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

Date of Decision: 13th July, 2021

\+ **W.P.(C) 1882/2021 & CM APPL.5479/2021**

M/S RIDING CONSULTING ENGINEERS INDIA LIMITED ..... Petitioner

Through: Mr. S. P. Arora and Mr. Rajiv Arora, Advocates.

versus

ASSISTANT P. F. COMMISSIONER, DELHI (NORTH) ..... Respondent

Through: Mr. Shivanath Mahanta, Advocate.

5 WITH

\+ **W.P.(C) 3851/2021 & CM APPL.11613/2021**

M/S RIDING CONSULTING ENGINEERS INDIA LIMITED ..... Petitioner

Through: Mr. S. P. Arora and Mr. Rajiv Arora, Advocates.

versus

ASSISTANT P. F. COMMISSIONER, DELHI (NORTH) ..... Respondent

Through: Mr. Shivanath Mahanta, Advocate.

6 AND

\+ **W.P.(C) 2990/2021 & CM APPLs.9069/2021, 9071/2021**

M/S RIDING CONSULTING ENGINEERS INDIA LIMITED ..... Petitioner

Through: Mr. S. P. Arora and Mr. Rajiv Arora, Advocates.

versus

ASSISTANTP. F. COMMISSIONER

DELHI (NORTH) ..... Respondent

Through: Mr. Shivanath Mahanta, Advocate.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through video conferencing.

2. In these petitions, the question that is raised is as to whether the Petitioner is entitled to a waiver of the 10% pre-deposit amount that has been directed to be paid by the Central Government Industrial Tribunal (*hereinafter referred as "CGIT"*).

3. The Petitioner is a company, which had entered into an agreement with one M/s. Microcenter for providing certain employees for working in Bahrain. In respect of the said agreement, an enquiry under Section 7A of Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (*hereinafter, "Act"*) was initiated by the Respondents in December, 2015. Summons under section 7A of the Act were sent to the Petitioner for production of various records and for representation, and proceedings were held before the Departmental Representative of the Respondent. In respect of the said proceedings, an interim report was submitted in 2016.

4. Thereafter, a further report was submitted by the Area Enforcement Officer on 27th February, 2020. When the said report was received by the Assistant Provident Fund Commissioner (*hereinafter referred as "APFC"*), the same was communicated to the Petitioner on 27th February, 2020 itself, and a hearing was fixed on 28th February, 2020. The Petitioner-establishment wrote an email on 28th February 2020, to the authority seeking an adjournment in the matter. However, the matter was not adjourned. The authority went ahead and computed the liability under Section 7A of the Act

as being Rs. 3,58,24,797/-, along with a penalty of Rs. 8500/-, in one matter and Rs. 1,64,69,901/- in the other matter. The Petitioner filed an appeal against the said orders and amounts determined under section 7A of the Act, before the CGIT. The CGIT, vide order dated 18th January 2021, stayed the operation of the orders passed under section 7A of the Act by the APFC, and instead of seeking 75% of pre-deposit under section 7-O of the Act for admission of the appeal, granted a reduction in the pre-deposit, and reduced it to 10% of the assessed amount. The said 10% pre-deposit was to be made with the Registrar of the CGIT. The operative portion of the said orders of the CGIT, which have been impugned in the present petitions, are as under:

In **W.P. (C) 1882/2021:**

> *"Considering the submission advanced by the counsel for both the parties an order need to be passed on the compliance/waiver of the conditions laid under the provisions of sec 7-O of the Act. <u>There is no dispute on the facts that the commercial activities in all sectors are facing a backlash on account of the outbreak of COVID-19 and the preventive shut down of commercial activities.</u> At the same time it need to be considered that the period of default in respect of which inquiry was initiated are from 04/2008 to 10/2015 and the amount assessed is Rs.3,58,33,29/-. <u>There is no mention in the order about the basis of the calculation arrived at and identification of the beneficiaries</u>. Without going to the other details pointed out by the appellant challenging the order as arbitrary, and at this stage of admission without making a roving inquiry on the merits of the appeal, it is felt proper to pass an order keeping in view the principle decided in the case of Small Gaudge Ltd referred supra, as well as considering the grounds of the*

