**(2015) 09 DEL CK 0081**

**In the Delhi High Court**

**Case No :** LPA 8 of 2014

Saheli Marbles Private Limited, Udaipur APPELLANT

Vs

Assistant Provident Fund Commissioner, Udaipur RESPONDENT

**Date of Decision :** 07-09-2015

**Acts Referred:**

Constitution of India, 1950 — Article 226
Employees Provident Funds Family Pension Fund and Deposit-linked Insurance Fund Act, 1952 — Section 2(e), 2(f), 7-A
Factories Act, 1948 — Section 7

**Citation :** (2015) 147 FLR 533 : (2015) LLR 1189

**Hon'ble Judges :** Pradeep Nandrajog, J;Mukta Gupta, J

**Bench :** Division Bench

**Advocate :** P.D. Gupta and Atul Gupta, for the Appellant; Keshav Mohan and Piyush Choudhary, Advocates for the Respondent

**Final Decision :** Dismissed

## Judgement

Mukta Gupta, J—An inspection was carried out by the officers of Employers Provident Fund Organization (in short the organization) of the premises of the appellant M/s. Saheli Marbles Pvt.Ltd. (in short the Saheli Marbles) on September 11, 1996 wherein a list was prepared noting down the names of the employees for the month of June and 21 names were recorded. The said names included Nana Lal, Jai Gopal and Harish Chandra and the list was signed by the officers of the organization besides Nana Lal Chhaparwal. Relevant would it be to highlight that the list indicated that it contained the names of the employees of the appellant and Nana Lal Chhaparwal who is a director of the appellant signed the list. The said survey was proceeded by a letter dated November 07, 1996 asking M/s. Saheli Marbles to comply with the provisions of the Employees Provident Fund Act (in short the EPF Act). M/s. Saheli Marbles sent a representation dated January 01, 2004 to the Organization stating that as per the wage register and books of account only 12 members in the list were regular employees in the company and the other 9 were either employees of the company or their family members not related to the company. It was also pointed out that out of the 9 members 3 members were the Directors of the company namely Shri Nana Lal Chhaparwal, Shri Jai Gopal Chhaparwal and Shri Harish Chhaparwal and have been the Directors of the company since its incorporation. Further representation was made by M/s. Saheli Marbles on December 11, 2003 giving the status of 8 persons included in the list. In the enquiry under Section 7-A before the Commissioner despite repeated adjournments from time to time for 32 occasions none appeared on behalf of M/s. Saheli Marbles and thus vide order dated November 24, 2009 in view of the number of workers employed in the establishment being 20 and above, it was directed that M/s. Saheli Marbles fell within the ambit of the provisions of EPF Act.

2. Aggrieved by the order dated November 24, 2009 passed by the Commissioner, an appeal was preferred before the Appellate Tribunal by M/s. Saheli Marbles which was dismissed vide order dated October 04, 2010. The Appellate Tribunal relying upon the decision in Employees'' State Insurance Corporation Vs. Apex Engineering Pvt. Ltd., (1997) 3 CTC 354 : (1997) 9 JT 54 : (1998) 1 LLJ 274 : (1997) 6 SCALE 652 : (1998) 1 SCC 86 : (1997) 5 SCR 57 Supp wherein it was held that "remuneration paid to Directors for rendering services is wage and Directors be considered as employees" held that even Directors were employees of M/s. Saheli Marbles and thus employee strength was 20 and above, hence there was no infirmity in the order of the Commissioner.

3. M/s. Saheli Marbles thereafter preferred a writ petition before this Court being W.P.(C) No. 8473/2010 which was dismissed vide the impugned order dated October 09, 2013. The learned Single Judge held that the finding of fact by the original authority confirmed by the appellate authority could not be gone into by the Court in exercise of its power of judicial review under Article 226 of the Constitution and since the list prepared by the Enforcement Squad was in presence of one of the Directors of M/s. Saheli Marbles duly signed by him, the facts cannot be disputed.

4. A perusal of the record would reveal that the list as prepared on the spot in the inspection dated September 11, 1996 was duly signed by Shri Nana Lal Chhaparwal, one of the Directors of the company. The heading of the document is list of employees for the month of June. Names of Nana Lal, Jai Gopal and Harish Chandra are mentioned as employees. The list is duly signed by Nana Lal Chhaparwal with no protest. Even in the subsequent representations the facts stated in the list are not denied and it is stated that the three persons named above were Directors of the company and hence not employees.

