

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on February 04, 2014

Judgment Delivered on February 12, 2014

+ **W.P.(C) 2165/2013**

ASSISTANT PROVIDENT FUND COMMISSIONER

..... Petitioner

Represented by: Mr.R.C.Chawla, Advocate

versus

M/S JHALANI TOOLS (INDIA) LTD.

..... Respondent

Represented by: Mr.Arun Bhardwaj, Sr. Advocate
with Mr.Aman Vachher,
Mr.Ashutosh Dubey and
Mr.Abhishek Chauhan, Advocates

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The Assistant Provident Fund Commissioner, Faridabad ('Commissioner', in short) has filed the present writ petition challenging the order dated March 05, 2013 passed by the Employees' Provident Fund Appellate Tribunal, New Delhi ('Tribunal', in short) in A.T.A. No. 581 (16) 2005 which is an appeal filed by the respondent against the order dated April 26, 2005 passed by the Commissioner under Section 7-B of the Employees Provident Fund and Misc. Provisions Act, 1952 ('Act' in short), whereby the Tribunal has found the appeal filed by the respondent within limitation as it was filed after 58 days of the passing of the impugned order dated April 26, 2005, and thereby rejected the objection of the petitioner by imposing a cost of ₹ 5,000/-.

2. The brief facts are, proceedings under Section 7-A of the Act were initiated against the respondent, whereby different orders were passed for different periods. The last order was dated May 31, 2001. The total demand including under Section 14B was for ₹ 5.71 crores. The details of the demand are as under:

Sr. No.	Period	Amount Assessed u/s		Date of order
		7A	14B	
1	08/94 to 03/96	1,83,66,785		10.12.96
2	06/96 to 11/97	4,62,018		12.07.99
3	12/97 to 04/98	40,54,282		12.03.99
4	05/98 to 09/98	34,56,065		31.05.99
5	10/98 to 01/99	32,17,870		07.04.2000
6	02/99 to 10/99	83,59,042		23.06.2000
7	11/99 to 06/2000	88,27,170		28.07.2000
8	11/2000 to 03/2001	34,53,956		31.05.2001
9	10/77 to 02/83		8,53,613	17.09.85
10	06/83 to 04/84		46,968	13.03.87
11	01/84 to 88-89		19,88,251	09.10.90
Total		5,42,97,188	28,88,832	
Grand Total		5,71,86,020		

3. The respondent filed a review application under Section 7-B of the Act on March 13, 2005. The review application was dismissed by the petitioner vide its communication dated March 31, 2005. The respondent was in receipt of the said communication i.e. March 31, 2005 on April 05, 2005. A perusal of the said communication would reveal that the Competent Authority had found the review, inter alia, being not fit to be considered as in terms of the provisions contained in Para 79A of the Employees Provident Fund Scheme, 1952 read with Section 7-B of the Act, the same was not filed within a period of 45 days of the orders under Section 7-A of the Act.

4. It is noted that the respondent had filed a Company Application

No. 275/2005 in C.P. No. 18/2001, inter alia, seeking a direction against the Commissioner (RPFC) to review/re-assess the earlier ex parte/ad-hoc assessment order in view of the returns filed by the company. Suffice would it be to say that the Company Court in its order dated February 23, 2005, on the said application, had observed that if the power to review exists, the respondent can always move an application seeking review of the earlier ex parte order passed by the Commissioner and no directions are needed by the Court. The respondent withdrew the said application with liberty to file an appropriate review petition. It may also be relevant to state here, the said application was dismissed with a further observation by the Company Court that as and when such an application is filed, the Commissioner (RPFC) shall decide the same in accordance with law.

5. It is under these circumstances, a review application was preferred, a reference of which above, is made on March 13, 2005 was filed.

6. That on March 24, 2005, the respondent filed a Writ Petition numbered as 5389-5392/2005 with a plea that despite the review application filed by the respondent is pending consideration, the department is proceeding with recovery. When the writ petition came up for hearing on 04th April, 2005, the following order was passed:

“Counsel for the petitioner seeks time for taking instructions.

It is stated that the review petition u/S 7B of the

EPF & MP Act, 1952 is pending before respondent No. 1 for adjudication. The petitioner shall appear before respondent No. 1 on 20th April 2005 along with all the relevant records and the respondent No. 1 shall dispose of the review petition by a reasoned order after affording a hearing to the petitioner”.

7. Pursuant thereto, Commissioner passed an order dated April 26, 2005 in the review application, whereby, the review application was rejected. It is against this order of April 26, 2005, the respondent filed an appeal before the Tribunal on June 24, 2005.

