
(2011) 08 BOM CK 0055

In the Bombay High Court

Case No : W. P. No's. 11228 and 11232 of 2010

Alphonsa English School, Pandharpur

APPELLANT

Vs

Assistant Provident Fund Commissioner and another

RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7, 7(1), 7A, 7A(2), 7A(3)
Penal Code, 1860 (IPC) — Section 193, 196, 228

Citation : (2012) 4 ALLMR 603 : (2012) 3 LLJ 775 : (2012) 2 MhLj 308

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : S.V. Adwant, for the Appellant; Bhushan Kulkarni, for the Respondent

Judgement

S.S. Shinde, J.—Rule. Rule made returnable forthwith and heard finally with the consent of learned counsel for the parties. The Writ Petition No. 11228/2010 is filed challenging the order passed by the respondent No. 1 on 30-7-2004 u/s 7 and 7Q of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 as well as the order passed by respondent No. 2 in ATA No. 696(9)2004 on 20-9-2010 whereas Writ Petition No. 11232/2010 is filed challenging the order passed by the respondent No. 1 on 4-8-2004 u/s 7A and 7Q of the said Act as well as the order passed by respondent No. 2 in ATA No. 697(9)2004 on 20-9-2010.

2. The relevant facts which are disclosed in the writ petition are as under :

The petitioner in Writ Petition No. 11228/2010 and in Writ Petition No. 11232/2010, are educational institutions being run by Diocese of Aurangabad, an umbrella organization which supervises such schools. The Diocese of Aurangabad is a registered public trust being, actively involved in performing religious duties and is aimed at supporting and promoting the advancement of educational activities in all the branches. In June, 1999, the petitioner/ school is established with the initial staff of two teachers. It is further case of the petitioners that, the

teaching as well as non teaching staff gradually increased as per the strength of students and in February, 2002, there were about 19 teaching and non teaching members in the school. It is further case of the petitioner that the autonomy of the petitioners schools included power to appoint its employees without consulting the Diocese of Aurangabad. All the expenditure of the school including the salary of the employees is incurred from the income of tuition fees etc. the petitioners schools is not dependent for its survival financially on any other institution including Diocese.

3. In 1998, school was established i.e. St. George English School at Lasur Station, Aurangabad, petitioner in Writ Petition No. 11232/2010. The said school is also autonomous school from the Diocese of Aurangabad having its own appointing authority and financially surviving on its own funds from fees etc. Both the schools have no concern whatsoever with each other. There is no functional or financial integrality or interdependency between the two school in respect of the matters of employment, service regulations as well as administration, neither are they subsidiaries of each other and are situated at far different places.

4. The enforcement officer of the respondent No. 1 visited the petitioner school in Writ Petition No. 11228/2010 and directed the school authorities to produce the record to apply the E.P.F. Act. On 3-12-2002, the record was produced as directed by the enforcement officer of the respondent No. 1 for perusal by the petitioner. It is the contention of the petitioner that, without recording any finding or giving opportunity to the petitioner, the respondent No. 1 simply informed the petitioner that, it is covered under the provisions of E.P.F. Act.

5. In June, 2004, the respondent No. 1 initiated proceedings u/s 7A of the said Act against the petitioner, wherein steps were taken to club the petitioner establishment with St. George English School, Lasur Station i.e. petitioner in Writ Petition No. 11232/2010. The respondent No. 1 directed its enforcement officer to submit the report as to clubbing the two institutions.

6. It is the contention of the petitioner that, on 25-5-2004, the petitioner submitted a detailed reply, stating therein that the two schools referred to above cannot be clubbed together as there is no interdependency in the management for control and finance of both the schools and there is no functional integrality between them and the fact of there being no interdependency was also demonstrated. It is further case of the petitioner that till that date, the enforcement officer of the respondent No. 1 had not visited the petitioner's school. On 6-7-2004, the squad of the enforcement office of the respondent No. 1 inspected the documents. On 8-7-2004, the petitioner school informed the respondent No. 1 that the strength of the employees working with the school has gone above specified limit from the academic year 2004-2005 and requested the said authority to apply the provisions of the E.P.F. Act to the petitioner school.

