(2010) 05 DEL CK 0277

In the Delhi High Court

Case No : Writ Petition (C) No. 1116 of 2008

Saroj Oil and Dal Industries APPELLANT

Vs

Central Board of Trustees and Another RESPONDENT

Date of Decision : 17-05-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3), 2, 3, 7A, 7I

Citation : (2011) 176 DLT 150 : (2011) 128 FLR 984 : (2011) 2 LLJ 735

Hon'ble Judges : Kailash Gambhir, J

Bench : Single Bench

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

Final Decision : Allowed

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 1.2.01 passed by respondent No. 2 and orders dated 5.3.07 and 5.11.07 passed by the E.P.F Appellate Tribunal whereby the The Employees Provident Funds & Misc. Provisions Act was held applicable to the petitioner establishment.

2. Brief facts of the case as set out by the petitioner relevant for deciding the present case are that on 22.8.07, enforcement officer of the P.F Department inspected the petitioner establishment and on 27.12.97, the petitioner received the applicability of the act letter to which the petitioner duly replied. Thereafter, an enquiry u/s 7-A was initiated by respondent No. 2 whereby vide order dated 1.2.01 the Asst. PF Commissioner held that the Act was applicable to the petitioner establishment w.e.f. 22.8.07, to which an appeal was filed by the petitioner u/s 7-I of the Act before the E.P.F Appellate Tribunal which was rejected. Consequently, the petitioner on 3.4.07 filed a review application which too was dismissed. Feeling aggrieved with the said orders, the petitioner has preferred the present petition.

3. Mr. Arora, counsel for the petitioner submitted that the order u/s 7-A has been passed by the Assistant Provident Fund Commissioner primarily based on admission on the part of the petitioner allegedly admitting employment of 21 persons as on the date of the inspection on 22.8.1997. Disputing the correctness of the said admission, Mr. Arora submitted that in fact there is a clear interpolation carried out by the inspector on the letterhead of the petitioner establishment by interpolating the entry to show as if the petitioner had deployed one truck driver Hari Singh and a car driver Laxman in its establishment. The contention of the counsel for the petitioner was that so far the deployment of three unloaders is concerned, none of them were in the employment of the petitioner and in fact out of them one was driver i.e. namely Hari Singh. Counsel further submitted that the entry recording their presence on the margin of the said letter dated 22.8.2007 is duly authenticated by the petitioner while there is no such authentication below the other entry where the PF Inspector had recorded the names of Hari Singh and Laxman in their capacities as truck driver and car driver respectively to make the total number of employees working in the establishment to 21. Counsel for the petitioner further submitted that a similar interpolation was carried out by the PF inspector in the performa on which signatures were taken from the partner as on the front page of the same there is no authentication of the said partner of the petitioner firm and in column 13 and 14 the said inspectors had interpolated the Nos. 3 and 2 to show the total number of employees of the petitioner establishment to that of 21 employees. Counsel for the petitioner further submitted that clearly in the said inspection report, names of two PF Inspectors were shown but in fact only one PF Inspector visited the petitioner establishment. Counsel further submitted that the affidavits of Hari Singh, the driver, and that of owner of the truck were placed on record by the petitioner but the learned Labour Commissioner did not deal with the said documents in the order passed u/s 7-A of the Act. The contention of the counsel for the petitioner was that the order passed by the learned Assistant PF Commissioner and also by the Appellate Authority are illegal and perverse and the same deserves to be set aside.

4. Refuting the said submissions of counsel for petitioner, counsel for the respondent, Mr. R.C. Chawla submitted that the disclosure of 21 employees cannot be disbelieved as the same was declared on the letter head of the petitioner itself wherein clearly the deployment of 3 unloaders and one truck driver and one car driver was disclosed. Counsel further submitted that the signatures of the partner of the petitioner firm were appended at the end of the said entries and therefore, it cannot be said that the said entries of the truck driver and that of the car driver were not authenticated by the petitioner. Counsel further submitted that in reply to the coverage notice, the petitioner in para 3 of the same clearly referred to his conversation that took place with the concerned inspector on 26.11.97, where he had questioned him as to how he had mentioned 21 workers in his report although 13+2 workers were actually present at the site. The petitioner also questioned in the said reply that neither

did the truck belong to the petitioner nor the driver was their employee then how could their names be added so as to show their employment with the petitioner. Counsel further submitted that in the said reply, the petitioner further mentioned that even if the presence of the truck driver and that of the truck owner was taken into consideration then also the total number of employees would come to 18 and not 21. The contention of counsel for the respondent was that the allegation of the petitioner that interpolation was carried out by the inspector falls face down with the said reply of the petitioner, wherein there is a candid admission on the part of the petitioner that the said truck driver and the truck owner were present at the time of the inspection.

