IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

FRIDAY, THE 18TH DAY OF SEPTEMBER 2015/27TH BHADRA, 1937

WP(C).No. 34485 of 2010 (I)

PETITIONER :

L.KUNJUKUNJU,
PROPRIETOR, CHAKKUPURAKKAL P.O., KUNNICODU
KOLLAM-691 508.

BY ADVS.SRI.A.V.XAVIER
SRI.K.JOLLY JOHN

RESPONDENT(S) :
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1. THE REGIONAL PROVIDENT FUND COMMISSIONER-II
EMPLOYEES' PROVIDENT FUND ORGANISATION
SUB REGIONAL OFFICE, CHINNAKKADA, KOLLAM-691 001.

2. THE ASST. PROVIDENT FUND COMMISSIONER
EMPLOYEES' PROVIDENT FUND ORGANISATION
SUB REGIONAL OFFICE, KOLLAM-691 001.

R1 & R2 BY ADVS. SRI.PIRAPPANCODE V.S.SUDHIR,SC
SRI.V.V.SURESH, SC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 18-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Mn

WP(C).No. 34485 of 2010 (I)

APPENDIX

PETITIONER'S EXHIBITS :

EXT.P1	:	COPY OF THE PROCEEDINGS/ORDER DATED 26-6-09 OF THE 2ND RESPONDENT.
EXT.P2		COPY OF THE PROCEEDINGS/ORDER DATED 8-9-10 OF THE 2ND RESPONDENT.
EXT.P3		COPY OF THE 7A PROCEEDINGS/ORDER DATED 19.11.2008.
EXT.P4		COPY OF THE INTERIM ORDER DATED 1.10.2009.
EXT.P5		COPY OF THE IA NO. 2935/2012 IN WP(C) NO. 5774/2009 DATED 22.2.2012.

RESPONDENT'S EXHIBITS : NIL

//TRUE COPY//

P.A. TO JUDGE

Mn

ANU SIVARAMAN, J.

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W.P. (C) No.34485 of 2010

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Dated this the 18th day of September, 2015

<u>J U D G M E N T</u>

Petitioner is the proprietor of an establishment engaged in business of processing and trading in cashew-nuts. The establishment is covered under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (*hereinafter referred as "the Act"*).

2. It is stated that a determination order under Section 7A of the Act was issued to the petitioner on 20.04.2009. The petitioner had preferred an application for the review of the order issued under Section 7B of the Act. It is submitted that on the review application, a report of inspection of the Enforcement Officer was called for and an enquiry was conducted by the 1st respondent. Thereafter, by Ext.P1 order dated 30.06.2009, the application for review was accepted, 7A assessment order dated 20.04.2009 was reviewed under Section 7B of the Act and the assessment in respect of the establishment on the omitted wages was reviewed and calculated at Rs.1,22,120/-. The petitioner was directed to remit the said amount within 15 days on receipt of

Ext.P1. It is submitted that the amount was duly remitted by the petitioner. Thereafter, after more than a year, Ext.P2 order has been passed on the self same review application which was decided in Ext.P1. In Ext.P2, it is stated that Ext.P1 order dated 26.06.2009, was an order admitting 7B review petition partially. It is further stated that dues in respect of omitted wages amounting to Rs.1,22,120/- for the period from 08/2004 to 03/2006 were “assessed partly” under Section 7B reserving the right to reassess after verification of records. It is stated that an Enforcement Officer was deputed to conduct an inspection and report dated 20.07.2009 had been obtained from him. Thereafter, the 1st respondent had proceeded to hold that petition under Section 7B can be entertained only if the employer has any new information or facts which could not be produced by him during the enquiry under Section 7A. It is further stated that since no new material has been produced by the petitioner, 7B application is finally rejected and the assessment dated 20.04.2009 under Section 7A is upheld. In the above view of the matter, remittance of a further amount of Rs.15,45,563/- is demanded by Ext.P2 proceedings.

3. Counter affidavit has been filed on behalf of respondents stating that the order under Section 7A dated 20.04.2009 had been subjected to a review, pursuant to an application preferred by the petitioner. It is stated that by Ext.P1 order, order under Section 7A dated 20.04.2009 was set aside under Section 7B partially on the condition that the records called for should be produced for final assessment. The petitioner was directed to remit Rs.1,22,120/- as EPF dues, which he did. Subsequently, it is reported by the Enforcement Officer who visited the establishment reported that petitioner had failed to produce the original documents requested for verification and therefore Ext.P2 order was passed rejecting the 7B application finally and confirming the order passed under Section 7A.

