IN THE HIGH COURT OF JUDICUATURE AT MUMBAI

ORDINARY ORIGINAL CIVIL JURISDICTION

PUBLIC INTEREST LITIGATION NO. 45 OF 2009

Sudarshan Kumar S/o Basuki)
Singh, Aged about 34 years,)
Indian Hindu Inhabitant at)
Mumbai, Occupation : Service)
as Assistant Provident Fund)
Commissioner, having his)
office at Regional Office,)
Mumbai – 1, Bhavishya Nidhi)
Bhavan, 341, Bandra (East),)
Mumbai – 400 051. ...).. ... ... Petitioner.

Versus

1) The Union of India,)
Through the office of the)
Government Pleader, High)
Court, Mumbai-400 023.)

2) The Employees' Provident)
Fund Organization,)
Bhavishya Nidhi Bhava,)
14-Bhikaiji Cama Place,)
New Delhi – 110 066.)

3) The Central Provident Fund)
Commissioner, Employees')
Provident Fund)
Organization, Bhavishya)
Nidhi Bhavan, 14 – Bhikaiji)
Cama Place, New Delhi)
110 066.)

4) The Regional Provident)
Fund Commissioner-I,)
Regional Office – Mumbai)
- I, Bhavishya Nidhi Bhavan)
341, Bandra (East),)
Mumbai – 400 051.)... ... Respondents.

Ms. Meena Doshi, Amicus Curae.
Mr. M. I. Sethna, Sr. Counsel with Mr. J. B. Mishra
for the Respondents.

CORAM : F. I. REBELLO &
A. A. SAYED, JJ.

DATED : 30TH APRIL, 2010

JUDGMENT (Per F. I. Rebello, J.) :

Rule. Heard forthwith.

2. The petitioner had earlier filed a writ petition to impugn the circular dated 19th June, 2008. At the relevant time the petitioner was working as Assistant Commissioner of Provident Fund, Employees' Provident Fund Organization (EPFO). The petitioner was also exercising power as an Authority under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 for the purpose of deciding the disputes arising under the provisions

of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (which shall hereinafter be referred to as “the Act”).

3. On 30th January, 2009 this Court had directed that no departmental action should be taken against the petitioner in relation to the issuance of arrest warrants on the parties in respect of the subject proceedings pending before him. On 28th April, 2009 a statement was made by the petitioner that the petition is a public interest litigation and the office was accordingly allowed to process it. On 5th November, 2009 Amicus Curiae was appointed to espouse the cause of the petitioner. The office thereafter has re-registered the petition as Public Interest Litigation No. 45 of 2009. By order of 10th March, 2010 the guideline No.3 of the Circular dated 19th June, 2008 was directed not to be given effect to until further orders.

4. On behalf of the petitioner, the learned Amicus Curiae submits that paragraph 3 of the Circular affects the administration of justice and interferes with the functioning of a quasi-judicial authority. It is further submitted that such a circular is in contravention to Article 50 of the Constitution of India which enjoins on the State to separate the judiciary from the executive in the public services of the State.

Any administrative instruction or direction which interferes with the administration of justice is arbitrary and therefore liable to be quashed and set aside.

5. We may gainfully refer to paragraph 3 of the Circular dated 19th June, 2008, which reads as under :

> "3. The officers of the rank of APFC should not invoke powers to issue arrest warrant in the matter of 7A in a routine manner unless all other methods including the repeated utilization of the Enforcement Officer's services are exhausted and the prior permission of RPFC-II (In-Charge SRO)/RPFC-I as the case may be is obtained for invoking the power u/s 7A(2)(a)."

6. Reply has been filed on behalf of respondents opposing the relief sought for in the petition. It is set out that the Circulars are merely instructions issued to bring awareness amongst the Officers to act reasonably and fairly and they should not act under duress and or arbitrarily and to avoid rash use of powers which may be detrimental to the image of the organization. It is, therefore, contended that the said paragraph nowhere interferes with the functioning of the quasi-judicial authorities.

Written submissions have also been filed on behalf of the respondents. According to respondents two main questions arise for

consideration which are (A) Locus standi of the petitioner to move the public interest litigation; and (B) Assuming that he has locus, whether the present petition can be entertained on the ground of public interest.

7. It is set out that the said Circular came to be issued pursuant to the judgment of the Andhra Pradesh High Court in **Vignan Education Development Society, Ongole v/s Assistant Provident Fund Commissioner and Authority, Guntur and Others.,** 2005 II LLJ 728, where the learned Single Judge of the Andhra Pradesh High Court on the facts was pleased to observe that the arrest warrant issued against the petitioner disclosed gross misuse of powers. That order was upheld in appeal. It is further contended that at the time the petition was filed on 25th July, 2008 the petitioner's charge was transferred with effect from 19th June, 2008. It is, therefore, set out that in these circumstances the petitioner would have no locus standi to maintain the petition. Reliance is placed on the judgment of the Supreme Court in the case of **J. R. Raghupathy v/s State of A.P. & others**, AIR 1988 SC 1681, to contend that in respect of the administrative instructions this Court will not interfere with the exercise of its extra ordinary jurisdiction under Article 226 of the

Constitution of India.

