

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR**WPL No. 211 of 2018**

M/s Sudama Prasad Shukla, Through Its Proprietor, Sudama Prasad Shukla, S/o Shri Sharda Prasad Shukla Aged About 71 Years R/o Green Park Colony, Jarhabhata, District- Bilaspur, Chhattisgarh.

---- Petitioner**Versus**

1. Union Of India, Through Secretary, Ministry Of Labour And Employment, Government Of India, Shram Shakti Bhawan, Rafi Marg, New Delhi-110001
2. Assistant Provident Fund Commissioner (Compl., C-1), Regional Office, Employees Provident Fund Organisation, Block D Scheme No. 32, I.G.V. Parisar, Pandri, Raipur, Chhattisgarh.
3. Branch Manager, Oriental Bank Of Commerce, Branch Office-Indu Chowk, Jarhabhata, District- Bilaspur, Chhattisgarh.

----Respondents

For Petitioner	:	Mr. Chandresh Shrivastava, Advocate
For Respondent No.2	:	Mr. Sunil Pillai, Advocate

Hon'ble Shri Justice P. Sam Koshy**Order on Board****17/09/2018**

1. The challenge in the present writ petition is to the order Annexure P/1 dated 31.08.2018, passed by the respondent No.2-Assistant Provident Fund Commissioner, Regional Office, Raipur.
2. Mr. Sunil Pillai, Advocate, who is the Panel Lawyer for the respondent No.2-Organization present in the Court, was directed to appear on behalf of the respondent No.2.
3. The impugned order Annexure P/1 dated 31.08.2018 is an order passed under the provisions of Section 8F of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (in short "Act of 1952").
Vide the said order the respondent No.2 has ordered the respondent

No.3 for recovering of an amount of Rs.31,32,727/- from the account of the petitioner under Section 8F of the Act of 1952.

4. The contention of the petitioner is that the respondent No.2- Organization had passed an order against the petitioner on 27.07.2018 under the provisions of Section 7A of the Act of 1952. The Act provides for an appeal against the order under Section 7A before the Appellate Tribunal and the period of limitation for preferring an appeal is 60 days. The period of limitation for filing an appeal was up till 27.09.2018.
5. The provisions of Section 7B also provides for the party to avail the remedy of review, if he so chooses. The period for preferring a review is 45 days. The period of 45 days for preferring an appeal would be till 13.09.2018. However without waiting for culmination of both these periods i.e. the period for filing of a review and also the period of preferring an appeal against the order under Section 7A, the respondents have issued the order under Section 8F on 31.08.2018.
6. The contention of the petitioner is that the said order is per se illegal for the reason that the petitioner has not been provided sufficient opportunity, even to exercise his right of appeal or to exercise the right of filing a review. He further submits that even otherwise, the respondent No.2 has not ensured compliance of the other mandatory requirements, which is required while issuance of the order under Section 8F of the Act of 1952.
7. The petitioner further submits that meanwhile the petitioner has already filed a review petition before the same authority under Section 7B on 10.09.2018 i.e. within the period prescribed for filing a review petition, which has till date not finalized and is pending consideration

before the authorities and for all these reasons, he submits that the issuance of the impugned order Annexure P/1 is bad in law.

8. The counsel for the Provident Fund Department however opposing the petition submits that the provisions of Section 7A itself clearly envisages the clause that in the event of the party not complying with the directions given under Section 7A, the authorities has the right to invoke the provisions under Section 7A and therefore there is no illegality in the impugned order. He further submits that the provision of Act even does not bar the authorities from initiating proceedings under Section 8F before the culmination of the period of limitation for appeal/review.
9. The provisions of Section 8F came for consideration before the Madhya Pradesh High Court in the matter of ***“Ferro Concrete Construction (India) (P) Ltd. v. Regional Provident Fund Commissioner” [2002 (1) MPLJ 116]***, wherein referring to judgment of the Hon’ble Supreme Court passed under the provisions of a ***pari materia*** provision under the income tax law in the case of “Biharilal Ramcharan vs. ITO reported in 1984 (131) ITR, 129 (SC)”, the Madhya Pradesh High Court in paragraphs No. 9 to 12 of its judgment held as under:

“9. As observed supra, the object of these two sections namely Section 8(F)(3) of the Act and Section [226\(3\)](#) of the Income Tax Act being common, both Sections are enacted to empower the authorities to recover the arrears of contribution/tax payable by the employer/assessee from any person other than the defaulter on fulfilment of certain conditions mentioned in the Section. In other words, if the

authorities come to know that some person has to pay certain sum to the defaulter i.e. (employer/assessee) by virtue of some contract or if any sum is found due or may become due, then in such eventuality, the authorities after following the procedure so prescribed in the section directly recover the said money from the concerning person and may equally restrain him from paying the said money to defaulter. Any recovery so made under these sections is adjusted towards the arrears outstanding against the defaulter. These Sections also provides for certain adverse consequences against the person in case if he makes a false statement relating to payment of any money to defaulter.

*10. The scope and ambit of Section [226\(3\)](#) of the Act came up for consideration before their Lordships of Supreme Court in the case of Biharilal Ramcharan vs. ITO reported in 1984 (131) ITR, 129, 136 (SC). Their Lordships explaining the true scope of Section [226\(3\)](#) *ibid* had ruled as a guiding principle to the recovery authorities while exercising their powers under said Section.*

11. In substance, the ratio of the Supreme Court decision rendered in the case of Biharilal (supra), is that it is mandatory on the part of the Recovery Officer before passing any order under these two sections to hold an inquiry after giving due opportunity to the person concern, allow him to state on oath whether he has to pay any amount to the defaulter and if so under what head, against which transaction or whether he holds any money on account of defaulter and if so how much, whether any money is due or not and if so, its extent? It is only after the person concern files and makes a statement

on oath on any of the facts referred supra, then depending upon the statement so made, the Recovery Officer will proceed to pass an order in other words, holding of an inquiry into the requirement of section 8(F)(3)(vi) is mandatory and any deviation from the compliance will result in vitiating the order.

