Neutral Citation No. : **2024:PHHC:054260**

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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CWP-9227-2015
Decided on : 22.04.2024

Central Board of Trustees,
Employees Provident Fund Organization,
Jalandhar City

. . . Petitioner(s)

Versus

M/s Hari Darshan Singh, BKO (Brick Kiln Owner)

. . . Respondent(s)

CORAM: HON'BLE MR. JUSTICE SANJAY VASHISTH

PRESENT: Mr. Rajesh Hooda, Advocate
for the petitioner(s).

Mr. Vivek Salathia, Advocate
for the respondent(s).

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SANJAY VASHISTH, J. (Oral)

1. By way of present writ petition, petitioner - Central Board of Trustees, Employees Provident Fund Organization through Assistant Provident Fund Commissioner (in short, 'Ld. APFC'), Jalandhar City, has challenged the sustainability of order dated 12.05.2014 (Annexure P-3), passed by the Employees Provident Fund Appellate Tribunal, New Delhi (in short, 'learned Appellate Tribunal'), whereby, appeal filed by the respondent – M/s Hari Darshan Singh, BKO (Brick Kiln Owner), has been allowed.

2. In the aforesaid appeal, order dated 03.09.2008 (Annexure P-1) passed by the Ld. APFC, under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for brevity, 'the Act of 1952'), was assailed by the respondent.

3. As per the order dated 03.09.2008 (P-1), respondent –

Establishment/Employer was ordered to deposit the total amount of Rs.8,44,331/- within a period of 15 days of the receipt of the order, and then to submit the proof of deposit, failing which, same would be recovered as per the provisions of Section 8B to 8G of the Act of 1952. As per the order passed by the Ld. APFC, under Section 7A of the Act of 1952, no objection to the assessment done by Enforcement Officer/Inspector was filed by the respondent. Rather, said assessment was made *ex-parte* on the basis of District Food Controller's report etc.

4. In the appeal, learned Appellate Tribunal, examined the record and found that merely on the basis of the report of the Enforcement Officer/ Inspector, the Commissioner determined the amount due from the establishment/employer, whereas, as per Section 7A of the Act of 1952, an inquiry is required to be conducted by the Commissioner himself. Thus, order dated 03.09.2008 was set aside for want of compliance of Section 7A of the Act of 1952, by observing as under:-

> *"3. The appellant did not produce all documents before the Commissioner. The Commissioner ultimately called for a report from the Provident Fund Inspector. The Inspector visited the appellant establishment and submitted a report that the appellant's establishment had defaulted in remitting the PF dues. On the basis of this report the Commissioner determined the amount due from the appellant employer. The respondent authority has, however, kindly accepted the report submitted by the Enforcement Officer without any examination.*
>
> *4. Section 7A of the Act rejoins that it is the Commissioner who would have to make the enquiry. The determination of outstanding PF dues is to be made by him and not by the inspector. Therefore, the impugned order is not sustainable on this ground. The Ld. Advocate for the appellant also contended that the report of the Provident Fund Inspector had not been supplied to the appellant before being taken into consideration.*

The validity of the impugned has also been assailed on this ground. The impugned order, is therefore, legal not sustainable.

5. Accordingly, the impugned order is not sustainable and is set aside. The appellant is allowed. Copy of the order be sent to both the parties. File be consigned to the record."

5. In the writ petition filed before this Court, counsel for the petitioner – Organization, argues that provisions of Section 7A of the Act of 1952, have been duly complied with. Numerous opportunities were granted to the respondent to represent its case and matter was heard on 29/08/2006, 05/09/2006, 26/09/2006, 12/10/2006, 8/11/2006, 29/11/2006, 13/12/2006, 03/01/2007, 24/01/2007, 21/02/2007, 21/03/2007, 25/04/2007, 30/05/2007, 11/07/2007, 31/07/2007, 19/09/2007, 17/10/2007, 26/12/2007, 23/01/2008, 05/03/2008, 16/04/2008, 28/05/2008, 02/07/2008, 23/07/2008 and 13/08/2008. However, neither anybody appeared on behalf of the organization, nor any representation was received from its side on any date, despite repeated letters and summons. Thus, there being no objection/representation, no deep inquiry was required to be conducted at the first instance by the Commissioner, and therefore, undisputed and sole material i.e. *ex-parte* assessment made by the Enforcement Officer/Inspector, was sufficient for the Commissioner, to decide the amount payable by the Respondent – Employer under Section 7A of the Act of 1952. Thus, there being no illegality in the order dated 03.09.2008 (Annexure P-1) passed by Ld. APFC, appeal against it has been wrongly allowed by the learned Appellate Tribunal.

