NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

WPL No. 5032 of 2011

M/s Mahavir Rice Mill, through its Partner Naresh Kumar Lunkad S/o Late Shri Dhan Raj Lunkad aged about 56 years, R/o Sihava Road, Dhamtari, Disrict Dhamtari (C.G.)

---- Petitioner

Versus

1. Employees Prvident Fund Appellate Tribunal, New Delhi, Scope Minar, Core-II 4th Floor, Laxmi Nagar, District Centre, Laxmi Nagar, New Delhi 1100 92
2. Assistant Provident Fund Commissioner, office of Employees Provident Fund Organization, Regional Office, Indira Gandhi Vyavasaik Parisar, Pandri, Raipur, Chhattigarh
3. Regional Provident Fund Commissioner, cum Recovery Officer, office of Employees Provident Fund Organization, Regional office, Indira.And Ors. Of Employees Provident Fund, Indira Gandhi Vyavasaik Parisar, Pandri, Raipur, Chhattigarh

---- Respondent

For Petitioner	:	Mr. N. K. Vyas, Advocate
For Respondent/s	:	Mr. Sunil Pillai, Advocate

Hon'ble Shri Justice P. Sam Koshy
Order on Board

14/01/2021

1. The challenge in the present writ petition to the order Annexure P-1, P-2 & P-3. Annexure P-1 is an order by which the appeal preferred by the petitioner under Section 7I of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 has been rejected. While rejecting the appeal of the petitioner the Appellate Tribunal has affirmed the order dated

19.12.2008 Annexure P-2 an order passed in review proceedings under Section 7B of the aforementioned Act of 1952 and in the process further affirming the original order of assessment passed under Section 7 A of the aforementioned Act of 1952 by the order dated 31.12.2007.

2. The facts of the case is that the petitioner is a Rice Mill having its unit at Sihava Road District Dhamtari. The petitioner were already under the coverage of Act of 1952. The Enforcement Officer for the concerned area made an inspection of the aforesaid Rice Mill on 26.03.2007 and it was found that there were around 20 employees working under the petitioner establishment and of whom the provident fund contribution was not being deposited. The Enforcement Officer thereafter submitted a report to the Department on the basis of which the Assistant Commissioner initiated 7A proceedings against the petitioner. It is said that the petitioners were granted various opportunities for submitting the entire records to refute the inspection notes prepared by the Inspection Officer on the date of inspection. The Department contended that the petitioner did not submit any of those records and therefore the authorities had no other option but to pass the final order based upon the inspection report submitted by the Enforcement Officer.

3. The petitioner after the order of assessment under Section 7A dated 31.12.2007 was passed preferred a review under Section 7B. The Review Application also was rejected vide order dated 19.12.2008 on the ground that no case for review has been made out as the order of assessment itself clearly reflects that the petitioner has not cooperated in the course of enquiry.

4. Both these orders were subjected to challenge before the Employees Provident Fund Appellate Tribunal under Section 7I of the Act of 1952. The Appellate Tribunal affirming the two earlier orders of the Department rejected the appeal while impugned order Annexure P-1 dated 14.06.2011.

It is these three orders which are under challenge in the present writ petition.

5. The challenge primarily to these orders is on the ground that the entire assessment made by the department is only on assumption and presumption without any substantial materials available with them. According to the petitioner the whole assessment has been done on the basis of the inspection note of the Enforcement Officer who inspected the site on 26.03.2007. It is further contention of the petitioner that said Enforcement Officer himself has not been examined in the course of finalization of 7A proceedings, neither was he permitted to be cross examined for rebuttal of his inspection note in the course of assessment. Further contention of the petitioner is that from the order sheet dated 19.07.2007 it clearly reflects that petitioner did submit the Balance Sheets of the relevant period before the authorities concerned which has not been further scrutinized by the Department before passing of the order of assessment and also before rejecting the review application. Further submission of the petitioner also is that at least before finalization of the 7A proceedings the Department ought to had brought some evidence on record so far as identifying the 20 workers who have been reflected to be working with the petitioners by the Enforcement Officer in his inspection note. The petitioner further submits that there were certain personal grudge which the Enforcement Officer at that relevant point of time was having with the petitioner establishment on the basis of which entire inspection note has been prepared and proceedings have been drawn.

6. Per contra, counsel for the Department submits that department has already subjudiced the application for rejecting the petitioner for non joinder of the necessary parties in as much as under Section 5C of the EPF Act. It was necessary for the petitioner to have made Central Board of Trustees as a necessary party to the proceeding. Further contention of the

Department is that from the plain reading of the three impugned orders it clearly reflects that those are all speaking orders and where sufficient opportunity of hearing was given to the petitioner for substantiating their contentions. However the petitioner has miserably failed to avail the said opportunity leading to the passing of the order under assessment and also therefore the rejection of the review before the Appellate Tribunal. Counsel for the Department further drew attention of the costs being imposed on two occasions for non submitting of the records which were to be submitted by the petitioner.

