

**Bright Export Limited Vs. Central Board of Trustees, EPF Organisation**

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**Court :** Delhi

**Decided On :** Mar-21-2016

**Judge :** Ved Prakash Vaish

**Appeal No. :** W.P.(C) No. 2095 of 2011

**Appellant :** Bright Export Limited

**Respondent :** Central Board of Trustees, EPF Organisation

**Judgement :**

**Prakash Vaish, J.**

1. By way of present petition under Article 226 and 227 of the Constitution of India, the petitioner has assailed order dated 01st November, 2010 in ATA No.642(4)2008 passed by learned Presiding Officer, Employees' Provident Fund Appellate Tribunal, New Delhi (EPFAT) whereby the appeal filed by the petitioner against the order dated 02nd June, 2008 and 30th July, 2008 passed by Assistant PF Commissioner under Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the EPF Act ) was rejected.

2. The brief facts as culled out from the petition are that the petitioner, M/s. Bright Export Ltd. is a company incorporated under the Companies Act, 1956, the petitioner is covered under the EPF Act and was allotted code No.DL/26215. Vide

summons dated 25.07.2006, the respondent initiated an inquiry under Section 7A of the EPF Act on the ground that 27 employees of the petitioner s company are not members of the fund and that PF dues for the period September, 2002 to April, 2006 in respect of 27 employees had not been deposited by the petitioner establishment.

3. Vide order dated 02nd June, 2008, Assistant PF Commissioner, New Delhi determined the dues under Section 7A of the EPF Act amounting to Rs.15,93,038/- (Rupees Fifteen lakhs ninety three thousand thirty eight) for the period September, 2002 to April, 2006. Thereafter, the petitioner moved an application under Section 7B of the EPF Act for review of the order which was rejected by Assistant PF Commissioner on 30th July, 2008.

4. Against the said orders dated 02.06.2008 and 30.07.2008, the petitioner preferred an appeal bearing ATA No.642(4)2008 before the EPFAT. Vide impugned order dated 01st November, 2010, the appeal filed by the petitioner was dismissed.

5. Feeling aggrieved by the said order, the petitioner has filed the present petition.

6. Learned counsel for the petitioner contended that the impugned order is a non-speaking order and against the provisions of the EPF Act. The summons under Section 7A of the EPF Act was erroneous as the same were issued without any cogent reasons.

7. Learned counsel for the petitioner further submitted that order under Section 7A of the EPF Act dated 07.06.2008 was dispatched under the cover letter dated 12.06.2008; the same is beyond the purview of notice as envisaged under Section 7A of the EPF Act.

8. Learned counsel for the petitioner further contended that the onus to prove an existence of fact lies on the person who alleges the same. The respondent failed to prove that said 27 persons were the employees of the petitioner establishment. The EPFAT has passed the impugned order on the basis of affidavits filed by 27 employees who were complainants. There is no other document to show that the

complainants were the employees of the petitioner. In support of his submission he has relied upon judgment in the case of *The Range Forest Officer vs. S. T. Hadimanl* , 2002 LLR 339.

9. Learned counsel for the petitioner also urged that neither the copy of complaint made by the Trade Union nor the report of squad committee along with list of 27 employees filed on 02.06.2008 were supplied to the petitioner. Learned counsel for the petitioner further submitted that reasonable opportunity of hearing was not afforded to the petitioner.

10. Another submission of learned counsel for the petitioner is that the respondent has passed order under Section 7A on the basis of Inspector s Report, without identifying the employees in respect of whom, the PF dues were allegedly not paid by the petitioner. In support of his submission he has relied upon *H.P. State Forest Corporation vs. Regional Provident Fund Commissioner* , Appeal (Civil) No.5717/2001 decided on 03.04.2008 and *Food Corporation of India vs. Provident Fund Commissioner and Ors.* , (1990) 1 SCC 68.

11. Per contra, learned counsel for the respondent contended that the squad report dated 20.04.2006 was filed before the Assistant Provident Fund Commissioner on 02.06.2008. Counsel for respondent pointed out that affidavit of Mr. Raju, Assistant Provident Fund Commissioner dated 12.03.2015 has been filed wherein it is clarified that the squad report is dated 20.04.2006 and not of 02.06.2008; the same was duly filed on 01.05.2006 and a copy of the same was handed over to the petitioner establishment on 20.04.2006 itself, which is duly noted on the squad report dated 20.04.2006. Learned counsel for respondent also pointed out that the order sheet of the Assistant Provident Fund Commissioner dated 30.04.2007 clearly shows that the copy of EO report submitted on 01.05.2006 (Squad R. Anand, S. Yadav, P.S. Rawat and Xalxo) including list of employees (physical verification) was handed over to Shri M. R. Malhotra, Advocate for the petitioner establishment.