6. To counter the aforementioned submissions, counsel for the respondent – Employer, submits that as per settled law, a deep inquiry is required to be conducted by the Commissioner under Section 7A of the Act

of 1952. Thus, while defending the order passed in appeal, which is under challenge before this Court, Mr. Vivek Salathia, counsel for the respondent, argues that neither appropriate opportunity has been afforded to the respondent to produce the material/representation/objection, nor the order has been passed by the Commissioner after holding due inquiry, as is mandatorily required under Section 7A of the Act of 1952.

Further submits that even the procedure of conducting inquiry has been specified under Section 7A (a) & (b) of the Act of 1952. However, no such procedure was adopted; rather, Commissioner has relied solely on the report of the Enforcement Officer (E.O). Enforcement Officer (E.0) is the Inspector of the Department who derives his functionary power, by virtue of Section 13 of the Act of 1952. Thus, order dated 03.09.2008 (P-1) has been rightly set-aside.

7. Mr. Vivek Salathia, counsel for the respondent further submits that in fact, respondent was a new partner, therefore, the proceedings before the APFC were not within its knowledge and perhaps for the said reason, notices/summons, if any, sent to the earlier partner, were never part of the knowledge of the respondent. Moreover, out of the total amount due, 60% amount has already been deposited and paid by it. Therefore, in the interest of justice, it would be appropriate if both the orders i.e. order dated 03.09.2008 (P-1), passed by Ld. APFC and order dated 12.05.2014 (P-3), passed by learned Appellate Tribunal, are set-aside, by remanding the matter back to the Commissioner for a fresh decision.

8. Further submits that in consonance with the principles of natural justice i.e. *audi alterem partem* (Right to fair hearing), a party should be granted adequate opportunity to lead evidence in regard to the defense

taken by it.

In support of his submissions, Mr. Vivek Salathia, counsel for the respondent, cites judgment of Hon'ble the Apex Court rendered in ***Food Corporation of India*** ***vs.*** ***Provident Fund Commissioner and others*****,** ***1990(1) SCC 68***, and refers to paragraph Nos. 7, 8 & 9, which says as under:-

> *"7. The question, in our opinion, is not whether one has failed to produce evidence. The question is whether the Commissioner who is the statutory authority has exercised powers vested in him to collect the relevant evidence before determining the amount payable under the said Act.*
>
> *8. It is of importance to remember that the Commissioner while conducting an inquiry under section (7A) has the same powers as are vested in a Court under the Code of Civil Procedure for trying a suit. The Section reads as follows:-*
>
> > *"S. 7(A) Determination of Moneys due from Employer--*
> > *(1) The Central Provident Fund Commissioner, any Deputy Provident Commissioner or any Regional Provident Fund Commissioner may, by order determine the amount due from any employer under any provision of this Act (the scheme or the Family Pension Scheme or the Insurance Scheme as the case may be) and for this purpose 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, 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."*
>
> *9. It will be seen from the above provisions that the Commissioner is authorized to enforce attendance in person and*

> *also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person."*

Further relies upon another judgment of the Hon'ble the Apex Court rendered in ***<u>H.P. State Forest Corporation</u> vs. <u>Regional Provident Fund Commissioner</u>; 2009(1) LLJ 14***. For the sake of convenience, relevant extracted part of paragraph No.2 is reproduced here-under:-