7. The counsel for the respondents refers to the amendment that was brought to the Section 7 (A) vide memo of the year 1988 whereby the provisions of the Clause (3A) was incorporated to the Section 7 (A) of the Act, 1952wherein the assessing officers have been empowered to proceed further based upon the evidences itself during the course of enquiry or the document available on record.

8. Having heard the contentions put forth on either side and dealing with the first objection raised by the Department, this Court would like to hold that the said objection is not sustainable for the reason that it is an order passed under 7A proceeding by the Assistant Commissioner Provident Fund which was originally challenged in a review and subsequently before the Appellate Tribunal and therefore it was only the EPF Department which was necessary party to the proceedings. The Custodian of the amount recovered under the provisions of the EPF Act may not be a necessary party for the purpose of challenging the order initiated against the assessment proceedings and appellate proceedings thereafter. It is undisputed that proceedings under challenge are one drawn under Section 7(A), Section 7(B) and under Section 7(I) therefore the respective authorities who have been conferred under the aforementioned Sections were necessary parties. The word ‘shall’ under Section 5(c) of the Act of

1952 is not to be read as if it is mandatorily applied while challenging an order of the Assessment Officer or an Appellate Tribunal, for the reason that assessment authorities and the appellate authorities have been exercising their powers which have been conferred upon them for and on behalf of the Board as would be evident from the Section 5(E) of the aforementioned Act of 1952 hence the objection stands rejected.

9. As regards, the other contentions raised undisputedly from the order sheets available with the record it would reveal that there is an entry so far as petitioner did in fact submitted the balance of sheet to the authorities on 19.07.2007, neither the Assessment Officer nor in the review proceedings or in the appellate proceeding have the authorities dealt with the submission of the balance sheet by the petitioners so far as its authenticity, veracity and also contents therein where it would had been any assistance for the purpose of defending edge for and on behalf of the petitioner. The specific ground raised by the petitioner both in the review as also in the appeal was that the authorities have not considered and discussed on the balance sheet that petitioner has submitted.

10. Today when the matter was being heard learned counsel for the petitioner submits that even today petitioners are willing to extend all necessary assistance or the Assisting authorities to reach to the logical conclusion so far as under Section 7A was concerned. According to the petitioner, if directed they are still willing to produce entire records required for the purpose of determining the 7A proceedings for the period April, 2000 to February, 2007 i.e. the disputed period in the present writ petition.

11. Given the aforesaid facts and circumstances of the case and also the factual matrix which is reflected from the proceedings, this court is of the opinion that authorities concerned appears to have over shot the balance sheet which was submitted by the petitioner which needed to be considered either accepting the same or rejecting and asking the petitioner for producing other relevant records. Similarly, the identification of the beneficiaries or the 20 workers so found also is based only on the report of the Enforcement Officer without there being any corroborative or supporting records or evidence.

12. For the aforesaid reasons the order passed in the review proceeding Annexure P-1 & P-2 dated 14.06.2011 as also 19.12.2008 would not be sustainable and same deserves to be and is accordingly set aside and matter stands remitted back to the Assessment Authorities for entertaining the review application on merits afresh keeping in view the aforesaid observations made by this Court and also taking note of the balance sheet submitted by the petitioner as is evident from the order sheet dated 19.07.2007. Assessment Officer in the course of deciding the review can further direct the petitioner to submit any further documents required for deciding the review application for which the petitioner shall also render all cooperation. In case if the petitioners do not cooperate by tendering any relevant documents sought for by the EPF Department within the stipulated period the Authorities would be at liberty to draw an adverse inference and proceed and decide the review application. In case, if for any genuine reason the petitioners are not able to submit the relevant records before the authorities on the specified date they may move an appropriate application with justifiable reasons for the same and upon which another opportunity may be granted by the authorities concerned before taking a decision.

13. Meanwhile, the interim order dated 23.09.2011 passed by this Court to the extent of stay of the effect and operation of the Assessment Order subject to the petitioner furnishing Bank Guarantee would operate.

14. Taking into consideration that the writ petition itself is of the 2011 and is an old matter and the assessment being for the period 2000-2007 the Authorities concerned are expected to take a decision on the review application as expeditiously as possible within a period of six months from the date of receipt of copy of this order.

15. With the aforesaid observations, the present writ petition stands partly allowed and disposed of.

Sd/-
(P. Sam Koshy)
Judge

Rohit