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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (L) No.6264 of 2011

Sunshine Caterers Pvt. Ltd., A Private Company incorporated under the provisions of the Companies Act, 1956, having its registered office at Opposite Railway Station, Station Road, Durg, Chhattisgarh. Through its Authorised Representative Rakesh Kumar Agrawal, S/o Late Shri G.D. Agrawal, aged about 47 years, R/o Road No.4, Deepak Nagar, Durg, District Durg, Chhattisgarh.

---- Petitioner

Versus

1. Employees Provident Fund Appellate Tribunal, Ministry of Labour and Employment, Government of India, 4th Floor, Core-2, Scope Minar, Laxmi Nagar, Delhi – 110 092.
2. Assistant Provident Fund Commissioner, Office of the Employees Provident Fund Organisation, Regional Office, Nav Bharat Press Complex, Raipur, Chhattisgarh.

---- Respondents

Writ Petition (L) No.6263 of 2011

Sunshine Caterers Pvt. Ltd., A Private Company incorporated under the provisions of the Companies Act, 1956, having its registered office at Opposite Railway Station, Station Road, Durg, Chhattisgarh. Through its Authorised Representative Rakesh Kumar Agrawal, S/o Late Shri G.D. Agrawal, aged about 47 years, R/o Road No.4, Deepak Nagar, Durg, District Durg, Chhattisgarh.

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2. Assistant Provident Fund Commissioner, Office of the Employees Provident Fund Organisation, Regional Office, Nav Bharat Press Complex, Raipur, Chhattisgarh.

---- Respondents

Writ Petition (L) No.6262 of 2011

Sunshine Caterers Pvt. Ltd., A Private Company incorporated under the provisions of the Companies Act, 1956, having its registered office at Opposite Railway Station, Station Road, Durg, Chhattisgarh. Through its Authorised Representative Rakesh Kumar Agrawal, S/o Late Shri G.D. Agrawal, aged about 47 years, R/o Road No.4, Deepak Nagar, Durg, District Durg, Chhattisgarh.

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AND

Writ Petition (L) No.6261 of 2011

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Versus

1. Employees Provident Fund Appellate Tribunal, Ministry of Labour and Employment, Government of India, 4th Floor, Core-2, Scope Minar, Laxmi Nagar, Delhi – 110 092.

2. Assistant Provident Fund Commissioner, Office of the Employees Provident Fund Organisation, Regional Office, Nav Bharat Press Complex, Raipur, Chhattisgarh.

---- Respondents

For Petitioner: Mr. Manish K. Bishnoi and Mr. Harsh

Wardhan, Advocates.

For Respondent No.2: -

Mr. Pradeep Saxena, Advocate.

For Intervener: -

Mr. Y.C. Sharma and Mr. Govind
Dewangan, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

CAV Order

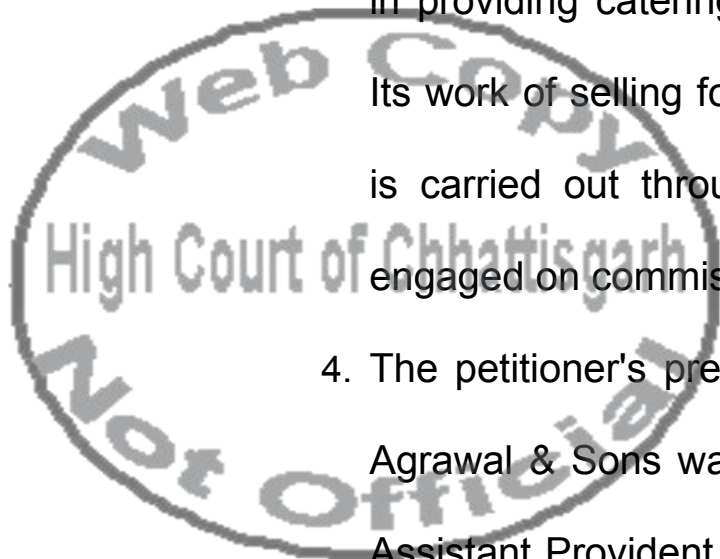
04/01/2016

1. Superb question of law involved in this batch of writ petitions is whether the Assistant Provident Fund Commissioner is justified in holding that "Commission Vendors" engaged by the petitioner/its predecessors-in-interest for selling its food products can be considered to be its employees for the purpose of Section 2 (f) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short 'the EPF Act').
2. Invoking the jurisdiction of this Court under Article 226/227 of the Constitution of India, the petitioner herein has filed these writ petitions questioning the order passed by the Employees' Provident Fund Appellate Tribunal, New Delhi (for short 'the Appellate Tribunal') dated 11-5-2011 (Annexure P-1) in all the four writ petitions by which the Appellate Tribunal has affirmed the order passed by the Assistant Provident Fund Commissioner, Raipur, deciding the applicability dispute and consequently, determining the

