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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 8th October, 2021
+ **W.P.(C) 2047/2020**
PEARSON INDIA EDUCATION SERVICES PRIVATE
LIMITED Petitioner
Through: Mr. Shantanu Malik, Advocate (M-
9818687928).

versus

ASSISTANT PROVIDENT FUND COMMISSIONER,
DELHI Respondent
Through: Ms. Rashmi Malhotra, Advocate.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition has been filed by the Petitioner challenging the impugned order dated 13th November, 2019 by which the Employees' Provident Fund Appellate Tribunal (*hereinafter* 'EPFAT') has allowed an application filed by the Respondent/APFC (*hereinafter* 'APFC'). By the impugned order the EPFAT has recalled its earlier order dated 13th April, 2016 by which the appeal of the Petitioner had stood finally allowed.
3. The genesis of the dispute is a demand which was made by the Respondent-Authority against the Petitioner under Sections 7Q and 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (*hereinafter* 'EPF Act'). The APFC directed a sum of Rs.14,35,568/- to be paid as interest and damages, vide order dated 21st April, 2015. The said order was challenged by the Petitioner and was listed before the EPFAT on

5th June, 2015. On the said date, a conditional order was passed granting an interim stay of the impugned order of the APFC, pending verification of payments made by the Petitioner to the APFC. The APFC was directed to file a counter affidavit within 30 days. On 6th November, 2015, it was noted by the EPFAT that the counter was not filed by APFC and on 10th February, 2016, last opportunity was granted to file the counter affidavit, subject to deposit of cost of Rs.5,000/-. On 31st March, 2016, though the counter was filed, the proof of payment of cost was not placed on record. Accordingly, opportunity was granted for producing the receipt of costs. Again, on 13th April, 2016, the receipt of cost was not placed on record. Accordingly, the reply/counter affidavit of APFC was struck off and the appeal was allowed by way of default. No consideration was given by the EPFAT on merits. The said order dated 13th April, 2016 reads as under:

“Today case is fixed for producing receipt regarding payment of cost of Rs. 5000/- in Delhi State Legal Service Authority. No receipt regarding payment of cost of Rs.5000/- placed on case file on behalf of respondent.

Perusal of case file duly reveals that cost of Rs.5000/- was imposed on respondent for not filing counter reply on time. Despite availing sufficient opportunity, respondent not deposited cost of Rs.5000/- so counter reply filed on behalf of respondent can not be read over.

Present appeal filed on behalf of appellant u/s 7-I of the EPF & MP Act, 1952 (the Act) challenging order dated 29.04.2015 passed by respondent u/s 14-B & 7-Q of the Act. As counter reply filed by respondent is not to be entertained for not depositing cost so this Tribunal has no option but to presume that respondent has to say nothing against the appeal filed by appellant so accordingly appeal filed by appellant is allowed.

Impugned order dated 29.04.2015 passed by respondent u/s 14-B & 7-Q of the Act set aside. Copy of the order be sent to the parties as per law. File be consigned to the record room after due compliance.

4. The APFC thereafter moved an application seeking restoration of the appeal dated 28th May, 2018. In the said application, an explanation was given that the costs were in fact deposited by the authority and was handed over to their counsel. However, the demand draft was misplaced by the court clerk and the Bank had to be thereafter approached to certify that the demand draft was misplaced. A fresh demand draft thereafter got issued and was then deposited before the Tribunal. In the light of these facts, vide the impugned order dated 13th November, 2019, the Tribunal imposed further costs of Rs.5,000/- to be deposited with the DLSA and permitted participation of the APFC in the hearing by recalling the order dated 13th April, 2016. The present writ petition challenges this order dated 13th November, 2019.

5. The submissions of Mr. Malik, Id. Counsel for the Petitioner are twofold. First, that the EPFAT does not enjoy powers of review under the statute and a Tribunal cannot exercise the power of review unless and until the same is conferred upon it by the statute. Second, he submits that the conduct of the authority does not entitle the APFC for any indulgence inasmuch as after the appeal was filed and time was granted in 2015 for filing the counter affidavit, the counter affidavit came only one year later while the costs were not deposited till 2017. Thus, the decision in the appeal has been delayed from April, 2015 till 2018 and in 2019, the impugned order was passed.

