

(2019) 02 DEL CK 0136

In the Delhi High Court

Case No : Civil Writ Petition No. 1663 Of 2017, Civil Miscellaneous No.7447 Of 2017

Central Board Of Trustees

APPELLANT

Vs

Standing Conference Of Public Enterprises (Scope)

RESPONDENT

Date of Decision : 14-02-2019

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Fund & Miscellaneous Provisions Act, 1952 — Section 2(f), 6, 7A, 7A(1), 7A(2), 7A(3), 7B, 7B(1), 8A, 8A(1)

Citation : (2019) LLR 346

Hon'ble Judges : Rekha Palli, J

Bench : Single Bench

Advocate : Keshav Mohan, K.K. Rai, V.P. Singh, Tarkeshwar Nath

Final Decision : Dismissed

Judgement

1. Vide the present petition under Article 226 of the Constitution of India, the petitioner/Central Board of Trustees, Employees Provident Fund Organization, impugns the order dated 19 th October, 2016 passed by the Employees Provident Fund Appellate Tribunal in ATA No.870(4) 2009 whereunder the respondent/establishment's appeal has been allowed. Resultantly, the orders dated 23rd July, 2003 and 30th October, 2009 passed by the petitioner under Sections 7-A and 7-B of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act") have been set aside and the matter has been remanded back to the petitioner for conducting a fresh inquiry.

2. The facts as emerge from the records are that on 1st December, 1999, the petitioner initiated proceedings under Section 7-A of the Act against the respondent for determination of the provident fund dues payable by the respondent towards the employees engaged through by its contractors during the period 1988-89 to November, 1994. On 19th March, 2002, the Enforcement Officer of the petitioner visited the respondent/establishment and sought

information regarding compliance in respect of provident dues of the respondents employees engaged through contractors dues of the contractor's employees. As the Enforcement Officer was not able to get the requisite information, the respondent was informed that it being the principal employer, it was the duty and responsibility of the respondent alone to deduct and deposit the provident fund dues in respect of all its employees. The respondent was, therefore vide the letter dated 19 march 2002 asked to submit a detailed list of contractors and wages of their employees in respect of each year. As directed, the respondent vide its letter dated 24th December, 2002, furnished the details of all the sixteen contractors who had been engaged by it during the period in question. It was pointed out therein that five of the contractors did not have any separate sub codes while the remaining eleven contractors had been allotted sub codes in accordance with the provisions of the Act. Upon receipt of the aforesaid information, the petitioner directed the respondent to provide the dates of allotment of sub code numbers to the eleven contractors as referred to in the respondent's letter dated 24th December, 2002. The respondent is stated to have responded to the petitioner's above letter by giving further information regarding the contractors wherein the names of those contractors who were directly depositing the provident fund in respect of their workers, were specifically mentioned. The said letter also stated that some of the contractors were no longer working with the respondent and therefore, despite efforts, the respondent was unable to get the requisite replies from them and a request was, therefore, made to the petitioner to summon those contractors.

3. In the light of the above reply furnished by the respondent, a team of the petitioner's Enforcement Officers visited the respondent's premises on 27th February, 2003 and based on the information provided by the respondent in respect of the contract labour for the period 1988/89-1994, the petitioner made some ad hoc calculations and worked out the provident fund dues payable in respect of the employees engaged through the contractors. The said amount was calculated as being Rs.15,44,905/-, based on which calculations, an order under Section 7-A of the Act was passed on 23rd July, 2003 wherein the respondent was held liable to pay the aforesaid sum of Rs.15,44,905/- along with interest at the rate of 12% per annum from the due date till the date of payment.

4. Aggrieved by the aforesaid order which was passed under Section 7A of the Act, the respondent preferred a review petition under Section 7-B(1) of the Act contending therein that the liability of Rs.15,44,905/- had been assessed not only without identifying the employees but also by ignoring the fact that a sum of Rs.4,00,000/- already stood deposited by the respondent on 19th March, 2002 towards the provident fund dues of these employees. It was also urged therein that some of the contractors who were already having separate provident fund code numbers, had also duly deposited the provident fund amounts those amounts were not taken into consideration while assessing the amount payable by the respondent. Upon the review petition being filed, a fresh inspection was directed to be held and the officers of the petitioner visited the respondent/

establishment on 28th July, 2008, 27th July, 2009 and 8th September, 2009 to verify the records. It appears that though the petitioner summoned the contractors from whom the requisite information had not been received by the respondent but only one contractor namely M/s A.P. Bansal & Company appeared before the Enforcement Officer and based on the records produced by the aforesaid contractor during the inspection, the amount payable by the respondent was now reduced to Rs.12,24,538/-. At this stage, it needs to be also noted that as the respondent was unable to produce any record to show the actual wages paid to the employees engaged through the contractors, the petitioner had calculated the same by treating 20% of the contractual amount as labour component and thereby quantified the provident fund dues payable by the respondent.