amount due under Section 7A of the EPF Act in the following background facts: -

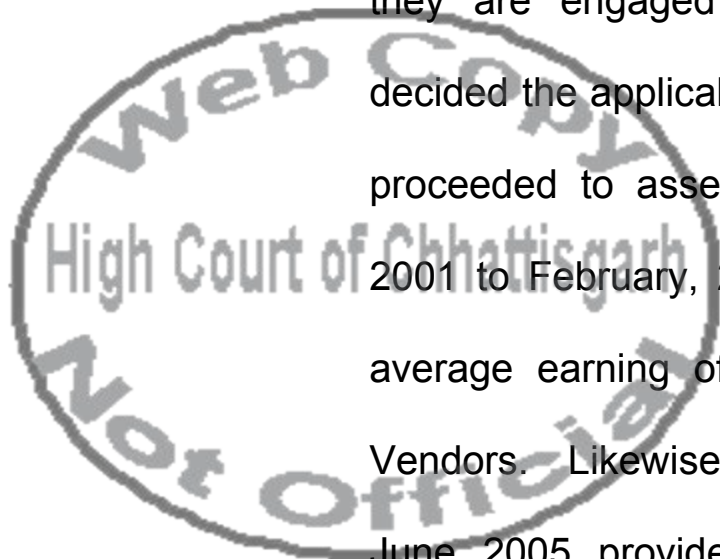
Background Facts: -

3. The petitioner is a private limited company registered under the provisions of the Indian Companies Act and successor-in-interest of the original assessee namely M/s. R.K. Agrawal & Sons, a partnership firm, and is engaged in providing catering services at Railway Station, Raipur. Its work of selling food and other eatables and beverages is carried out through Commission Vendors said to be engaged on commission basis.
4. The petitioner's predecessor-in-interest namely M/s. R.K. Agrawal & Sons was summoned in the year 2002 by the Assistant Provident Fund Commissioner, Raipur (for short 'the APFC') on 6-3-2002 for non-payment of provident fund dues under the EPF Act by registering proceeding under the said Act. He appeared before the APFC and raised objection with regard to applicability of the EPF Act to its establishment stating that the EPF Act is not applicable since the commission paid to its vendors does not fall within the definition of "basic wages" defined under Section 2 (f) of the EPF Act and, therefore, the petitioner is not liable to make payment of provident fund dues to the



Commission Vendors.

5. The APFC by its order dated 7-5-2004, turned down the objection of the petitioner finding the plea of the petitioner not acceptable holding that since the Commission Vendors are getting their wages on the basis of commission fixed on sale and thus, they are very much employees of the petitioner / contractor establishment as they are engaged by the establishment and thereby decided the applicability dispute against the petitioner and proceeded to assess provident fund dues from March, 2001 to February, 2004 and it was further held that the average earning of vendors is Rs.50/- per day for 37 Vendors. Likewise, for the period from March, 2004 to June, 2005, provident fund dues were determined by the APFC on 31-7-2006. Similarly, for the period from July, 2005 to June, 2006, the APFC passed order determining dues on 15-12-2006 and from July, 2006 to August, 2007, the APFC passed order determining dues on 30-5-2008.
6. The petitioner preferred appeal before the Employees' Provident Fund Appellate Tribunal, New Delhi against the order of the APFC passed on 7-5-2004 questioning the said order holding that the commission paid to the Commission Vendors is not basic wages and provisions of



the EPF Act are not attracted and fixing of average earning Rs.50/- per day was arbitrary and based on no evidence. No enquiry was held by the assessing authority / APFC as mandated under sub-section (3A) of Section 7A of the EPF Act. By its order dated 11-5-2011, the Appellate Tribunal dismissed all the four appeals preferred by the petitioner holding that the commission paid to Commission Vendors satisfies the definition of “basic wages” relying upon the decision rendered by the Supreme Court in the matter of Indian Banks Association v. Workmen of Syndicate Bank and others¹.

7. The order of the APFC duly upheld by the Appellate Tribunal has been challenged by the petitioner in writ petitions in the following manner: -

Order of the APFC	Order of the Appellate Tribunal	Challenged in W.P.(L)No.
07.05.2004	11-5-2011 {ATA No.451(8)2004}	6264/2011
31-7-2006	11-5-2011 {ATA No.503(8)2006}	6263/2011
15-12-2006	11-5-2011 {ATA No.55(8)2007}	6262/2011
30-5-2008	11-5-2011 {ATA No.477(8)2008}	6261/2011