appeal, the period of default ,the amount assessed and the prevailing circumstances into consideration, it is felt that the circumstances do not justify total waiver of the condition of pre deposit. But the ends of justice would be met by reducing the amount of the said pre deposit from 75% to 10%. Accordingly, the appellant is directed to deposit 10% of the assessed amount within 3 weeks from the date of this order towards compliance of the provisions of sec 7-O of the Act by way FDR having self renewal mode initially for a period of one year favouring Registrar CGIT. On compliance of the above said direction, the appeal shall be admitted and there would be stay on execution of the impugned order till disposal of the appeal. List the matter on 15.02.2021 for compliance of the direction failing which the appeal shall stand dismissed. The interim order of stay granted on the previous date shall continue till then. Both parties be informed accordingly."

In **W.P. (C) 2990/2021:**

Considering the submission advanced by the counsel for both the parties an order need to be passed on the compliance/waiver of the conditions laid under the provisions of sec 7-O of the Act. There is no dispute on the facts that the commercial activities in all sectors are facing a backlash on account of the outbreak of COVID-19 and the preventive shut down of commercial activities. At the same time it need to be considered that the period of default in respect of which inquiry was initiated are from 11/2015 to 08/2016 and the amount assessed is Rs.1,64,69,901/-. There is no mention in the order about the basis of the calculation arrived at and identification of the beneficiaries. Without going to the other details pointed out by the appellant *challenging the order as arbitrary, and at this stage of admission without making a roving inquiry on the merits of the appeal, it is felt proper to pass an order keeping in view the principle decided in the case of* ***Small Gaudge Ltd, Benaras Valves*** *referred supra, as well as considering the grounds of the appeal, the period of default, the amount assessed and the prevailing circumstances in to consideration. The Hon'ble High Court of Bombay in the case of* ***MorirokuUt India Pvt Ltd vs Union Of India reported in 2005 SCC page 1 and in the case of Escorts Limited and another vs Union Of India reported in 43 (1991) DLT 207*** *the courts and tribunals are obliged to adhere to the question of undue hardship when such a plea is raised before it. But the Hon'ble Apex Court in the case of Benaras Valves referred supra has defined undue hardship as the hardship which adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant. The appellant of this matter has not pleaded or shown any material to presume undue hard ship except the plea that the commercial activities have been slowed down for the COVID condition.*

Thus, it is felt that the circumstances do not justify total waiver of the condition of pre deposit. But the ends of justice would be met by reducing the amount of the said pre deposit from 75% to 10%. Accordingly, the appellant is directed to deposit 10% of the assessed amount within 3 weeks from the date of this order towards compliance of the provisions of sec 7O of the Act by way FDR favouring Registrar CGIT initially for a period of one year along with provision for auto renewal. On compliance of the above said direction, the appeal shall be admitted and there would be stay on execution of the impugned order

> *till disposal of the appeal. List the. matter on 09-March-2021 for compliance of the direction failing which the appeal shall stand dismissed. The interim order of stay granted on the previous date shall continue till then. Both parties be informed accordingly.*"

5. In ***W.P.(C) 3851/2021***, the Petitioner-establishment had moved an application before the CGIT, seeking extension for making the pre-deposit. The same was rejected by the CGIT, vide order dated 15th February, 2021 in the following terms.

> "*Today the matter was listed for reporting of compliance of the order dated 18-January-2021 passed by this Tribunal for deposit of 10% of the amount assessed under section 7-A. However, today the Ld. Counsel for the Appellant has filed one application under Rule 21 of the EPFAT Rules 1997 seeking extension of time in complying with order dated 18.01.2021 through email at 03:43 P.M. wherein it has been prayed to extend the time till 17.03.2021 which is the next date of hearing before Hon'ble Delhi High Court in the matter by which the Appellant has challenged the order dated 18.01.2021 of this Tribunal.*
>
> *On carefully going through the Contents of the application filed by Ld. Counsel for the Appellant, it is observed that, the application for extension of time has been moved before this Tribunal in the last hours of the last day when the case was listed for reporting compliance of order dated 18.01.2021 and moreover, the application by which certain verbal directions given by Hon'ble Delhi*

