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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.14 OF 2016

Jaisal Shah, former Director,
JEJE Prototype Pvt. Ltd. ...Petitioner
V/s.
Assistant Provident Fund Commissioner ...Respondent

Mr.Aumkar V. Joshi for the Petitioner.

Mr.Suresh Kumar with Ms.Samiksha Kanani for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 7TH MARCH, 2016.

P.C. :-

1. By this writ petition filed under Articles 226 and 227 of the Constitution of India, the petitioner has prayed for writ of certiorari and has prayed that the impugned order dated 15th October, 2008 passed by the respondent under section 7(A) of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (for short the "said Act") and the order dated 4th January, 2008 passed by the respondent under section 7(B) of the said Act and the judgment and order dated 7th October, 2015 passed by the Employees Provident Fund Appellate Tribunal be quashed and set aside.

2. Admittedly the petitioner company was covered under the

provisions of the said Act and scheme framed thereunder. It is the case of the petitioner that the petitioner started its operation from June, 2004 and lockout was declared vide notice dated 22nd April, 2005. It is the case of the petitioner that from February, 2005 till the lockout was declared, the workers of the petitioner were working intermittently as there was lay off due to shortage of orders and other business reasons.

3. It was the case of the petitioner that since the lockout was declared on 22th February, 2005, no salary or wages were paid by the petitioner to his employees and thus no contribution was paid under the provisions of the said Act.

4. For the purpose of determining the amount due, the authority under the provisions of the said Act issued a summons to the petitioner – employer to appear before the Authority under section 7 on 23rd February, 2007. The proceedings were adjourned on 16th March, 2004, 9th April, 2007, 9th May, 2007, 21st August, 2007, 13th September, 2007 and 21st September, 2007. On 13th September, 2007 Mr.Mukund Shah, father of one of the director of the petitioner appeared without any authority from the petitioner. He was accordingly directed to produce an authority letter to plead the case on behalf of the petitioner. The authority under the said Act also gave final opportunity to the petitioner on 21st September, 2007 and 1st

October, 2007 to plead its case. The petitioner however, failed to produce any documents or any record. The authority accordingly passed an *ex-parte* order against the petitioner on 12th October, 2007.

5. On 8th August, 2007, the concerned officer of the respondent submitted its deposition that the petitioner had not produced any record, information and on the basis of the information / statement made available by the union's representative, the Enforcement Officer confirmed the dues amounting to Rs.10,57,312/-. The Assistant Provident Fund Commissioner accordingly determined the dues payable by the petitioner towards the amount of provident fund, pension fund and insurance fund for the period 1st April, 2004 onwards at Rs.13,48,609/- inclusive of outstanding amount and interest thereon.

6. The petitioner thereafter filed an application for review under section 7(B)(1) of the said Act on 19th December, 2007. By an order date 4th January, 2008, the Assistant Provident Fund Commissioner, Regional Officer, Pune rejected the said application for review. A perusal of the said order indicates that a copy of the calculation made by the squad of the Enforcement Officer was furnished to the father of the director of the petitioner with a direction to produce the documents in original if the petitioner was disputing the liability as calculated by the squad of the Enforcement Officer.

The petitioner however, did not produce any documents disputing the calculation made by the squad of the Enforcement Officer.

7. The petitioner thereafter filed an appeal under section 7(i) of the said Act before the Employees Provident Fund Appellate Tribunal. It was contended before the Employees Provident Fund Appellate Tribunal that on 27th May, 2005 there was lockout declared in the establishment of the petitioner and there was no business in the petitioner's establishment.

8. The Employees Provident Fund Appellate Tribunal passed an order on 7th October, 2015 dismissing the said appeal *inter-alia* holding that it was for the petitioner herein to prove its case that there was lockout and no wages were payable to the workers and no deduction could be made. The petitioner was to prove that after lockout, no business activities were carried out by the petitioner. The Employees Provident Fund Appellate Tribunal also considered the fact that despite various opportunities granted to the petitioner and also to Mukund Shah, father of one of the director of the petitioner to produce the documents, neither the said Mukund Shah appeared nor submitted any documents to prove that no business activities were carried out by the petitioner after declaration of lockout on 27th May, 2005.