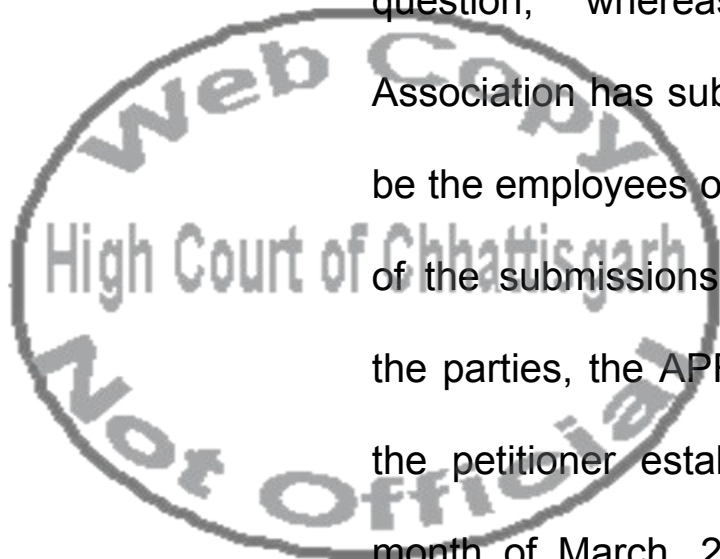
8. The Appellate Tribunal has dismissed the above-stated four appeals of the petitioner by separate similar orders but on a common date i.e. 11-5-2011.

¹ (2001) 3 SCC 36

9. The instant writ petitions have been filed by the petitioner stating inter alia that the Appellate Tribunal has wrongly held that Commission Vendors are covered by the provisions of the EPF Act and wrongly relied upon the definition of “wages” provided under the other enactments and has failed to decide the applicability dispute by holding an enquiry as envisaged under sub-section (3A) of Section 7A of the EPF Act. It has further been averred that Commission Vendors are not “employees” within the meaning of the EPF Act referring to the decision of the Supreme Court in the matter of Union of India and others v. K.V. Baby and another² that Commission Vendors working on commission basis cannot be treated at par with regular employees, and it has been prayed that the writ petitions be allowed and the orders of the APFC as well as the Appellate Tribunal be quashed and it be held that the petitioner is not liable to make payment of provident fund dues, as the EPF Act is not applicable to the petitioner establishment.
10. Respondent No.2 herein – APFC has filed return stating inter alia that the petitioner's predecessor-in-title M/s. R.K. Agrawal & Sons and the present petitioner stand covered

2 (1998) 9 SCC 252

under the provisions of the EPF Act, yet they were not complying the provisions of the EPF Act and upon receipt of complaint from the Railway Vendor Welfare Association dated 16-2-2002, enquiry was initiated under Section 7A of the EPF Act in which the petitioner establishment has disputed the applicability of the EPF Act on the ground that the employer is having only 8 employees / vendors in question, whereas the Railway Vendor Welfare Association has submitted a list of 37 vendors claiming to be the employees of the petitioner. Thereafter, on perusal of the submissions, return and documents filed by both the parties, the APFC held that the employee strength of the petitioner establishment was more than 19 in the month of March, 2001 and consequently, the petitioner establishment falls within the ambit of the EPF Act with effect from 1-3-2001, as the petitioner establishment has paid commission to 37 vendors and working relation between the two would show that vendors are working for the petitioner establishment and were getting amount by way of commission from the petitioner establishment, and the commission paid to them also falls within the definition of "basic wages" as defined under Section 2 (b) of the EPF Act. Therefore, the APFC has not committed any

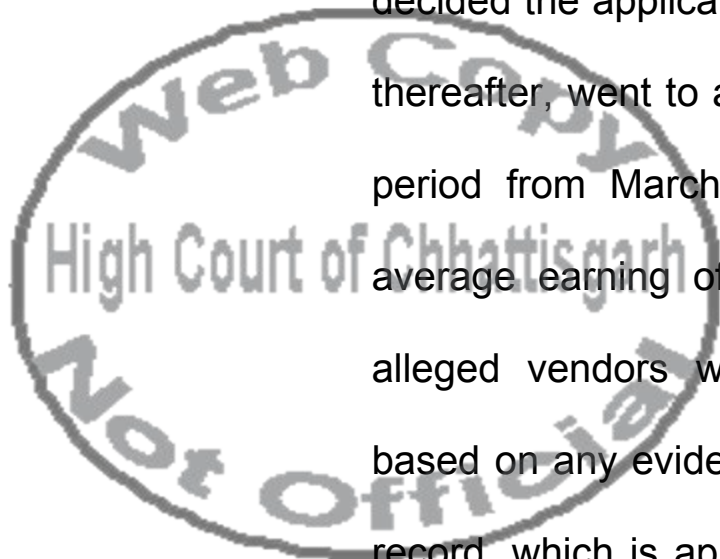


illegality in determining the provident fund and allied dues for the aforesaid periods questioned in the four writ petitions and the Appellate Tribunal has rightly dismissed the appeals finding no merit and thus, the petitioner is liable to make payment of provident fund and allied dues to Commission Vendors engaged by it and writ petitions filed questioning the order of the Appellate Tribunal deserve to be dismissed.