8. I may state here that the appeal against the order passed under Section 7-A or Section 7-B and against some other provisions of the Act is filed under Section 7-I of the Act. Rule 7(2) of the Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997 require that the appeal is to be preferred within 60 days to the Tribunal. The proviso appended to the above Rule 7(2) stipulate that the Tribunal, on being satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period of 60 days, may extend the said period by a further period of 60 days. Para 79-A of the Employees Provident Fund Scheme, 1952 prescribes that a person aggrieved by the order under Sub-Section (1) of Section 7-A may apply for review of that order as provided in Sub-Section (1) of the Section 7-B of the Act. The proviso clause stipulate that no application for review of an order will be entertained by the concerned officer unless it is submitted within 45 days from the date of making such order.

9. Mr. R.C.Chawla, learned counsel for the petitioner would submit that the respondent had played a fraud on the Commissioner inasmuch as while arguing the review petition under Section 7-B of the Act on April 26, 2005, it did not disclose the fact that the review application filed by the respondent on March 13, 2005 already stood dismissed and the said aspect was communicated to the respondent vide communication dated March 31, 2005 and which the respondent received on April 15, 2005. He would further state that the reliance placed by the respondent on the order of the Company Court to the extent that the Court has directed the Commissioner to pass an appropriate order in review application, is totally misconceived. According to him, the order of the Company Court in the Company Application No. 275/2005 is only an observation to the extent that the respondent can always move an application seeking review of the ex parte order and nothing more. According to Mr. R.C. Chawla, the application was even dismissed. He also lay stress on the fact that the Company Court has observed that the Commissioner shall decide the application to be filed, in accordance with law. Mr. R.C.Chawla would further submit that the Company Court could not have extended the period of limitation as prescribed under the Act.

10. Mr. R.C.Chawla further submits that the review petition has been filed by the respondent after a period of four years and the same is beyond the period of limitation as prescribed under the Employees Provident Fund Scheme which stipulates only 45 days. Mr. R.C.Chawla states that the communication dated March 31, 2005 was received by the respondent company on April 05, 2005. The respondent was very well in the knowledge of the communication regarding dismissal of the

review application and was required to disclose the same to the Commissioner. Mr. Chawla lastly submits that there is no power of extension for filing a review beyond a period of 45 days. He further submits that similar is the provision for filing an appeal inasmuch as beyond a period of initial 60 days and thereafter, for a further period of 60 days, the limitation could not have been condoned. According to him, the appeal against the communication dated March 31, 2005 was barred by limitation and could not have been entertained. He relied upon the Judgments of this Court in the case of Shri Shyam Kamal Industries Pvt. Ltd. Vs. Union of India, 2005, VII AD (Delhi) 155; Dr. A.V. Joseph Vs. Assistant Provident Fund Commissioner and Another, 2009 Labour Industrial Cases, 2842 and S.P. Chengalvaraya Naidu Vs. Jagannath, AIR (1994) SC 853 in support of his submissions.

11. On the other hand, Mr. Arun Bhardwaj, learned Senior Counsel for the respondent would submit that the assessment made by the Commissioner on May 31, 2001 was only an ad-hoc assessment. Thereafter, the respondent made a representation dated June 09, 2003 and August 14, 2003 to the Commissioner with regard to Provident Fund dues. According to him, the Commissioner sent a reply to the respondent vide its letter dated August 26, 2003 whereby the respondent was called upon to submit the annual returns of 2002-2003. According to the learned Senior Counsel, the respondent had filed an application before the Company Court for seeking a direction against the Commissioner for re-assessing the assessment orders in view of the returns filed by the company. According to him, pursuant thereto, a review application has been filed and the Commissioner concerned,

considered the review application and passed the order dated April 26, 2005. He would further submit that when the Writ Petition Nos. 5389 - 5392/2005 came up for hearing on April 04, 2005, it was pointed out in the Court by the petitioner that the review application has been rejected vide communication dated March 31, 2005. According to him, it is under these circumstances, the learned Single Judge of this Court on 4th April, 2005 had passed the order directing the commissioner to dispose of the review petition by reasoned order after hearing the respondent. He would state after the passing of the order under Section 7-B of the Act by the Commissioner, the respondent had filed the appeal before the Tribunal within the limitation period as prescribed under the Act/Scheme. He would state that the order of the review under Section 7B has not been challenged by the Commissioner and the impugned order dated March 05, 2013 in appeal is a prima facie view taken by the Tribunal and the petitioner would still be within its right to argue on the point of limitation.

12. I have considered the rival submissions made on behalf of the parties.

13. The issue primarily which arises for consideration in this writ petition is whether the conclusion arrived at by the Tribunal in the impugned order is justified. For this, it has to be determined whether communication dated March 31, 2005, had, in fact been received by the respondent and on the strength of order dated February 23, 2005 of the Company Court in C.A. No. 275/2005, the limitation was to be overlooked and further, in view of the order dated April 04, 2005 of the

learned Single Judge of this Court in W.P.(C) No. 5389-5392/2005 de hors communication dated March 31, 2005, the review application was to be considered afresh.