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

6. The point in issue, in the facts of the present case is that as to whether on the relevant date of the inspection conducted by the Provident Fund Inspector i.e. 22.8.1997, there were 21 workmen in employment with the petitioner establishment attracting applicability of the Employees Provident Funds & Misc. Provisions Act 1952. Since the petitioner had disputed the coverage under the said Act, therefore enquiry u/s 7-A of the Act was initiated against the petitioner by the EPF Authorities and vide order dated 1.2.2001 passed by the Assistant Provident Fund Commissioner, it was found that the petitioner establishment was rightly covered under the Act. A perusal of the said order shows that the alleged admission of the partner of the petitioner establishment admitting the factum of employment of 21 persons on the date of the inspection is the only basis on which Assistant Provident Fund Commissioner relied to invoke the applicability of the said Act to petitioner establishment. It would be relevant to reproduce the following observations of the Assistant Provident Fund Commissioner here:

Further, the partner had also admitted that the estt. had employed 21 employee as on 22.8.97 and put his signature in confirmation to the employment strength of the estt. and now the employer wants to escape from his liabilities of provident Fund dues. Therefore, the coverage of the estt. may be up-held.

I have heard both the parties and I have gone through the documents placed on record. In exercising the powers conferred upon me u/s 7A of the Act and after applying my mind, observed that the employer had put as 21 as on 22.8.1997 and the signature of the Partner Shri Sevaram confirms that the employment strength of the estt. including contract labour was touched to 21. Therefore, there is no scope for me to disbelieve on the document signed by the employer. Further, as per decision of M/s Deep Cycle Ind. u/s Union of India (1971) 39 FJR 407, Punjab and Haryana High Court, it was held that if the employment strength of the estt. touched 20 on any day, the Act becomes applicable to the estt.

7. Counsel for the petitioner seriously disputed the correctness of the said observations of the Asstt. Provident Fund Commissioner and that of the Appellate Authority by taking a stand that infact there was a strength of 16 employees with

the petitioner establishment and on the date of the inspection, three of the employees were on leave and the three persons who were found, out of them, two were unloaders and one was driver. The contention of the counsel for the petitioner was that the said entry of two unloaders and of driver on the letter head was duly authenticated by the petitioner even though the said two unloaders and truck driver were not in the employment of the petitioner, but so far the other entry on the letter head was concerned, the same was not even authenticated by the petitioner. As per the counsel for the petitioner, a similar interpolation was done by the Provident Fund Inspector on the survey form to show the employment of 21 persons with the petitioner establishment as on the date of the said inspection.

8. Mr. R.C. Chawla, counsel for the respondent, on the other hand laid much emphasis on the said two documents, one of which was on the letter head of the petitioner establishment itself, which was duly signed by none else but the partner of the petitioner firm himself. The contention of the counsel for the respondent was that there was no scope of any kind of interpolation by the enforcement officer. Counsel for the respondent thus submitted that no fault can be found with the order of coverage of the petitioner establishment under the Act which was made on the basis of the inspection carried out by the officers of the Department on 22.8.1997, who on their inspection found presence of 21 employees on the roll of the petitioner which fact was duly admitted by the partner of the petitioner firm on their letter head. Mr. Chawla also contended that this Court will not act as a court of appeal, to sit over the findings of fact arrived at by the assessing authority duly affirmed by the appellate authority which is a final fact finding court.

