

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

110

CWP No.12682 of 2022
DATE OF DECISION: 1st JUNE, 2022

M/s. Punj Security & Housekeeping Services Pvt. Limited, Village Daddu Majra, Near Dronacharya Stadium, Chandigarh through its Director.

.... Petitioner

Versus

Employees Provident Fund Organization, Regional Office, SCO 4-7, Secor 17-D, Chandigarh & others

.... Respondents

CORAM : HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

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Present: Mr. Nitin Kaushal, Advocate for the petitioner.

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RAJBIR SEHRAWAT, J. (Oral)

1. The petitioner has filed this petition under Articles 226/227 of the Constitution of India, praying for issuance of a writ in the nature of certiorari for quashing the impugned order dated 19.08.2021 (Annexure P-8) received in the month of March, 2022, whereby the review application under Section 7B of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (in short, the EPF Act) has been rejected by respondent No.2 without issuing any notice or affording opportunity of personal hearing to the petitioner; along with certain other prayers.

2. The facts as pleaded in the petition are that the petitioner is a registered agency providing security and house keeping services within the territory of Chandigarh. The petitioner had, allegedly, not deposited

the EPF contributions as per the provisions contained in the EPF Act. Hence, the respondents-authorities had initiated the proceedings under Section 7A of the EPF Act; for assessing the due amount. During the process the petitioner was granted due opportunity of hearing. After hearing the petitioner an amount of Rs.2,61,18,206/- was assessed by the competent authority. Though the order passed under Section 7A of EPF Act is appealable, however, instead of preferring appeal the petitioner had chosen to invoke review of the assessment order; as provided under Section 7B of the EPF Act. The said review filed by the petitioner has been rejected by the respondents-authority. Hence, the present petition has been filed.

3. Arguing the case, the counsel for the petitioner has submitted that Section 7B of the EPF Act provides a remedy to the petitioner which is 'alternate' to the remedy of appeal. Hence, the petitioner had availed the said remedy. However, even before taking final decision upon the review filed by the petitioner, the authority had sent a recovery notice to the petitioner. This shows that the authorities were already bent upon effecting recovery from the petitioner. The subsequent rejection order is only an *ante-dated* document created by the authorities, without issuance of any notice and without granting any opportunity of being heard to the petitioner. Even the intimation regarding rejection of review was given to the petitioner after a period of 7 months from the stated date of passing of the order. The petitioner had brought to the notice of the assessing authority that the original order passed by it was not in accordance with law because; while assessing the liability for provident fund deposit; even the salary of the Directors,

which was exempted from calculation under the provisions of the EPF Act; had been included by the assessing authority. Moreover, the liability has been assessed even for the post-retirement period qua certain employees. Despite these facts, having been brought to the notice of the assessing authority, the review has been rejected.

4. Notice of motion.

5. Mr. Rajesh Hooda, Advocate accepts notice on behalf of the respondents and submitted that the petitioner was granted umpteen number of opportunities at the time of passing of the order under section 7A of the Act. The said order has been passed after full appreciation of facts and the entire relevant material. There is no error or mistake in the said order. Therefore, any review of the said order is not called for. The order impugned in the present petition has been passed in exercise of powers under Section 7B (3) of the EPF Act which stipulates that in case the authority finds that no fresh material has been brought to the notice then the said authority shall reject the review. No opportunity of hearing is required for passing of such an order. Even on the aspect of date of passing of the order and supply of the copy of the same to the petitioner establishment, the counsel for the respondents has submitted that the assertion made by the petitioner is factually incorrect. The order in question was passed on 18.08.2021 and a copy of the same was dispatched to the address of the petitioner, as mentioned in the petition itself, on 19.08.2021. Therefore, the petitioner cannot be heard to say that it was not supplied the copy of the order for seven months. The argument taken by the counsel for the petitioner is only an after-thought; so as to fabricate a ground to file the present petition. It is further

submitted that in case the review is rejected by the assessing officer even on the ground that no material has been brought to the notice of the assessing authority during the review, then also the original order is always appealable under the provisions of the EPF Act. Hence, the petitioner should have filed the appeal against the original order. The petitioner is avoiding filing appeal only because of the condition of pre-deposit of a portion of the assessed amount for filing the appeal. There is no substance in the writ petition and the same deserves to be dismissed.

