IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 16.10.2023

Coram:

THE HONOURABLE MRS.JUSTICE N.MALA

WP.No.28982 of 2010
and
WMP.No.2 of 2010

M/s. Arcot Textile Mills Ltd.,
Represented by its Managing Director,
Mr.Nadrajh Annamalai,
P.B.No.1, Ulagamkathan Village,
Kallakurichi 606 202.
Villupuram District.

...Petitioner

Vs.

1. The Regional P.F. Commissioner,
Sub-Regional Office,
P.B.No.588, Sree Complex,
D Block, No.18, Madurai Road, Trichy.

2. The Enforcement Officer,
Cuddalore II Division,
Employees Provident Fund Organisation (EPF)
A.R. Complex, No.22, Nethaji Road,
Manjakuppam, Cuddalore 607 001.

...Respondents

Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records on the file of the first respondent relating to the impugned proceedings of the 1st respondent dated 22.11.2010 in Ref. No. C2/RC/TN/TR/6901/SRO- TRY/2010 and quash the same.

For Petitioner : Mr. T. Saikrishnan
for M/s. Sai Bharath and Ilan

For Respondents : M/s. S.M. Deenadayalan
Standing Counsel

ORDER

Writ Petition is filed challenging the proceedings dated 22.11.2010 of the 1st respondent under Section 7-C of the Employees' Provident Fund and Miscellaneous Provisions Act (hereinafter referred to as the “Act”).

2. The petitioner is a textile factory at Kallakurichi which was incorporated in the year 1964. The main business of the petitioner is manufacturing yarn from cotton and man made fibre which are used in the textile industries. The petitioner is covered under the Act with the code TN/6091. The petitioner was regular in paying the provident fund dues till 1997-98, but thereafter from 1998 to April 2006 defaulted in remitting

contributions as there was slump in the cotton industry and the petitioner establishment became financially critical. According to the petitioner on 03.10.2007 the petitioner paid a sum of Rs.83,01,037.80/- towards the arrears of provident fund contribution to the 1st respondent and with that payment, the entire provident fund contribution i.e. arrears of principal amount were cleared completely. Thereafter the petitioner was regular in remitting the contributions. Whileso, the 2nd respondent initiated proceedings under Section 7A of the Act on 09.02.2010 for the period from 2/2009. In the said proceedings the representative of the petitioner appeared and produced proof for payment of contributions from 3/2009 to 2/2010. As the 1st respondent sought to proceed in respect of earlier periods which were not covered by the notice, the petitioner objected and on the basis of the petitioner's objection the 1st respondent closed the 7A proceedings vide order dated 29.10.2010. Having closed the 7-A proceedings, the 1st respondent without any justification unilaterally initiated the proceedings under Section 7C of the Act. The 1st respondent issued the impugned notice dated 22.11.2010 under Section 7C of the Act for the period from 1997-98 to 2009-10 for the purpose of determination of escaped amount due from the petitioner. Against the said impugned notice the petitioner has filed the above writ petition.

3. The respondent filed counter stating that as the petitioner establishment did not pay the statutory contribution and other charges for the period 3/2009 to 2/2010 within the stipulated period, proceedings were initiated to determine the amount due from it. The respondent further stated that the impugned notice was issued for the entire period of default including those periods were the establishment paid 10% instead of 12% from 1997-98 to 2009-10 under the guise of BIFR proceedings. The main contention of the respondent in the additional counter affidavit was that 7A proceedings were initiated for non payment of statutory contribution for the period from 02/2009 onwards. The respondents referred to various dates on which the 7A enquiry proceedings were adjourned. It was stated that during the pendency of inquiry the petitioner establishment remitted Rs.4,28,481/- towards contribution for the period from 03/2009 to 02/2010 and Rs.2,17,830/- towards contribution for the period from 03/2010 to 07/2010. The respondent stated that in the inquiry held on 07.09.2010 in 7-

A proceedings, it was found that there was no evasion on the part of the petitioner in respect of PF membership, but it was found that there was negative balance of Rs.1,29,41,187/- reported by the Accounts Group, which maintained accounts of the members of the petitioner establishment. According to the respondent negative balance arose due to the difference between the contribution payable as per the returns (Form 3A, 6A etc.,) submitted vis-a-vis the actual contributions during the accounting year. It was only to reconcile the said gap that the petitioner was advised to submit the relevant records. The respondent further stated that the 7-A enquiry proceedings were closed on the objection of the petitioner's counsel that when the notice was limited to the period from 02/2009 onwards only, the assessments for the back periods could not be re-opened. According to the respondent, the petitioner was informed that the relevant provisions would be relooked and the back periods would be assessed under Section 7C of the Act to which he accepted. Accordingly the respondent closed 7A enquiry proceedings and issued the impugned notice invoking provisions 7C of the Act. In short it was the contention of the respondent that 7C proceedings were initiated for the purpose of determining the escaped amount due from the petitioner establishment for the period 02/2009 onwards and also for the negative balance to the tune of Rs.1,29,41,187/-. In view of the aforesaid contentions, the respondents prayed for dismissal of the writ petition as devoid of merits.