6. Ms. Malhotra, Id. Counsel for the APFC, on the other hand submits, that there is a distinction between power of review and power of recall. APFC itself is not at fault as it had given the costs to its panel counsel for being deposited. However, it was due to the counsel's office which misplaced the demand draft that costs could not be deposited. Thus, indulgence shown by the Tribunal was after *bonafides* were established by the authority.

7. The Id. Counsels have relied upon the following judgments:

(i) ***Modern Public School Education Society (Regd.) v. Presiding Officer, EPF Appellate Tribunal [2007 Lab IC 1], Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji [1971 (3) SCC 844],*** and ***Grindlays Bank v. CGIT [1980 (Supp) SCC 420],*** relied upon by the Petitioners; and

(ii) ***Grindlays Bank (supra)*** relied upon by the APFC.

8. This Court has heard the parties and perused the judgments relied upon by the parties. It is the settled position in law that a Tribunal cannot enjoy the power of review of its orders on merits until and unless the same is specifically conferred upon it by statute or necessary implication, as held in ***Patel Narshi Thakerji (supra)***. However, there is a clear distinction between the power of review and the power of recall of an order on procedural grounds, as is supported by various judgments. The observations in such judgments are discussed below.

9. In ***Grindlays Bank (supra)***, a judgment relied upon by both parties, the distinction between procedural and substantive review was made clear. While discussing whether the Industrial Disputes Tribunal could set aside an *ex parte* award on the basis of sufficient cause for non-appearance, the

Hon'ble Supreme Court held that such setting aside was not a review on merits and it was in fact, a part of the Tribunal's power to regulate its own procedure. Therefore, this was held to be an ancillary power of the Tribunal, even if not specifically conferred by statute. The relevant portion reads as under:

"We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary. On the other hand, there are indications to the contrary."

Sub-section (1) of s. 11 of the Act, as substituted by s. 9 of the Industrial Disputes (Amendment & Miscellaneous Provisions) Act, 1956 is in these terms:

"11. (1) Subject to any rules that may be made in this behalf, an arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as the arbitrator or other authority concerned may think fit."

The words 'shall follow such procedure as the arbitrator or other authority may think fit' are of the widest amplitude and confer ample power upon the Tribunal and other authorities to devise such procedure as the justice of the case demands.

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The decision in Narshi Thakershi v. Pradyumansinghji is distinguishable. It is an authority for the proposition that the power of review is not an inherent power, it must be conferred either specifically or by necessary implication. Sub-sections (1) and (3) of s. 11 of the Act themselves make a distinction between procedure and powers of the Tribunal under the Act. While the procedure is left to be devised by the Tribunal to suit carrying out its functions under the Act, the powers of civil court conferred upon it are clearly defined. The question whether a party must be heard before it is proceeded against is one of procedure and not of power in the sense in which the words are used in s. 11. The answer to the question is, therefore, to be found in sub-s. (1) of s. 11 and not in sub-s. (3) of s. 11.

10. In **Hindustan Domestic Oil & Gas Company (Bombay) Limited & Ors. Vs. State & Anr. [Crl.M.C. 1737/2011, decided on 3rd August, 2012]**, a Division Bench of the Court has also relied upon **Grindlays (supra)** to hold that:

“Courts have recognized difference between orders of this nature which are procedural and substantive orders. [See Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and Ors. 1980 (Supp) SCC 420, which draws distinction between procedural and substantive review. Power of procedural review need not be specifically conferred but power of substantive review has to be conferred by the statute before it can be exercised by a judicial forum/court. Power of procedural review is inherent and therefore does not require any statutory provision or conferment.]”

11. In *Eaton Power Quality Pvt Ltd v. Competition Commission of India* [W.P.(C) 6797/2020, decided on 10th September, 2021], this Court reiterated that the power of review on merits would have to be expressly provided and a substantial reasoning of the order could not be reviewed by the Competition Commission of India by way of review:

*The reasoning of the CCI i.e., delay in finalising the White Labelling arrangements, is in stark contrast with the earlier reasoning that wider participation fits with the spirit of the Approval Order. This order too was clearly without jurisdiction as the CCI lacked the statutory power of Review, which was expressly taken away by the Legislature vide the Competition (Amendment) Act of 2007. Further, its action could not have been termed as a rectification under Section 38 of the Act of 2002, as it substantively affected the rights of the parties concerned. **The order was not merely administrative in nature, but an adjudicatory order,** qua which the power of Review could have not been exercised as the said power under Section 37, no longer existed in the statute book. In effect, therefore the impugned order was the first occasion when the CCI got the opportunity to hear both the parties and evaluate the respective merits, though under a completely incorrect exercise of the power of Review, which it did not possess.*

