

(Reportable)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.3363 OF 2022

M/S NAGPAL PROJECTS AND CONSTRUCTION PRIVATE LIMITED
THROUGH ITS MANAGING DIRECTOR
VERSUS
THE REGIONAL PROVIDENT FUND COMMISSIONER AND ANOTHER

...
Advocate for the Petitioners : Shri Yenge Balaji B.
Advocate for the Respondents : Shri Nitin K. Chaudhari
...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 09th March, 2022

ORAL ORDER:

1. By this Writ Petition, the petitioner is aggrieved by the order dated 15.02.2022 passed under Section 7B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (for short "the EPF Act").
2. The grievance is that the application under Section 7B has been rejected without even issuing the notice of hearing to the petitioner. Reliance is placed on the order dated 22.02.2022 delivered by this Court at the Principal Seat in Writ Petition Nos.984/2021, 988/2021 and 989/2021 (Kulgaon Badlapur Nagar Parishad vs. the Regional Provident Fund Commissioner, Thane) wherein, it is concluded that the review application has to be heard and therefore, an opportunity of hearing to the

applicant has to be granted.

3. The learned advocate representing the respondent/ PF authorities submits that the Section 7A order has been passed for the period October, 2010 to April, 2016. The enquiry was adjourned under Section 7A on at least 50 dates mentioned on pages 2 and 3 of the order under Section 7A. Several adjournments have been sought by the petitioner Management. They have never cooperated with the Department in the Section 7A enquiry.

4. If the application under Section 7B is considered favourably, naturally the order under Section 7A would be modified. However, if the application under Section 7B is rejected, by the doctrine of merger, Section 7A order would come into force and for a challenge to which, the petitioner shall file an appeal before the Appellate PF Tribunal u/s 7-I.

5. The learned advocate for the respondent/ PF authorities places reliance upon the judgments delivered by this Court, (a) (Coram : Myself) in *Ashmit Motors Private Limited, Ahmednagar vs. Assistant Provident Fund Commissioner, Sub Regional Office, Nashik, 2017 (1) Mh.L.J. 885* and (b) the judgment delivered by this Court at the Nagpur Bench in *Municipal Council, Dhamangaon vs. Assistant Provident Fund Commissioner, Akola, 2020 (4) Mh.L.J. 750*. He submits that there appears to be a confusion as to whether, an order rejecting the application under Section 7B is appealable or not and whether, an order allowing the

application under Section 7B would still enable the employer to prefer an appeal under Section 7I.

6. Per contra, Shri Yenge, the learned advocate for the petitioner/ employer, relies upon the judgment delivered by the Kerala High Court in the matter of *M/s Manvish Info Solutions Private Limited vs. Employees Provident Fund Organization, 2018 (1) CLR 224* and the judgment of the Karnataka High Court in *M/s Deccan Education Society vs. Union of India, 2016 (150) FLR 646*.

7. In order to deal with the above contentions and the slight controversy that emerges from the views expressed on behalf of the PF authorities and the employer, it would be apposite to reproduce Sections 7A, 7B and 7I as under :-

- “7A. *Determination of moneys due from employers.—*
- (1) *The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,—*
- (a) *in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and*
- (b) *determine the amount due from any employer under any provision of this Act, the Scheme or the [Pension] Scheme or the Insurance Scheme, as the case may be,*
- and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary];*
- (2) *The officer conducting the inquiry under sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect*

of the following matters, namely:—

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses;

and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).

(3) No order shall be made under sub-section (1), unless [the employer concerned] is given a reasonable opportunity of representing his case.

(3A) Where the employer, employee or any other person required to attend the inquiry under sub-section (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.

(4) Where an order under sub-section (1) is passed against an employer ex parte, he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry:

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Explanation.—Where an appeal has been preferred under this Act against an order passed ex parte and such appeal has been disposed of otherwise than on

the ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the ex parte order.

- (5) *No order passed under this section shall be set aside on any application under sub-section (4) unless notice thereof has been served on the opposite party.]”*

“[7B. *Review of orders passed under section 7A.—*

- (1) *Any person aggrieved by an order made under sub-section (1) of section 7A, but from which no appeal has been preferred under this Act, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of such order may apply for a review of that order to the officer who passed the order:*

Provided that such officer may also on his own motion review his order if he is satisfied that it is necessary so to do on any such ground.

- (2) *Every application for review under sub-section (1) shall be filed in such form and manner and within such time as may be specified in the Scheme.*
- (3) *Where it appears to the officer receiving an application for review that there is no sufficient ground for a review, he shall reject the application.*
- (4) *Where the officer is of opinion that the application for review should be granted, he shall grant the same:*

Provided that,—

(a) no such application shall be granted without previous notice to all the parties before him to enable them to appear and be heard in support of the order in respect of which a review is applied for, and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be produced by him when the order was made, without proof of such allegation.

- (5) *No appeal shall lie against the order of the officer rejecting an application for review, but an appeal under this Act shall lie against an order passed under review as*

if the order passed under review were the original order passed by him under section 7A.”

“7-I. *Appeals to Tribunal.—*

(1) *Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section (4), of section 1, or section 3, or sub-section (1) of section 7A, or section 7B*

[except an order rejecting an application for review referred to in sub-section (5) thereof], or section 7C, or section 14B, may prefer an appeal to a Tribunal against such notification or order.