6. As rebuttal to the arguments raised by counsel for the respondents the learned counsel for the petitioner has submitted that during the review the petitioner had furnished some additional documents, which justified the prayer of the petitioner for review. The calculations of the assessing officer; as given in the original order are erroneous and are against the actual facts available on the record. Therefore, there was an error on the face of it; in the order passed by the assessing authority. Qua the maintainability of the appeal, in terms of Section 7B of the EPF Act; learned counsel for the petitioner has submitted that there is no provision under Section 7B of the EPF Act, under which the petitioner could file appeal against the rejection of the review. Although, a provision is made in Sub-Section (5) of Section 7B of the EPF Act for filing appeal, however, the said provision makes a clear distinction between the order passed while rejecting the review and the order allowing the review. Under the said provision the appeal is maintainable only in case the review is allowed by the authority. Since no further appeal is provided against order of rejection of the review, therefore, hearing the party applying for review becomes imperative.

The counsel has reiterated that in exercise of power under Section 7B the EPF Act, the assessing authority could not have rejected the review filed by the petitioner; without granting an opportunity of being heard or even without issuing a notice. The counsel has relied upon the judgment of this court in case of CWP No.17608 of 2011, ***M/s. G4S Security Services (India) Pvt. Ltd. Vs. Regional Provident Fund Commissioner*** decided on 07.11.2012; two judgments of Bombay High Court in the case of WP No.4685 of 2021 ***M/s. Deogiri Nagari Sahakari Patsanstha Ltd. Vs. The Assistant Provident Fund Commissioner*** decided on 19.06.2021 & in WP No.9676 of 2016 ***M/s. Ashmit Motors Private Limited, Nagpur Vs. The Assistant Provident Fund Commissioner***, decided on 19.09.2016, and also a judgment of High Court of Kerala in the case of WP(C) No.29255 of 2017 ***Manvish Info Solutions Pvt. Ltd. Vs. Employees Provident Fund Organization and Ors.*** decided on 14.09.2019. Taking the intensity of the arguments to the next level, ld. counsel for the petitioner has also relied upon the judgment rendered in ***National Insurance Company versus Pranay Sethi***, reported in (2017) 16 SCC 680 to contend that the earlier decisions of equal or larger Bench strength constitute precedents which are binding upon the subsequent Benches and if a subsequent bench does not find itself in agreement with the decision of the earlier Bench then only alternative available to the subsequent bench is to make a reference to a larger Bench. Accordingly, the judgment rendered in ***M/s. G4S Security Services (supra)*** is binding upon this Bench; failing which a reference to a larger Bench would be required. It is further argued that since the petitioner has not been heard at the time of rejection of review and there is no further appeal provided

under the Act; against an order passed in review under Sub-Section (3) of Section 7B of the Act, therefore this court is to be approached in writ jurisdiction. Hence the present petition.

7. Having heard the counsel for the parties, this court finds substance in the arguments raised by the counsel for the respondents. It is not even in dispute that during the proceedings taken under Section 7A of the EPF Act, the petitioner was granted full opportunity of being heard by the assessing officer. The petitioner was granted as many as 23 opportunities to produce its relevant record. However, the assessing officer found that the petitioner was avoiding producing evidence and was adopting delaying tactics. Therefore, the assessing officer had summoned the record of employment from the principal employers; including Verka Milkfoods. It is only after participation of the petitioner and obtaining relevant records from the principal employers that the assessing officer had crystallized the assessed amount as the liability against the petitioner. The said order is appealable in itself, under Section 7-I of the EPF Act. However, there is a condition of pre-deposit of 75% of the assessed amount as required under Section 7-O of the EPF Act for availing the remedy of appeal. In the present case, instead of availing the remedy of appeal, the petitioner had chosen to go in review before the same authority on certain grounds. Even if the grounds taken in review and the arguments of the counsel for the petitioner being raised now; are taken on their face value, the case of the petitioner in review is nothing but an attempt to reargue the matter before the same authority. The