12. Learned counsel for respondent also submitted that the petitioner despite repeated opportunities has failed to adduce any evidence to discard employer-employee relationship. He also pointed out that the petitioner did not cross-

examine the 27 complainants who had filed their affidavit before the Assistant Provident Fund Commissioner. The petitioner did not produce the attendance/ wages register or any other record to show that the said complainants were not employees of the petitioner.

13. Learned counsel for the respondent further submitted that it is the duty of the petitioner to pay contribution on behalf of the employees as well as his own contribution. The petitioner did not extend the benefit available under the EPF Act to its 27 employees even though the petitioner was covered under the EPF Act and, therefore, the petitioner failed to perform his duties as provided under para 36 of the EPF Scheme. According to learned counsel for respondent the identification of employees is the responsibility of the employer and not the department.

14. I have given my thoughtful consideration to the submission made by learned counsel for the parties and carefully gone through the material on record.

15. Before examining the merits of the present case, it is necessary to consider the definition of employer and employee . The term employer is defined in Section 2(e) of the EPF Act which reads 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 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 manger, managing director or managing agent, such manager, managing director or managing agent;

16. The term "employee has been defined in Section 2(f) of the Act which reads as under: -

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 (52 of 1961), or under the standing orders of the establishment].

17. 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. It was passed with an object of making some provisions for the future of the industrial workers after their retirement or their dependents in the case of early death. The Parliamentarian, after considering various financial and administrative difficulties in old and survival pension schemes and gratuity schemes, agreed to introduce the institution of contributory provident fund schemes in which, both the worker and the employer would contribute. Provident Fund Scheme was considered as a means to encourage the stabilization of a steady labour force in industrial centre. The Parliamentarians were well aware of the fact that with industrial growth, although, the big employers had introduced the scheme of provident fund for the welfare of their workers, but all these schemes until then were private and voluntary and the workers of the small employers remain deprived of the benefits which were provided by big employers. This led to the enactment of EPF Act which aims to provide for establishment of provident fund scheme by every employer in the industrial concerns for the protection and welfare of its employees.

18. The Apex Court in the case of Regional Provident Fund Commissioner vs. S.D. College, Hoshiarpur and Ors. , 1997 II LLJ - 55, has also considered the Act of 1952 as a beneficial welfare legislation to ensure help and other benefits to the employees.

19. It is worthwhile to refer to the judgment of Hon ble Supreme Court in the case of Maharashtra State Co-operative Bank Ltd. vs. Provident Fund Commissioner , (2009) 10 SCC 123, wherein the philosophy of the EPF Act has been very eloquently put as: -

30. 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* [(1979) 4 SCC 573 : 1980 SCC (LandS) 92] : (SCC pp. 587 and 591-92, paras 28 and 40-41)

28. The pragmatics of the situation is that if the stream of contributions were frozen by employers' 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 workers' 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 workers' 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.

20. The EPF Act, under its various Sections, encompasses the provisions for establishment of Employees Provident Fund Schemes, contribution and matter which may be provided for in the Scheme, determination of money due from the employer, deposit of amount due, mode of penalties, recovery, etc. From a combined reading of Section 6 of the EPF Act read with para 30 of EPF Scheme it is clear that it is the duty of the employer, at the first instance, to remit both the share payable by itself and on behalf of its employees, in the respective EPF Account of the employees.

21. Section 6A of the EPF Act provides for the contribution required to be made by the employer and employees to the fund. Section 7A of the EPF Act empowers the Central Provident Fund Commissioner, Additional Central Provident Fund Commissioner, Deputy Provident Fund Commissioner, Regional Provident Fund Commissioner, or Assistant Provident Fund Commissioner to decide any dispute regarding the applicability of the EPF Act to an establishment as also the amount due from any employer under the provisions of the EPF Act, the scheme or the Pension Scheme or the Insurance Scheme, as the case may be. Section 7A of the EPF Act reads as under:

7A. Determination of moneys due from employees. (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 commission 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.

22. From a perusal of Section 7A of the EPF Act it is manifestly clear that the determination is to be made by the competent authority and he has to conduct such inquiry as he may deem necessary. Section 7A of the EPF Act does require that determination of money due from the employer will be done only after giving a reasonable opportunity to the employer.

23. As regards the identification of the beneficiaries it may be mentioned that once an establishment is covered by the EPF Act, the employer becomes liable to pay the contribution in respect of the employee in his employment directly or indirectly. The Hon ble Supreme Court in Regional Director, E.S.I., Corporation vs. Kerala State Drugs and Pharmaceuticals Ltd. and Ors. , 1995 Supp. (3) SCC 148, observed as under: -

3. As regards the finding that the workmen were unidentifiable, what is forgotten is that under the Act, once an establishment comes to be covered by the Act, the employer becomes liable to pay the contribution in respect of the employees in his employment directly or indirectly. The contribution which had become payable for the relevant period has to be paid even if the employees concerned are no longer in employment. Whether the employees are unidentifiable today or not is, therefore, irrelevant so long as the contribution was liable to be paid on their behalf, when they were in employment .