9. It is a settled legal position that the word ?employment? envisaged u/s 2(f) and as well in Section 3 of the Act would not include the employment of persons for a short period on account of some pressing necessity or for some temporary urgency beyond the control of the company. It would be appropriate to refer to the following observations of the Apex Court in The Regional Provident Fund Commissioner, Andhra Pradesh Vs. Sri. T.S. Hariharan, here:

Considering the language of Section 1(3)(b) in the light of the foregoing discussion it appears to us that employment of a few persons on account of some emergency or for a very short period necessitated by some abnormal contingency which is not a regular feature of the business of the establishment and which does not reflect its business prosperity or its financial capacity and stability from which it can reasonably be concluded that the establishment can in the normal way bear the burden of contribution towards the provident fund under the Act would not be covered by this definition. The word "employment" must, therefore, be construed as employment in the regular course of business of the establishment; such employment obviously would not include employment of a few persons for a short period on account of some passing necessity or some temporary emergency beyond the control of the company. This must necessarily require determination of the question in each case on its own peculiar facts. The approach pointed out by us must be kept in view when determining the question of employment in a given case.

This Court in the matter of Grand Chemical Works v. Presiding Officer, Employees? Provident Fund Appellate Tribunal and Anr. 2009 LLR 1082 (DHC), following the ratio of the Apex Court judgment held as under:

10. Further in Calcutta Port Shramik Union Vs. Calcutta River Transport Association and Others, the Hon''ble Apex Court observed as under:

10. The object of enacting the Industrial Disputes Act, 1947 and of making provision therein to refer disputes to tribunals for settlement is to bring about industrial peace. Whenever a reference is made by a government to an Industrial Tribunal it has to be presumed ordinarily that there is a genuine industrial dispute between the parties which requires to be resolved by adjudication. In all such cases an attempt should be made by courts exercising powers of judicial review to sustain as far as possible the awards made by industrial tribunals instead of picking holes here and there in the awards on trivial points and ultimately frustrating the entire adjudication process before the tribunals by striking down awards on hyper technical grounds. Unfortunately the orders of the Single Judge and of the Division Bench have resulted in such frustration and have made the award fruitless on an untenable basis.

The Employee''s Provident Funds and Miscellaneous Provisions Act provides for the compulsory institution of contributory provident funds, pension funds and deposit linked insurance funds for employees. The act aims to ensure grant of retiral benefits to secure the future of the employee after retirement. The Employees'' Provident Funds and Miscellaneous Provisions Act extend to whole of India except State of Jammu and Kashmir. The Act applies to industries specified in Schedule I employing 20 or more persons and any other class of establishments employing 20 or more persons notified by the Government. The Government may apply the Act to establishments employing less than 20 people. Employees covered under the Act include contract labour but exclude apprentices, trainees, directors, working partners, domestic servants and contractors. Establishments can seek exemption from any or all the provisions of the act.

10. There cannot be any dispute with the legal proposition canvassed by the counsel for the respondent that this Court while exercising writ jurisdiction under Article 226 and 227 of the Constitution of India would not sit as a court of appeal to reappreciate the findings of facts unless the findings of facts arrived at by the courts below are patently illegal, perverse or irrational on the very face of it. It would be worthwhile to refer to the judgment of the Apex Court in the case of Management of Madurantakam, Co-operative Sugar Mills Ltd. Vs. S. Viswanathan, where it was held that:

12. Normally, the Labour Court or the Industrial Tribunal, as the case may be, is

the final court of facts in these type of disputes, but if a finding of fact is perverse or if the same is not based on legal evidence the High Court exercising a power either under Article 226 or under Article 227 of the Constitution of India can go into the question of fact decided by the Labour Court or the Tribunal. But before going into such an exercise it is necessary that the writ court must record reasons why it intends reconsidering a finding of fact. In the absence of any such defect in the order of the Labour Court the writ court will not enter into the realm of factual disputes and finding given thereon. A consideration of the impugned order of the learned Single Judge shows that nowhere he has come to the conclusion that the finding of the Labour Court is either perverse or based on no evidence or based on evidence which is not legally acceptable. Learned Single Judge proceeded as if he was sitting in a court of appeal on facts and item after item of evidence recorded in the domestic enquiry as well as before the Labour Court was reconsidered and findings given by the Labour Court were reversed. We find no justification for such an approach by the learned Single Judge which only amounts to substitution of his subjective satisfaction in the place of such satisfaction of the Labour Court.