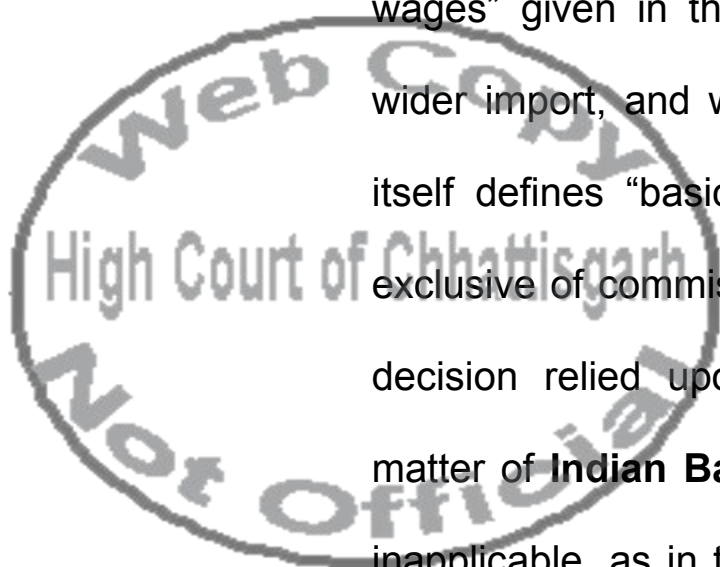
11. A short rejoinder has been filed by the petitioner refuting the averments made in the return stating that the commission paid to the vendors cannot reasonably be said to be covered within the meaning of "basic wages" defined under Section 2 (b) of the EPF Act and further pleaded that mere factum of payment of commission on food articles by the petitioner to the Commission Vendors would not *ipso facto* attract the liability under the provisions of the EPF Act since the EPF Act is a benevolent legislation enacted by the Parliament for the benefit of employees, therefore unless an employer-employee relationship satisfying the functionality test is established as rendered by the Supreme Court, no liability can be fastened under the provisions of the EPF Act.

12. Appearing for the petitioner, Mr. Manish K. Bishnoi and

Mr. Harsh Wardhan, Advocates, would submit that the APFC who is an assessing authority under the EPF Act has failed to decide the applicability dispute in accordance with sub-section (3A) of Section 7A of the EPF Act, as no enquiry was conducted by the assessing authority and merely on the basis of list of employees submitted by the Railway Vendor Welfare Association, the APFC had decided the applicability dispute against the petitioner and thereafter, went to assess the provident fund dues for the period from March, 2001 to February, 2004 by taking average earning of vendors as Rs.50/- per day for 37 alleged vendors which was purely imaginary and not based on any evidence / matter brought and available on record, which is apparent from the assessment order, as neither the employer nor the Railway Vendor Welfare Association has submitted any records showing details of wages being earned by the Commission Vendors. Therefore, the dispute of applicability as well as the consequent assessment was made in arbitrary and wholly unjustified manner. Elaborating his submission, Mr. Bishnoi would further submit that in appeals being preferred by the petitioner, the petitioner has clearly raised grounds that the commission paid to Commission Vendors



is not “basic wages”, provisions of the EPF Act are not attracted, fixing of earning of Rs.50/- per day was arbitrary and without any basis, it was perverse and no enquiry was held under sub-section (3A) of Section 7A of the EPF Act, but such legal grounds were not considered by the Appellate Tribunal. He would also submit that the learned Appellate Tribunal relying upon the definition of “basic wages” given in the Law of Lexicon, which is of much wider import, and was not applicable since the EPF Act itself defines “basic wages” for the purpose of the Act exclusive of commission. He would lastly submit that the decision relied upon by the Appellate Tribunal in the matter of **Indian Banks Association** (supra) was clearly inapplicable, as in the said case the Supreme Court was dealing with the matter in the context of “wages” defined under the Industrial Disputes Act, 1947, while deciding as to whether the Deposit Collectors were workmen or not and “wages” in the Industrial Disputes Act is much wider unlike “basic wages” under the EPF Act and as such, the appellate authority has failed to decide the appeals in just and fair manner, and failed to see that proper enquiry mandated under sub-section (3A) of Section 7A of the EPF Act is conducted to determine whether the



Commission Vendors can be treated as employees of the petitioner. The APFC has failed to apply its mind to the peculiar arrangement between the petitioner and vendors while deciding the applicability dispute. Mr. Bishnoi would further submit that the grounds raised in the memorandum of appeal and argument advanced during the course of hearing were not even adverted to by the Appellate Tribunal while deciding the appeals and as such, dismissal of appeals smacks absolute non-application of mind by the Appellate Tribunal besides it is perverse and contrary to well settled law in this regard. Therefore, the order of the APFC upheld by the Appellate Tribunal deserves to be quashed in toto by this Court in exercise of jurisdiction under Article 227 of the Constitution of India.