5. Thus the short issue before this Court is whether the Directors of M/s. Saheli Marbles were employees or not in terms of the provisions of EPF Act. Learned counsel for M/s. Saheli Marbles relies upon the decision reported in Regional Director, E.S.I. Corporation Vs. Sarathi Lines (P) Ltd., (1997) 2 ILR (Ker) 529 : (1998) 1 LLJ 28 , ESI Corporation Vs. Sarathi Lines (P) Ltd. and learned counsel for the Corporation on the other hand relies upon the decision reported in

 

Employees'' State Insurance Corporation Vs. Apex Engineering Pvt. Ltd., (1997) 3 CTC 354 : (1997) 9 JT 54 : (1998) 1 LLJ 274 : (1997) 6 SCALE 652 : (1998) 1 SCC 86 : (1997) 5 SCR 57 Supp .

6. The words employer and employee have been defined under the EPF Act under Sections 2(e) and 2(f) respectively as under:

"2(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, 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];

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) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment];

7. Thus as per Section 2(e) EPF Act "employer" is a person who has authority or ultimate control over the affairs of the establishment. Directors in a company can be both employer and employee and the same would depend on the status accorded to them which inference has to drawn from the facts of the case which are essential to be gone into to find out whether the person enjoys control over the affairs of the establishment. In Employees'' State Insurance Corporation (supra) the Supreme Court analysing articles of association and the terms and conditions of the agreement appointing the assessee as Managing Directors observed that the Managing Director had to work under the control and supervision of the Board of Directors and to discharge his functions he earned a remuneration of Rs. 1000/- per month. The Supreme Court after considering the various provisions held that before a person can be said to be an employee, the following characteristics must exist qua his service conditions.

"(1) He should be employed for wages. This would presuppose relationship between him as employee on the one hand and the independent employer on the other;

(2) Such employment must be in connection with the work of the factory or

 

establishment to which the Act applies;

(3) He must be directly employed by the principal employer on any work of, or incidental or preliminary to or connected with work of, the factory or establishment;

(4) In the alternative he should be employed by or through an immediate employer on the premises of the factory or establishment or under supervision of the principal employer or his agent;

(5) We are not concerned with clause (3) of the said definition. But the inclusive part of the definition being relevant has to be noted as Condition No. 5. He should be employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof. We are also not concerned with the exempted categories of persons in the present case and hence we need not dilate on the same.

(6) This is subject to the further condition that the wages of the person so employed excluding remuneration for overtime should not exceed such wages as prescribed by the Central Government."

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.

9. In the decision Regional Director, ESI Corporation (supra) relied by learned counsel for M/s. Saheli Marbles the Kerala High Court itself drew a distinction and held that unlike in the case of a partner receiving remuneration it cannot be said that a Director or Managing Director of a company owning the factory or establishment can never be an employee also. It was further held that it was possible that a Director or a Managing Director can have a dual capacity of an agent as well as an employee and the same would depend on his work and the terms of his employment as discernable from the articles of association or the terms of agreement.

10. In the present case no evidence was led to show the non-existence of employer-employee relationship vis-a-vis the three Directors who were named in the list, the onus of which was on the appellants to show. Further, by signing the list of employees prepared on September 11, 1996, Nana Lal Chhaparwal, a director of the appellant admitted that all 21 persons named in the list were the employees. It being an admission made, was capable of being explained as a mistake and suffice it to record that an admission contained in a previous statement can be explained or withdrawn by the maker of the statement, but onus would be on the person concerned. Learned counsel for the appellant admitted before us that the three directors whose names were included in the list of employees prepared on September 11, 1996, which list was signed by

 

Sh.Nana Lal Chhaparwal were being paid remuneration. The argument advanced was that it was for the respondent to prove that the remuneration was towards wages. With regret, in view of the admission contained in the list dated September 11, 1996, the onus was on the appellant to establish that the remuneration paid was not towards wages for the reason law recognizes a dual relationship of a director with a company, one fiduciary and the other as an employee.

11. Appeal is dismissed.

12. No costs.

 