5. Based on these fresh inspections and more particularly the report dated 28th July, 2018, the respondent's review petition was dismissed by the Assistant Provident Fund Commissioner on 30th October, 2009.

6. Aggrieved by the rejection of its review petition, the respondent preferred an appeal before the Employees Provident Fund Tribunal which appeal had been allowed vide the impugned order. In the appeal, the main grievance raised by the respondent was that even though it had duly furnished the necessary details of the contractors through whom employees had been engaged during the period in question i.e. from August, 1989 to November, 1994, the petitioner had failed to take appropriate steps to ensure that all the contractors, many of whom had been allotted separate provident fund numbers, appear before the petitioner's officers so as to provide the necessary details of the amounts deposited by them and had on the other hand, simply fastened the liability to pay the provident fund dues of even those engaged, through contractors on the respondent and that too without, making any effort to identify the workmen.

7. Vide the impugned order, the tribunal allowed the respondent's appeal after noticing the fact that even though the respondent, which had engaged workmen through its registered contractors, had duly provided the details of all the contractors to the petitioner along with their complete addresses, the petitioner had failed to take steps to implead those contractors and had on the other hand simply assessed the amount on the basis of the respondent's balance sheets. The tribunal, therefore, while setting aside the assessment orders passed by the petitioner under Section 7A of the Act as also the order passed under Section 7B of the Act, remanded back the matter to the petitioner for a fresh inquiry with a specific direction to join all the contractors named by the respondent in the inquiry. Reference may be made to Para's 3 to 5 of the tribunal's order, which reads as under:-

"3. The entire controversy in-between the parties to the present appeal is with regard to non-remittance of statutory dues with regard to contractual employees. As per case of appellant, manpower was engaged through registered contractors and it is registered contractors who are responsible for payment of dues. On the

other hand whereas as per case of respondent being principal employer, appellant establishment not remitted statutory dues so respondent was having no option but to pass such order.

4. It becomes clear on case file that during course of inquiry, whereabouts of all the contractors were informed to the respondent but despite that respondent not joined all the contractors just to know the number of employees, name of employees, their wages and their period of employment. Any assessment on the basis of balance sheet with regard to contractual workers without joining the contractors is not justified.

5. Considering all the facts of case, impugned order passed by respondent set aside. Matter remanded back to respondent for fresh inquiry. Respondent is directed to join all the contractors in the inquiry (as per list 29). In case any of the contractor found duly registered with PF authority then appellant establishment may not be fastened for any PF liability and only registered contractor shall be responsible for such liability. In case any contractor found un-registered with PF authority then respondent shall assess dues against appellant establishment only with regard to identified beneficiaries, not on the basis of balance sheet. Any amount deposited by appellant establishment on the basis of impugned orders be refunded back within one month of this order failing which appellant establishment shall be entitled to recover such amount along with interest @10% from the date of payment till its realization. Copy of the order be sent to the parties as per law. File be consigned to the record room after due compliance."

8. Aggrieved by the order passed by the tribunal for allowing the respondent's appeal, the Central Board of Trustees, has filed the present petition. Mr. Keshav Mohan, learned counsel for the petitioner while impugning the tribunal's order submits that while remanding back the matter to the petitioner for a fresh inquiry with specific directions to join all the contractors, the tribunal has exceeded its jurisdiction and has failed to appreciate that once the definition of an employee under Section 2(f) of the Act makes it evident that persons employed through contractors are the employees of the respondent/organization, it is the respondent alone who was liable to make contributions in respect of those employees in accordance with Section 6 of the Act. He, thus, submits that the petitioner could not be saddled with the responsibility of either impleading the contractors or trying to collect information from them and contends that the impugned order remanding back the matter to the petitioner was liable to be set aside on this ground alone. He further draws my attention to Section 8-A of the Act as also to para 30 of the Employees Provident Fund Scheme to contend that it is the sole duty of the employer, in the present case the respondent, to ensure that the provident fund dues of all the persons employed through its contractors, are deposited and in case of any default, it is for the employer to deposit the same, though it is open for the employer to recover the same from the contractor. Mr. Mohan places reliance on the decisions of the Supreme Court in All

India Food Corporation of India Workers Union, Jagraon, District Ludhiana & Anr. Vs. Presiding Officer, Employees Provident Fund Appellate Tribunal, New Delhi & Ors. 2016 SCC OnLine P&H 12367; Saraswati Construction Company Vs. Central Board of Trustees 2010 SCC Online Del 1584 & M/s Bidi Supply Co. Vs. R.P.F. Commissioner & connected matters 2016 SCC OnLine Ori 352 in support of his contention that it is not the contractors but the principal employer alone, who is responsible for making deposits of the provident fund dues of all its employees, and for ensuring compliance with the provisions of the Act even in respect of the employees engaged through contractor.