108. The CCI, therefore, clearly adopted the wrong course of action in respect of both its orders, i.e., the order dated 7th January 2020 as well as the impugned order dated 24th August 2020. Though the CCI need not give personal hearings at every stage as held in *Mahindra* (supra), however, where the function being performed is adjudicatory in nature, or affects the substantive rights and liabilities of parties, notice to the parties and an opportunity to advance submissions, which are written and/or oral depending on the facts of the case, ought to be afforded by the CCI.”

12. Even in *Modern School (supra)*, the facts are distinguishable in as much as in that case the order under review was an order decided on merits. The earlier order by the EPFAT had quashed the order of the Provident Fund Commissioner, after a hearing on merits. This order was subsequently recalled by the EPFAT by asserting a new rationale that was not mentioned in the previous order, i.e. that a provision of the statute in question had not been considered. Relying on this new rationale, the EPFAT recalled its order stating that the earlier order was a typographical error. The Single Judge of this Court, relying on *Grindlays Bank (supra)* therefore, held that this constituted a review on merits, and the EPFAT did not have the power to review its orders on merits.

13. In the present case, this Court is of the opinion that this restoration of appeal is in the nature of a procedural decision, and not a review on substantive grounds. In this regard, it is pertinent to note that the first order dated 13th April, 2016 was not an order on merits, but an order allowing the Petitioner's appeal merely by striking off the counter affidavit for non-deposit of costs. The APFC delayed in filing the counter-affidavit and then had not deposited the proof of payment for costs imposed on it to take the counter affidavit on record. Therefore, the order dated 16th April 2016, was merely an order by which the counter affidavit was not taken on record and due to this default of the APFC, the appeal was allowed. There is no discussion in the order dated 13th April, 2016 on the substantive aspects of the appeal of the Petitioner and also no discussion on merits in respect of the imposition of demands under Sections 7Q and 14B of the EPF Act.

14. On the application for restoration being filed, the Tribunal has merely noted the various facts leading to non-deposit of costs and has found that the APFC was not guilty of *malafide* conduct. The EPFAT also holds that it has the power to regulate its own procedure under Section 7J of the EPF Act, and has thus recalled its earlier order. The operative portion of the order is as under:

“ But in this case, the order dated 13.04.2016 is not an order for exparte hearing of the appeal on the same day or on any other date. The order dated 13.04.2016 was passed setting aside the impugned order without hearing the appellant or setting the respondent exparte, in a hyper technical manner. The said order if not recalled would definitely cause serious prejudice to the respondent.

Under section 7J of the EPF and MP Act power has been granted to this tribunal to regulate it's own procedure in all matters arising out of the exercise of its power or of the discharge of its function. Hence, while exercising power u/s 7J of the EPF Act, it is felt expedient in the interest of justice to recall the order dated 13.04.2016 and adjourn the case for hearing of the appeal since pleading has been completed.

But it is noticed that the present petition has been filed 2 years after the order dated 13.04.2016 and one year after deposit of cost in DLSA, which again amounts to lack of diligence on the part of the respondent. Considering the peculiarity of the circumstances, it is directed that the Respondent shall deposit Rs.5000/- again as cost in DLSA before the next date of hearing i.e., on 04.03.2020 and report compliance as a condition precedent to recall of order dated 13.04.2016 and it's participation in hearing. If the respondent would again fail to comply the direction within the stipulated time, the petition shall stand rejected and the record be consigned.”

15. Thus, the order dated 13th April, 2016 was passed due to a procedural default. The APFC having then established *bonafides*, though belatedly i.e. two years later, the Tribunal has allowed the applications for restoration, by deposit of Rs.5,000/-further costs. Consequently, since the Tribunal was vested with the power to regulate its own procedure under Section 7J, any procedural recall orders can be passed by the Tribunal.

16. Accordingly, the present petition is disposed of with these observations and with directions to the EPFAT that the appeal of the Petitioner shall be heard on merits. Since the appeal's hearing has been delayed considerably for more than six years, the EPFAT shall take up the appeal, and dispose of the same within four months. List before the EPFAT on 15th August, 2021.

17. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

OCTOBER 8, 2021
Rahul/MS