4. The learned counsel for the petitioner mainly contended that the determination of escaped amount under Section 7C of the Act can be initiated within a period of 5 years from the date of communication of the order passed under Section 7A or 7B of the Act. The learned counsel further submitted that the impugned notice was bad in law in as much as the jurisdictional requirements contemplated under the statute for proceedings under Section 7C of the Act were conspicuously absent. The learned counsel for the petitioner submitted that there was a specific bar on reopening any 7A order after the expiry of five years from the date of communication of the order. The learned counsel referring to the various 7A orders filed in the type set of papers submitted that the impugned order was ex facie illegal. The learned counsel therefore pleaded that the writ petition be allowed.

5. The learned counsel for the respondent on the other hand submitted that there was no jurisdictional error in invoking Section 7C of the Act. The learned counsel further submitted that the impugned order was issued not only for determining the escaped amount due from the petitioner for the period 2/2009 onwards but also to reconcile the negative balance to the tune of Rs.1,29,41,187/-. The learned counsel submitted that limitation of 5 years would not apply in respect of reconciliation of negative balance. The learned counsel therefore submitted that the writ petition was meritless and deserved to be dismissed.

6. I have heard both the learned counsels and have perused the entire materials placed on record.

7. The short question to be considered in this writ petition is whether the impugned notice is hit by limitation and further if the jurisdictional requirements of Section 7C of the Act are not satisfied. Section 7(C) of the Act reads as follows:

"7C. Determination of escaped amount. Where an order determining the amount due from an employer under section 7A or section 7B been passed and if the officer who passed the order-

(a) has reason to believe that by reason of the omission or failure on the part of the employer to make any document or report available, or to disclose, fully and truly, all material facts necessary for determining the correct amount due from the employer, any amount so due from such employer for any period has escaped his notice;
(b) has, in consequence of information in his possession, reason to believe that any amount to be determined under section 7A or section 7B has escaped from his determination for any period notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the employer, he may, within a period of five years from the date of communication of the order passed under section 7A or section 7B, re-open the case and pass appropriate orders re-determining the amount due from the employer in accordance with the provisions of this Act:

Provided that no order re-determining the amount due from the employer shall be passed under this section unless the employer is given a reasonable opportunity of representing his case."

Objection on the ground of limitation:

8. In the light of the provisions, let me examine if the impugned order can be sustained.

9. From a reading of Section 7-C it is clear that power to reopen the case is available within a period of 5 years from the date of communication of the order under Section 7A or 7B. In the present case the 7A orders which are sought to be reopened by the impugned notice are as follows:

S.No.	***Dates***	***Order in 7A proceedings***	***Assessment period***
1.	09.02.1998	Order of the respondent under section 7A of the Act.	08/97 to 11/97
2.	08.11.2000	Order of the respondent under section 7A of the Act	5/98 to 5/00
3.	23.05.2002	Order of the respondent under section 7A of the Act	6/00 to 2/02
4.	30.09.2002	Order of the respondent under section 7A of the Act	4/02 to 7/02
5.	05.02.2003	Order of the respondent under section 7A of the Act	3/02, 8/02 to 11/02
6.	16.10.2003	Order of the respondent under section 7A of the Act	12/01 to 6/03
7.	08.10.2004	Order of the respondent under section 7A of the Act	7/03 to 4/04
8.	29.04.2005	Order of the respondent under section 7A of the Act	11/04 to 1/05

From the above table it is clear that the impugned notice reopens 7-A orders which are beyond the period of limitation provided in the Act. In this regard the Judgment of Calcutta High Court in the case of *Satnam Singh Ahluwalia Versus The R.P.F.C. E.P.F.O and others* reported in *2007 SCC OnLine Cal 816* can be usefully referred. The Calcutta High Court in the aforesaid decision construed the provisions of Section 7C with respect to the period of limitation of 5 years stated therein. The Court held as follows:

> *"6. I fully agree with counsel for the petitioner that the authority was totally wrong in holding that since in certain circumstances certain offence committed under provisions of the Act could be continuing offence, the provisions in Section 7C were not be treated as disabling provisions. The continuing offence principle had no manner of application to the 7A proceedings in which the authority was making the order. The question before him was whether in view of the period of limitation prescribed by the provisions in Section 7C he was empowered to reopen the case in which the previous 7A order had been made for the period from July 1987 to February 1994. The provisions in Section 7C clearly put a prohibition against reopening any 7A case after expiration of five years from the date of communication of the order passed in it. Hence there cannot be any doubt that by initiating fresh 7A*

proceedings on June 17th, 2003 the authority was not competent to reopen circuitously the case in which the order dated June 27th, 1994 had been made. The authority was wrong in ignoring the specific prohibition put by the provisions in Section 7C.

