

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

% **Reserved on: 19th February, 2015**
Date of Decision: 11th March, 2015

+ W.P.(C) 7182/2013

FOOD CORPORATION OF INDIA,
DIRBA, SANGRUR (PB)

..... Petitioner

Through: Mr. Rajeev Sharma, Advocate.

versus

REGIONAL PROVIDENT FUND COMMISSIONER,
BATHINDA (PB)

..... Respondent

Through: Mr. D. Rajeshwar Rao,
Advocate.

CORAM:
HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By way of present petition, the petitioner assails the order dated 21.12.2012 passed by learned Employees' Provident Fund Appellate Tribunal, New Delhi (for short, 'EPF Appellate Tribunal') in ATA No.523(11) 2008.

2. Shorn off unnecessary details, the facts of the case are that the petitioner applied for the EPF Code number and the respondent allotted the PF Code No.12603 to it. The petitioner had since been paying its provident fund dues regularly and punctually in respect of its employees. The enforcement officer vide its inspection report dated

09.12.1996 confirmed about inspection of the EPF records for the period from 12/1991 to 11/1996 and it was observed in the said report that the EPF dues were correctly deposited by the petitioner on 30.12.1996. Vide inspection report dated 24.03.1998 of the enforcement officer, it was confirmed that the PF Account records for the period 12/1996 to 02/1998 had been inspected and the due amount was paid except for a sum of Rs.503/-. Vide inspection report dated 09.01.1999 of the enforcement officer, it was confirmed that PF Accounts were inspected for the period 03/1998 to 12/1998 and as per records, no work had been done during 04/1998, 09/1998, 10/1998 and 11/1998 and only minimum administration charges were to be deposited. It was also confirmed that the calculation of Provident Fund has been correctly done as per provisions of the EPF Scheme. Vide letter No.F.10(17)/EPF/KHN/98/22021 dated 26/30.03.1999, the enforcement officer confirmed that on inspection of the EPF record for the period from 12/1991 to 12/1998 it was found that there were arrears of Rs.14/- for the period from 12/1991 to 11/1996 which was thereafter deposited vide DD No.523760 dated 04.02.1997 and deficit of Rs.503/- for the period from 12/1996 to 02/1998 was deposited vide DD No.64706 dated 28.04.1998 and deficit of Rs.28/- for the period from 03/1998 to 12/1998 was deposited vide Challan dated 25.03.1999. The petitioner also requested the Regional Provident Fund Commissioner, Chandigarh to confirm and intimate whether there were still any dues/ penalty against the HTC for the period 12/1991 to 12/1998, within 30 days of the receipt of the aforementioned letter otherwise, it would be presumed that nothing more was due and FCI would not be responsible towards any liability.

3. The enforcement officer vide inspection report of 1999 confirmed that the PF accounts were inspected for the period from 01/1999 to 06/1999 and it was found that EPF dues were deposited for the said period except Rs.28/- towards administrative charges to be deposited within 3 days positively. Thereafter, vide inspection report dated 13.06.2000, it was confirmed that PF accounts were inspected for the period 15.06.1999 to 04/2000 and it was found that EPF dues were deposited for the said period except for a sum of Rs.21/- towards administrative charges. Again, vide inspection report dated 21.03.2002 it was confirmed that the PF accounts were inspected for the period from 02/2001 to 06/2001 and it was found that EPF dues were deposited for the said period except Rs.21/- towards administrative charges which the petitioner was asked to deposit.

4. The enforcement officer vide inspection report dated 29.04.2003 confirmed that the EPF dues for the period from 04/2002 to 06/2002, 10/2002, 12/2002 and 02/2003 have been correctly deposited by the petitioner.

5. Vide letter No.F.10(17)/EPF/Khanauri/03/6006 dated 01.05.2003, the petitioner informed to the respondent that the enforcement officer had inspected the EPF record for the period from 03/2002 to 02/2003 in respect of FSD Khanauri and a deficit of Rs.42/- was found which was deposited vide Challan dated 30.04.2003. The respondent was further requested to confirm and intimate if there were still any dues/ penalty pending against HTC for the said period within 30 days, otherwise it would be presumed that nothing more was due and FCI would not be responsible towards any

liability and arrears/ security of the contractor lying with FCI would be released after 30 days. The HTC contractor vide letter dated 17.03.2005 confirmed that his contract was from 15.06.2003 to 14.06.2005 and he had deposited the EPF dues for the said period.

6. The petitioner vide letter dated 18.03.2005 apprised the respondent that nothing with regard to EPF dues was pending and requested the respondent to verify and confirm if any additional amount was due against the contractor or not for processing the case further for release of their pending dues.

