IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4153 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

GUJARAT STATE CIVIL SUPPLIES CORPORATION LIMITED

Versus

REGIONAL PROVIDENT FUND COMMISSIONER

Appearance:

TANNA ASSOCIATES for Petitioner

MR BHARAT T RAO for Respondent No. 1

NOTICE UNSERVED for Respondent No. 2

SERVED BY AFFIX.(N) for Respondent No. 3

MR TR MISHRA for Respondent No. 4

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 29/01/99

ORAL JUDGEMENT

1. Heard learned counsel for the parties.

2. By this petition, the petitioner challenges the orders dated 1.12.97 and 20.4.98 issued by Regional

Provident Fund Commissioner, Ahmedabad and Asst. Provident Fund Commissioner, Ahmedabad respectively.

3. Learned counsel for the respondent Regional Provident Fund Commissioner urged that since the appellate authority has been constituted before whom the appeal lay against order under Section 7A, the petitioner had an efficacious alternative remedy to challenge the order. The petitioner has not deliberately pursued the alternative remedy and therefore this court should not interfere in this case to bye pass the alternative remedy available to the petitioner. Attention was also invited of the court to the fact that petitioner knew about the existence of alternative remedy soon after the impugned order was made and he was advised to pursue alternative remedy. It was also urged that in fact review application has been rejected before filing the writ petition, a fact which has not been disclosed by the petitioner. Order was also supported on merit.

4. The petitioner submitted that the decision of the review application had not been served to the petitioner until filing of the writ petition and therefore he was not aware of the decision of the review petition when he has filed the review petition. Moreover, the review petition has been rejected, so it has no relevance. It has lost its relevance now. It was said that the petitioner has in fact pursued alternative remedy. One alternative remedy was to file an appeal. Review was another alternative remedy. Petitioner has pursued one of the alternative remedies, namely, filing of review petition before the authority concerned as advised by the counsel, before pursuing the other remedy. He has not chosen to pursue both remedies simultaneously. It was because while he was pursing alternative remedy, the petitioner had been put to threat by respondent Regional Provident Fund Commissioner to take recourse to coercive method of recovery that he has been forced to approach this court. It was also urged that existence of alternative remedy does not inhibit jurisdiction of this court to entertain the petition under Article 226 and grant appropriate relief if the situation so demands, where it is alleged that the orders have been made in breach of principles of natural justice. or the authority whose order is challenged lacks jurisdiction inherently, ordinarily, existence of alternative remedy has not been held to be a ground for refusing relief under Article 226.

5. Having given careful consideration to the rival contentions, I am of the opinion that it is true that

ordinarily jurisdiction under Article 226 is not invoked where there exists alternative remedy but at the same time it is also true that it does not inhibit the existence of jurisdiction to interfere in appropriate cases, notwithstanding existence of alternative remedy. The principle has been succinctly stated by the Apex Court in A.V.Venkateswaran, Collector of Customs, Bombay vs. Ramchand Sobhraj Wadhwani and another AIR 1961 SC 1506, wherein the Apex Court said:

> "The wide proposition that the existence of an alternative remedy is a bar to the entertainment of a petition under Article 226 ofthe petitioner unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of the natural justice and could therefore, be treated as void or non est and that in all other cases, courts should not entertain petitions under Article 226, or in any event not grant any relief to such petitioners, cannot be accepted."

6. Thus court not only accepted that complete lack of jurisdiction and violation of principles of natural justice are the two well known exceptions to the general rule that existence of alternative remedy inhibits the exercise of discretion under Article 226, for invoking extraordinary jurisdiction. But in other circumstances also, the existence of alternative remedy may not be held to complete bar on the power of the court to consider the cases on merit. The principle has since not been deviated, the authorities need not be multiplied. In the present case the impugned order has been challenged on both the grounds, viz., the Act of 1952 does not apply hence Regional Provident Fund Commissioner had no jurisdiction to initiate proceedings and that he order is in violation of principles of natural justice. Therefore, I am not inclined to close the enquiry on threshold in the two contentions raised before me. In this connection, it may also be noticed that it cannot be doubted that petitioner did pursue one of the two other remedies available to him viz., to file an appeal, or to apply for review or recalling the order. The latter remedy followed by him has resulted in no result. The review application was rejected prior to filing of petition. Thus that remedy was exhausted. Had it been accepted the petition would not have survived. Non disclosure of fact about its decision by the petitioner has been explained by the petitioner by pleading

ignorance about such decision at the time of filing of petition. That has grain of truth. The decision of revision was announced a few days before filing of petition. It has not been announced in the presence of the parties. Therefore the petitioner could not be attributed with knowledge since the date of order. There is nothing to suggest that it was served on petitioner before the petition was filed. No reason could be there for not disclosing the fact. If the review were to be allowed, necessity of filing petition would have obviated. In case of its rejection exhaustion of one remedy could be pleaded. Moreover it is not of substantial effect on the petition.