counsel for the petitioner has not even disputed that the aspects which were being raised in the review; regarding the salary of the Directors and the salary of the retired employees having been included for the purpose of assessment of the liability, were raised before the assessing authority at the time of the passing of the original order. Be that as it may, the order of the assessing authority may or may not be sustainable in law in the perception of the petitioner, however, the Statute has provided a remedy of appeal; in case the petitioner felt dissatisfied with the order. The remedy of review is only in cases where there was some material which was not earlier in the knowledge of the petitioner or the same could not be produced earlier despite due diligence; and the same is brought before the authority in review; or where there is a factual mistake or an error apparent on the face of it. Therefore, Section 7B (3) of the Act provides for summarily rejection of review if it '**appears**' to the authority that no new material has been produced or otherwise there is no ground to review the order. In the present case the relevant record was only the record of the petitioner establishment. So, it could not be said that the petitioner was not having knowledge of the record or that it could not produce the same despite due diligence. Petitioner was granted numerous opportunities only for that purpose. Moreover, mere possibility of a different conclusion being arrived at by giving a different interpretation to the same or substantially the same material; cannot be taken to be an error apparent on the face of the order. This may be a ground for appeal, but the same cannot be a ground for review, as such. Hence, the

argument of the counsel for the petitioner to that extent is totally non-sustainable.

8. The counsel for the petitioner has emphasized that the petitioner was not granted any opportunity of hearing before rejecting his review, nor was any notice issued to him. However, the order passed by the assessing authority in review is, undisputedly, passed summarily under Sub-Section (3) of Section 7B. Therefore, this summary order has been passed on appearing to the assessing authority that the points taken in the review petition had already been taken care of by the assessing officer while passing the original order and that no fresh material was produced and, further, that there was no error or mistake in the order. None of these factors is such which required arriving at any additional conclusion by the assessing authority. The reasons given are such which needed only reiteration of earlier reasons or expression of fresh summary opinion thereon. None of these involves recording of fresh findings vis-à-vis the substantial civil rights of the petitioner. Therefore, it required no role of the petitioner. In view of the nature and scope of the order to be passed by the review authority only, the provision, as contained in Section 7B (3) of the EPF Act, does not contemplate any opportunity of hearing to any party, unless the review authority finds some ground to proceed further with review application; where it shall proceed with the application under section 7B (4). At this stage, it is pertinent to have a reference to the provisions of Section 7B of the Act, which are as hereunder:

Section 7B in the Employees' Provident Funds and Miscellaneous Provisions Act, 1952

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.

9. A perusal of the language of the aforesaid Act itself shows that Sub-Section (3) of Section 7B contemplates only 'receiving' of review application and 'appearance' to the assessing officer that no sufficient ground exists for review. The 'appearance' to the assessing officer involves only a prima facie stage of opinion framing, which does not require any out-side assistance from an external party. Moreover, this prima facie view is prescribed to be taken on 'receiving' the application itself. Therefore, this sub-section does not provide for any opportunity of hearing to any party; including the party applying for review. On the other hand, sub-Section (4) of Section 7B requires 'opinion' of the assessing officer that the review could be granted; and that subject to fulfillment of certain conditions; the review should be granted. This provision requires the party to satisfy the assessing officer qua fulfilment of the conditions mentioned above. Hence, hearing is required. Therefore, the opportunity of hearing to the parties, is contemplated under sub-section (4) of section 7B. Unless the assessing authority itself is of the view that the original order could be, possibly, reviewed and changed, no opportunity of hearing or the notice, is contemplated under the provisions of this Act. Therefore, rejection of review; by passing the order under Sub-Section (3) of Section 7B of the EPF Act; cannot be set