7. The respondent vide letter No.PN/12603/A/S dated 30.03.2005 confirmed that the enforcement officer had already verified the EPF accounts and the amount from 15.06.2003 to 28.02.2005 had been deposited correctly.

8. The petitioner vide letter dated 20.05.2005 further apprised the respondent that no EPF dues were pending and requested the respondent to confirm and intimate if any amount was due against the contractor. The respondent vide letter No.PN/12603/1303 dated 31.05.2005 confirmed that the EPF dues for the period from 15.06.1999 to 14.06.2001 had been deposited correctly.

9. The petitioner vide letter dated 22.06.2005 requested the respondent to verify and confirm if any amount was due against the contractor or not for the above said period. The respondent vide letter No.PN/12603/ dated 16.11.2005 confirmed that EPF dues for the period from 01.03.2005 to 14.06.2005 had been deposited.

10. The respondent vide letter No.1(20)/Legal Cell/BTI/4488 dated 11.07.2002 confirmed that the applicability of the EPF Act to FCI, Punjab has been struck down by the EPF Appellate Tribunal and the petitioner's organization stands "excluded" from the provisions of the EPF Act.

11. The respondent sent letter No.SRO/BTI/DMG/PN/12603/6198 dated 23.10.2007 to the petitioner under Section 14B of the EPF Act detailing the amount due under Section 14B and 7Q of the EPF Act as against the petitioner. The said show-cause notice was duly replied to by the petitioner vide its reply dated 26.11.2007. Finally, vide impugned order No.SRO/BTI/DMG/PN/12603/2666 dated 20.06.2008 the respondent levied damages and interests on the petitioner and directed the petitioner to deposit an amount of Rs.2,00,207/- (Rupees Two lakhs two hundred and seven) along with an interest of Rs.11,154/- (Rupees Eleven thousand one hundred and fifty four) within fifteen days of receipt of the said order by the petitioner, failing which, it was directed, that proceedings under Section 8 of the EPF Act would be initiated against the petitioner.

12. Aggrieved by the said order, the petitioner filed an appeal under Section 7-I of the EPF Act on 22.07.2008. Vide order dated 16.03.2011 the EPF Appellate Tribunal allowed the appeal of the petitioner and set aside the order dated 20.06.2008.

13. Against the said order an application under Section 7-L(2) read with Section 21 of the EPF Act dated 19.04.2011 was filed by the respondent. The said application for review was heard and decided by

impugned order dated 21.12.2012 passed by learned EPF Appellate Tribunal.

14. Learned counsel for the petitioner contended that the impugned order dated 21.12.2012 is bad in law and is beyond the jurisdiction and scope of Section 7-L(2) of the EPF Act. Section 7-L of the EPF Act gives limited power of review by way of amendment and the order so passed by exercising the power under the said section cannot be inconsistent to the main order. The power of review as provided under the said Section can only be exercised to rectify the mistake or error which is apparent on the face of record. A review petition cannot be permitted to operate as an appeal. The jurisdiction to set aside an erroneous judgment lies with the next higher court or the appellate court when the matter is brought before it, in a proper appeal.

15. It was further contended on behalf of the petitioner that while passing the impugned order, the EPF Appellate Tribunal nowhere mentioned that there was any error on the face of record which needed any review.

16. Lastly, it was contended by learned counsel for the petitioner that in the review application the respondent nowhere mentioned about the impleadment of contractor as a party to the proceedings. The EPF Appellate Tribunal passed the impugned order beyond the pleadings and remanded the matter to the respondent to conduct fresh inquiry without considering the limited power it possessed under Section 7-L of the EPF Act.

17. *Per contra*, learned counsel for the respondent urged that the impugned order was passed in accordance with law after due consideration of submissions of both the parties. The main ground on which the EPF Appellate Tribunal reviewed its order dated 16.03.2011 was that the contractor engaged by the petitioner was not made a party either before the Provident Fund Commissioner or the Tribunal. In the absence of a contractor who was a necessary and proper party for adjudication of the dispute in question, the Tribunal was well within its powers to remand the matter back by means of the impugned order. There was an error apparent on the face of record, which necessitated the review of the earlier order.

18. I have bestowed my thoughtful consideration to the submissions made by learned counsel for the parties and have also perused the material on record.

19. Before examining the rival submissions made by learned counsel for the parties, it is necessary to consider the provisions of Section 7-L of EPF Act which is relevant to the case before this court and reads as under: -

“7L. Orders of Tribunal – (1) A Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against or may refer the case back to the authority which passed such order with such directions as the Tribunal may think fit, for a fresh adjudication or order, as the case may be, after taking additional evidence, if necessary.