Now about merit of the contentions.

7. Two fold contentions have been raised before me. In the first instance, it was stated that the petitioner is wholly owned Government Corporation incorporated under the provisions of the Companies Act, 1956, and is engaged in the activities of the public distribution system through fair price shops. For this purpose petitioner engages private agents/contractors on contract basis at their various godowns in the State. Learned counsel for the petitioner urges that for the purposes of Employees Provident Fund and Miscellaneous Provisions Act, 1952, (Hereinafter called the Act of 1952) employees engaged through contractors in such kind of activities is not governed and the petitioner is not liable for provident fund deductions under the Act of 1952 and the scheme framed thereunder from the wages payable to such employees. He draws a distinction between the contractor's employee in establishment in general and contractor's employee in public utility establishments like the petitioner. Therefore according to him, the assumptions of jurisdictions by Regional Provident Fund Commissioner to hold enquiry and pass orders under Section 7A or for that matter any other provisions of the Act in respect of the petitioner concerning the persons employed by or through the contractor is inherently lacking.

8. This takes us to the meaning assigned to the term employee and employer under the Act of 1952. Section 2(e) defines the term employer and 2(f) defines the word employee 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, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f) of sub-section (1) of section 7 of the Factories Act, 1948, the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or management agent.

2(f) "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets his wages directly or indirectly from the employer, and includes any person -

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment"

9. With reference to the aforesaid definition it has been urged by learned counsel for the petitioner Mr. Tanna that the establishment of the petitioner not being a factory subclause (i) of Section 2(e) is not applicable, and subclause (ii) is also not applicable because the petitioner or any of its officers does not enjoy any control in respect of workmen who were employees of contractor. They are exclusively and completely under the control of the contractor who employs them and takes work from them.

10. I am unable to accept this contention on the plain reading of the provision. The requirement envisaged to consider a person to be employer in relation to any establishment other than factory is that that person or authority which has the ultimate control over the affairs of the establishment is considered to be employer in relation to the workmen employed at that

establishment or where the affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent is considered to be an employer vis-a-vis employees employed in relation to the establishment whose affairs have been entrusted to such persons as manager, managing director or managing agent. From the perusal of the definition it is abundantly clear that what is required to consider a person to be employer is the control over the affairs of the establishment in which or in respect of which any person is employed and not direct or indirect control over the functioning of employees by such person. The control of affairs of the establishment in which or in respect of which a person is employed has different connotation than control or supervision over the employees concerned in the context in which the term has been used for the purpose of giving effect to the provisions of the Act of 1952 which is a beneficial legislation, extending a scheme of economic security of future, by way of making provision for by accumulations in a provident fund through contributions from employees as well as employer. It is not the case of the petitioner that they are not controlling the affairs of the establishment of the Corporation in question at all its establishments which include place of working of the respondents.

11. In these circumstances, the ultimate control of the fiscal affairs, namely, the finances of the establishment and control over its affairs concerning the payment, deductions, deposits etc. has to be viewed. Even in the case of employees directly employed by the owner may be supervised and controlled by officers other than manager, managing director or managing agent or the person having authority or ultimate control over the affairs of the establishment. If petitioner's contention were to be accepted, the owner of an establishment will not be an employer even in respect of employees directly employed under him, and shall render the whole scheme of the Act unworkable. In such event, the owner, authority or manager, managing director or managing agent, as the case may be, cannot with reference to this definition cease to be employer of the workmen employed in the establishment provided they fall within the definition of employee given under section 2(f).

12. This brings us to the definition of employee. Whatever may have been the doubts about the person's employment through contractor prior to its amendment by inserting the words `and includes any person employed by or through a contractor in or in connection with the work

of the establishment' about the status of a person employed through contractor and getting his wages directly from him, there cannot be any ambiguity, in the face of clause (i) of Section 2(f) about the status of a person employed by or through a contractor in or in connection with the work of the establishment. Clause (i) by reading separately the alternatives provided by the use of word or if it were to be read in a simple manner would read as under:-

"employee means any person (a) employed by a contractor in the establishment; (b) employed by a contractor in connection with the work of the establishment; (c) employed through a contractor in the establishment; (d) employed through a contractor in connection with the work of the establishment."