9. Learned counsel for the petitioner submits that the

petitioner was at most liable to pay an amount of Rs.2,47,957/- and not the entire amount as calculated by the respondent. He submits that there was no proper opportunity rendered to the petitioner by the authorities to prove its case. He submits that the matter shall be remanded by this Court to enable the petitioner to avail of an opportunity and to prove its case.

10. Mr.Suresh Kumar, learned counsel for the respondent invited my attention to the judgment of the Supreme Court in case of ***Hindustan Times Limited vs. Union of India & Ors. (1998) 2 SCC 242*** and would submit that whether the petitioner was having any funds or not or that the petitioner had not paid any amount or salary to the workers is irrelevant for the purpose of paying the contribution to the provident fund and other amounts under the provisions of the said Act. Reliance is also placed on the judgment of the Delhi High Court in case of ***Birla Cotton Spinning & Weaving vs. Union of India & Ors. ILR 1984, Delhi 60*** in support of this submission.

11. A perusal of the record clearly indicates that several opportunities were given to the petitioner to dispute the amount quantified by the squad of the Enforcement Officer. A copy of such calculation was also furnished to the father of one of the director of the petitioner with a direction to file relevant documents, if there was any dispute raised in respect of such calculation. The matter was

thereafter adjourned from time to time. Neither the petitioner authorized any other person to represent the petitioner nor the father of one of the director of the petitioner filed any authority letter, nor produced any documents. In these circumstances, the authorities have confirmed the calculation made by the squad of the Enforcement Officer.

12. I do not propose to go into the issue whether the judgment of the Supreme Court in case of ***Hindustan Times Limited vs. Union of India & Ors.*** (supra) relied upon by Mr.Suresh Kumar and the judgment of the Delhi High Court in case of ***Birla Cotton Spinning & Weaving vs. Union of India & Ors.*** (supra) would apply to the facts of this case or not.

13. This Court has repeatedly called upon the petitioner through its learned counsel to find out whether the petitioner would deposit at least the amount of Rs.13,48,609/- before the authority without prejudice to its rights and contentions considering the fact that *prima-facie* the liability of the petitioner as demanded by the respondent would be much more than the said amount and upon such deposit, the petitioner could be furnished an opportunity to prove its case before the authority, the learned counsel for the petitioner would submit that the petitioner can only deposit a sum of Rs.2,47,957/- and has no funds to deposit the larger amount, as

suggested by this Court.

14. Though the petitioner was rendered sufficient opportunities and the petitioner failed to appear despite several opportunities, and is not willing to deposit even Rs.13,48,609/-. At this stage the learned counsel for the petitioner seeks time to take instructions whether the petitioner can deposit Rs.13,48,609/-

15. I therefore, pass the following order :-

a). As and by way of last indulgence, the petitioner is given an opportunity to deposit a sum of Rs.13,48,609/- to the authority within four weeks from today without prejudice to the rights and contentions of both the parties which if deposited will be subject to the out come of the notice issued by the respondent. If the amount as directed aforesaid is deposited by the petitioner within the time prescribed, the impugned order passed by the authorities including the Employees Provident Fund Appellate Tribunal shall stand set aside and the matter stands remanded to the Assistant Provident Fund Commissioner, Regional Office, Pune for disposal in accordance with law.

b). It is made clear that if the petitioner fails to deposit the amount as directed aforesaid, the order of the conditional remand passed aforesaid to stand vacated and the writ petition filed by the petitioner to stand dismissed without further reference to Court.

c). If the amount is deposited by the petitioner as directed aforesaid, the learned Assistant Provident Fund Commissioner, Regional Office, Pune shall render an opportunity to the petitioner to file its reply along with documents and shall pass a fresh order in accordance with law after considering the documents produced by the petitioner, if any, and after hearing the petitioner.

d). The writ petition is accordingly disposed of in aforesaid terms.

e). It is made clear that if the petitioner deposits the amount as directed aforesaid and if the matter is remanded back, the authorities shall furnish a copy of the calculation along with other relevant documents sought to be relied upon by the authorities to the petitioner to enable the petitioner to deal with the same in the reply.

f). No order as to costs.

(R.D. DHANUKA, J.)