BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.06.2023

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P(MD)No.14105 of 2023
and
W.M.P.(MD)No.11957 of 2023

M/s.RR Infra Constructions,
Represented by its Partner,
R.Murugaperumal. ... Petitioner

Vs.

1.Regional Provident Fund Commissioner,
Employees' Provident Fund Organization,
Regional Office, No.1, LDC Road,
Chokkikulam,
Madurai – 625 002.

2.Regional Provident Fund Commissioner No.-II,
Employees' Provident Fund Organization,
Regional Office, No.1, LDC Road,
Chokkikulam,
Madurai – 625 002.

3.Enforcement Officer,
Employees' Provident Fund Organization,
Regional Office, No.1, LDC Road,
Chokkikulam,
Madurai – 625 002. ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus, directing the 1st respondent to transfer the 7A file vide Diary No.539 of 2021 from 2nd respondent to some other officers for reassessing the inspection dues.

For Petitioner : Mr.S.Parthasarathy,
For Mr.V.Malaiyendran.

For Respondents : Mr.A.John Xavier,
Standing Counsel.

ORDER

The petitioner is an establishment covered under the provisions of Employees' Provident Funds and Miscellaneous Provisions Act, 1952. The enforcement officers of the respondent organization inspected the establishment in 2019 and 2022. Prosecution notice was issued on the footing that the petitioner did not comply with the summons. The petitioner thereupon filed W.P.(MD)No.13950 of 2022. When the matter was taken up for hearing, the petitioner through their counsel undertook to participate in the enquiry and cooperate with the authority for determination of their dues. In view of the same, the said writ petition was disposed of on 26.04.2023 in the following terms:-

> *"6. .... I direct the petitioner to appear before the respondent on 26.05.2023 at 11.00 am. It is further undertaken by the petitioner that whatever documents that are available with them and whatever information that the petitioner can provide will be placed before the respondent authority. When this writ petition was admitted, interim stay was granted. The petitioner also undertakes to cooperate in Section 7(A) enquiry. No purpose will be served by keeping the prosecution notice alive. The prosecution notice dated 30.12.2020 is set aside. The writ petitioner is called upon to abide by the undertaking now given before this Court."*

Now the petitioner wants the enquiry to be conducted by some other officer and not the incumbent.

2.The learned counsel for the petitioner took me through the averments set out in the affidavit filed in support of the writ petition. An additional affidavit was also filed by the counsel who appeared in the enquiry.

3.The second respondent has filed a detailed counter affidavit. The learned standing counsel took me through its contents. The second respondent appeared in person. The respondents argued that the petitioner is adopting obstructionist tactics and that their sole intention is to drag on. They do not want the second respondent to conclude the enquiry initiated under Section 7A of the Act. The allegations made in the affidavit filed in support of the writ petition have been controverted. The learned standing counsel pressed for dismissal of this writ petition.

4.I carefully considered the rival contentions and went through the materials on record. I must straightaway note that though the second respondent was directed to have the hearing on 26.05.2023, he chose to advance the same to 25.05.2023. According to the second respondent, this was due to administrative reason. Since the petitioner was not ready, they sent an e-mail seeking adjournment and the hearing was adjourned to 30.05.2023 at 10.30 am. In the daily order sheet issued by the second respondent, quite a few queries were raised. On 30.05.2023, the petitioner appeared and submitted their registers. The enforcement officer was directed to examine and submit his report and the hearing was adjourned to 06.06.2023. On 05.06.2023, the enforcement officers informed the second respondent that the documents submitted by the employer were already submitted during inspection and that no new documents / records have been submitted and therefore, "the dues statements" already submitted based on the records may be considered. It was also noted therein that the employer had not submitted the documents as sought for by them earlier. The petitioner on 06.06.2023 took the stand that new enforcement officers may be appointed to conduct fresh assessment for the period between December 2014 and November 2020. The daily order sheet dated 06.06.2023 reads as follows:-

DAILY ORDER

Mr. Murugavel Perumal (Partner) and Mr MN Ramkumar (advocate) appeared on behalf of the establishment. The establishment has given a representation dt. 06/06/2023 along with a reconciliation of salary statements for period 2014-15 to Nov 2020 along with Balance sheet (Pg 1 to 114)

This shall be checked and replied.

