**(2010) 04 DEL CK 0326**

**In the Delhi High Court**

**Case No :** Writ Petition (C) No. 5625 of 2007

Saraswati Construction Company APPELLANT

Vs

Central Board of Trustees RESPONDENT

**Date of Decision :** 19-04-2010

**Acts Referred:**

Constitution of India, 1950 — Article 226, 227, 37, 38, 43
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 2F, 7A, 7A(1), 7A(3)
Penal Code, 1860 (IPC) — Section 193, 196, 228

**Citation :** (2010) 171 DLT 3 : (2010) 127 FLR 116

**Hon'ble Judges :** Kailash Gambhir, J

**Bench :** Single Bench

**Advocate :** S.P. Arora, for the Appellant; R.C. Chawla, for the Respondent

**Final Decision :** Dismissed

## Judgement

Kailash Gambhir, J.—By this petition filed under Article 226/227 of the Constitution of India, the petitioner seeks quashing of the order dated 13.11.2006 passed by the EPF Appellate Tribunal and orders dated 12.11.99 and 14.5.2001 passed by the Regional Provident Fund Commissioner, Delhi u/s 7A and 7B of the Employees Provident Fund and Misc. Provisions Act, 1952. The petitioner also seeks directions to direct Regional PF Commissioner, Delhi not to proceed further in the matter of determination of PF dues u/s 7A of the Act till final decision of the present petition.

2. Brief facts of the case relevant for deciding the present petition are that on 9.3.89, a two member squad of Enforcement Officers visited the petitioner firm and submitted their enquiry report and on 23.9.92, the respondent department initiated enquiry u/s 7A of the Employees Provident Fund and Misc. Provisions Act, 1952. On 12.11.99, the Regional PF Commissioner, Delhi upheld the coverage as recommended by the squad of the Enforcement officers. Thereafter, the petitioner filed review petition and the Regional PF Commissioner on

14.5.2001 passed an order against the petitioner. Consequently, the petitioner filed an appeal before the EPF Tribunal which vide order dated 13.11.06 dismissed the same. Feeling aggrieved by the aforesaid orders, the petitioner has filed the present petition.

3. Mr. S.P. Arora, counsel for the petitioner argued that the enquiry report dated 9.3.1999 submitted by the Officers of P.F. Enforcement is bogus and incorrect as the said officers never visited the establishment of the petitioner. Counsel further submitted that in the inspection report submitted by the Provident Fund Inspectors, the address of the petitioner has been wrongly disclosed as 908, Hemkunt House, 6 Rajendra Place, Delhi where as the correct address of the petitioner is 906, Hemkunt House, 6, Rajendra Place, Delhi. Similarly the petitioner firm has been shown to be a partnership firm comprising of two partners while in fact the petitioner firm is a proprietorship firm under the sole proprietorship of Mr. Lalit Mohan Madhan. Finding further faults with the inspection report, counsel submitted that the enforcement inspectors did not obtain signatures of any employee of the petitioner and had given incorrect strength of the employees then working in the establishment of the petitioner firm besides quoting wrong and inappropriate amount of wages being drawn by such employees. The contention of the counsel for the petitioner was that at no point of time the petitioner establishment had employed 20 employees and therefore, the petitioner could not have been brought under the purview of the said Act w.e.f. 1.8.88. Counsel further submitted that the onus to prove the existence of 20 employees or more was on the respondent, but since the respondent failed to discharge the said onus, therefore, the Tribunal ought to have drawn an adverse inference against the department instead of proceeding against the petitioner. Counsel for the petitioner further submitted that the petitioner was not given any opportunity to cross-examine the said two enforcement inspectors who had submitted their inspection report based on their alleged visit to the petitioner establishment despite specific requests made by the petitioner, and therefore, the impugned orders passed by the Regional Provident Fund Commissioner suffers from patent illegality and perversity besides being arbitrary and in violation of principles of natural justice. Counsel for the petitioner further submitted that it is for the respondent Provident Fund Commissioner to establish the fact of any establishment employing 20 or more persons with their exact identification, period of service etc. and since the respondent failed to prove the same, therefore, the provisions of the said Act could not have been made applicable to the establishment of the petitioner. In support of his arguments, counsel for the petitioner placed reliance on the following judgments:

1. Himachal Pradesh State Forest Corporation v. Regional Provident Fund Commissioner 2008 LLR 980.

2 Food Corporation of India Vs. Provident Fund Commissioner and Others,

4. Per contra Mr. R.C. Chawla, counsel for the respondent supported all the three

orders under challenge before this Court. Counsel pointed out that the fact of employment of more than 20 employees was admitted by the petitioner itself as it was stated by the petitioner that it had employed 10 regular employees and 30 on daily wages through petty contractors and thus in the face of the said admission, the petitioner cannot take any contrary stand before this Court in the present petition. Counsel further submitted that an order u/s 7A can be passed even in a case where workers are employed through a contractor and that all the relevant service records were in the possession of the petitioner and hence the onus was on the petitioner to prove that it had not deployed 20 or more persons at the relevant time and on the failure to discharge such an onus, the petitioner cannot find fault with the inspection report submitted by the inspectors. Counsel for the respondent further submitted that the proceedings u/s 7A of the said Act were initiated against the petitioner on 23.9.92 and not less than 84 hearings were held before the Regional Provident Fund Commissioner, but the petitioner failed to produce the relevant records comprising of his balance sheet, wage register, account books etc and, therefore, the Regional Provident Fund Commissioner rightly upheld bringing the petitioner establishment under the umbrella of Section 7A of the Act. Counsel for the respondent further submitted that the petitioner failed to produce any document on record even in the review proceedings filed by the petitioner u/s 7B of the Act. Counsel thus submitted that the review application of the petitioner was also dismissed as it failed to substantiate its case by means of any supporting documentary evidence and also the appeal filed by the petitioner was dismissed as no merit was found in it by the Tribunal. Counsel further submitted that this Court while exercising its jurisdiction under Article 226 of the Constitution of India will not reappreciate the findings of fact arrived at by the Appellate Authority and the Regional Provident Fund Commissioner unless the petitioner points out any manifest illegality or perversity in such findings which as per the counsel for the respondent, the petitioner has failed to show before this Court. In support of his arguments counsel for the respondent placed reliance on the following judgments:

1. 1975 Lab IC 1162 Calcutta

2. 1975 Lab 1C 1186 Delhi

3. 1999 Lab 1C 3407 Andhra Pradesh

5. I have heard learned Counsel for the parties at considerable length and perused the records.

6. The order dated 12.11.1999 passed by the Regional Provident Fund Commissioner u/s 7A of the said Act clearly shows that the petitioner had admitted that it had employed 10 permanent employees and about 30 employees on daily wages through petty contractors. u/s 2(f) of the said Act ''employee'' has been defined to mean any person who gets wages directly or indirectly from the employer and includes any person employed by or through a contractor in or in connection with the work of the establishment. Section 2(f) of the said Act is

 

reproduced as under:

2. Definitions

(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. Going by the said definition, it would be manifest that if an employer has employed certain employees through a contractor in or in connection with the work of establishment, then the strength of such employees shall also be taken into consideration to see whether by counting such a strength the establishment employs 20 or more persons for the applicability of the provisions of the said Act. In the inspection report dated 9th March, 1989 the strength of the petitioner establishment in the year 1988-89 from August to March, so far the permanent employees are concerned, have been shown to be between 9-10 and so far daily wagers or other casual employees are concerned, they have been shown to be 25 to 40 persons. The petitioner is engaged in the field of construction and, therefore, deployment of employees through contractor to work for the establishment of the petitioner cannot be ruled out. The report of the inspectors should have been more clear, specific and categorical to show the exact strength of employees, possibly with the names and their salaries etc. But in any event of the matter, the petitioner was given enough opportunities to rebut the said inspection report, but the petitioner failed to adduce any evidence despite number of opportunities, preceding the stage of Section 7A of the Act, in the proceedings u/s 7A of the Act, and even at the stage of the review were given. Therefore, once the petitioner itself failed to substantiate its case by means of any supporting documentary evidence, then, no fault can be found with the finding of fact arrived at by the Regional Provident Fund Commissioner while passing orders u/s 7A and 7B of the Act. The Appellate Tribunal also upheld the orders passed by the Regional Provident Fund Commissioner and dismissed the appeal filed by the petitioner. I do not find merit in the submission of the counsel for the petitioner that the onus was on the respondent to prove that the petitioner had deployed 20 or more workers at the relevant time of the inspection as the entire documentary evidence always remained in the control, power and possession of the establishment. Therefore, it was for the petitioner establishment to have placed sufficient cogent documentary evidence so as to rebut the said inspection report and despite numerous opportunities granted to the petitioner at every stage of the proceedings, the petitioner failed to produce any such evidence. Hence no infirmity or perversity can be found in the findings

 

arrived at by the Regional Provident Fund Commissioner and also in the order passed by the Appellate Authority.

8. It is a settled legal position that unless there is any perversity or illegality in such findings, the writ Court would be hesitant to reappreciate the findings of the fact and in the present case the petitioner has failed to advance any reason as to why the documentary evidence was not placed before the Regional Provident Fund Commissioner to rebut the said inspection report dated 9th March, 1989.

9. Before carrying on further discussion it would be relevant to reproduce Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 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 CPC 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.