> *High Court are conveyed is not supported by any affidavit.*
>
> *Accordingly the application filed by the Appellant being devoid of any merit, is hence rejected.*"

6. All these three orders passed by the CGIT are under challenge in the present writ petitions.

7. The submission of Mr. Arora, ld. Counsel appearing on behalf of the Petitioner- establishment is that the final report of the Area Enforcement Officer was submitted only on 27th February, 2020, and no time was granted for filing a reply. In fact, the matter was taken up on 28th February, 2020 for hearing on which date when an email was sent at 3:43 pm for adjournment of the matter, no response was received. He submits that in the order passed under section 7A of the Act, it has been recorded by the APFC that none appeared for the Petitioner-establishment, and no communication was received on their behalf. This, according to him, is itself contrary to the record, which shows that an email was sent seeking adjournment and the matter ought to have been adjourned allowing the Petitioner sufficient time to respond to the final order of the Area Enforcement Officer. He further submits that the manner in which the amount liable to be paid, under Section 7A of the Act, has been calculated also shows that there was no identification of the beneficiaries concerned in this case. Reliance is placed upon various judgments, which have been placed on record, and are as under:

(i) Builders Association of India v. Union of India & Ors., [CC No.8035/2016, decided on 2nd May, 2016]

(ii) Food Corporation of India v. Provident Fund Commissioner

and Ors., (1990) SCC 68

(iii) Himachal Pradesh State Forest Corporation v. Regional Provident Fund Commissioner, (2008) 5 SCC 756

(iv) Assistant Provident Fund v. M/s Nand Lal & Company, [LPA No.391/2013, decided on 28th March, 2016 (Patna High Court)]

(v) Regional Provident Fund Commissioner v. Ahluwalia Contracts (India) Ltd., [W.P.(C) No.887/2013, decided on 27th August, 2019]

8. On the strength of these judgments, it is argued by Mr. Arora, that if the beneficiaries are not identified at all, demand cannot be raised by the authority and hence, the initial order under Section 7A itself is completely untenable.

9. Mr. Arora further impresses upon this Court that the contract between the Petitioner and M/s Microcenter, pertains to Bahrain and the employees were sent to Bahrain. The obligations of consultants are contained in the agreement, which was entered into between the authority in Bahrain and M/s Microcenter. On the strength of this agreement, it is argued that the fundamental responsibility is of M/s Microcenter and not of the Petitioner-establishment in this case. It is accordingly submitted that the Petitioner has a good case on merits and the pre-deposit ought to be fully waived.

10. On the other hand, Mr. Shivanath Mahanta, ld. Counsel appearing for the Respondent, submits that the challenge in ***W.P.(C) 1882/2021*** and ***W.P. (C) 2990/2021*** is to the order of the CGIT permitting waiver of the pre-deposit from 75% to 10%. He relies upon the provisions of Section 7-O of the Act, to argue that it is only in exceptional circumstances that the reduction or a waiver of the said amount of pre-deposit can be granted. He further submits that due to these orders being interim orders which are

discretionary in nature, this Court ought not to entertain the present writ petitions. He further submits that records were not submitted by the Petitioner's management before the APFC.

11. Mr. Mahanta, ld. counsel has relied upon the following judgments:

(i) O.G. Bajaj Construction v. Assistant Provident Fund Commissioner, Nagpur of the Bombay High Court (2010 LLR 767)

(ii) G4S Facility Services India Pvt. Ltd. v. Regional Provident Fund Commissioner-1 (WP(C) 1390/2018, decided on 8th May 2018)

(iii) Girdhar Silk Mills (P) Ltd. v. Presiding Officer, EPF Appellate Tribunal (2003 ILLJ 255)

(iv) JBM Auto System Pvt. Ltd. v. Regional PF Commissioner II(C &R) EPFO (WP(C) 25400/2019, decided on 9th September 2019, Madras High Court)