13. If a person falls in any one of the categories, he is to be treated as an employee in relation to the establishment in or in connection with the work of which he has been employed and the owner, manager, managing director or managing agent of the establishment is treated as his employer. It becomes immaterial whether he is employed by the person treated as employer within the meaning of Section 2(e) or by any other person who receives his remuneration from such employer, under the terms of agreement between the employer and the person who actually employs and supervises the work of such persons. In the face of this provision, and in the light of admitted position that the petitioner has been getting services of some person at their godowns in the State who has been engaged by private agents or contractors to give such services. The godowns are the work places of the petitioner. It is not the case that the petitioner is not in the ultimate control of the godown which are part of petitioner establishment where such persons were employed by private agents or contractors. Thus whatever position may be taken whether such persons were employed by contractor but worked in the various godowns in the State of the petitioner or they were engaged through contractors to render their services at such establishments of the petitioner or they were engaged in connection with the work relating to public distribution system or any other activity which the petitioner carries on whether in the regular course of its business or on special assignment which it has undertaken to discharge. He cannot escape from being treated employer in relation to such persons employed in or in connection with his establishment by or through private agents or contractors. No distinction can be drawn from the mere

fact whether the employer is engaged in a public utility service or is engaged in work for personal profits. There is no warrant for such distinction in the scheme of statute. Therefore this contention of learned counsel on behalf of the petitioner that the Act does not apply to the persons employed by it in connection with its activities is not acceptable.

14. In this connection reference may be made to M/s. P.M.Patel & Sons and others v. Union of India and others etc. 1987 SC 447. Considering the provisions of Act of 1952 the court said the `term of definition of employee are wide. They include not only persons employed directly by the employer but also persons employed through a contractor. Moreover they include not only persons employed in the factory but also persons employed in connection with the work of the factory'.

15. The court while considering whether a person who is not at all discharging his duties in the establishment of the employer could be considered entitled to the benefit of the Act, emphasised that :

> "Clause (f) of S.2 of that Act defines an "employee" to mean "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 employed by or through a contractor in or in connection with the work of the establishment."

16. It was next contended by the learned counsel for the petitioner that the award otherwise is a non speaking order and suffers from mistakes apparent on the face of record inasmuch as it has reproduced the award which was found by this court to be unreasoned one and in breach of principles of natural justice on earlier occasion, without completing enquiry. It was urged that in the first instance respondent No.4 union has filed a Special Civil Application No. 771 of 1992 to abolish contract labour system. While the court observed that whether to abolish the contract labour system is to be decided by the appropriate authority of the State Government and not by this court, it felt proper to direct the respondent No.3 Regional Provident Fund Commissioner before it took appropriate action as provided under Section 7A of the Act of 1952 as expeditiously as possible. Thereafter the proceedings were initiated by the Regional Provident Commissioner and he made an order on 29.4.93 raising

demand of Rs.3,09,567.80ps against the petitioner to be deposited by way of provident fund contributions due from the petitioner establishment. This order was challenged through Special Civil Application No. 5227 of 1993 which was decided on June 15, 1993. The order was challenged inter alia on the ground that the same has been made exparte without affording an opportunity of hearing. That plea found favour with the court and it quashed the order on condition that the petitioner corporation deposits an amount of Rs.1,05,000/- in the office of Regional Provident Fund Commissioner on or before 15.7.93. The said amount was to be treated as deposit towards provident fund dues in respect of the period commencing from June, 1986 to May, 1992. The amount was to be deposited without prejudice to the rights and contentions of the petitioner corporation and that deposit of amount shall not preclude the petitioner corporation from raising all contentions as may be available to it in accordance with law. The amount had been deposited by the petitioner corporation. After that order has been made the impugned order came to be made on 1.12.1997 by the Regional Provident Fund Commissioner, against which on 2.1.1998, petitioner filed review application. While that review application was pending decision, the Regional Provident Fund Commissioner issued directions to the petitioners to comply with the order dated 1.12.97 by 30.4.98 else to suffer the consequence of attachment of the bank accounts of the petitioner. This led to the filing of this petition in May 1998. The petitioner says that order is cryptic one and is reproduction of the same order of 29.4.93 without completing enquiry and on the face of it suffers from these errors, and deserves to be quashed.