10. The learned counsel for the respondent tried to explain the reason for reopening the cases by stating that the prior periods were sought to be reopened because of negative balance to the tune of Rs.1,29,41,187/-. In my view whatever may be the reason, when the statute prohibits the reopening of 7-A orders after the expiration of 5 years, the Authority cannot circumvent the same. Hence I find merit in the submission of the learned counsel on the point of limitation.

Objection as to Jurisdictional Requirements:

11. The relevant portion of the impugned order is as follows:

"WHEREAS information has been laid and on consideration whereof there is every reason to be believe that there is an escaped amount in the proceedings dated 29/10/2010 issued for this enquiry under section 7A in respect of your establishment, namely M/s. Arcot Textile Mils Ltd, Kallakuruchi 606202 (Code

No.TN/TR/6901) covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the schemes framed there under.

WHEREAS the counsel appeared for you in respect of your establishment has raised the objection stating that 7A notice did not contemplated for the proposed period in proceedings and hence requested for dropping it. Though it was not the stage to raise such objection, in fitness and interest of justice the said case was dropped and now the case is proceed under section 7C for the entire period of default including that of those period where the establishment paid 10% instead of 12% from 1997-1998 to 2009-2010 under the guise of explained before the BIFR, which was rejected finally.

And, Whereas, the Regional Provident Fund Commissioner, Trichy in accordance with Section 7C of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 to determine the escaped amount due from you under the Provisions of the Employees' Provident Funds and Miscellaneous Provisions Act and the Schemes framed there under for the period 02/2009 onwards and also a negative balance to the tune of Rs.1,29,41,187/-(one crore twenty nine lak forty one thousand one hundred and eighty seven only).

And, whereas, for determining the amount due from you as above, it is desired to give you a reasonable opportunity of *representing your case."*

Para's 1 and 2 of the impugned order relate to the closure of the 7-A proceedings earlier initiated. Para 3 alone refers to 7C proceedings.

12. A reading of Section 7-C extracted supra shows that jurisdiction to re-determine the assessment under Clause (a) and (b) therein are different.

Whereas,

i) Clause 'a' of 7C relates to failure or omission of employer to make any document or report available, or to disclose, fully and truly, all material facts necessary for determining the correct amount due from the employer.

ii) Clause 'b' of 7C relates to consequence of information in possession of the officer and his reason to believe that any amount determined under Section 7A or 7B has escaped from his determination for any period. Clause 'b' has no reference to the omission or failure of the employer.

In both the cases, the officer can determine the escaped amount under Section 7C within a period of 5 years from the date of communication of the order passed under Section 7A or 7B, so as to reopen the cases. The proviso to the Section states that no orders to re-determine can be passed without giving reasonable opportunity to the employer to represent his case. Therefore the reason to believe is by reason of omission or failure either on the part of the employer or it is a consequence of the information in his possession.

13. In the present case from the extract of the impugned notice given supra the officer has not even whispered on the “reason to believe”. Hence it cannot be said that the officer has applied his mind to the provisions of Section 7C. Mere use of the word 'reason to believe' would not satisfy the statutory requirement. The statute states that the reason to believe may arise out of 2 contingencies provided in Clause 'a' or Clause 'b'.

14. In either case the officer has to apply his mind to the materials,

examine the same and thereafter he has to form an opinion on the extent of failure to disclose. This opinion should be reflected in the notice, so that the establishment may have an opportunity to contest the same. As the impugned notice is not in consonance with the statutory requirements of Section 7-C, the objection of the petitioners counsel is sustained.

15. I am therefore of the view that the impugned order cannot be sustained and hence the same is set aside. The respondents are at liberty to take fresh proceedings after satisfying the requirements of the provisions of Section 7-C only with respect to those assessment proceedings which are within the limitation provided under the provision.

16. In view of the above discussions, the objections taken by the writ petitioner are justified and therefore the impugned order dated 22.11.2010 is set aside with liberty to the respondents as stated above.

In the result, writ petition is allowed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

16.10.2023

Index: Yes/No
Speaking Order: Yes/No
Neutral Citation: Yes/No
dsn

To

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N.MALA, J.

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