12. The aforesaid principle equally applies to cases falling in Section 8(F)(3) of the Act and hence, Recovery Officer while exercising the powers under Section 8(F)(3), has to follow the aforesaid principle enunciated by the Supreme Court in the case of Biharilal.”

10. Likewise on the ground of the impugned order having being issued without waiting for the appeal period to be over, the Madhya Pradesh High Court in the case of *“Municipal Council, Dabra v. Recovery Officer and Ors.”* [2016 LLR 1208] in paragraph No.5 has held as under:

5. As per the scheme of the Act of 1952, against the assessment order passed by the competent authority, the assessee has a right of appeal before the Appellate Tribunal. The period prescribed therefore is 60 days. The Tribunal also has power to issue interim order. The measures for recovery including coercive measures can be taken recourse to if the assessee without filing the appeal avoids payment thereof and the authority is left with no option than to ensure recovery through such measures. In the instant case, admittedly the period of limitation for filing the appeal had not expired while impugned attachment order was passed. Thereafter, appeal was filed within limitation and interim order has been passed (supra). Therefore before expiry of the period of limitation taking recourse to coercive measures by the

Assessing Officer, in the opinion of this Court, is not in accordance with law and in fact and in effect tantamounts to an arbitrary exercise of power lacking bona fides. Therefore, in the opinion of this Court, the impugned attachment order cannot withstand the test of reasonableness under Article [14](#) of the Constitution of India, therefore, the same deserves to be and is accordingly quashed. However, assessment order under section [7-A](#) of the Act of 1952 since is subject-matter of appeal, the petitioner shall abide by the orders passed by the appellate authority. With the aforesaid, writ petition stands allowed.”

11. On the same footing, the Madras High Court also in the case of “***TI Metal Forming v. Regional Provident Fund Commissioner 2 [LLR 2013 0 1251]***” in paragraphs No. 4 & 5 held as under:

“4. No doubt, the contribution has been computed at Rs. 7,16,589. The order of the first respondent dated 12.8.2013, was received on 17.8.2013, by the petitioner. As per section [7\(1\)](#), the petitioner has got 60 days time, i.e., upto 16.10.2013, to file an appeal before the Employees' Provident Fund Appellate Tribunal, New Delhi.

A perusal of the order dated 12.8.2013, passed by the first respondent, would show that the petitioner has got a right of appeal before the Employees' Provident Fund Appellate Tribunal, New Delhi under section [7\(1\)](#) of the Act. When the Act itself provides 60 days to file an appeal, the first respondent did not allow the said time to expire. Even before expiry of 60 days, attachment proceedings is taken and amounts are sought to be recovered. The right of statutory appeal available to the petitioner, cannot be curtailed by

the act of the first respondent which is provided under the Act itself.

5. Though the amount has been quantified as on 12.8.2013, considering the fact that 60 days is available for the petitioner to file an appeal as per section [7\(1\)](#) Act, the order dated 12.8-3013 could become effective only on expiry of 60 days. Therefore, the first respondent is not justified to pass the impugned order, which is in violation of the provisions of section [7\(1\)](#) of the Act.”

12. Similar view has also been taken by the Kerala High Court in the case of “***Popular Industries (Pynadath Crusher) v. Assistant Provident Fund Commissioner and Recovery Officer [FLR 2015 Vol. 145, page 13]***” wherein in paragraph No.5 has held as under:

“5. True, the statute does not provide for any interdiction from proceeding with the recovery immediately on the order being passed. It is also to be noticed that the statute does not also provide for any intimation of intention to file statutory appeal. The provision to file statutory appeal as incorporated in the statute, is definitely a benefit conferred on the employer who has suffered the order and if recovery is effected, even when the statutory appeal period is not over, the same would invite allegation of an arbitrary exercise of power. An appellate remedy available to an assessee cannot be rendered nugatory, before even the statutory period is over. The statutory authorities would do well to keep in abeyance the recovery proceedings till the statutory period of appeal is over.”

13. Given the aforesaid factual matrix of the case and the judgments which have been referred to in the preceding paragraphs, from the contents of the writ petition prima facie what reflects is that before issuance of

the impugned order, no notice whatsoever has been issued to the petitioner, neither does it appears of any notice to the respondent No.3-bank been issued, straight away the impugned order has been passed.

14. Moreover, in the meanwhile the review petition also has been filed by the petitioner before the same authority and which has been seized by them for consideration.
15. Under the given facts and circumstances of the case, this Court is of the opinion that the impugned order dated 31.08.2018 passed under the provisions of Section 8F is not sustainable and the same deserves to be and is accordingly set-aside/quashed. The respondent No.2 is directed to decide the review of the petitioner at the earliest and it is further ordered that before initiating the provisions of Section 8F, again the respondents would grant sufficient time to the petitioner for assailing the order passed in the review petition, if it is decided against the petitioner's interest.
16. Needless to mention that it is also required that before initiating the proceedings under Section 8F, the respondent No.2 would ensure that the necessary compliance as is required under the Section is complied with.
17. The writ petition accordingly stands allowed and disposed off.

Sd/-
(P. Sam Koshy)
Judge