9. Mr. Mohan further states that even otherwise, the tribunal has ignored the fact that the petitioner had during the pendency of the respondent's review petition, not only repeatedly visited the office of the respondent/establishment for further enquiry, but had also summoned the remaining contractors in response where to only one of the contractors, namely, M/s A.P. Bansal & Company, had appeared before the Enforcement Officer, whose explanation was duly taken into account while passing the fresh assessment order whereby the amount was reduced from Rs.15,44,905/- to Rs.12,24,538/-. He, therefore, contends that the petitioner could not be expected to make repeated efforts to elicit information from the contractors as it was the statutory duty of the respondent to ensure compliances of the Provident Fund Act, even in respect of all the employees engaged through contractors.

10. On the other hand, Mr. K.K. Rai, learned Senior Advocate for the respondent while supporting the impugned order, submits that there is no infirmity in the well reasoned order passed by the tribunal whereby the matter has only been remanded back to the petitioner for making a fresh inquiry before passing an assessment order. He submits that the tribunal was fully justified, in coming to the conclusion that once the respondent had furnished complete details about all the contractors, there was no reason as to why the petitioner ought not to have made efforts to summon the contractors and therefore there is no infirmity in the tribunal's order directing the petitioner to collect all the relevant evidence before assessing the dues of any establishment, and the dues. He submits that once the competent authority under Section 7-A of the Act, has been vested with the same powers as available with a Civil Court for examining witnesses, production of documents, affidavit, issuance of summons etc, it was mandatory for the petitioner to make efforts to ensure the presence of the contractors, whose details were duly made available by the respondent. He further submits that the mere issuance of summons to the contractors to appear once was not enough and could not have been said to be a bona fide attempt on the part of the petitioner to collect the requisite information before passing the assessment order.

11. Mr. Rai places reliance on the decision of the Supreme Court in 1990 (60) F.L.R. 15 Food Corporation of India Vs. The Provident Fund Commissioner & Ors., in support of his contention and states that the authority under section 7-A being

a statutory authority is enjoined to exercise its powers to collect the relevant facts before passing the assessment order which it had failed to do and had passed the assessment order on the basis of some ad hoc calculations. Mr. Rai further states that even otherwise, the action of the petitioner in initiating the proceedings under Section 7-A after a delay of more than twelve years and that too without even making an attempt to identify the workmen was mala fide and in the teeth of the decision of the Supreme Court in the case of (2008) 5 SCC 756 Himachal Pradesh State Forest Corporation Vs. Regional Provident Fund Commissioner.

12. I have heard the learned counsel for the parties at length and with their assistance, perused the records. Before dealing with the rival contentions of the parties, it would be appropriate to refer to the relevant portions of the Sections 2 (f), 7-A (1) to (3) & 8A(1) of the EPF Act, on which reliance has been made by the learned counsel for the parties:-

2(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) xx

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 1960.

(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.

8A. Recovery of moneys by employers and contractors.

(1) The amount of contribution that is to say, the employer's contribution as well as the employee's contribution in pursuance of any Scheme and the employer's contribution in pursuance of the Insurance Scheme and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of an employee employed by or through a contractor may be recovered by such employer from the contractor, either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

13. As the learned counsel for the petitioner has also relied on para 30 of the Employees Provident Fund Scheme, 1952, in support of his contention that it is for the employer to make contributions, in respect of even those employees who are engaged through contractors, it may be appropriate to set out para 30, which reads as under:-

30. Payment of contributions

(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 this 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 directly employed by him and also in respect of the employees employed by or through a contractor

and also administrative charges."

14. As noted hereinabove, the basic contention of the petitioner is that once the definition of an "employee" in the Act includes those engaged through a Contractor, it is the sole responsibility of principal employer to ensure that the contributions in respect of all the employees including those appointed through the contractors are deposited in a timely manner. In the event there is any failure on the part of the contractor, it is the principal employer who alone is liable under the Act to make those deposits. In the light of the provisions of section 2(f) and section 8A of the Act as also para 30 of the Scheme, which no doubt includes employees engaged through contractors within the ambit of the term employee of an employer, though there can be no manner of doubt regarding the liability of the respondent as the principal employer, to comply with the provisions of the Act and to deposit the provident fund contribution qua the employees engaged through its contractors also, the question, which arises for determination in the present case is slightly different. The issue in the present case is as to whether merely because it is the duty of the principal employer to comply with the provisions of the Act, even qua the employees employed through its contractors, can the competent authority while conducting an inquiry under the provisions of Section 7-A of the Act, simply claim the amount from the principal employer without even making at least a bona fide attempt to determine the contributions made by the contractors and thereafter determine the shortfall, if any, required to be deposited by the principal employer.