Mr. G Subramanian and Ms Vanaja (EO's) appeared on behalf of the department. The two EO's have given a reply to the earlier hearing dt. 30/05/2023, saying the following records have not been submitted yet.

The establishment is required to check and reply to this requirement of the EO's for determining the dues.

Establishment has also requested for copy of the workers name list collected on site, dues assessment year wise list Establishment can come and collect this by 12/06/2023.

In order to provide another opportunity, the present inquiry is adjourned to 26/06/2023 at 11.00am

ADJOURNED

Copy of the EO's list of records attached here.”

5.This writ petition came to be filed on 13.06.2023. Notice was ordered and the second respondent appeared in person on 26.06.2023. What is material is what happened on 06.06.2023. The affidavit filed in support of the writ petition reads that on 06.06.2023, the second respondent conducted enquiry in the presence of the counsel for the petitioner. Shri.MN.Ramkumar, advocate is a legal practitioner having twenty years of experience in labour law. The second respondent is alleged to have addressed him in singular and disrespectful manner. Shri.MN.Ramkumar was present in person before this Court and he stood by the allegations made against the second respondent. Shri.MN.Ramkumar had also lodged written complaint on 08.06.2023 to the Central Provident Fund Commissioner, Employees Provident Fund Organization, New Delhi. At this stage, Thiru.P.Subramani, RPFC-II Madurai submitted that he merely matched the decibel level of the advocate. He admitted that since the advocate raised his voice, he also raised his voice. I can visualize what would have happened during enquiry.

6.According to the inspection report submitted by the enforcement officers, the establishment has to pay a sum of Rs.60.00 crores. It is obvious that much is at stake. Of course, as against the determination under Section 7A of the Act, an appeal can be filed before the Tribunal.

But under Section 7-O of the Act, no appeal by the employer shall be entertained unless 75% of the amount due from him as determined under Section 7A of the Act has been deposited. Of course, this amount can be waived or reduced by the Tribunal. As a matter of practice, the deposit amount is reduced usually to 40%. The Hon'ble Division Bench in W.A.(MD)No.435 of 2023 dated 18.04.2023 had held that the discretion of the Tribunal under Section 7-O of the Act should not be interfered with in writ proceedings. Hence, the petitioner / establishment is justified in seeking legal assistance and also insisting that the enquiry is conducted in a fair manner. They are also entitled to demand that they should be given the fullest opportunity.

7.The manner in which the enquiry under Section 7A of the Act has to be conducted has been set out in the decision reported in 2011 SCC OnLine Mad 1271 (V.S.Murugan v. RPFC, Tamil Nadu and ors). Paragraph 13 of the said order reads as follows :

> "13.Section 7A(2) of the Act contemplates conducting enquiry and according to the petitioner the erstwhile employer was not able to appear for enquiry due to non-availability of records. The Division Bench of this Court in

the decision reported in (2003) 3 LLJ 795 (*Q793, Madathupatti Weavers Co-Opeative Production and Sales Society Ltd.* v. *Regional Provident Fund Commissioner, Madurai*) considered similar question regarding conducting of enquiry and in paragraph 9 held thus,

"9. As far as the determination under Section 7-A of the Act is concerned, it is seen that the provision comprises two parts. Firstly, the authority has to decide whether the Act applies to the establishment and secondly, he has to determine the amount due from the employer. For the purpose of this determination, the officer has to conduct such inquiry as deemed necessary. A reading of sub-Section (2) of Section 7-A of the Act shows that the officer conducting the inquiry has to decide the issue as if he is trying a suit in a civil Court with powers under the Code of Civil Procedure. The inquiry shall be deemed to be judicial proceedings. Sub-Section (3) shows that no order shall be made under sub-Section (1), unless the employer concerned is given a reasonable opportunity of representing his case. Sub-Section (3) empowers the officer to compel the attendance of the person concerned or the production of documents to decide the applicability of the Act or determination of the amount due from the employer. From the reading of these provisions, it is clear that no order under Section 7-A of the Act can be passed without conducting a full-fledged inquiry as if the matter is decided in a suit and that the officer determining the question has to decide both the coverability as well as the determination of the amount".

