Nikita

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2467 OF 2024

Penguin Kids
C/o. New Horizon Public School … Petitioner
V/s.
Assistant Provident Fund Commissioner … Respondent

WITH
WRIT PETITION NO.2472 OF 2024

New Horizon Public School, through
Nagar Yuwak Shikshan Sanstha … Petitioner
V/s.
Assistant Provident Fund Commissioner … Respondent

WITH
WRIT PETITION NO.2470 OF 2024

New Horizon Scholars School … Petitioner
V/s.
Assistant Provident Fund Commissioner … Respondent

Mr. Mayur Khandeparkar a/w Mr. Saurabh Kshirsagar a/w Ms. Druti Datar a/w Mr. Amit Hailkar a/w Mr. Nivit Srivastava i/b Maniar Srivastava Associates, for the Petitioners.

Mr. Gunjan Chaubey, for the Respondent.

CORAM : AMIT BORKAR, J.

DATED : APRIL 4, 2024

P.C.:

1. The challenge in these petitions is to the order dated 23rd

January 2024 directing petitioners to pay 50% of the assessed dues on an application filed by petitioners for waiver of liability under proviso to Section 7O of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("the Act" for short).

2. The petitioners challenged an order passed under Section 7A by appeal under Section 7O of the Act. In the said appeal, petitioners filed an application for waiver of amount which has been partly allowed by the Appellate Authority by directing petitioners to deposit 50% of the assessed dues.

3. Learned counsel for the petitioners invited my attention to the Division Bench's judgment of this Court in the case **O.G. Bajaj Construction Vs. Assistant Provident Fund Commissioner** reported in 2010 (3) Mh.L.J. 325. He submitted that order impugned before the Appellate Authority was patently illegal as the employees were not identified by the Authority while holding the inquiry under Section 7A of the Act, which is mandatory requirement. In support of his contention, he relied on unreported judgment of this Court (Nagpur Bench) in Writ Petition No.1674 of 2016 delivered on 23rd March 2018. The Co-ordinate Bench of this Court held that while determining provident fund dues, under Section 7A of the Act, actual identification of employees along with their verifiable address is the mandatory requirement. It is not open for the Assistant Provident Fund Commissioner to proceed to determine the liability of employer under Section 7A of the Act by holding that employer failed to adduce evidence as the liability of employee remains unidentified. He further submitted that the Authorized Representative of the petitioners was not allowed to make submissions and the order under Section 7A of the Act was passed without granting opportunity of oral hearing. According to him, number of employees considered by the authority while holding inquiry under Section 7A of the Act contain employees which were exempted under the provisions of the Act. Therefore, such exercise falls within the parameters laid down by the Division Bench of this Court.

4. Per contra, learned counsel for the respondent submitted that the order under Section 7A of the Act was based on records submitted by the petitioners which includes reconciliation statement for the period of April 2014 to March 2019; the soft copies of salary-slip for the period of April 2014 to March 2019; balance-sheet for the period from 2014-2015 to 2018-2019. He therefore, submitted that the number of employees stated in the order against the entries, in the second column corresponds with the salary-sheet produced by the petitioners. Therefore, this is not a case unlike the case before the Co-ordinate Bench of this Court, where the Authorities under the Act recorded a finding against the employer only on the ground of failure of employer to produce material and the conclusions arrived were based on *ipse dixit.*

5. I have heard learned counsel for the parties and considered Section 7A and 7O of the Act. It is not in dispute that entertainment of an appeal under Section 7I of the Act is made subject to deposit 75% of the amount due as determined under Section 7A of the Act. However, under the proviso, the Appellate Authority is conferred with the power to waive or reduce the amount to be deposited under the said Section.

6. Before considering the contentions raised on behalf of the parties, it is necessary to refer to parameters laid down by the Division Bench for consideration of application of waiver which are as follows:

> "**17**. Any party claiming waiver of prior deposit has to show:
>
> (1) That the order under appeal is patently illegal or without jurisdiction.
>
> (2) No liability whatsoever is attracted.
>
> (3) Even if liability is attracted, on facts, the appellant has no capacity or resource and liquidity of paying the dues so claimed."

7. Moreover, the Co-ordinate Bench of this Court laid down parameters for holding an inquiry under Section 7A of the Act which reads as under:

> "The law laid down by the Apex Court is absolutely clear in respect of three things i.e. (1) that the Provident Fund Commissioner cannot saddle the liability upon the employer for the reason that the employer has failed to produce evidence, (2) the liability can be fixed only upon identifying the workmen or employees and (3) it is the duty of the Provident Fund Commissioner to collect evidence and collate all material before coming to proper conclusion."

8. The main thrust of the petitioners for seeking waiver of liability imposed under Section 7A of the Act is based on unreported judgment of this Court in the case of **Kaushik K. Chatterjee Engineers and Contractors, Vs. Assistant Provident Fund Commissioner** in Writ Petition No.1674 of 2016 dated 23rd March 2018, wherein this Court observed that in absence of identification of employees' liability under Section 7A of the said Act, cannot be imposed.

9. As rightly pointed out on behalf of the respondent, it appears that the Authorities under Section 7A of the Act have taken in to consideration, the documents submitted on behalf of the petitioners, such as salary-sheet and reconciliation statement for relevant period. Such document which contains salary-sheet are sufficient to direct appellant to deposit 50% of dues. Non identification of names and addresses would be the factor which the Appellate Authority need to consider at the stage of deciding appeal finally. However, at the stage of consideration of waiver of deposit required under Section 7O of the Act, one cannot forget that the first Authority had passed order based on salary-sheets submitted by the petitioners. The chart referred in the order under Section 7A of the Act provides sufficient indication about the number of employees based on documents furnished by the petitioners.

10. In the case of **Kaushik K. Chatterjee** (supra), Co-ordinate Bench of this Court was faced with a situation where the Authority while conducting inquiry under Section 7A had no material to identify number of employees or their identities. Therefore, based on inferences and surmises the Authority under the Act arrived at a conclusion which was held to be not permissible by Co-ordinate Bench of this Court. In the facts of the present case identifiable data was before the Authority under Section 7A of the Act. Therefore, at the stage of consideration of waiver of deposit, it was not necessary for the Appellate Authority to grant complete waiver for lack of details of identities of employees.

11. Insofar as the other contentions raised on behalf of the petitioners are concerned, both contentions refer to failure to afford sufficient opportunity of hearing to the petitioners. All these contentions regarding breach of opportunity of hearing shall be considered by the Appellate Authority at the time of final hearing while considering the merits of submissions raised on behalf of the petitioners. However, at this stage of consideration of waiver, if on prima facie consideration of the material on record Authority is satisfied that the liability in any case would not be reduced below 50% of the recoverable dues, in my opinion, absence of sufficient reasons in the impugned order cannot be ground to grant relief of waiver of entire amount of liability under Section 7A of the Act.

12. Therefore, in my opinion, there is no legal infirmity in the impugned order.

13. Time to deposit granted earlier is continued for a period of four weeks from today.

14. All the writ petitions are dismissed. No costs.

(AMIT BORKAR, J.)