

3. The facts necessary to be explicated are that on 22nd October, 2020, the Enforcement Officer addressed an email to the Petitioner's establishment directing production of certain records for verification on 28th October, 2020. The Petitioner did not comply with the said requisition. On 6th August, 2021, show cause notice was issued by the Respondent No 2 for non production of records as directed by Enforcement Officer and directing the Petitioner to submit the required records as demanded by the Area Enforcement Officer within the period of 15 days and to show cause within 15 days of the receipt of the notice as to why action should not be taken under the provisions of EPF Act in the event of non-compliance of the notice. By response dated 4th October, 2021, the Petitioner sought time of 30 working days to submit the records as called by the Area Enforcement Officer.

4. On 31st October, 2022 notice was issued by the office of Respondent No. 2 under section 7A of the EPF Act stating that Respondent No. 2 has reasons to believe that the Petitioner had failed to remit the employees share of Provident Fund contribution, pension fund contribution, the administrative/inspection charges and insurance fund contribution as well as employers share of contribution for the period from September, 2015 to March, 2022 within the prescribed period and it is deemed necessary to conduct an inquiry under section

7A(1) of the EPF Act. The notice summoned the Petitioner to appear before Respondent No. 2 on 10th November, 2022 to give evidence and to produce all the relevant records for determination of due amount. By communication dated 14th November, 2022 and 15th December, 2022 the Petitioner submitted the documents pertaining to the Petitioner's establishment.

5. The Petitioner submitted an application on 30th January, 2023 objecting to the maintainability of initiation of the proceedings under section 7A and by order dated 27th March, 2023, the Petitioner's application came to be dismissed leading to filing of Writ Petition (St.) No. 1075 of 2023. Vide order dated 24th April, 2023, this Court disposed of the Petition directing the Respondent No. 2 to ensure that copies of all materials proposed to be relied upon against the Petitioner including three complaints which are set out in paragraph 6 of the order dated 27th March, 2023 and any other complaints including all materials proposed to be used be furnished to the Petitioner. It further directed that the Petitioner's maintainability application and arguments to be heard first without requiring separate application for that purpose.

6. In compliance of the said order, by email dated 28th April, 2023 the copies of three complaints dated 28th January, 2019, 1st April, 2019 and

21st January, 2023 were forwarded to the Petitioner. The Petitioner called upon the Enforcement Officer to confirm that the complaints are the only documents on which reliance would be placed by the Respondents, to which there was no response. The Respondent No 2 conducted the hearing on the maintainability of proceedings and application was dismissed by the impugned order.

7. Mr. Cama, learned counsel appearing for the Petitioner submits that though required by law and mandated by order of this Court, the Petitioner was not supplied with all relevant documents. He points out that the show cause notice dated 6th August, 2021, which directed production of record refers to Area Enforcement Officer's inspection report dated 28th June, 2021 which was not furnished to the Petitioner. He submits that the initiation of proceedings under Section 7A of EPF Act is in violation of the department's own guidelines and circulars. He has taken this Court through the guidelines dated 6th August, 2014, 8th February, 2016, 14th February, 2020 and 19th January, 2021. Drawing attention of this Court to the guidelines of 14th February, 2020, he submits that it specifically provides that the inquiry under section 7A shall not be initiated on the ground of non submission of returns, non production of reports and non cooperation of inspection etc. as the same are not reasons within the sweep of section 7A and do not

constitute sufficient basis for initiating proceedings under section 7A. He submits that the show cause notice which was issued on 6th August, 2021 was for production of documents and the notice issued under section 7A was based on the show cause notice dated 6th August, 2021. which, according to department's own guidelines, do not fall within the sweep of section 7A of the EPF Act. He submits that it was also not noticed that all the relevant documents were subsequently produced by the Petitioner.

8. He would further take this Court in detail through the findings of the Respondent No. 2 in the impugned order and would submit that the order makes reference to the complaints received against the establishment from the Member of Parliament, the General Secretary of Mazdoor Karmachari Sabha and President of Aurangabad Mazdoor Union. He would submit that except the purported complaint of the Member of Parliament, other complaints were not taken into consideration and therefore do not form the basis of initiation of Section 7A inquiry. Drawing attention of this Court to the complaint dated 28th January, 2019 by the Member of Parliament, he would submit that the said complaint only requested the department to provide certain details of recovery of earlier sum from the Petitioner and the status of further enquiry, if any. He would submit that the guidelines of

14th February, 2020 provides that the mere complaint in itself does not constitute *prima facie* evidence sufficient to initiate inquiry under section 7A of the EPF Act which is required to be investigated by the Enforcement Officer under section 13(1) of the EPF Act and substantiated on the basis of admissible evidence gathered during the investigation.