(Emphasis Supplied)

The said decision was followed by the Division Bench of Madurai Bench of this Court, in which I was also a party, in W.A.(MD) Nos. 833 to 835 of 2010 judgment dated 4.1.2011 and set aside the demand and remitted the matter to follow Section 7A and pass fresh orders by conducting enquiry."

8.It is the second respondent who has to determine the dues. He cannot mechanically go by the inspection report of the enforcement officers. A reading of the daily order sheets indicate that the second respondent without undertaking an independent assessment of the materials on record, is going by the stand taken by the enforcement officers. Evidence must be adduced to show that there was evasion or failure on the part of the employer to comply with the provisions of the Act to remit the contribution. The employer will have to produce documents to show that there was compliance on his part. There is no need to have any provocative exchanges during enquiry. The process can go on in a civil manner. In the counter affidavit, the second respondent has referred to Section 7A.(2) of the Act which confers same powers as vested in a Court under the Code of Civil Procedure. The second respondent even while exercising the powers conferred on him under Civil Procedure Code should bear in mind that he has the duty to conduct himself in a civil manner. There was no necessity or need for him to raise his decibel level. He has to pursue the records, apply the provisions of law and determine the dues. As held by the Hon'ble Division Bench, the enquiry must be conducted like a suit. In view of the unpleasant exchange between the second respondent and the petitioner's counsel, the petitioner is justified in nurturing a feeling that the enquiry may not be conducted fairly. In fact, the second respondent may not at all be negatively disposed towards the petitioner. But what matters is not actual bias but the reasonable apprehension entertained by the litigant that there may be likelihood of bias.

9.If I dismiss the writ petition and direct resumption of the enquiry, the petitioner is bound to entertain a legitimate feeling that he is not likely to get justice at the hands of the second respondent. In such cases, the test to be applied by this Court is reasonable likelihood of bias. This

Court cannot disregard the affidavit filed by a lawyer having twenty years' standing. I am not casting any aspersion on the second respondent. He in fact rose in my esteem. There was no need for him to have fairly admitted that he raised his voice. I applaud the second respondent for having been truthful. I only want the second respondent to remember that while the litigant or the lawyer can afford to give vent to their emotions, those on the bench will have to keep a watch over their responses. I am only holding that if the second respondent conducts the enquiry, the petitioner would certainly have the feeling that the outcome is not likely to be fair or impartial. Someone observed that the most important person in a Court is the losing litigant. He must go out of the Court with a feeling that he had the fullest opportunity to put forth his case. The establishment which is facing a himalayan demand must have the feeling that they were fully heard and that their entire evidence was considered. This case cannot be dealt with summarily. The records are voluminous. It is not matter that can be dealt with in a single hearing. The enquiry does not appear to have been conducted like a suit. A summary approach appears to have been adopted. In order to avoid the allegation that they were given a short shrift, the proceedings must be duly videographed and audiographed. Under no circumstances, the enquiry officer should lose his cool. The moment the enquiry officer loses his cool, it generates needless heat and controversy. Considering the stakes involved, in view of the unpleasant exchange that had taken place between the second respondent and the counsel for the petitioner and also taking note of the fact that the second respondent appears to go by the reports of the enforcement officers, I direct the first respondent to assign the enquiry to some other authority. I make it clear that the petitioner will have to abide by the undertaking given before this Court to extend their fullest cooperation.

10.With this observation and direction, this writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

30.06.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
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G.R.SWAMINATHAN, J.

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W.P(MD)No.14105 of 2023

30.06.2023