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EMPLOYMENT AND LABOUR NEWSLETTER

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I. CIRCULAR

EPFO issues a circular on withdrawal of prosecutions cases related to non-submission of KYC

The Employees' Provident Fund Organisation ("**EPFO**") via circular dated 26 September 2022 has authorized Regional Provident Fund Commissioners (**"RPFC"**) to consider applications for withdrawal of prosecutions against employers for non-submission of KYC documents as per the following terms and conditions:

a. Employer should request for withdrawal of prosecution by application before RPFC / Competent court;
b. The application shall only be for withdrawal of prosecutions filed against employers for non-filing / non-submission of KYC document(s) of the member(s) under the EPF Scheme;
c. Subsequent to filing of the said prosecution case, the employer must have made the necessary compliance for the concerned employees' required KYC document(s);
d. The employer shall submit an undertaking to comply with the statutory provisions for filing / submission of KYC document(s) in the future.

This is a welcome development for employers who previously faced technical difficulties, such as failure on part of the employees to link their Universal Account Number ("**UAN**") with KYC data like their Aadhaar number or PAN, which prevented the employers from timely depositing the employees' provident fund contributions.

II. CASE LAWS

1. Bare perusal of Emails & Form 16A for TDS deduction is not sufficient to establish an Employer-Employee Relationship between Freelancer and Management: Delhi High Court

Case: Kaushal Kishor Singh v. M/s Sita Kuoni World Travel India Ltd., W.P.(C) 11631/2018

The Delhi High Court has held that there is no master-servant or employer-employee relationship in freelancing because the freelancer is his own master and has the freedom to choose his projects, allowing him to work both for himself and for multiple employers.

The Court observed that "*Freelance as per the term itself implies a person who acts independently without being affiliated with or authorized by an organization and is distinguishable from part-time, full-time or contractual employees. Freelancing thus enables a person to work for himself and multiple other employees and enables unfettered submission of work to many potential buyers. For eg. a writer who submits work to many publishers, a journalist working for several channels, a tour guide etc... Freelancer or freelancing thus are terms currently used to mean a person who is self-employed or an independent contractor in the business of selling their services and skills to different employers for a*

specified time period."

In this case, the petitioner was working as a freelance *Approved Part Time Foreign Language Linguist Guide* with the respondent since 2011 and continued for a period of about 3 years. Although he was not issued any appointment letter, he claimed that he was a workman and that his services were illegally terminated by the management without giving any notice, holding any inquiry, or assigning any valid reason. Consequently, he sent a demand notice to the management to whichno reply was received. Thereafter, the petitioner claimed that while the Management immediately released his pending payments, it failed to reinstate him. The petitioner thus alleged that the management's acts were in contravention of the provisions of the Industrial Dispute Act, 1947 ("**ID Act**").

He moved the High Court, challenging an order passed by Labour Court, which had held that he had failed to establish the existence of employer-employee relationship with the management and thus there was no question of illegal or unjustifiable termination.

Upholding the Labour Court's order, the Court held that the petitioner had failed to establish the relationship of employer-employee with the management and observed that *"A bare perusal of the documents filed as evidence on behalf of the petitioner workman, which includes the various emails and the forms under 16A, do not, in any way, prove that there existed any relationship of employer-employee between the parties."*

Further, the Court observed that Form 16A categorically reflects that TDS was deducted by the management in respect of payments made to the petitioner under the head of '*payments made to contractors and sub-contractors*', which thereby disqualifies the petitioner to fall within the definition of workman as enumerated under Section 2(s) of ID Act. The Court also noted that the petitioner was not provided any regular amount as salary or otherwise and was only paid on assignment basis.

Lastly, the Court held that the documents including emails, Form 16A and a license issued by Ministry of Tourism provided by the petitioner would have some value, only if there was a primary nature of evidence of more acceptable type as mentioned in the form of ESI, PPF records maintained by the management or a PPF No. etc., in which case the management would not have escaped liability if the petitioner was working there.