aside merely on the ground that the opportunity of hearing was not granted to the party seeking review. The fact that the opportunity of hearing is a part of the principles of natural justice is also not relevant in case the order is to be passed by the reviewing authority under Sub-Section (3) of Section 7B; because this order does not create anymore fresh adverse civil consequences; as compared to the original order, qua the party applying for review and, secondly, it pre-supposes the existence of only unadulterated and preliminary appearance to the review authority to the effect that no sufficient ground for review existed. The opportunity of being heard can be claimed and granted only if the authority is of the opinion that there is some fresh material which is required to be freshly appreciated by the authority. Therefore, the Act makes the provision for opportunity of hearing only while proceeding under Sub-Section (4) of Section 7B of the EPF Act. Section 7B (3) and Section 7B (4) contemplate and pertain to two different stages of opinion framing, two different genres of opinions of assessing authority, two different degrees of satisfactions of the assessing authority and two different processes of the opinion framing on the part of the assessing authority. One requires the participation of a party to the lis in the process of opinion framing, the other does not, although the end-result of both the processes can, very well, be the same, i.e. the rejection of the review. Hence, the argument of the counsel for the petitioner qua the order being vitiated for non-grant of opportunity of hearing is also liable to be noted only to be rejected.

10. Although the counsel for the petitioner has relied upon an order passed in the case of *M/s. GAS Security Services (supra)*, to argue that the impugned order has to be set aside because of having been

passed without hearing, however, before following the order/judgment passed in this case; the court has to see whether this constitutes a precedent; at all. The opinion expressed in the said order/judgment is only as under:

“After hearing learned counsel for the parties and considering the fact that remedy of review has been statutorily provided under Section 7-B of the Act; the petitioner filed review application on 7.9.2011 which was dismissed by the authority concerned on 12.9.2011 without issuing notice to the petitioner and affording opportunity of hearing mentioning that there is no sufficient ground available for review of the order, in my opinion, the order was passed in violation of the principles of natural justice and the same deserves to be set aside. Ordered accordingly.”

11. Perusal of the abovesaid order/judgment shows that although it makes observations about the requirement of hearing before passing the review order, however, the said order/judgment has not even adverted to the bare provisions of or the distinction between the provisions as contained in Sub-Section (3) and (4) of Section 7B of the Act. The said order/judgment has not even considered the provisions of Section 7B (3) and Section 7B (4), as such, or their nature and scope; or even the interplay between the relevant provisions of the Act. Therefore, in humble opinion of this court the said order is an order of disposal of the lis between the parties; and not a judgment constituting any binding precedent. An earlier judgment can be; and is required to be; followed only if it qualifies to be a valid precedent; as per the established jurisprudential requirements. There is no judicial propriety in

perpetuation of an adjudicatory casualness, mistake, error or ignorance of law; only because it may have happened in a judgment delivered at an earlier point of time. A subsequent bench cannot pretend to stand on the crutches of an earlier judgment unless the crutches are of adequate jurisprudential strength. Due caution has to be exercised while following an earlier judgment as a precedent. This note of caution has been sounded by the Supreme Court in case of ***Commissioner of Income Tax versus M/s Sun Engineering Works Private Limited AIR 1993, SC 43***, wherein the Hon'ble Apex Court has held as under:

“While applying the decision to a later case, the court must carefully try to ascertain the true principle laid down by the decision of the Supreme Court and not to pick out words or sentences from the Judgment divorced from the context of question under consideration by the court to support their reasoning.”

12. Carrying forward this caution and while clarifying when earlier judgment should be followed as a precedent; the Supreme Court has, in case of ***Krishna Kumar versus Union of India and others, (1990) 4 SCC 207***, observed as under:

“In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case

which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it.”

13. Moreover, the earlier judgment may be affected by *Sub Silentio* because of the relevant point or the provision not having been properly argued before the bench or it may be a judgment *per incuriam* as clarified by the judgment of the Supreme Court in case of ***State of Bihar Vs. Kalika Kuer alias Kalika Singh & others (2003) 5 SCC 448***; wherein it was so observed:

“A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of House of Lords decision, in which case it must follow those decisions; or when the decision is given in ignorance of the terms of a statute or rule having statutory force.”