> *"2. The Appellant Corporation (hereinafter called the "Corporation") which is a company registered under the Companies Act, came into existence on 1st April, 1974. Proceedings for the deposit of the provident fund under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter called the "Act") were initiated by the issuance of a notice dated 12th December 1988 under section 7-A of the Act for determination of the amounts due from the Corporation. This notice pertained to the period 1982-88. The Corporation, through its Regional Manager, contended, inter-alia, that the provisions of the Act were not applicable to it inasmuch as it was not an 'industrial establishment' in terms of section 2(e) of the Industrial Employment (Standing Order) Act, 1964 nor under section 25(k) of the Industrial Disputes Act, 1947. The Regional Provident Fund Commissioner however in his order dated 14th July 1999 took the view that the Corporation was covered under Section 1(4) of the Act as it had voluntarily submitted to its coverage and had been allotted a provident fund code number as well. The Commissioner then went into the question as to whether*

the persons employed by the contractor could be said to be the employees of the Corporation and hence entitled to the benefits of the Act and after examining the matter threadbare concluded that the said employees were in fact employees of the Corporation and therefore subject to the provisions of the Act and also drew up an assessment of the amounts due from the Corporation. An appeal was thereafter preferred before the Presiding Officer, Employees Provident Fund Appellate Tribunal wherein similar contentions were raised by the Corporation. The Tribunal in its order of 15th December 1999 held that the Corporation was indeed covered by the provisions of the Act but on the facts of the case opined that as the matter was stale and pertained to the year 1982, it would be appropriate that the matter be remitted to the Commissioner for re-determination of the amount due and for this purpose issued the following guidelines:

> *"In view of the above discussions, the appeal is fit to be partly allowed and the case to be remanded back for re-determination of the dues with reference to the identifiable employees only. The appellant cannot be pressed to produce such records which under any Statute they are not made liable to maintain or which they are authorized to destroy because of expiry date. The appellants are directed to produce all the records in their possession for the disputed period and explain satisfactorily for those which they cannot produce. Contractors may be summoned if the appellant make a prayer for that and give full details. However, it is the appellant's liability to maintain the records and produce them as held by the Hon'ble Supreme Court.*
> *Both the appeals are partly allowed. Coverage of the appellant in respect of contractors employees is held valid. The determination portion of the impugned order is set aside. The case is remanded back for re-determination after giving reasonable opportunity to the appellants to prove their case." "*

Further relies upon the judgment of this High Court rendered in ***Regional Provident Fund Commissioner*** ***vs.*** ***Faridabad Thermal Power Station and another; 2015(145) FLR 922***, and refers to paragraph No.3 therein. For convenience, same is also reproduced here-under:-

"3. Having read the order of the Regional Provident Fund Commissioner exercising power under Section 7A of the Employee's Provident Fund and Miscellaneous Provisions Act,

1952 and the order passed by the Employees' Provident Fund Appellate Tribunal, New Delhi, there is left a large non-adjudicated margin for a fair and proper determination on the issue of liability which has not been resolved by the appellate tribunal when it should have remitted the case for returning proper findings of fact as to the liability of the respondent corporation."

9. For deciding the controversy involved in the present writ petition, the concerned provisions of the Act of 1952 i.e. Section 7A and Section 13 are required to be gone into.

Section 7A of the Act of 1952 says 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."

Section 13 of the Act of 1952 says as under:-

*"**13. Inspectors.**—(1) The appropriate Government may, by notification in the Official Gazette, appoint such persons as it thinks fit to be Inspectors for the purposes of this Act, the Scheme, the Pension Scheme or the Insurance Scheme, and may define their jurisdiction.*

(2) Any Inspector appointed under sub-section (1) may, for the purpose of inquiring into the correctness of any information furnished in connection with this Act or with any Scheme or the Insurance Scheme or for the purpose of ascertaining whether any of the provisions of this Act or of any Scheme or the Insurance Scheme have been complied with in respect of an establishment to which any Scheme or the Insurance Scheme applies or for the purpose of ascertaining whether the provisions of this Act or any Scheme or the Insurance Scheme are applicable to any establishment to which the Scheme or the Insurance Scheme has not been applied or for the purpose of determining whether the conditions subject to which exemption was granted under section 17 are being complied with by the employer in relation to an exempted establishment—

(a) require an employer or any contractor from whom any amount is recoverable under section 8A to furnish such information as he may consider necessary;