17. It cannot also be doubted that an order made in breach of principles of natural justice does not stand for that reason alone. The breach of principles of natural justice take place in many form. The order may not have been passed without affording an opportunity at all, the order may have been passed in violation of the fair procedure necessary for a fair adjudication, namely, where the accuser has acted as adjudicator or opportunity of cross examination has not been granted, or opportunity of leading evidence has wrongly been denied or for that matter, no reasons have been recorded before passing the order adversely affecting a person. These are not the exhaustive circumstances in which breach of principles of natural justice are confined.

18. It will be presently seen that the present order suffers from such vice on the face of it.

Any authority making an order affect civil right of any person adversely is not only under an obligation to afford a fair opportunity of hearing and adopt a fair procedure, but is also under an obligation to make a speaking order, that is to say reason for his concluding must find place in the order. Order must speak for itself. All those are parts of principles of natural justice. In the case of determination of sum payable by an employer to provident fund is required to be determined after affording opportunity of hearing to concerned parties and that all the more necessitates the making of a speaking order.

19. A perusal of the impugned order goes to show that the learned Regional Provident Fund Commissioner is not even completed the enquiry required of him. He specifically says:

> "The authenticity and validity of these documents were questioned by the representative of the worker's union i.e., Hindustan Mazdoor Sang, Ahmedabad, some exercise was also made for cross examination of the workers which could not be completed."

20. The order does not disclose that any fault lay with the petitioner for not completing the enquiry. Moreover, the function which Regional Provident Fund Commissioner discharges under Section 7A is not determining adversary disputes, but, is a statutory obligation cast upon him on information being come to his knowledge to hold an enquiry on his own and to find the correct state of affairs about the liability and obligation of employer for contribution towards provident fund. For this purpose, he has been invested with the powers of C.P.C. to enforce attendance of concerned witnesses and to procure material for its decision. In Food Corporation of India v. Provident Fund Commissioner (1990) 1 SCC 68, the Supreme Court observed:

> "The Commissioner while conducing an enquiry under Section 7A has the same powers as are vested in a court under Code of Civil Procedure for trying a suit. The power given under Section 7A to the Commissioner is 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. Though the employer and the contractors are both liable to maintain registers in respect of the workers employed but the question 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. It would be failure to exercise the jurisdiction particularly when a party to the proceedings request for summoning evidence from a particular person."

21. From the words spoken by the Commissioner in his award it appears that the Commissioner has failed to discharge his legal duty. In exercise of powers vested in him to collect the relevant evidence before determining the amount payable under the Act by the employer. He has also clearly stated the foundation of his impugned order to be the order dated 29.4.93 for which an amount of Rs.3,09,567.80ps was assessed. He says that `though this assessment of dues are not based on actual records but, it certainly contained element of validity in the light of total number of workers engaged and prevailing rates of wages for such type of workers.' To say the least the said order has been quashed by this court by finding it to have been arrived at not after giving proper opportunity to the petitioner. The same could not have been made the sole basis for making new order. Since sufficient long time has been taken by the Regional Provident Fund Commissioner and enquiry has not been completed he has just thought it fit to discharge the burden off his shoulders by reiterating the previous order which does not exist any more. In my opinion, such award suffers from the burden of violation of principles of natural justice on the face of it as it is not supported by any reason. It is founded on incomplete enquiry and without making sufficient effort by exercising powers vested in him for determining the amount payable by the petitioner which includes the determination of actual persons employed and amount payable in respect of each of the workers. It is also vitiated because on the face of it, the order reproduced the earlier order which was set aside by considering the same still have a valid existence.

22. In view of the aforesaid, I am not inclined to sustain the preliminary objection as not to entertain the petition in view of the existence of alternative remedy

and on the merit of the contention the award is not sustainable for the infirmities pointed above.

23. Accordingly, petition succeeds. The impugned award is set aside and the Regional Provident Fund Commissioner is directed to complete the enquiry within a period of six months from the service of the writ on it and make fresh order in accordance with law determining the amount payable by the petitioner if any under the provisions of the Provident Fund Act.

24. Keeping in view the facts and circumstances of the case, there shall be no order as to costs of this petition.

(Rajesh Balia, J)