(2) A Tribunal may, at any time within five years from the date of its order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendment in the order if the mistake is brought to its notice by the parties to the appeal:

Provided that an amendment which has the effect of enhancing the amount due from, or otherwise increasing the liability of, the employer shall not be made under this sub-section, unless the Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

(3)

(4)”

20. From a bare perusal of Section 7-L(1) of the EPF Act it is manifestly clear that it confers powers to the Tribunal to decide the appeals which are preferred before it after hearing the parties under the said section. A Tribunal, after affording an opportunity to the parties of being heard, is empowered to pass such order as it think fit, confirming, modifying or annulling the order appealed against or may refer the case back to the authority which passed such an order with directions as the Tribunal thinks fit. As per Section 7-L(2) of the EPF Act, a Tribunal is empowered to rectify any mistake apparent on record and for which, the Tribunal may amend any order passed by it under sub-section (1) of Section 7-L of the EPF Act, if such a mistake is brought to its notice by the parties to appeal. Further, as per the proviso to Section 7-L(2) of the EPF Act the Tribunal cannot make such correction or amendment if the effect of the same is to enhance

the amount due from the employer or increase the liability of the employer, unless the employer is heard. Further, the power of rectification of mistake can be exercised within a period of five years from the date of passing of the order.

21. The legislature provided such a long period to the Tribunal for exercising its power under Section 7-L(2) of EPF Act because it thought that if there was any factual mistake or miscalculation apparent in the order, the same could be corrected as and when the mistake comes to the notice of the Tribunal within the prescribed period of five years. However, Section 7-L(2) of the EPF Act is not to be construed as conferring the power of review to the Tribunal. If the legislature intended that the order could be reviewed by the Appellate Tribunal, legislature would have provided it the power to review an order as well.

22. The powers conferred to the Tribunal under Section 7-L(2) of the EPF Act are limited and can be exercised only to make corrections which are apparent on record. The Tribunal cannot, in the garb of this power, reverse or recall its own order even if it is bad in law. In the absence of an express provision in the EPF Act, Tribunal cannot recall or review its own order.

23. It is a well settled law that when a Court or a quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or the quasi-judicial authority is invested with the power of review by express provision or by necessary implication. However, there is another kind

of review as well, i.e., the procedural review which belongs to a different category. A procedural review is applicable to cases wherein, the Court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so but while doing so commits a procedural irregularity which goes to the root of the matter and invalidates the proceedings itself and consequently the order passed therein. Such procedural irregularities alone would be the subject matter of consideration in procedural reviews. Obviously, when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent abuse of its process and such power is inherent in every Court or Tribunal. A procedural review is a power that is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it. It should be distinguished from a review on merits wherein the error sought to be corrected is one of law and is apparent on the face of the record.

24. The Hon'ble Supreme Court in '**Grindlays Bank Ltd. vs. Central Government Industrial Tribunal & Ors.**', *AIR 1981 SC 606*, discussed the scope of review and observed: -

“13.Furthermore, different considerations arise on review. The expression 'review' is used in two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court in Narshi Thakershi's case held that no review lies on merits unless a statute specifically

provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process, and such power inheres in every court or Tribunal.”

25. Relying on the said judgment, the Apex Court in ‘**Kapra Mazdoor Ekta Union vs. Birla Cotton Spinning & Weaving Mills Ltd.**’, (2005) 13 SCC 777, held: -

“19. Applying these principles it is apparent that where a court or quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the court or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits (*sic* ascertains whether it has committed) a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the court or quasi-judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch as the opposite party concerned was

not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be reheard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In *Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal* [1980 Supp SCC 420 : 1981 SCC (L&S) 309] it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be reheard and decided again.”

26. In the present case, the petitioner had filed an appeal dated 22.07.2008 against the order dated 20.06.2008 passed by Regional Provident Fund Commissioner-II, Employees Provident Fund Organization, Bathinda (Punjab) levying damages under Section 14-B and levying of interest under Section 7-Q of the EPF Act. The said appeal was allowed by the EPF Appellate Tribunal vide order dated 16.03.2011 in appeal bearing ATA No.523(11)2008. The operative part of which reads as under: -

“6. The applicability of the EPF Act to the appellant establishment is not questioned. The advocate for appellant asserted that the appellant paid the dues and no dues were pending also there was no delay in depositing the EPF dues. The record filed before this tribunal shows that the deposit was made in time. So, there is no material on record to show that there was any delay in making the EPF contribution.

7. Thus, in view of the discussion held above, the order of the Authority EPF Authority is hereby set aside. Hence ordered, the appeal is allowed the order of the EPF Authority is hereby set aside. Copy of order be sent to the parties and file be consigned to record room.”