9. He would further submit that based on the adjudication order of the period from April, 2003 to March, 2011, the Respondent No. 2 has drawn an adverse presumption of default which does not constitute *prima facie* case of default as mandated by the guidelines issued by the department. He would further submit that impugned order observes that on account of persistent failure and non cooperation, present proceeding under section 7A of the EPF Act are initiated, which is contrary to the guidelines. He submits that except three complaints, no other documents/material was furnished to the Petitioner and the adverse presumption of default has been drawn on the basis of adjudication proceeding pertaining to period 2003 to 2011 which does not even find a mention either in the show cause notice or notice issued under section 7A of the EPF Act. He would further submit that in the affidavit in reply filed by the Respondents in present proceedings, it is the Respondent's own case that the proceeding under section 7A of the

EPF Act have been initiated for non-production of the records. In support, he relies upon the following decisions:

(1) **State Bank of India and Ors. vs. Rajesh Agarwal and Ors.**¹

(2) **Ayyappa Bharamappa Kadiwal vs. President, Local Governing Council, Arts & Commerce College, Ambad, Dist. Jalna and Ors.**²

10. *Per contra*, Ms. Bharucha, learned counsel appearing for the Respondents has taken this Court in detail through the reply affidavit and would submit that the Petitioner's establishment is habitual defaulter. She would further point out the pleadings in paragraph 16 and 25 of the reply affidavit to contend that the case of the department is that on account of persistent failure in submission of records and non co-operation, the proceedings have been initiated under Section 7A of the EPF Act. She would support the impugned order by pointing out the findings as regards the earlier default for the period 2003 to 2011 taken to the Hon'ble Delhi High Court which directed pre-deposit of the amount as well as the default covering the period from 2011 and 2015 of almost 180 Crores as against which an Appeal is under consideration of the Hon'ble CJIT. She submits that there is conformity with the guidelines as adverse presumption of default has been drawn.

1 SCI, Civil Appeal No. 7300/2022, Dt.27/03/2023.

2 2000 (4) Mh.L.J. 470.

11. I have considered the submissions and perused the record.

12. The objection to the maintainability of the proceedings under Section 7A of the EPF Act is premised on the non conformity with the guidelines issued by the department. It is well settled that the relevant circulars issued by the Employees Provident Fund Organisation cannot be ignored and so long as the circulars are in force, they are binding on the authorities. The Respondent No 2 is conscious of this position and has accepted the same as noted in the impugned order. Before proceeding further, it will be relevant to distill the procedure and requirements as set out in the guidelines to address the challenge of non conformity with the said guidelines.

13. The department had issued guidelines for initiation of quasi judicial proceedings under Section 7A of EPF on 6th August, 2014, which are summarized as under:

(a) The inquiry to be initiated only after receiving actionable and verifiable information. The source may include verifiable complaints received from public and report of Enforcement Officer.

(b) The authorised officer on receipt of information to issue notice to the establishment enclosing the information which

forms basis of the notice and if no response is received the Enforcement Officer to investigate and file a report in prescribed format.

(c) The investigation report of Enforcement Officer to be examined by Compliance Branch to decide whether any case is made out for initiation of inquiry. If the recommendation is in the affirmative, the same to be forwarded to the Assessing Officer for initiation of inquiry under Section 7A.

(d) The inquiry to be initiated if prima facie case exists on the basis of the said report.

(e) The notice under Section 7A to be accompanied by the documents on the basis of which an enquiry is proposed to be conducted in prescribed format.

14. In continuation of the guidelines of 6th August, 2014, further instructions were issued by circular dated 8th February, 2016 mandating serving the establishment with the documents forming basis of initiation of inquiry such as Enforcement Officer's report alongwith Section 7A notice. In order to bring uniformity in the procedure for initiation of inquiries under Section 7A, by circular dated 14th February, 2020, the following procedure is laid down:

(a) Non production of records, non submission of returns etc are

not reasons within the sweep of Section 7A and do not constitute sufficient basis for initiation proceedings under Section 7A.