14. Insofar as the order dated February 23, 2005 of the Company Court in C.A. No. 275/2005 is concerned, the same is very clear. It was only an observation that if power to review exists in Section 7-B of the Act, the respondent can always move an application seeking the review. In fact, the Company Court qualifies the observation by stating “*No directions are needed in this Court*”. In any case, the Company Court has also observed that when such an application is filed, RPFC shall decide the same in accordance with law. In no way, the observation of the Company Court can be construed to mean that the limitation has to be overlooked.

15. Insofar as the receipt of communication dated March 31, 2005 is concerned, there is no dispute on this aspect. Mr. Arun Bhardwaj, learned Senior Counsel, on a specific query had, on instructions, acknowledged the receipt of the said communication on April 05, 2005. According to him, during the hearing of the W.P.(C) No. 5389-5392/2005, the petitioner had pointed out the issuance of communication dated March 31, 2005. The learned Single Judge acknowledging the fact it being not a reasoned order, directed the disposal of the review petition by reasoned order after affording a hearing to the respondent.

16. I find there is no indication in the order dated April 04, 2005 of the learned Single Judge that the communication dated March 31, 2005 was

pointed out during the proceedings. Had it been pointed out, the learned Single Judge would have referred the same so as to justify the consideration of the review petition afresh. Rather, I find, the learned Single Judge starts the order with the observation “*Counsel for the petitioner seeks time for taking instructions. It is stated that the review petition u/S 7B of the EPF & MP Act, 1952 is pending before respondent No. 1 for adjudication*”. It is clear that the learned Single Judge proceeded on the premise that the review application is pending consideration before the Commissioner. Surely, having received the communication dated March 31, 2005 on April 05, 2005, it can be inferred that the same was not in the counsel’s knowledge at least on April 04, 2005, a day earlier. It is clear that the order dated April 04, 2005 was passed by the learned Single Judge on the premise that the review petition is still pending and without any knowledge of communication dated March 31, 2005.

17. It is relevant to note here, even on April 26, 2005 when the review application was decided, the communication dated March 31, 2005 was not brought to the knowledge of the Commissioner whereby the review petition stood rejected. Even the Commissioner had not taken care to look into the aspect that the review application already stood rejected vide communication dated March 31, 2005. There is no provision of review of a review order. It is clear that the rejection of the review application vide communication dated March 31, 2005 has been concealed by the respondent herein. The review application having been decided vide communication dated March 31, 2005, the respondent was required to challenge the said communication.

18. Before I conclude, I note for benefit that the ratio of the judgment of the Supreme Court in the case of *S.P. Chengalvaraya Naidu (supra)* relied upon by the learned counsel for the petitioner would be applicable in the facts of this case. Even if the dismissal of review was not noted by the Commissioner, surely, the respondent should have brought to the knowledge of the Commissioner about the rejection of the review vide communication dated March 31, 2005. Insofar as the Judgment of the Division Bench of this Court in *Shri Shyam Kamal Industries Pvt. Ltd. (supra)* is concerned, suffice would it be to state, the Division Bench has set aside the order of the Tribunal wherein, the Tribunal has condoned the delay in filing the appeal, by holding as under:

“25. In the instant case, a separate period of limitation is provided, as also the period for which delay can be condoned. The Legislature was aware about the provisions contained in Section 5 of the Limitation Act, yet with an intention to curb the delay in labour matters, legislature left it to the Rule making authority to make a provision for limitation. Rule making authority under the Statute has specifically provided that after the statutory period, if there is delay of 60 days, on showing sufficient grounds for delay of 60 days, that can be condoned. Thus applicability of Section 5 of the Limitation Act is specifically excluded”.

19. Insofar as the Judgment in the case of *Dr. A.V. Joseph (supra)* is concerned, the Kerala High Court held that there is no provision available, enabling the reviewing authority to condone the delay. It was

also held, when Statute conferred power on the authority to condone the delay only to a limited extent, it can never be widened by any Court contrary to intention of the law makers.

20. Surely, the right to challenge the said communication cannot be taken away. I accordingly set aside the impugned order dated March 05, 2013, permitting the respondent to challenge the communication dated March 31, 2005 by amending the appeal. The application for amendment shall be filed by the respondent on or before February 28, 2014 and the pleadings thereof, including reply and rejoinder shall be filed by the petitioner and respondent within three weeks and two weeks thereafter. The Tribunal shall dispose of the appeal latest by May 31, 2014, considering all the pleas to be taken by the parties in the pleadings including the point of limitation in accordance with the law. The parties to file an application before the Tribunal, for revival of the appeal, which was directed to be adjourned sine die by this court while reserving the writ petition for judgment on February 04, 2014.

21. The writ petition is disposed of in terms of the above. No costs.

C.M No.4113/2013

In view of the order passed in the writ petition, this application is also disposed of as infructuous.

(V.KAMESWAR RAO)
JUDGE

FEBRUARY 12, 2014

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