24. The aforesaid judgment in Kerala State Drugs and Pharmaceuticals case (supra) was relied upon by Karnataka High Court in case titled M/s. Siddeshwar and Co., Hubli vs. E.S.I Corporation , Bangalore and Ors. , 1998 LIC 157. In the said case while dealing with the casual employees it was observed as under: -

This view of the Full Bench holding that a casual employee also comes within the purview of the Act and the definition of the term, employee as per S.2(9) of the Act stand supported by the decision of the Supreme Court in the case of Regional Director, Employees State Insurance Corporation, Madras v. South Indian Floor Mills Limited reported in AIR 1986 SC 1686 is equal to 1986 (3) SCC 238; (1986) Lab. IC 1193). Therefore, the employees those have been employed by the appellant/ applicant even if they be said to be casual employees, are covered by the definition of the term employee. The learned counsel submitted that such employees might have ceased to work and they are not identifiable and therefore with respect to them, there is no liability to deposit or to make contribution. Such a contention is also based on mis-conception

25. The judgments in H.P. State Forest Corporation s case and in Food Corporation of India s case (supra) relied upon by the counsel for the petitioner are not applicable to the facts and circumstances of the present case.

26. It is no doubt true that in terms of Section 103 of the Indian Evidence Act, 1872 the burden of proof as to any particular fact lies on the person who wishes the Court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

27. Furthermore, in relation to certain matters, the fact being within the special knowledge of the petitioner, the burden to prove the same would be on the employer in terms of Section 106 of the Indian Evidence Act. However, the question as to whether the burden to prove a particular matter is on the petitioner/ plaintiff or the respondent would depend upon the nature of the dispute.

28. In the present case, the question regarding number of employees and the names of employees who are employed with the petitioner establishment is well within the knowledge of the petitioner, thus, the burden was upon the petitioner

establishment in terms of Section 106 of Indian Evidence Act.

29. The Assistant Provident Fund Commissioner has observed that the petitioner establishment had failed to produce the record in its possession to determine the actual dues. It was also observed that the petitioner had been seeking adjournment for about two years on one pretext or the other and avoided to produce the actual records. The petitioner failed to adduce any evidence to show that the 27 complainants were not the employees of the petitioner. The Assistant Provident Fund Commissioner has also observed that the representative of the petitioner management himself certified five lists of employees numbering 78, when the squad of E.O.s visited the petitioner on 20.04.2006. Thus, the respondent rightly came to the conclusion that the petitioner failed to prove that 27 complainants were not its employees.

30. The respondent had produced copy of squad report dated 20.04.2006 along with list of employees. Copy of the same was duly supplied to the petitioner as recorded in the order sheet dated 30.04.2007 and the same was duly signed on behalf of petitioner. Thus, it was incumbent on the petitioner to have placed sufficient cogent documentary evidence so as to rebut the said inspection report and despite numerous opportunities granted to the petitioner before Assistant Provident Fund Commissioner, the petitioner failed to produce any such evidence. It is pertinent to mention here that all the service records of the employees i.e. the date of employment, attendance register, wages register, eligibility register, cash-book, ledger/ vouchers, etc. were in the exclusive knowledge, custody and possession of the petitioner establishment. But the petitioner failed to substantiate its case by means of any documentary evidence for the reason best known to it.

31. In so far as the submission of counsel for the petitioner that copy of squad report dated 02.06.2008 was not supplied to the petitioner it may be mentioned that the squad report is dated 20.04.2006 and not 02.06.2008. A copy of the said report along with list of employees was supplied to the petitioner on 30.04.2007. The same was duly acknowledged by the representative of the petitioner, as per order dated 30.04.2007. However, the copy of squad report dated 20.04.2006 along with list of employees on physical verification has been placed on record

along with short affidavit of Mr. Raju, Assistant Provident Fund Commissioner. The same is not disputed by the petitioner.

32. Thus, once the petitioner itself failed to substantiate its case by means of any supporting documentary evidence, then, no fault can be found with the findings arrived at by the Employees Provident Fund Appellate Tribunal and Assistant Provident Fund Commissioner. It was for the petitioner establishment to have placed sufficient cogent documentary evidence so as to rebut the inspection report and in spite of various opportunities granted to the petitioner, the petitioner failed to produce any such evidence. Hence, I find no illegality or infirmity in the finding arrived at by the Assistant Provident Fund Commissioner and the Employees Provident Fund Appellant Tribunal, New Delhi.

33. For the aforementioned reasons, the petition is bereft of any merit. The same deserves to be dismissed and the same is hereby dismissed.

34. No order as to costs.

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