(b) at any reasonable time and with such assistance, if any, as he may think fit, enter and search] any establishment or any premises connected therewith and require any one found in charge thereof to produce before him for examination any accounts, books, registers and other documents relating to the employment of persons or the payment of wages in the establishment;

(c) examine, with respect to any matter relevant to any of the purposes aforesaid, the employer or any contractor from whom any amount is recoverable under section 8A, his agent or servant or any other person found in charge of the establishment of any premises connected therewith or whom the Inspector has reasonable cause to believe to be or to have been, an employee in the establishment;

(d) make copies of, or take extracts from, any book, register or other document maintained in relation to the establishment and, where he has reason to believe that any offence under this Act has been committed by an employer, seize with such assistance as he may think fit, such book, register or other document or portions thereof as he may consider relevant in

respect of that offence;

(e) exercise such other powers as the Scheme or the Insurance Scheme may provide.

(2A) Any Inspector appointed under sub-section (1) may, for the purpose of inquiring into the correctness of any information furnished in connection with the 10[Pension] Scheme or for the purpose of ascertaining whether any of the provisions of this Act or of the Pension Scheme have been complied with in respect of an establishment to which the Pension Scheme applies, exercise all or any of the powers conferred, on him under clause (a), clause (b), clause (c) or clause (d) of sub-section (2).

(2B) The provisions of the Code of Criminal Procedure, 1898 (5 of 1898) shall, so far as may be, apply to any search or seizure under sub-section (2), or under sub-section (2A), as the case may be, as they apply to any search or seizure made under the authority of a warrant issued under section 98 of the said Code (45 of 1960).”

10. After examining the relevant record. hearing the arguments of both the sides, deeply perusing the provisions of law as well as going through the judgments cited, this Court is of the considered opinion that the present writ petition deserves to be dismissed with certain modifications in the order dated 12.05.2014 (P-3), passed by learned Appellate Tribunal.

11. This Court is convinced with the submissions addressed by the Counsel for the Respondent – Employer that Commissioner vide order dated 09.09.2018 (Annexure P-1) has got impressed solely from the report of the Enforcement Officer (E.O)/ Inspector which in all likelihood is prepared by exercising power granted by virtue of Section 13 of the Act of 1952. Further, Commissioner was not expected to decide the issue under Section 7A by solely replying upon the report of the Enforcement Officer (E.O). Proceedings under Section 7A of the Act is mandatorily required to be conducted by the Commissioner himself, which may be called as an

independent enquiry conducted by him in accordance with the provisions of law.

In view of the judgments cited and also in the interest of justice, respondent - employer, who has been burdened with the monetary liability, should be given sufficient opportunity for producing its material or raising its objection, against the liability imposed upon it. Moreover, 60% of the total amount due has already been deposited.

12. Without making any comments over the fact whether the summons/notices were ever received by the respondent or not, I deem it appropriate to modify the order dated 12.05.2014 (P-3), passed by the learned Appellate Tribunal, whereby, decision of the Ld. APFC dated 03.09.2008 (P-1), has been completely set-aside, by remanding the matter back to the concerned Commissioner to re-decide the amount /liability of the respondent within a period of four months i.e. on or before 24.08.2024, keeping in view the fact that 60% of the amount has already been deposited. Learned Commissioner shall pass a fresh order after following the due process of law, including the compliance of Section 7-A of the Act of 1952, in letter & spirit.

It is further clarified that both the parties i.e. petitioner and respondent shall be afforded three effective opportunities each for the purpose of leading respective evidence/material/substance. None of the parties would be afforded any extra chance, unnecessarily on the plea or excuse that the required material/record is not available in it's/their office.

Parties are directed to appear before the learned Assistant Provident Fund Commissioner/concerned authority on 01.05.2024 for further proceedings.

Needless to say that order dated 03.09.2008 (P-1) passed by learned APFC has already been set-aside by the learned Appellate Tribunal.

Accordingly, writ petition is **disposed of**.

(SANJAY VASHISTH)
JUDGE

April 22, 2024
J.Ram

Whether speaking/reasoned: ✓ *Yes/~~No~~*
Whether Reportable: ✓ *Yes/~~No~~*