But it has also been a settled principle of law that the jurisdiction of the High Court under Article 226 of the Constitution of India, is very wide and no fetters can be placed on such power of the court to set aside the order of the court below if the same is found to be perverse, irrational or contrary to evidence. It was held in the case of Seema Ghosh Vs. Tata Iron and Steel Company, that when the judgment of the labour court is perverse and against the facts and records, the High Court is entitled to exercise its jurisdiction under Article 226 to interfere with the perverse finding and set aside the same. It would be worthwhile to refer to the judgment of the Apex Court in the case of G.M. ONGC, Shilchar Vs. ONGC Contractual Workers Union, here:

We have examined the arguments advanced by the learned Counsel. This Court has held time and again that the High Court had the authority to enquire as to whether a finding arrived at by the Tribunal was based on evidence and to correct an error apparent on the face of the record. The observations in Trambak Rubber Industries Ltd. case are to this effect and it has been highlighted that the High Court would be fully justified in interfering with an award of an Industrial Court on account of a patent illegality. In Seema Ghosh case this Court observed that the High Court?s interference under Articles 226 and 227 of the Constitution with an award of the Labour Court was justified as the award had been rendered contrary to the law laid down by this Court and as a measure of "misplaced sympathy", and was thus perverse. The other judgments cited by Mr. Dave lay down similar principles and need not be dealt with individually. It will be seen therefore that the interference would be limited to a few cases and as already noted above, in the case of a patent illegality or perversity.

11. Hence, in the backdrop of the aforesaid principles, coming back to the facts of the present case, the inspection was conducted by the Provident Fund

Inspector on 22.8.1997 and since the petitioner had disputed its coverage under the said Act, therefore, the enquiry u/s 7-A of the Act was initiated against the petitioner. The petitioner in its reply dated 27.12.1997 to the very initial letter sent by the respondent dated 23.12.1997, categorically took a stand that according to their attendance register a total number of 16 workers were mentioned in it and 3 out of them, due to various reasons, were on leave. The petitioner also took a stand that because three workers were on leave, therefore, the work of unloading from the truck was taken from two labourers from the market and if they were included in the total strength of the establishment, even then the Act would not become applicable. The petitioner also stated in its reply that the truck driver was not their employee and therefore, his name could not have been added in the entry by the Provident Fund Inspector. It would be thus manifest that right at the threshold the petitioner had disputed the correctness of the report submitted by the Provident Fund Commissioner. The Assistant Provident Fund Commissioner readily believed the report of the Provident Fund Inspectors on the premise that the same was found duly authenticated by the partner of the petitioner firm. But the Assistant Labour Commissioner glossed over and over looked the fact that there was a clear mention of three persons as unloaders, which entry was duly authenticated by the partner of the petitioner firm while a separate unauthenticated entry on the letter head contained the name of the truck driver and a car driver. By no stretch of imagination the presence of truck driver and the car driver could be taken to imply that they were in the employment of the petitioner as it is not the case of the department that the truck also belonged to the petitioner. The presence of two unloaders also appeared to be temporary because of their temporary deployment for unloading the goods from the truck and therefore also the deployment of such temporary persons who are not the regular employees of the petitioner could not have been included to determine the exact strength of the petitioner firm for attracting the coverage of the said Act. Similar such additions carried out by the Provident Fund Commissioner on the format placed on record at page 56-57 of the paper book casts a shadow of doubt on their genuineness. During the course of the arguments, counsel for the respondent also failed to give any reasons as to why the said performa was not signed by both the inspectors although their names duly appeared in the form.

12. Taking an overall view of the gamut of facts and considering the fact that the authorities below decided the coverage of the petitioner based on the said admission of the partner of the petitioner firm on his own letter head, taking the same to be a confirmation of strength of 21 as on the date of the inspection, in my considered view the findings arrived at by the authorities below are wholly perverse, illegal and irrational and the same are liable to be set aside.

13. Hence, in view of the above discussion, the present petition is allowed and the orders dated 1.2.2001, 5.3.2007 and 5.11.2007 are accordingly set aside.