2. The Payment of Gratuity Act, 1972 is a beneficial statute for employees and overrides other enactments: Andhra Pradesh High Court

Case: The District Cooperative Central Bank Ltd. v. The Controlling Authority under Payment of Gratuity Act 1972, Writ Petition No. 13203 of 2011

The Andhra Pradesh High Court has reiterated the position of the Supreme Court in *Beed District Central Coop. Bank Ltd. v. State of Maharashtra (2006)* that the Payment of Gratuity Act, 1972 ("**PGA 1972**") has to be interpreted in favor of the respondent-workman and that it overrides all other statutory legislations, and has observed "*the Payment of Gratuity Act is a beneficial statute. When two views are possible, having regard to the purpose the Act seeks to achieve being a social welfare legislation, it may be construed in favour of the workman."*

The petitioner had filed this writ petition under Article 226 of the Constitution of India for issue of a writ of certiorari to quash an order passed by Controlling Authority under PGA 1972 on the ground that the petitioner-bank is not liable to pay the gratuity of Rs. 1,08,758/- to respondent-workman as it is not an employee of the petitioner-bank. The petitioner-bank argued that after the respondent-workman was allotted to the respondent-society, he was to be governed by the terms of the Andhra Pradesh Cooperative Societies Act, 1946 and Andhra Pradesh Cooperative Societies Rules, 1964 ("**Societies Act and Rules**") and as per the same, the respondent-society would be the employer of the respondent-workman and not the petitioner-bank. The petitioner-bank cited Section 2(f) of the PGA 1972 to contend that it did not have ultimate control over the affairs of the respondent-society and consequently the petitioner was not the 'employer'.

The High Court observed that the respondent-workman was appointed as a secretary to the area of the

petitioner-bank in 1973 and subsequently, the General Manager of the petitioner-bank transferred the respondent-workman to the respondent-society. The respondent-workman retired from the respondent-society in 2001. Based on the evidence on record, the Court held that the petitioner had ultimate control over the affairs of the establishment of respondent-society in which the respondent-workman was appointed and was transferred from time to time. The court in respect of relationship between the petitioner and the respondent-workman held that *"The finding on relationship of employer and employee is a finding of fact and being based on evidence on record, which could not be shown to be suffering from any perversity or any other infirmity on such other permissible grounds, this Court is not inclined to interfere with such finding of fact in the exercise of writ jurisdiction."*

Additionally, the Court also observed that the Societies Act and Rules do not deal with the subject of gratuity and that PGA 1972 overrides all the other enactments in view of Section 14 of PGA 1972 by observing that *"It is a piece of social welfare legislation and deals with the payment of gratuity which is a kind of retiral benefit like pension, provident fund etc. Gratuity in its etymological sense is a gift, especially for services rendered, or return for favours received. The provisions contained in the Act are in the nature of social-security measures to wage-earning population in industries, factories and establishments. The main purpose and concept of gratuity is to help the workman after retirement, whether retirement is a result of rules of superannuation or physical disablement or impairment of vital part of the body or on death to the nominee."* In view of the above, the Court directed the petitioner-bank to make the payment of gratuity to the respondent-workman.

3. Blood relatives can share employer-employee relationship as per the Workmen's Compensation Act: Karnataka HC

Case: The Divisional Manager, The Oriental Insurance Co., Ltd V Sayeeda Khanam W/O. Late Azam Khan

The Karnataka High Court has reiterated its position in *New India Assurance Company Ltd., v. Smt. Mahananda and others, Kar MAC 476,* that that there is no prohibition under the Workmen's Compensation Act, 1923 ("**WC Act**") for the blood relatives to be employer and employee. In this case, the High Court dismissed the appeal filed by the petitioner who questioned the order of the Workmen's Compensation Commissioner by which liability was fastened on the petitioner-company in a claim petition filed by the respondents, who are the legal heirs of deceased driver who died in an accident in 2008, and thereby ordered the petitioner-company to disburse the insurance amount in favour of the respondents.

The petitioner-company argued that the deceased was working for his brother and thus, there was no relationship of employer and employee.

However, the Court placed reliance on the case of *United India Insurance Company Ltd. v. Prakash Shankar Gourav & Anr., ILR 2006 Kar. 1036*, wherein it was held that a father engaging his son as an employee in his vehicle is not prohibited in law. Similarly, in *United India Insurance Company Ltd. v. Jonsa & Ors., 2001 ACJ 1682*, it was held that Commissioner's finding that two sons employed by their father as coolies in his agricultural land were workmen, could not be challenged in appeal.

The High Court, by dismissing the appeal observed that *"It is clear that there is no any provisions under the Act that any prohibition to employ the blood relatives as driver...Licence is produced before the Court which is not rebutted by leading any rebuttal evidence by the Insurance company, the very contention that he was not a workman cannot be accepted."*

4. Employees can't withdraw from Voluntary Retirement Scheme After stipulated deadline or after the acceptance of benefits: Gujarat High Court

Case: Gohil Rameshbhai Amarsinh V/S Indian Petrochemicals Corporation Ltd., C/SCA/13747/2021

The Gujarat High Court has reiterated the position of the Supreme Court in the case of *National Textile Corporation (MP) Ltd. v. M.R. Jadav, AIR 2008 SC 2449* ("**National Textile Corporation**"),

that once the employees have accepted the benefits under Voluntary Retirement Scheme ("**VRS**"), it is not open to them to challenge the scheme. Additionally, they are not entitled to assert that they should be permitted to continue with their employment, after having withdrawn the amount.