14. Hence it is clear that if an issue is a subject matter of statutory provisions than unless the said provisions are considered,

interpreted and decided in a judgment; the said judgment cannot be treated as any precedent on the said issue. Rather; such a judgment takes itself to the realm of *per incuriam*. Moreover, there can never be any estoppel against a statute, a judgment being no exception. Hence, this court find itself unable to follow the abovesaid order/judgment passed in the case of ***M/s. G4S Security Services (supra)***, as any binding precedent. Same is the situation in the judgment rendered in ***M/s. Deogiri Nagari Sahakari Patsanstha Ltd. (supra)***; ***M/s. Ashmit Motors Private Limited, Nagpur (supra)*** & ***Manvish Info Solutions Pvt. Ltd. (supra)***. Hence, the said judgments are totally distinguishable. Moreover, a judgment delivered by another High Court is of only persuasive value and not as any binding precedent, even that if the same is found to be in consonance with the provisions of law contained in the Statute. Therefore, by any means, the judgment of the Supreme Court in ***Parnay Sethi case (Supra)*** is also not attracted in this case. Hence this argument of the counsel for the petitioner is also rejected.

15. The counsel for the petitioner has also submitted that after passing of the order of rejection of the review the petitioner has been left totally without remedy; because Section 7B (5) of the EPF Act does not provide any appeal against the order of rejection of review passed by the assessing authority. Therefore, only this court is required to intervene and to set aside such an order in exercise of writ jurisdiction. However, even this argument of the counsel for the petitioner is found to be non-sustainable. Under the scheme of the EPF Act the assessing authority is required to pass the original assessment order under Section 7A after hearing the parties concerned. That order is made appealable under Section 7-I of the EPF Act. If the petitioner was not satisfied with the

order, there was nothing to stop the petitioner from availing the remedy of the appeal; as provided under the above said Section. Hence, he was not remediless. However, he has chosen to file a review. The review has been rejected by the authority finding that no new material has been produced before it. At this stage also the petitioner had the remedy to challenge the original order and raise all the pleas raised by him in the review application. The provision of review is not a remedy 'alternate' to the remedy of appeal. Provision for review is only a lateral enabling provision to bring to the notice of the authority passing the original order; some mistake, new material or the apparent error. Even if the authority rejects the lateral remedy of review; the linear and hierarchical remedy of statutory appeal is always available to a party. The right to appeal provided by Sub-Section (5) of section 7B of the Act also does not contemplate any independent appeal against the review order *de hors* the provision of appeal under section 7-I against original order passed under section 7A. Rather, this provision also re-directs the appeal against the review order to the same linear and hierarchical remedy of appeal as provided under section 7-I of the Act. The language as used in Sub-Section (5) of section 7B, which stipulates that no appeal shall lie against the rejection of the review, is intended for a different purpose. If the rejection of the review, independently and *per se*, is made appealable then in every case the assessee; like the petitioner; would be able; and would be entitled; to avoid the provision of appeal under section 7-I of the Act against the original order; which requires pre-deposits of the assessed amounts as prescribed under Section 7(O) of the Act. To obviate that possibility only the sub-Section (5) of Section 7B has clarified that the order of rejection of the review would not be appealable in itself. However, the right and remedy to file appeal against the original order passed under section 7A would not be extinguished only because of the

rejection of the review under sub-section (3) of the section 7B of the Act. Since the petitioner is having remedy of appeal against the substantive order passed by the Assessing Officer under section 7A of the Act, therefore, this court, otherwise also, does not find it appropriate to interfere in the matter.

16. In view of the above, finding no merit in the present petition, the same is dismissed.

1ST JUNE, 2022
‘raj’

(RAJBIR SEHRAWAT)
JUDGE

<i>Whether speaking/reasoned:</i>	<i>Yes</i>	<i>No</i>
<i>Whether Reportable:</i>	<i>Yes</i>	<i>No</i>