(b) Existence of prima facie is required for initiating proceedings under Section 7A and before initiating process under Section 7A, the Assessing Officer shall record reasons in file regarding existence of prima facie case of default.

(c) The complaint, if source of information, is required to be investigated under Section 13(1) of EPF Act and substantiated on basis of admissible evidence gathered during investigation and tendency to initiate inquiry on basis of complaints alone is legally untenable and must be avoided.

15. By circular dated 19th January, 2021, it was reiterated that where ever inquiries/proceedings are initiated, Adjudicating Officers must record reasons *qua* existence of prima facie case before commencing any inquiry proceedings under the Act.

16. Now if we turn to the facts of the present case, the show cause notice dated 6th August, 2021 called upon the Petitioner to produce the records as demanded by the Area Enforcement Officer. Subsequently, on 31st October, 2022 proceedings were initiated under section 7A of the EPF Act. In the reply Affidavit, the Assistant Provident Fund

Commissioner has stated that three complaints were received against the establishment for which inspection was ordered through jurisdictional Enforcement Officer who submitted his report dated 28th June, 2021 that he had sought submission of relevant records which was not done and show cause notice was issued on 6th August, 2021. The reply affidavit states that complete record required from the establishment as per notice was not submitted and therefore inquiry under Section 7A of EPF Act was initiated against the establishment. Paragraph 16 and 25 of the reply Affidavit reiterates that on account of persistent failure in submission of records and non-co-operation in the investigation, the inquiry proceedings under Section 7A were initiated. The impugned order while setting out the facts of the case observes that non furnishing of documents has led to initiation of proceedings under Section 7A.

17. The pleadings in the reply Affidavit and the observations in the impugned order leaves no manner of doubt that the basis for initiation of Section 7A inquiry was non production of the records, which the circular of 14th February, 2020 holds to be insufficient for initiating proceedings under Section 7A of EPF Act. The foundation of Section 7A proceedings has been rendered vulnerable for being non-compliant with the department's own directives.

18. The show cause notice dated 6th August, 2021 was in turn based on three complaints received against the Petitioner. The reply Affidavit and the impugned order records that the complaint by the Member of Parliament was forwarded to the office of the Respondent No 2 for further investigation. The circular dated 6th August, 2014 permits the verifiable complaints received from general public to constitute source for investigation and/or enquiry. The procedure set out in the circulars first requires the Enforcement Officer to investigate the complaint, then to submit the report to the Compliance Branch and the investigating report alongwith the observations of the Compliance Branch to be forwarded to the Assessing Officer for initiation of inquiry under Section 7A. The circular directs that no inquiry is to be initiated unless *prima facie* case exists.

19. The reply Affidavit states that the jurisdictional inspector was directed to investigate the complaint who submitted report dated 28th June, 2021 informing that no records were submitted for inspection. The investigation by Enforcement Officer contemplated is as per provisions of Section 13(1) of EPF Act, which vests the inspector with investigating power of checking the correctness of the information provided under the Act, verifying compliance by the employers and for the said purpose to enter and search an establishment, examine and

make copies of relevant book, register etc. The complaint, even if received by the department, has to be substantiated by investigation and on the basis of admissible evidence gathered during the investigation.

20. The investigation done in the present case by Enforcement Officer was only to address a communication to the Petitioner to produce records and such report can by no stretch of imagination be said to substantiate the complaint received against the establishment. The reply Affidavit is completely silent as to whether the report was forwarded to the Compliance Branch and thereafter forwarded to the Assessing Officer along with the observations of the Compliance Branch. From the material on record, it appears that the complaint was received from the Member of Parliament which was acted upon with promptitude by directing the investigation. No investigation was carried out under Section 13 of the EPF Act and as no records were produced, show cause notice dated 6th August, 2021 was issued for production of records and due to non production of records, notice under Section 7A was issued. There is a complete departure from the directives laid down in the circular of 6th August, 2014 which sets out a three tier mechanism before initiation of inquiry under Section 7A. The initiation of inquiry is to be preceded by an investigation report by Enforcement Officer, recommendations of the Compliance Branch on the investigation report

and existence of *prima facie* case. From the pleadings, it is evident that there is no investigation by Enforcement Officer, no recommendation of Compliance Branch and no finding of existence of *prima facie* case. The initiation of inquiry was based on mere complaint without the same being substantiated, which was precisely cautioned against by the circulars of the department.