13. Appearing for respondent No.2, Mr. Pradeep Saxena, Advocate, would submit that applicability of the EPF Act has been decided by the APFC in just, proper and fair manner by giving reasonable opportunity of hearing to the petitioner and a clear finding has been recorded that the employee strength of the petitioner has been more than 19 as on 1-3-2001. He would further submit that the Appellate Tribunal has rightly upheld the order of the APFC relying upon the meaning of “wages” given in the

Law of Lexicon and the decision of the Supreme Court in **Indian Banks Association** (supra), therefore, all the writ petitions preferred by the petitioner deserve to be dismissed with cost(s).

14. Mr. Y.C. Sharma, learned counsel appearing for the intervener – Railway Vendor Welfare Association, would also oppose the writ petitions and would submit that the APFC has rightly determined the applicability dispute and rightly recorded a finding that the members of the Association/Commission Vendors are entitled for provident fund dues which has been confirmed in appeal by the Appellate Tribunal and no interference is called for in this batch of writ petitions by this Court and petitions deserve to be dismissed.

15. I have heard learned counsel for the parties and given anxious consideration to the submissions raised therein and also gone through the records carefully and minutely.

16. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 is a beneficial legislation and was enacted to provide for the institution of provident funds, pension fund and deposit-linked insurance fund for employees in factories and other establishments.

17. In order to appreciate the submissions of learned counsel

for the parties, it would be appropriate to refer certain provisions of the EPF Act. Section 1 (3) of the EPF Act deals with applicability of the Act to the establishment which reads as under: -

“(3) Subject to the provisions contained in section 16, it applies—

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification.”

18. From the aforesaid provisions, it would appear that the EPF Act applies to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf.

19. Section 2 (f) of the EPF Act defines the term “employee”

which reads as under: -

“(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;”

20. A careful perusal of the definition of “employee” as contained in Section 2 (f) of the EPF Act would show that a person would be deemed to be an employee (i) if he is employed for wages in any kind of work, manual or otherwise; (ii) in or in connection with the work of an establishment; (iii) getting his wages directly or indirectly from the employer; (iv) including any person employed by or through a contractor in or in connection with the work of the establishment; and (v) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment.

21. It would appear that definition of “employee” under the EPF Act is an independent one and comprehensive enough. Definition of “employee” or to say “workman” or “worker” cannot be borrowed from other enactments

relating to labour laws such as the Minimum Wages Act, the Employees' Compensation Act, the Industrial Disputes Act etc.. Definition of "employee" under the present Act is completely different from the definition of "worker" or "workman" or "employee" under these Acts. Thus, the scope of the term used "employee" under the EPF Act is having altogether different connotation, purport and scope than that of other enactments.

22. Likewise, "basic wages" has been defined in Section 2 (b) of the EPF Act which states as under: -

"(b) "basic wages" means all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include—

- (i) the cash value of any food concession;
- (ii) any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;
- (iii) any presents made by the employer;"

23. A bare perusal of the definition of "basic wages" would show that basic wages excludes/does not include commission.

24. Section 7A of the EPF Act provides for determination of

moneys due from employers which states 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 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;

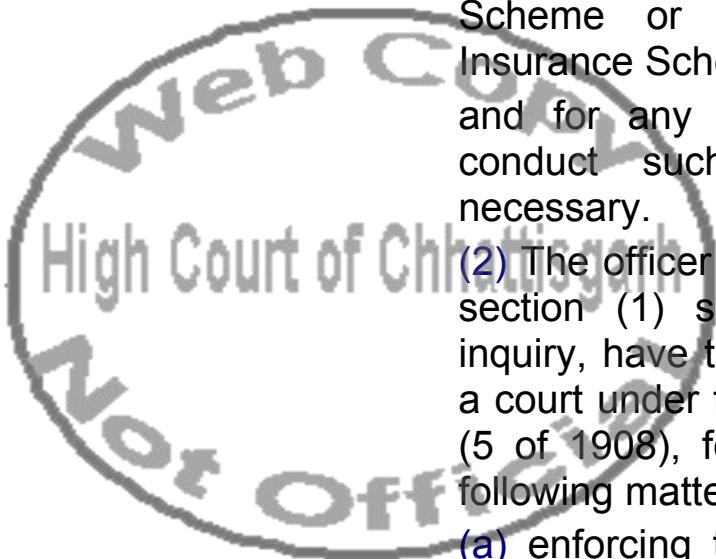
(c) receiving evidence on affidavit;

(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 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:

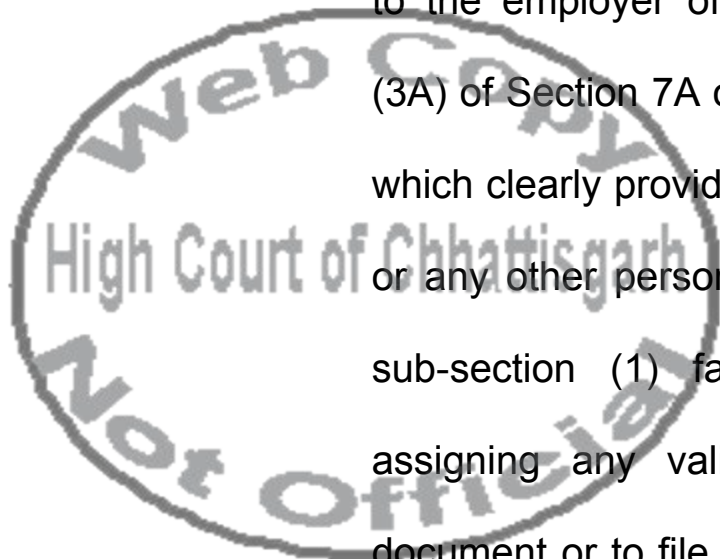
Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show-cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

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.”