(2) *Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed.”*

8. In ***M.C. Dhamangaon (supra)***, the PF authorities had contended that once the fate of the review application under Section 7B was decided, no appeal remedy is available to the employer. Negating such contention, this Court recorded its conclusions in paragraph 17 as under :-

“17. *Thus, it becomes patently clear that a proper interpretation of the said provisions of the Act of 1952 would show that the first part of section 7-B(5) of the said Act prohibiting filing of appeal against the order rejecting review application is relatable to exercise of power under section 7-(B)(3) of the Act of 1952 for rejection of review application and further that the second part of section 7-B(5) of the Act specifies that when a review application is granted under section 7-B(1) and (4) of the Act of 1952, it has to be treated as if it is an original order passed by the concerned officer under section 7-A of the Act of 1952, against which an appeal would lie under Section 7-I of the Act of 1952. Therefore, on a conjoint, harmonious and proper reading of Section 7-B and 7-I of the Act of 1952, it has to be held that an appeal under Section 7-I thereof is not available when a review application is rejected*

under section 7-B of the said Act. Hence, the preliminary objection raised on behalf of the respondent is rejected and it is held that the present writ petition is maintainable.”

9. This Court, while delivering the judgment in ***M.C. Dhamangaon (supra)***, has relied upon the view taken by me in ***Ashmit Motors Private Limited (supra)***. It has held that if the review application is rejected under Section 7B, an appeal under Section 7I would not be available.

10. In ***Deccan Education Society (supra)***, the Karnataka High Court has concluded in paragraph 9 as under :-

“9. *A bare perusal of Section 7-B(5) clearly reveals that the said sub-section can be divided into two parts. While the first part debars filing of an appeal against an order of the Officer rejecting an application for review, the second part permits an appeal against an order passed under review, and creates a legal fiction that the said order shall be deemed to have been passed under Section 7-A of the Act.*”

11. I find that there is no confusion insofar as the right of appeal available to the employer under Section 7I vis-a-vis the order passed under Section 7A is concerned, after the application u/s 7B is allowed. The PF authorities appear to have doubts as to what would be the fate of the employer if the application under Section 7B is either allowed or rejected. I find that such confusion is non-existent. The application under Section 7B is a statutory remedy of review available to the employer. If

such an application is allowed, the order under Section 7A is likely to undergo a modification and that would, therefore, amount to an independent order passed under Section 7A. If an order under Section 7A, pursuant to a decision on the application under Section 7B, casts financial liability on the employer, or it's grievance survives, the employer can challenge the same under Section 7I since it has the trappings of an order passed under Section 7A.

12. If an application under Section 7B is rejected, there cannot be an appeal against such rejection and a writ petition, as like the present case in hand, is the remedy. This is so because, by the rejection of the application under Section 7B, the order passed under Section 7A is sustained. However, an employer can prefer to challenge the order under Section 7A before the appellate authority by preferring an appeal under Section 7I. Considering the case from any angle, as long as the order under Section 7A survives, be it by the rejection of the application under Section 7B or even partly allowing of such application, the grievance as against the assessment of the provident fund dues under Section 7A would be appealable only under Section 7I.

13. It has come to the notice of this Court in several matters that Managements, in order to avoid the deposit of assessed amounts under Section 70 while preferring an appeal, file a review petition under the 1952 Act and they approach this Court with the plea that no deposit is

mandatory. I have noticed that in matters under the Employees Compensation Act, the Management file an application for recalling of the judgment and once it is rejected, they prefer a writ petition by avoiding a first appeal since the first appeal mandates deposit of the entire amount decreed by the compensation Court u/s 30 of the 1923 Act. Similar is the approach of the Management when it comes to the assessment of PF dues u/s 7-A, they file a review application u/s 7-B. Once the application u/s 7-B is rejected, they approach this Court since an appeal is not maintainable against such order and, therefore, to avoid the deposit of 75% of the assessed amount which is necessary if the Management is to challenge the Section 7-A order in an appeal u/s 7-I r/w Section 7-O. I am, therefore, of the view that in a given case wherein the Management challenges the order u/s 7-B for the second time before this Court, it would be appropriate to direct the Management to deposit at least 50% of the assessed amount in the light of the Division Bench judgment of this Court in **M/s Shewalkar Developers Ltd., Vs. Rupee Co-operative Bank Ltd., [2016(1) MH.L.J.382]**, so as to avoid repeated filing of writ petitions which are actually aimed at avoiding the deposit u/s 7-O.

14. Having settled the controversy that has incidentally arisen in this petition, the ground on which the petition is filed, is sustainable.

15. Considering the above and since the opportunity of hearing has not been granted under Section 7B, this Writ Petition is partly

allowed. The impugned order dated 15.02.2022 is quashed and set aside with the following directions :-

(a) All applications under Section 7B filed by the petitioner shall be restored to the files of the respondent.

(b) The petitioner shall appear before the respondent authority on 04.04.2022 at 12:00 noon.

(c) The petitioner shall not be granted a single adjournment for any reason whatsoever considering its conduct recorded in the order under Section 7A.

(d) The submissions of the parties should be concluded by 08.04.2022 and the competent authority is at liberty to deliver its order on or before 22.04.2022.

(e) The petitioner is at liberty to tender written notes of submissions.

(f) It is made clear that if the application under Section 7B is rejected, by the doctrine of merger, same would merge in the order under Section 7A and thereafter, the petitioner would be at liberty to prefer an appeal under Section 7I r/w Section 7O of the EPF Act.