4. Heard, Sri. A.V. Xavier, learned counsel appearing for the petitioner and Sri. Pirappancode V.S.Sudhir, learned standing counsel appearing for the respondents.

5. I have considered the arguments and the materials on record and the contentions advanced on either side. It is clear from Ext.P1 that the petitioner had made an application for review of the order passed under Section 7A on 23.04.2009 before the 1st

respondent. This review application was considered by the 1st respondent on 26.06.2009. It is stated that the copy of the inspection report of the Enforcement Officer who conducted an inspection dated 15.10.2008 and reported that omission of wages which formed the basis of the order under Section 7A had not been given to the establishment even though requested by it. In the above circumstances, the 1st respondent found that the assessment made based on the wages taken as per the unauthenticated calculation of wages from a retrospective date is excessive. It is further stated that no records of wages were verified by the authority to arrive at the wages payable by the employer since August, 2004.

6. In the above circumstances, on the basis of the arguments made by the learned counsel for the petitioner and on the basis of the report of the Enforcement Officer, the Section 7A assessment order was set aside and reassessment of the dues was made under Section 7B of the Act. The amount so arrived at was paid by the petitioner also. There is nothing in Ext.P1 to show that it was a provisional or partial assessment order or that any further step was required to be taken by the petitioner in the

matter. It appears from a plain reading of the order that this was an order passed under Section 7B of the Act and the amounts payable have been reassessed and determined under Ext.P1 order.

7. It is thereafter that Ext.P2 order has been issued. The petitioner has a specific case that no notice preceded Ext.P2 order. It is stated in Ext.P2 that what was ordered in Ext.P1 was only an admission of the application for review under Section 7B and a “partial assessment” of the amounts payable by the petitioner. It is stated that the Enforcement Officer had submitted a report on 20.07.2009 to the effect that the petitioner had not produced any further document to support his contentions made in the application for review under Section 7B. It is also stated that since no new information has been produced before the Enquiry Authority which could not be produced at the time of 7A enquiry, there is no reason to hold that the order under Section 7A was vitiated. It is in above circumstances that the order rejecting the Review Petition dated 09.06.2009 under Section 7B and upholding the earlier assessment is passed. Section 7A(1) and 7B of the Act are extracted below:

*"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.

*7B. **Review of orders passed under Section 7A**. - (1) Any person aggrieved by an order made under sub-section (1) of section 7A, but from which no appeal has been preferred under this Act, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of such order may apply for a review of that order to the officer who passed the order:*

Provided that such officer may also on his own *motion review his order if he is satisfied that it is necessary so to do on any such ground.*

(2) Every application for review under sub-section (1) shall be filed in such form and manner and within such time as may be specified in the Scheme.

(3) Where it appears to the officer receiving an application for review that there is no sufficient ground for a review, he shall reject the application.

(4) Where the officer is of opinion that the application for review should be granted, he shall grant the same:

Provided that, -

(a) no such application shall be granted without previous notice to all the parties before him to enable them to appear and be heard in support of the order in respect of which a review is applied for, and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be produced by him when the order was made, without proof of such allegation.

(5) No appeal shall lie against the order of the officer rejecting an application for review, but an appeal under this Act shall lie against an order passed under review as if the order passed under review were the original order passed by him under section 7A."

8. After going through the pleadings and the materials on record as well as provisions of Sections 7A and 7B of the Act, I

am of the opinion that there was no occasion for the 1st respondent to pass an order admitting the review application and "partially assessing" the dues of the petitioner under Section 7B of the Act. No such course of action is contemplated by the provisions of Section 7B. It is also seen from Ext.P2 order that no notice was issued to the petitioner preceding the order. Ext.P1 order on the review application preferred by the petitioner having become final, no order in the nature of Ext.P2 was warranted or could have been issued by the 1st respondent. Ext.P2 order is therefore set aside. Ext.P1 shall stand confirmed.

The writ petition is allowed as above.

Sd/-
ANU SIVARAMAN,
JUDGE

DST

//True copy//

P.A. To Judge