25. By Section 7A of the EPF Act, power and jurisdiction has been conferred to the Provident Fund Commissioner(s) to decide the dispute regarding applicability of the EPF Act to establish and thereafter, to determine dues from the

employer under the provisions of this Act. In order to decide the dispute under Section 7A (2), the said Commissioner has been conferred with the powers vested in a court under the Code of Civil Procedure, 1908, for trying a suit and enquiry shall be deemed to be a judicial proceeding. By virtue of sub-section (3) of Section 7A of the EPF Act, a reasonable opportunity has to be afforded to the employer of representing his case. Sub-section (3A) of Section 7A of the EPF Act is of utmost importance which clearly provides that 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. Thus, sub-section (3A) of Section 7A of the EPF Act obliges the officer conducting inquiry or the APFC in this case, to decide the applicability dispute by holding an inquiry and to collect "evidence" / material, even if the employer and employee fail to attend



the inquiry and fail to produce evidence and as such, decision on the applicability of the EPF Act is to be based upon the evidence / material adduced and must be based on documents available on record. Thus, powers of the officer conducting inquiry that is of the Provident Fund Commissioner(s) is akin to a civil court to summon persons and call for documents, examine witnesses and to record evidence and it is for these reasons, the dispute about applicability raised therein and determination of dues are to be decided in the same manner as if the determination is being done by the court of law.

26. The law laid down by the Supreme Court in this regard may herein be noticed carefully and fruitfully. In the matter of **Food Corporation of India v. Provident Fund Commissioner and others**³, Their Lordships of the Supreme Court have clearly mandated that the officer making inquiry/assessing officer, who is the statutory authority, is obliged to collect evidence and material before any order is made under Section 7A of the EPF Act and his duty is independent and regardless of material brought by the establishment or the employee, and held in paragraphs 7 and 9 as under: -

3 (1990) 1 SCC 68

“7. The question, in our opinion, is not whether one has failed to produce evidence. The question is whether the Commissioner who is the statutory authority has exercised powers vested in him to collect the relevant evidence before determining the amount payable under the said Act.

9. 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.”

27. The principles of law laid down by the Supreme Court in the aforesaid case **Food Corporation of India** (supra) has been followed with approval by Their Lordships of the Supreme Court again in the matter of **Bharat Heavy Electricals Ltd. v. Employees' State Insurance Corporation**⁴.

28. The aforesaid determination brings me to advert to the factual matrix of the present case. The Assistant Provident Fund Commissioner (APFC), by its order dated 7-5-2004 decided the applicability dispute on the basis of

⁴ (2008) 3 SCC 247

complaint submitted by the Railway Vendors Welfare Association dated 12-3-2001 with the medical certificate containing names of 37 vendors. It has further been held that though neither the establishment nor the employees have submitted details of wages paid to the employees, it has been held to be Rs.50/- per day average earning in respect of 37 vendors, in the interest of the employees.

Relevant portion of the order dated 7-5-2004 {Annexure P-3 in W.P.(L) No.6264/2011} reads as follows: -

“Whereas, during the course of enquiry the employer has raised applicability dispute on the ground that Employees Provident Funds & Miscellaneous Provisions Act 1952 is not applicable to the establishment since their employment strength is less than 20. In their written submission dated 05.04.2002 they have mentioned that the Railway Vendors are not their employees and are separate identity in the eyes of law.

On going through the records it is found that initially the establishment M/s Railway Refreshment room, Raipur was covered w.e.f. 01.04.1977 as a unit of Central Government Undertaking but no compliance was reported by the Railways Authority. Later on the Central Govt. Undertaking units had gone out of purview of the Employees Provident Funds & Miscellaneous Provisions Act 1952 vide Govt. of India's notification dated 20.01.1983. Further the said establishment was taken over by M/s R.K. Agarwal, Contractor, which is a Partnership firm registered under Indian Partnership Act, 1932. M/s R.K. Agarwal has taken over Railway Refreshment room, Raipur in the year 1992 for five years and thereafter renewed the contract upto the year 2005. The establishment has

been registered under Sales Tax Act, M.P. Shop & Establishment Act, 1958. Consequent upon taking over of M/s Railway Refreshment Room, Raipur by M/s R.K. Agarwal, Contractor since 1992 the establishment is to be treated as independent establishment and hence come under the purview Employees Provident Funds & Miscellaneous Provisions Act 1952. However the establishment is entitled for infancy period as per rule.