7. On 8-7-2004, the respondent No. 1 passed an order of clubbing the schools

with effect from 1-6-2000 as per the report of the enforcement officer dated 21-11-2002. On 26-7-2004, the respondent No. 1 assessed the dues and passed the order against the petitioner school. On 30-7-2004, the respondent No. 1 determined that a sum of Rs.3,67,439/- is payable towards the dues u/s 7A and 7Q of the E.P.F. Act. Feeling aggrieved, the petitioner preferred appeal u/s 71 of the E.P.F. Act before the respondent No. 2 on 10-9-2004. The petitioner filed an application for waiver of the certain record and the application for stay to the impugned order.

8. It is the contention of the petitioner that, due to non-availability of the Presiding Officer with the respondent No. 2, the petitioner was constrained to approach this Court by filing Writ Petition No. 6905/2004, wherein this Court granted stay to the impugned order passed by respondent No. 1 on depositing 40% of the claim amount. The substantive appeal filed before respondent No. 2 was listed for admission. The respondent No. 2 admitted the appeal and granted the waiver of payment of the statutory amount. On 28-4-2005, on 8-2-2008. Writ Petition filed by the petitioner was withdrawn in view of the availability of the respondent No. 2. On 20-9-2010, the respondent No. 2 rejected the appeal. Hence this Writ Petition.

9. The learned counsel appearing for the petitioner submits that, the President Officer, Appellate Tribunal has applied the criteria of same management and similar business to both the schools mechanically, without considering the documents placed on record by the petitioner. It is further submitted that the orders passed by the authorities in respect of clubbing of two separate schools as one establishment and further calculating the dues, as arrived at. are violation of principles of natural justice, which is integral part of section 7A of the Act. It is further submitted that, at no point of time, the enforcement officer of the respondent No. 1 authorities verified the record of both the schools till 26-6-2004 and after the verification of the record, a chance was not given to the petitioner to rebut the said report. Therefore, the respondent No. 1 has proceeded on wrong premise and passed a totally unconscionable order. The respondent No. 1 authority never supplied the copy of the alleged report of the enforcement officer dated 6-7-2004 on the basis whereof, the two institutions were clubbed together. Therefore, according to the counsel for the petitioner, the order impugned is contrary to the statutory provisions governing the case. It is further submitted that, the authorities below failed to consider the vital aspect of the functional integrality and financial integrality between two separate institutions for clubbing them for the purposes of application of the Employees Provident Funds and Miscellaneous Provisions Act, 1952. It is further submitted that, the conclusions drawn by the respondent No. 2 while deciding the appeal are less difficult to understand and more difficult to approve when the respondent No. 2 has failed to follow its statutory duty to follow the statutory restrictions before passing the order under challenge and fastening the liability on the petitioner. It is further submitted that, while passing the order, the principles of natural justice are not followed by the respondent No. 2. The learned counsel invited my attention to

provisions of section 7-A (2) and (3) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 and submitted that, no reasonable opportunity to represent the petitioner's case was given by the respondent No. 1 authority. It is further submitted that, the copy of report of the enforcement officer was not supplied to the petitioner. It is specific contention of the petitioner that the respondent No. 1 was under statutory obligation to give report of the enforcement officer to the petitioner and then to allow the petitioner to put forth his contentions. However, admittedly the copy of the report submitted by the enforcement officer was not given to the petitioner and the respondent No. 1, without giving reasonable opportunity of hearing, closed the enquiry for orders. The learned counsel for the petitioner, in support of his contention that such copy of the report should have been given to the petitioner and further opportunity should have been given to him to reply the said report, pressed into service the reported judgment of this Court in case of Nandeeni Travels Pvt. Ltd. vs. Regional Provident Fund Commissioner, Goa, 2003 (5) LJ Soft. 146, and in particular para 8 of the said judgment. Therefore, learned counsel appearing for the petitioner would contend that the impugned order is not sustainable and same may be quashed and set aside.

