Saheli Marbles Private Limited Vs. APFC,*** (2015) SCC OnLine Del 11797. This court has carefully gone through the aforesaid judgment. The Paragraph No. 8 of the aforesaid judgment reads as under:

> "***8.*** *Thus where a person is employed for wages an employer-employee relationship is pre-supposed and to discharge the said burden material should be produced by the person seeking exemption to show that there was no employer-employee relationship, rather the person was controlling and managing the affairs of the establishment."*

16. In light of the aforesaid judgment, it was the duty of the Appellant Establishment to establish by producing evidence on record, that there was no employer-employee relationship between the Appellant Establishment and the Chairman. The Appellant Establishment has not established the aforesaid fact. On the contrary, the Chairman was receiving regular salary from the Appellant Establishment as an employee, and, therefore, the learned Single Judge was justified in dismissing the Writ Petition.

17. The Hon'ble Supreme Court in the case of ***Pawan Hans Ltd. Vs. Aviation Karmachari Sanghatana,*** (2020) 13 SCC 506, held as under:

> *"**6.5** As per Section 2(f) of the EPF Act, the definition of an "employee" is an inclusive definition, and is widely worded to include "any person" engaged either directly or indirectly in connection with the work of an establishment, and is paid wages. [Provident Fund Office v. Godavari Garments Ltd., (2019) 8 SCC 149 : (2019) 2 SCC (L&S) 483]"*

18. Keeping in view the definition of employee as defined under Section 2(f) of the Act and the judgment of the Hon'ble Supreme Court, the Chairman was covered within the meaning of definition of employee.

19. In the considered opinion of this Court, as the Chairman of the Appellant Establishment was engaged in connection with the work of the Appellant Establishment and was paid salary/ wage in lieu thereof, he was rightly considered to be an employee.

20. The salary paid to the Chairman was recorded in the salary register of the Appellant Establishment, and, therefore, the question of setting aside the order passed by the APFC and the order passed by the EPFAT under Section 7A of the Act does not arise.

21. In respect of the driver and the conductor of the school bus, the Report establishes that the bus was operated by the Appellant Establishment. The amount paid was also reflected in the balance-sheet and, therefore, the conductor and driver were also rightly included as employees. Thus, this Court does not find any reason to interfere in the findings of fact arrived at by the APFC, EPFAT and the learned Single Judge.

22. The order passed by the learned Single Judge does not suffer from any legal infirmity and the appeal is, accordingly, dismissed.

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

(SANJEEV NARULA)
JUDGE

AUGUST 24, 2023/aks