8. To understand the controversy, we may gainfully reproduce Sections 7A(1), (2), (3) and (3-A) of the Act, which reads 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.

(3-A) 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) . . . . . .

(5) . . . . . .”

The bare perusal of the afore mentioned provisions would show that the authorities under Section 7A conducting an inquiry have been conferred powers as are vested in a Civil Court including enforcing attendance of any person or examining him on oath. It is in that context that we must examine the paragraph to the circular.

9. On consideration of paragraph 3 of the said Circular, the first part is setting out that the power to issue arrest warrant should not be exercised in a routine manner, perhaps that could be said to be merely advisory in character. However, the following sentence, “..... and the prior permission of RPFC-II (In-Charge SRO)/RPFC-I as the case may be is obtained for invoking the power u/s 7A(2)(a)”, can be

said to directly interfere with the power of quasi judicial authority exercising its powers under Section 7A of the Act. The contention in the affidavit of respondents that even if a power has been conferred, it should be used sparingly and with utmost care cannot be faulted. The question is who will decide. Is it the quasi-Judicial Authority or by the administrative circular such as the one we have reproduced earlier. The law on exercise of discretion even by an administrative authority is well settled. We may only quote the relevant portion of para 20 from the judgment in J. R. Raghupathy (supra), which reads thus:

> "At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work `Judicial Review of Administrative Action' 4th Edn., at pp. 285-287 states the law in his own terse language. The relevant principles formulated by the courts may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be wayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously."

Therefore, it is for the authorities in whom the power is vested to exercise the power. The exercise of power cannot be interfered with by any administrative authority. If such a power is allowed to be exercised by an administrative authority which has the effect of controlling the exercise of power of quasi-judicial or judicial body that would directly impinge on the administration of justice and the rule of law. It is not possible for this Court to accept such a contention that the judicial power can be fettered by administrative instructions. The rule of law would contemplate that the judicial authority exercises its powers in terms of the act and the rules framed thereunder. If the Authority is a creature of a statute it is bound by the provisions of that statute. A body even if be a part of the machinery of the same act cannot be permitted to issue direction controlling the discretion of the authority exercising quasi-judicial powers. In our opinion, therefore, para 3 of the impugned Circular is arbitrary and violative of the powers conferred on the authority under Section 7A of the Act and consequently will have to be set aside.

10. The argument advanced on behalf of the respondents by their counsel relying on the judgment in J. R. Raghupathy (Supra) that the

Court should not interfere under Article 226 of the Constitution of India in respect of the administrative Circulars, would really not arise in this case. In J. R. Raghupathy's case (supra) on the facts there it would be clear that what was being considered was the setting up of Mandal Headquarter and for that purpose the State Government had issued a Circular which had to be considered while proposing the setting up of the Mandal Headquarter. It is in that context that the Court observed that there must be legal right and then only can a Court exercise its jurisdiction under Article 226 of the Constitution of India. The law is well settled that mandamus does not lie to enforce administrative instructions not having any statutory force and which do not give any legal right in favour of the petitioner. The reason being they confer no legal right upon anybody.

11. The other challenge was to the maintenance of the petition as a public interest litigation. It is true that the petitioner, when he filed a petition, did it as a person aggrieved. The Court, however, thereafter allowed the petition to be treated as a public interest litigation and has been so processing. We have no difficulty in holding that the petition would be maintainable as a public interest litigation as paragraph 3 of the impugned Circular is arbitrary and

apart from that directly impinges or interferes with the administration of justice. In these circumstances, we have no hesitation in holding that the petitioner would have locus to maintain this petition as a public interest litigation.

12. We had earlier noted that this Court had directed the respondents not to proceed to initiate disciplinary proceedings against the petitioner herein. Once the petitioner exercises his quasi-judicial powers conferred by statute, it is really not for the executive to proceed to hold that the action amounts to misconduct warranting disciplinary proceeding. The law would require that any exercise of judicial powers can only be corrected by taking recourse to remedies available under the Act. Administrative Authority cannot sit in judgment over a judicial or quasi-judicial order under the order be malafide. In the circumstances, if the respondents are proceeding to initiate the disciplinary proceedings against the petitioner for exercise of quasi-judicial powers, in our opinion, prima facie, such an exercise cannot be done. However, we do not propose to enter into that controversy considering that the issue is not directly before us. In the light of that the following order:

13. Rule made absolute in terms of prayer clause (a), to the extent that paragraph 3 of the impugned Circular dated 19th June, 2008 issued by the Central Provident Fund Commissioner is quashed and set aside. In the circumstances of the case, there shall be no order as to costs.

Sd/-

(F.I. REBELLO,J.)

Sd/-

(A. A. SAYED, J.)