10. On the other hand, learned counsel appearing for the respondent submits that, the date which was fixed for hearing by the respondent No. 1 i.e. on 26-7-2004, none appeared for the petitioners/ establishment and, therefore, it can not be said that, the proper opportunity was not given to the petitioner. The officer/representative of the establishment appeared before the Enforcement Officer on 20-6-2004. There was no occasion for the respondent No. 1 to give copy of the report. On 24-7-2004, none appeared for the petitioners/ establishment on said date. The learned counsel appearing for the respondent No. 1 also invited my attention to the averments in the reply and relying on the said averments, he submitted that, this petition is devoid of any merits and same may be dismissed.

11. I have given thoughtful consideration to the averments and pleadings in the petition and annexures thereto and reply filed by the respondent and documents made available for the perusal.

12. The provisions of section 7A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 reads thus :

7-A. 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 the 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.

(3-A) 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 irregularity in the service of the show-cause notice if the officer is satisfied that the employee 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.

13. Bare perusal of the provisions of sub-sections (2) and (3) of section 7A of the said Act would make it abundantly clear that, an enquiry by the enforcement officer under the provisions of this section, shall be deemed to be a judicial proceedings within the meaning of sections 193 and 228, and the enforcement officer is supposed to give reasonable opportunity of hearing to the concerned party and in present case, to the petitioner. Sub-section (3) of said section explicitly provides for providing reasonable opportunity to the concerned institution/ establishment to put forth their case.

14. In the present case, admittedly copy of the report of the enforcement officer, dated 6-7-2004, which was submitted to the respondent No. 1 by the enforcement officer on 26-7-2004, was not supplied to the petitioner.

15. The Division Bench of this Court, in case of Nandeeni Travels (supra) has considered the provisions of section 7A of the said Act and in para 8 and held :-

8. The dispute can also be considered from altogether different angle. The provision of section 7A of the said Act contemplates quasi-judicial enquiry in the sense that, by virtue of sub-sections (2) & (3) thereof, it is contemplated that the officer conducting enquiry under sub-section (1) shall, for the purpose of such enquiry, have some powers as vested in the Court in the CPC for trying a suit in respect of certain matters including attendance of witnesses, discovery of production of documents and receiving evidence on affidavit and issuing commission. It is further stipulated that, no order shall be made under sub-section (I) unless the employer concerned has given an opportunity of representing his case. If we peruse the entire record including the contents of the impugned order, it is more than apparent that the respondent Commissioner has totally relied upon the reports of the Inspector without applying his own mind to the pros and cons of the case. This aspect assumed further importance in view of the unchallenged allegations made by the petitioner that he was not provided proper opportunity to defend his case, nor was provided even copies of the reports of the Inspector which are relied upon by the concerned authorities to plead his case effectively. If this is the position, then there is hardly any compliance with provisions of section 7A of the said Act with regard to the manner of conduct of the enquiry.

(Emphasis supplied)

16. Therefore, viewed from any angle, it has to be concluded that the respondent No. 1 has not followed the mandate and procedure as prescribed u/s 7A of the said Act. Admittedly, the copy of the report prepared by the enforcement officer, which was submitted to the respondent No. 1, was not supplied to the petitioner. The petitioner had no opportunity to reply to said report, since the day on which such report was submitted with respondent No. 1 by the enforcement officer, the respondent No. 1 closed the enquiry for orders. That itself indicates that no opportunity was given to the petitioner to put forth its case in reply to the report

by the enforcement officer. In that view of the matter, on this ground alone the writ petitions succeed and same are allowed in terms of prayer clause (B). However, it will be open for the respondent No. 1 to continue the enquiry from the stage of filing the report by the enforcement officer. It is needless to mention that the respondent No. 1 will supply the copy of the report submitted by the enforcement officer, to the petitioner. After receiving the copy of the report of enforcement officer from the respondent No. 1, it will be open for the petitioners to file reply and to agitate all points available to them before the respondent No. 1. It is left open for the parties to agitate all points available to them in the facts and circumstances of the case. Rule made absolute to above extent. Both the writ petitions are disposed of. The enquiry officer/ respondent No. 1 to complete the enquiry within four months from today. The amount which is deposited with the respondent No. 1 will remain with the respondent No. 1 till the decision in enquiry.