As would be manifest from the above provision that whenever an employer raises a dispute regarding the applicability of the said 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. It is not in dispute that in the present case the petitioner was given innumerable opportunities from 8.1.1993 till 20.8.1999, but still he failed to place on record any cogent documentary evidence based on which the Regional Provident Fund Commissioner could have come to the conclusion that the petitioner management was not employing 20 or more employees in their establishment. In fact the petitioner management on its own admitted that they were employing 10 employees as permanent employees and about 30 on daily wages or through petty contractors and once having taken such a stand the establishment of the petitioner would clearly fall u/s 2F of the said Act. 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 u/s 7A of the said Act, necessary documents could have been placed by the petitioner to dispute and dislodge the fact finding report of the enquiry 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 Regional Provident Fund

 

Commissioner and, therefore, no infirmity can be found with the order of the competent authority passed u/s 7A of the said Act upholding the coverage of the establishment under the Act w.e.f. 1.8.1988. The petitioner also equally failed to place any further documentary material when review was sought by it u/s 7B of the Act and in the appeal as well the case of the petitioner was not on a better footing.

10. The Employees Provident Fund and Miscellaneous Provisions Act, 1952 is a beneficial piece of legislation for the benefit and betterment of the employees and their families 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. It would be worthwhile to refer to the judgment of the Apex Court in the case of Maharashtra State Co-operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner, where the philosophy of the said Act has been very eloquently put as:

Since the Act is a social welfare legislation intended to protect the interest of a weaker section of the society i.e. the workers employed in factories and other establishments, it is imperative for the courts to give a purposive interpretation to the provisions contained therein keeping in view the Directive Principles of State Policy embodied in Articles 38 and 43 of the Constitution. In this context, we may usefully notice the following observations made by Krishna Iyer, J. in Organo Chemical Industries v. Union of India: (SCC pp. 587 & 591- 92, paras 28 & 40-41)

28. The pragmatics of the situation is that if the stream of contributions were frozen by employer''s defaults after due deduction from the wages and diversion for their own purposes, the scheme would be damnified by traumatic starvation of the Fund, public frustration from the failure of the project and psychic demoralisation of the miserable beneficiaries when they find their wages deducted and the employer get away with it even after default in his own contribution and malversation of the worker''s share. ''Damages'' have a wider socially semantic connotation than pecuniary loss of interest on non-payment when a social welfare scheme suffers mayhem on account of the injury. Law expands concepts to embrace social needs so as to become functionally effectual.

* * *

40. The measure was enacted for the support of a weaker sector viz. the working class during the superannuated winter of their life. The financial reservoir for the distribution of benefits is filled by the employer collecting, by deducting from the worker''s wages, completing it with his own equal share and duly making over the gross sums to the Fund. If the employer neglects to remit or diverts the moneys for alien purposes the Fund gets dry and the retirees are denied the meagre support when they most need it. This prospect of destitution demoralises the working class and frustrates the hopes of the community itself. The whole project gets stultified if employers thwart contributory responsibility and this

 

wider fall-out must colour the concept of ''damages'' when the court seeks to define its content in the special setting of the Act. For, judicial interpretation must further the purpose of a statute. In a different context and considering a fundamental treaty, the European Court of Human Rights, in the Sunday Times Case, observed:

The Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty.

41. A policy-oriented interpretation, when a welfare legislation falls for determination, especially in the context of a developing country, is sanctioned by principle and precedent and is implicit in Article 37 of the Constitution since the judicial branch is, in a sense, part of the State. So it is reasonable to assign to ''damages'' a larger, fulfilling meaning.

11. It is a settled legal position that if any establishment or employer is not covered under the said Act, then it is for the employer to place sufficient cogent and convincing material before the designated authority in an enquiry u/s 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 the case of Himachal Pradesh State Forest Corporation v. Regional PF Commissioner (Supra) cited by the counsel for the petitioner, being distinguishable on facts would not be applicable to the present case. As in the facts of the said case employer itself had admitted its liability under the Act and since due to delay of 16 years period, the employer was not in possession of the records, the Court directed the benefits only with respect to those employees who are identifiable and whose entitlement was proved on evidence. So far as the facts of the present case are concerned, the petitioner itself never came forward to place on record the documents or took any such plea of non-availability of the documents, therefore, the said judgment of the Apex Court will not cut any ice to help the petitioner in the facts of the present case.

12. In the light of the above discussion, this Court upholds the orders dated 13.11.2006 passed by the EPF Appellate Tribunal and orders dated 12.11.99 and 14.5.2001 passed by the Regional Provident Fund Commissioner, Delhi.

13. Hence the present petition being devoid of any merits stands dismissed.