15. The facts of the present case reveal that the petitioner, had initiated proceedings under the Act after an inordinate delay of twelve years which in itself would have made it very difficult for the respondent to obtain the requisite information from its contractors and in these circumstances, in my view, there was no reason as to why the petitioner ought not to resort to its statutory powers under Section 7-A of the Act to enforce the presence of the contractors in order to make a proper assessment of the dues which were payable by the respondent towards the employees engaged through the contractors. Even though the petitioner may be under no obligation to approach the contractors engaged by the respondent, but once a specific request for summoning the contractors, was made by the respondent, the petitioner by issuing summons to the contractors on a solitary occasion and by recording the statement of the sole contractor i.e. M/s A.P.Bansal & Company, who had appeared before the Enforcement Officer, had merely offered lip service to its statutory duty under Section 7-A of the Act by not making any bona fide efforts to enforce the presence of the other contractors. Merely because it is the respondent's duty to ensure compliance with the provisions of the Act in respect of the employees engaged through the Contractors also, cannot absolve the petitioner/organization of its statutory duty to carry out an enquiry as envisaged under the Act. There is a reason as to why section 7A of the Act gives such wide powers to the Provident Fund Commissioner while making an inquiry under the Act and the reason obviously is to ensure that a proper and just assessment is made by collecting all

available evidence.

16. Thus, the question would not only be as to whether the principal employer produces relevant material but it would also be whether the provident fund commissioner who is the statutory authority, has exercised the powers vested in him to collect the relevant evidence before determining the payable amount.

17. I have also considered the decisions relied on by the learned counsel for the petitioner and found that the said decisions merely reiterate the settled legal position that the principal employer is responsible for the deposit of the provident fund dues of employees engaged through contractors also, the said decisions also reiterate that if a statute casts any duty upon any person, the said person alone is responsible to discharge the same and in the event of any failure to do so, he cannot take advantage of his own wrong. These decisions, however, do not deal with the issue arising in the present petition which pertains to the scope of the statutory enquiry, required to be conducted before passing an assessment order. On the other hand, the decision relied upon by Mr. Rai, learned senior counsel for the respondent, deals with exactly the same question as arising in the present case wherein while dealing with a somewhat similar fact situation, the Supreme Court in Food Corporation of India (Supra) held as under:-

"We have carefully perused the Commissioner's order and also the order of the High Court. The total amount ordered to be payable comes to about Rs.22,48,000.00 in respect of the employees of depots namely: Udaipur, Jaipur, Ajmer, Badmer and Sawai Madhopur. The Commissioner has also directed the Divisional Officer, Jaipur to deposit the Provident Fund Contribution i.e., Rs. 18,72,194.00 to the Fund being maintained by the trustees of the establishment. It is indeed a large amount for the determination of which the Commissioner has only depended upon the lists furnished by the workers Union. It is no doubt true that the employer and contractors are both liable to maintain registers in respect of the workers employed. But the Corporation seems to have some problems in collating the lists of all workers engaged in depots scattered at different places. It has requested the Commissioner to summon the contractors to produce the respective lists of workers engaged by them. The Commissioner did not summon the Contractors nor the lists maintained by them. He has stated that the Corporation has failed to produce the evidence."

After noticing the facts as above, the Hon'ble Supreme Court held as under:-

"It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the

jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person."

18. In the light of the aforesaid decision of the Supreme Court in Food Corporation of India (Supra), that there can be no doubt about the fact that it was incumbent upon the petitioner while making an inquiry in accordance with Section 7A of the Act to take all possible steps as set out in the Act to make a correct and proper assessment of the dues. It needs no reiteration that while making such an inquiry, the Commissioner has ample powers not only to summon any witness but also has powers to enforce the attendance of any person or summon him on oath. In these circumstances, once the tribunal found that the petitioner, had not taken adequate steps to summon all the contractors, by enforcing their attendance and that too in a case where the petitioner had initiated proceedings after an inordinate delay of twelve years, which in itself would have made it very difficult for the respondent to obtain information from its erstwhile contractors as also the fact that the assessment order itself is made on the basis of ad hoc calculations, I find absolutely no infirmity in the order of the tribunal directing the petitioner to summon all the contractors and then carry out the requisite assessment.

19. For the aforesaid reasons, I find no reason to interfere with the impugned order in exercise of my writ jurisdiction under Article 226 of the Constitution of India.

20. The petition is dismissed in the aforesaid terms with no orders as to costs.