Further the establishment is not treating the Vendors who are working on commission basis as their employees, on the plea that the commission paid to the employees does not come within the definition of wages. The plea of the establishment is not acceptable since the working as Vendors and getting their wages on the basis of commission fixed on sale basis is very much employees of the Contractor establishment as they are engaged by the establishment. Hence the plea of the establishment is rejected. The establishment has submitted month wise employment strength since 03.1992 which reveals that employment strength crossed 19 in the month of 02/2002. However a copy of the letter dated 12.03.2001 regarding medical certificate contains names of 37 Vendors. As such the Employees Provident Funds & Miscellaneous Provisions Act 1952 is applicable on the establishment w.e.f. 01.03.2001.

I, Dildesh Singh, Assistant P.F. Commissioner A.P.F.C. in exercise of the powers conferred upon me under Section 7 A of Act, 52 hereby resolve the applicability dispute and hold that the the Employees Provident Funds & Miscellaneous Provisions Act 1952 is applicable on M/s R.K. Agrawal & Sons Contractor, Railway Refreshment room, Railway Station, Raipur, C.G. w.e.f. 01.03.2001.

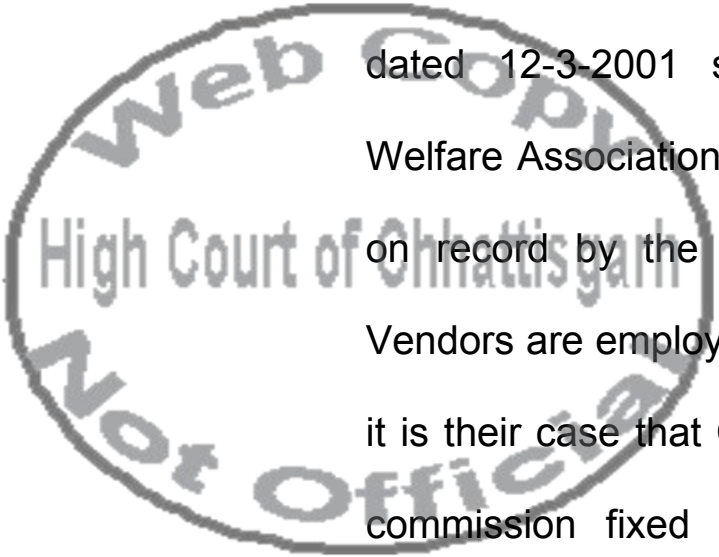
Whereas the establishment has failed to submit details of wages paid to the employees of the establishment. A complaint has also been received from Railways Vendors Association regarding non-extension of Provident Fund



benefits to Railway Vendors of Raipur Railways Station. Neither the establishment nor the employees have submitted details of wages paid to the employees. As such, to the better interest of employees the dues have been assessed on ex-parte basis, for the period 03/2001 to 02/2004 on the basis of average earning of Vendors @ Rs.50/- per day in respect of 37 Vendors as detailed below:

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29. Thus, the APFC has decided the applicability dispute raised by the petitioner herein solely on the basis of letter dated 12-3-2001 submitted by the Railway Vendors Welfare Association. No evidence / material was brought on record by the employer showing that Commission Vendors are employees of the petitioner establishment, as it is their case that Commission Vendors are getting their commission fixed on the sale basis. The so-called Commission Vendors did not appear before the APFC nor they adduced any evidence individually and collectively and even did not file any affidavit claiming to be the employees of the petitioner establishment and as such, the petitioner establishment did not have any opportunity to cross-examine those Commission Vendors in order to ascertain their claim put-forth by the Association. Likewise, the amount of Rs.50/- per day average earning has been assumed by the APFC without any evidence or



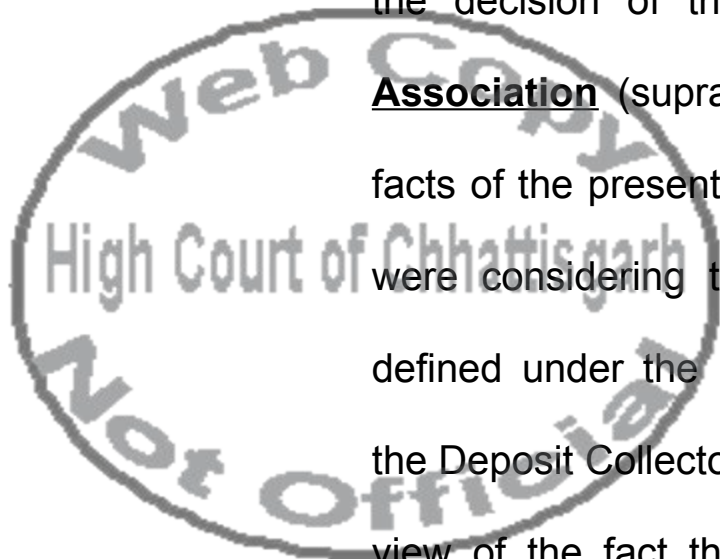
material brought on record by any party to dispute. Such a finding has been recorded ignoring the mandate of Section 6 of the EPF Act which provides that the contribution which shall be paid by the employer shall be ten per cent of the basic wages for the time being payable to each of the employees. None of the Commission Vendors came forward before the APFC stating his basic wages. The APFC took average earning to be Rs.50/- per day and proceeded to determine the PF dues.