27. Against the said order dated 16.03.2011 an application for review was preferred by the APFC, Bathinda (Punjab) (page 109 of the paper-book), which was allowed by the Appellate Tribunal by impugned order dated 21.12.2012. A perusal of the record shows that the application for review was filed mainly on two grounds, which are reproduced as under: -

“2. That 1st mistake committed by the Hon’ble Tribunal is not noticing that the claim creating under section 14-B and 7-Q are Rs.211361/- for the period 10/1992 to 02/2006. There is no record show in the appeal petition who was match up with the above said period.

3. That 2nd mistake committed by the Hon’ble Tribunal that the letter only certified the figure of amount deposited by the establishment not the same was done in time. This fact would duly established by the order passed in U/s 14-B and 7-Q of the Act, 1952. The correctness of paying the contribution is differ and payment of contribution in time or not is entirely different. The inspection report of the Enforcement Officer only proofs the remittance of Provident Fund dues not the dues deposited well in time and never ever gave any confirmation to the establishment on any date regarding dues deposited in time.”

28. The aforementioned application of the petitioner was decided by the EPF Appellate Tribunal and the impugned order dated 21.12.2012 was passed. The operative part of the said order reads as under: -

“2. In this case, the appellant had paid the PF & Allied dues in respect of the workers engaged by the contractor who was awarded the work with material. The contractor, to discharge the assigned work deployed the workers. Such worker in turn discharge their functions/ assigned duties under the control and supervision of the contractor. The appellant being a principal employer fastened with the PF liability including damages. The contractors are not made a party to the proceedings initiated under Section 14B of the Act. According to the case of FCI vs. PF Commissioner & others [1990 LLR 65], it is the duty of the EPFO to implead the contractors as party to the proceedings and summon their records from them directly. The appellant has submitted the details of all the contractors but the respondent Commissioner consider it safe to prosecute only the appellant, a Govt. of India Undertaking, to fasten the liability. The impugned Order thus in clear breach of the settled legal position. The matter is therefore, remanded back to the respondent Commissioner to conduct a fresh enquiry by calling upon the contractors, the records of employees and their roll in evasion of PF liability to the employees recruited and engaged by it. After affording due opportunity to the appellant as well as contractors, legal liability of the PF evader be decided. In terms of the above, the appeal is disposed of. Copy of the Order be sent to both the parties. File be consigned to the record room.”

29. Thus, what emerges from the above is that the EPF Appellate Tribunal, New Delhi vide order dated 16.03.2011 allowed the appeal and set aside the order under Section 14-B and 7-Q of the EPF Act on

the ground that there was no material on record to show that there was any delay in making the EPF contribution. In the impugned order dated 21.12.2012, however, the matter was remanded on the ground that the contractor was not made a party to the proceedings initiated under Section 14 B of the EPF Act. It was further observed in the impugned order that the commissioner prosecuted and fastened the liability only against the petitioner without summoning the records from the contractor which it was duty bound to do as per the judgment in '**FCI vs. PF Commissioner & others**', 1990 LLR 65. However, the reasoning reached by EPF Appellate Tribunal in the impugned order does not appeal to this Court.

30. At this juncture, it is pertinent to mention here that a perusal of impugned order dated 21.12.2012 shows that the EPF Appellate Tribunal passed the impugned order as if it was deciding an appeal. The same is clear from the opening lines of the said order which read as:

“The present appeal is filed to challenge the order dated 20.06.2008 passed by the RPFC- II, Bhatinda under section 14-B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, levying damages on account of delay remittance of the PF dues for the workers engaged through contractors for loading or unloading of Food Grains at the Appellant Establishment's.....”.

In fact the appeal was already decided by EPF Appellate Tribunal vide order dated 16.03.2011.

31. The findings reached by the presiding officer in the order dated 21.12.2012 are based on merits, however, as already observed, that the

presiding officer was not invested with a power of review on merits under section 7L(2) of EPF Act in the light of the judgment of the Hon'ble Supreme Court in '**Kapra Mazdoor Ekta Union**' and '**Grindlays Bank Ltd.'s**' (supra). Clearly while passing the impugned order he was not exercising his power of procedural review. There was no procedural, mathematical, typographical etc. errors which were being corrected in the order passed in appeal on 16.03.2011 rather the limited power vested with the EPF Appellate Tribunal under section 7L (2) of the EPF Act was extended to decide the case on merits which, as has been observed above, the authority was not competent to do.

32. In view of my aforementioned findings, the present petition succeeds. Consequently, the impugned order dated 21.12.2012 passed by learned Employees' Provident Fund Appellate Tribunal, New-Delhi is set aside.

C.M. No. 15452/2013

The application is dismissed as infructuous.

(VED PRAKASH VAISH)
JUDGE

MARCH 11th, 2015
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