12. On the strength of all these judgments, the submission of Mr. Mahanta, ld. Counsel for the Respondent, is that the question of identification of beneficiaries does not arise in a case relating to the amount of pre-deposit. He submits that in ***O.G. Bajaj (supra),*** the Bombay High Court has clearly held that the pre-deposit can be waived only under three circumstances, none of which have been made out in the present case. He submits that in ***JBM Auto (supra),*** the Madras High Court has also clearly held that waiver of pre-deposit cannot be granted as a matter of right inasmuch as the statutory system under the Act requires the payment of pre-deposit prior to entertaining an appeal, and if the CGIT exercises its discretion with application of mind, writ petitions ought not to be encouraged against the same. He further submits that in ***G4S Facility (supra),*** a ld. Single Judge of this court has opined upon the purpose of the statute in consideration as being a social welfare legislation and, therefore,

waiver ought not to be permitted against pre-deposit under Section 7-O of the Act.

13. In rejoinder, Mr. Arora, ld. Counsel, submits that the allegation of the Respondent that records were not produced by the Petitioner's management, is completely incorrect. Reliance is placed upon the order passed by the APFC under Section 7A of the Act, which records clearly that the management has produced the records on several dates and it is not even the case of the authority in the said order that the records were not produced by the petitioner. Mr. Arora finally submits on the strength of judgment in the case of ***Escorts Ltd. and Anr. v. Union of India and Ors*. *(43 (!991) DLT 207)*** that the circumstances permitting the granting of a waiver from depositing pre-deposit, are not mere financial hardship, but also where there is *a prima facie* case, or the balance of convenience is in favour of the Petitioner. It is argued that if the balance of convenience is in favour of granting complete waiver of pre-deposit, the same ought to be granted.

14. Heard ld. counsels for the parties and perused the records. This court has also perused the orders passed by the CGIT in all these petitions, as also the orders passed under Section 7A of the Act, by the APFC.

15. Various submissions have been made by the parties in this case on merits, which this Court does not intend to go into, inasmuch as the validity or tenability of the order under Section 7A would have to be primarily examined by the CGIT. The only question which is being considered at this stage is as to whether the CGIT's order directing 10% pre-deposit can be complained of in the present case.

16. A perusal of the order of the CGIT dated 18th January 2021, shows that the CGIT records quite clearly, that the payment of provident fund is

distinct and different from payment of tax. The order passed by the CGIT also records that commercial activities have come to a standstill due to the pandemic, and there is severe backlash which establishments are facing due to the shutting down of commercial activities. The second finding of the CGIT is that the beneficiaries are not being identified, as is clear from the paragraph extracted above. It is after arriving at both these findings, that the pre-deposit has been waived from 75% to 10%

17. The question currently before this court is whether complete wavier of the said pre-deposit amount ought to be granted, or the pre-deposit to the extent of 10%, as has been ordered by the CGIT, is justified.

18. The CGIT's finding that the beneficiaries have not been identified is clearly in line with the decisions of the Supreme Court and various High Courts, which have been relied upon by the Petitioner in the present case. If the beneficiaries are not identified, especially in the present case where the beneficiaries, i.e., the employees, were engaged for a contract in Bahrain and may be located in Bahrain, the question as to whether the authority's finding in respect of the liability of the Petitioner would itself be under doubt and would have to be gone into by the CGIT. Further, insofar as financial hardship is concerned, clearly there was a finding by the CGIT that the pandemic is an exceptional circumstance and commercial activities have taken a big hit during the pandemic. Therefore, both these findings clearly show that the requisite conditions for grant of a waiver of the pre-deposit have been satisfied in the present case.

19. Further, the manner in which the authority appears to have proceeded, i.e., without even granting a reasonable time for filing of reply/objections to the report filed by the Area Enforcement Officer, is clearly untenable. The

finding in the order of the APFC under Section 7A of the Act, that no communication was received from the management/establishment, in respect of the proceedings on 28th February 2020, is also clearly contrary to the record, as an email seeking an adjournment was sent on the same date and the said email has been placed on record. Thus, the Petitioner appears to have an arguable case before the CGIT.