21. Further non compliance of the guidelines/circulars is demonstrated from the fact that the notice issued under Section 7A on 30th October, 2022 is not in the prescribed format of Annexure A , as it fails to annex the copies of the report of Enforcement Officer. The notice was required to be accompanied with documents constituting basis for initiation of inquiries which was also directed by the Hon'ble Division Bench by its order dated 24th April, 2023. What was furnished to the Petitioner were copies of the complaint and not the report of the Enforcement Officer which was mandated to be furnished by circular of 8th February, 2016.

22. As per the applicable department circulars, the *sine qua non* for initiation of inquiry is existence of *prima facie* case to be ascertained on the basis of the investigation report and recommendation/observation of the Compliance Branch. Neither the reply affidavit nor the

submission of learned counsel for the Respondents speaks of such report being placed before the Assessing officer.

23. In the impugned order, the Respondent No. 2 has accepted the binding force of the guidelines issued by the department. The Respondent No. 2 formulated the correct proposition which arose for consideration as to whether initiation of present proceedings under section 7A is inconsistent with the department's guidelines however failed to notice the non-compliance of the pre-requisites for initiation of inquiry as set out in the guidelines.

24. The observation by Respondent No 2 that on account of persistent default in submission on records and non cooperation of investigation, the present proceedings under section 7A of the Act were initiated through the notice in question, ought to have resulted in terminating the proceedings being in breach of the guideline/circulars which clearly specifies that non production of records does not come within the sweep of Section 7A and does not constitute sufficient basis for Section 7A inquiry. The Respondent No. 2 has glossed over the relevant circular to uphold maintainability of proceedings.

25. The basis for rejection of the maintainability application as

evident from the impugned order are the previous adjudication orders covering the period April, 2003 to March, 2011 and April, 2011 to August, 2015, which issues are sub-judice. There is no mention of these adjudication orders either in the show cause notice or Section 7A notice or any report of the Enforcement Officer. The order of Division Bench of this Court dated 24th April, 2023 specifically directed furnishing of all material on which reliance would be placed by the department. These adjudication orders which formed the basis for rejecting the maintainability application find place directly in the impugned order without any opportunity to the Petitioner to respond or submit any explanation to the same. The circular of 6th August, 2014 permits the authorised officer to examine the compliance history of the establishment during the inquiry, however the same cannot form the basis for drawing adverse presumption of default. The requirement was of existence of prima facie case which requirement was to be met before initiation of inquiry and not an adverse presumption of default during the inquiry proceedings.

26. The basis of initiation of inquiry is stated to be the complaint received from the Member of Parliament. Mr. Cama is right in submitting that the complaint of the Member of Parliament which is referred in the impugned order merely requests for certain information

to be provided and does not constitute a complaint alleging default on part of the establishment. In any event, even if a complaint is received, the same could not form the basis for initiation of inquiry but had to be investigated to arrive at a prima facie case of existence of default before initiation of inquiry.

27. The initiation of the inquiry under Section 7A falls foul of the binding guidelines and circulars issued by the department and the proceedings are therefore not maintainable. Surprisingly, the decisions cited by the Petitioners before the Respondent No 2 have been annexed to the Respondent's Affidavit in reply. Though annexed, there is no submission canvassed as to the relevancy of these decisions to the case of the Respondents.

28. In the light of the above, as the initiation of inquiry under section 7A of the EPF Act was non compliant with the binding guidelines issued by the department, the proceedings are not maintainable. Resultantly, the impugned order is unsustainable and is hereby quashed and set aside. The impugned notice dated 31st October, 2022 initiating inquiry under section 7A of the Act is quashed and set aside. It is open for the Respondents to initiate fresh inquiry against the Petitioner after complying with the binding guidelines issued by the department.

29. In the light of above, the Petition succeeds and is allowed in terms of prayer clause (a) and (b). Rule is made absolute.

(SHARMILA U. DESHMUKH, J.)