30. Their Lordships of the Supreme Court in **Food Corporation of India** (supra) have clearly held that the Provident Fund Commissioner by virtue of the provision contained in sub-section (3A) of Section 7A of the EPF Act is obliged to collect all evidence being the legal duty on his part to determine the applicability dispute as well as the amount due, but the facts of the present case would show that the APFC failed to exercise jurisdiction vested in him by law. If the employer and employee both have failed to lead evidence, to decide the applicability dispute, the Commissioner ought to have held enquiry and ought to have collected material independently and decided the applicability dispute to reach on conclusion that Commission Vendors are employees of the petitioner, but

he failed to do so and merely on the basis of memo submitted by the Railway Vendors Welfare Association firstly held the Commission Vendors to be the employees of the petitioner within the meaning of Section 2 (f) of the EPF Act and then determined the dues by assuming Rs.50/- per day as average earning ignoring the mandate of Section 6 of the EPF Act without any legal evidence available on record to hold so and thereby the finding recorded with respect to applicability dispute as well as determination of provident fund dues becomes vulnerable being based on no evidence and is in teeth of the provisions contained in sub-section (3A) of Section 7A of the EPF Act and thus, runs contrary to the law laid down by Their Lordships of the Supreme Court in **Food Corporation of India** (supra) and followed in **Bharat Heavy Electricals Ltd.** (supra) as well.

31. The above-stated determination takes me to the order passed by the Appellate Tribunal upholding the order of the APFC. The petitioner has clearly averred and pleaded that the assessing authority has failed to conduct proper enquiry mandated under sub-section (3A) of Section 7A of the EPF Act to determine the applicability dispute and to determine whether the commission agent can be treated

as an employee of the petitioner and order of the APFC is based on no evidence and is perverse. The Appellate Tribunal affirmed the order of the APFC relying upon the dictionary meaning of “wages” as defined in the Law of Lexicon ignoring the fact that Section 2 (b) of the EPF Act defines “basic wages” and does not include “commission”. The Appellate Tribunal further went wrong in relying upon the decision of the Supreme Court in Indian Banks Association (supra) which is clearly inapplicable to the facts of the present case, as in that case Their Lordships were considering the matter in the context of “wages” defined under the Industrial Disputes Act as to whether the Deposit Collectors were workmen or not and further, in view of the fact that under the Industrial Disputes Act, definition of “wages” is much wider unlike “basic wages” under the EPF Act and in context of that, decision was rendered by the Supreme Court. Thus, the Appellate Tribunal has failed to determine to see that the APFC has committed illegality in not holding proper enquiry by the APFC as mandated under Section 7A (3A) of the EPF Act to decide the applicability dispute and further failed to consider the meaning of “basic wages” in its proper perspective as defined in the EPF Act. In my considered



opinion, the orders passed by the Appellate Tribunal are contrary to facts and law available on record.

32. As a fallout and consequence of aforesaid discussion, the orders passed by the APFC affirmed by the Appellate Tribunal deserve to be and are accordingly quashed and the matters are remanded back to the APFC for consideration afresh in accordance with law keeping in view the observations made herein-above.

33. The matters are restored to the file of the APFC, Raipur for hearing and disposal afresh in accordance with law and also to decide the applicability dispute in accordance with the provisions contained in sub-section (3A) of Section 7A of the EPF Act after holding proper enquiry and after affording reasonable opportunity to the employer and the persons concerned, and to take a final decision on the matters within a period of six months from the date of production / communication of this order.

34. All the writ petitions are allowed to the extent indicated herein-above but without imposition of costs.

Sd/-
(Sanjay K. Agrawal)
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (L) No.6264 of 2011

Sunshine Caterers Pvt. Ltd.

Versus

Employees Provident Fund Appellate Tribunal and another
and three other connected cases

HEAD NOTE

Provident Fund Commissioner is obliged to make enquiry under sub-section (3A) of Section 7A of the EPF Act before deciding applicability dispute and determining PF dues.

भविष्य निधि आयुक्त प्रयोज्यता विवाद तय करने और बकाया राशि का निर्धारण करने से पहले कर्मचारी भविष्य निधि अधिनियम की धारा 7क की उप-धारा (3क) के तहत जाँच करने के लिए बाध्य है।