In this case, Reliance Industries Limited became a significant shareholder in the respondent-company after the Central Government withdrew its investment from the respondent-company. To reduce the workforce, the VRS and the Special Separation Scheme were introduced. About 2,400 employees filed for VRS according to the petitioners, who claimed that they were coerced into doing so by the threat of being relocated to other sites and there was no period provided to withdraw their applications.

On the other hand, the respondent-company asserted that 19 employees had requested withdrawals and were authorised to do so up until the specified date. Before the acceptance, the petitioners hadn't withdrawn their applications. Additionally, they had consented to all the benefits of VRS before starting a labour dispute.

The petitioners contended that the scheme remained in operation up to 20 March 2007 and thus, the occasion to decide the applications was available with the respondent-company only from 21 March onwards. They added that since the petitioners had withdrawn their applications before dispatch of letters of acceptance on 26 March, there was no acceptance of the proposal under the Indian Contract Act 1872 ("**Contract Act**").

The respondent-company disagreed with this argument, contending that Sections 4 and 5 of the Contract Act applied because the acceptance was complete. The petitioners were now prohibited from contesting the benefits before the Labour Court because they had already accepted the same.

The High Court observed that once the VRS applications were sent and not withdrawn before the deadline of 20 March, the contention of the petitioners vis-a-vis offer and acceptance of Contract cannot be allowed. Tackling the issue under the Contract Act, the Court observed that *"…considering the question of the effective date, the non-communication of acceptance does not make the resignation inoperative provided there is in fact an acceptance before withdrawal."*

Relying on National Textile Corporation (supra) Justice Vaishnav averred *"…the Hon'ble Supreme Court opined that if the contractual scheme gives the option to an employee to voluntarily retire in terms of the scheme and if there is no condition that it will be effective only on acceptance of the employer, the scheme gives an enforceable right to the employee to retire by exercising his option in such a situation a provision in the contractual scheme that the employee will not be entitled to withdraw the option once made will be valid and binding and consequently an employee will not be entitled to withdraw from the option exercise."*

5. Punishment of dismissal is proportionate for bank employees on failure to discharge duty with honesty, integrity, devotion, and diligence: Andhra Pradesh HC

Case: Harinarayan Seet versus Andhra Bank, WP No. 23310 of 2011

The Andhra Pradesh High Court by relying upon the order of the Supreme Court in the case of *Chairman & Managing Director, United Commercial Bank v. P.C. Kakkar, (2003) 4 SCC 364* ("**United Commercial Bank**") has reiterated that when it comes to bank employees, the responsibility on the person is on the higher side and devotion to duty is to be utmost, and that they are mandated to exercise higher standards of honesty, integrity, devotion and diligence. If any such employee is found guilty of failure to discharge his duty with diligence, he can be meted with the dismissal from service as a proportionate punishment.

In this case, the petitioner challenged the order of dismissal from service. While serving the respondent-bank as a Deputy Manager, the petitioner was issued a charge sheet containing the allegations of serious irregularities in the appraisal of loan proposals. The respondent had submitted that the petitioner was required to make pre-sanction field visit before processing the loan, which he failed to

discharge. Upon an enquiry, the disciplinary authority found that the petitioner being a Processing Officer appraised applications for short term loans and recommended loans to farmers without making the field visits to cross check the existence and particulars of borrowers, ownership, and extent of land under cultivation and crops being raised. Also, it was established that even the pattadar passbook of a borrower was fake.

The Court, on the point of whether the punishment of dismissal imposed is disproportionate to the proved charges or not, held that in matters of banking, the responsibility on the person is on the higher side and devotion to duty is to be utmost, therefore, by placing reliance on the orders of the Supreme Court in United Commercial Bank (supra) and in *Canara Bank v. VK. Awasthy (2005) 6 SCC 321*, held that *"Once it is recorded, concurrently, that the petitioner being the employee of the bank and having failed to discharge his duty in processing in the matter of grant of loans which were found to be in the names of fake pattadars, considering the finding of proved guilt recorded concurrently by the disciplinary as also by the appellate authority, the punishment of dismissal cannot be said to be disproportionate to the proved charges."*

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