20. In ***Escorts Limited (supra)***, the ld. Division Bench of this Court has held that apart from financial hardship, the standards of prima facie case and balance of convenience can be considered for granting of a waiver of pre-deposit. The observations therein read:

> *"(12) The conclusion of the Collector (Appeals), according to the learned counsel, is quite contrary to the latest law laid down in case re : Jayashree Insulators Ltd., Rishra v. Collector of Central Excise, Calcutta-11 1987 (28) E.L.T. 279 (Tri)(2). While dealing with the question of waiver of pre-deposit of duty u/s 35F of the Act, the Bench after taking Into consideration the entire case law on the subject, in para 84 of the Judgment held :*
> *"AFTER very careful consideration it appears to me that a practicable manner of applying the guidelines given by the Supreme Court and the High Courts would be to consider that where financial hardship has been established, that should suffice for (whole or partial) waiver of pre-deposit, subject to whatever conditions the appellate authority may deem fit to impose. Where financial hardship is not established or not pleaded, it would still be open to the applicant to justify waiver on other adequate grounds. These grounds would be the existence of a prima facie case in his favor, plus balance of convenience. This would normally happen where the applicant lies shown that even on the face of it he has a case which is not merely a prima facie case as ordinarily understood, but something much stronger. One example, which was put to ShriAjwani (vide para 54 supra),*

> *would be where there has been an evident error in calculation of the penalty amount. Another would be as in the case which was before the Allahabad High Court in the case of Hari Fertilizers, (para 42 supra), where the demand is obviously barred by limitation. (Where questions arise as to whether there has been suppression, collusion etc. and as to whether the normal time limit or the extended time limit would apply, the time-bar may not be accepted as "obvious". Other cases would be where there is a decision of the Courts, or of the Tribunal itself, clearly in favour of the applicant. In all these cases it could be said that the balance of convenience is clearly in granting wavier of pre-deposit. Where on the very face of it, it is clear that an amount is not due from the applicant, the balance of convenience would not appear to lie in requiring him to deposit that amount, only so that it may be refunded to him a week or a month later. Therefore, where the applicant's case is so strong that it is apparent without laboured exposition, it may well be a case where the balance of convenience, over and above a mere prima facie case, calls for the waiver of pre-deposit, nothwithstanding that financial hardship is not established or has not been pleaded."*

21. The CGIT has clearly arrived at a conclusion that there are extenuating circumstances for businesses during the COVID-19 pandemic. Further, the beneficiaries have also not been identified, at this stage. Under these circumstances, without going into the merits of the matter and the various judgments which have been cited by both the sides, it is directed as under:

i) The CGIT would entertain the appeals of the Petitioner in both the cases i.e., ***Appeal No. D-1/01/2021*** as also ***Appeal no. D-1/03/2021***, subject to a deposit of Rs.5,00,000/- in each of the two appeals.

ii) The said deposit of Rs. 5,00,000/- in each of the appeals, shall be made by the Petitioner before the Registrar of the CGIT, and the said amounts shall be kept in an interest bearing fixed deposit, on auto renewal mode.

iii) The said deposit shall be made by the Petitioner on or before 31st August, 2021.

iv) Subject to the said deposits being made in both these matters, the CGIT shall hear the appeal of the Petitioners on merits and adjudicate the same in accordance with law.

22. At this stage, Mr. Arora, ld. Counsel, submits that the Department has already recovered a sum of Rs.18,50,000/- in respect of liabilities in this case. He submits that the Department ought not to enjoy the interest in this matter on the said amount, and the Department should be made to deposit the same with the Registrar of the CGIT. For this purpose, the Petitioner is permitted to approach the CGIT for directions, and the same shall also be considered by the CGIT.

23. Finally, in view of the above directions passed in W.P.(C) 1882/2021 and W.P.(C) 2990/2021, the extension that is sought in W.P.(C) 3851/2021 has in effect been granted. Accordingly, W.P.(C) 3851/2021 no longer survives.

24. With these observations, all these three petitions along with all pending applications, are disposed of.

PRATHIBA M. SINGH
JUDGE

JULY 13, 2021/*dk/dj/Ak*