(2022) 03 CAL CK 0086

In the Calcutta High Court

Case No : W.P.A. No. 734 Of 2022

Central Tool Room & Training Centre APPELLANT

Vs

Employees? Provident Fund Organisation & Ors. RESPONDENT

Date of Decision : 30-03-2022

Acts Referred:

Constitution Of India, 1950 — Article 226
Employees? Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2(f), 7A, 7A(2), 7Q, 14B

Citation : (2022) 03 CAL CK 0086

Hon'ble Judges : Suvra Ghosh, J

Bench : Single Bench

Advocate : Ranajay De, B. Banerjee, Ujjawal Dutta

Final Decision : Allowed

Judgement

Suvra Ghosh, J

1. The petitioner primarily complains violation of section 7A (2) of the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952.

2. The petitioner organisation was initially an exempted establishment under paragraph 79 of the Employees’ Provident Funds Scheme, 1952 vide order dated 28th February, 1985 and the said exemption was subsequently withdrawn by an order dated 28th December, 2011. During the period of exemption, the provident fund contribution was deposited with the Trust formed by the petitioner in the name and style of Central Tool Room and Training Centre Contributory Provident Fund (hereinafter referred to as BOT) and after withdrawal of exemption, the accumulation in the said fund was transferred to the account of the Employees’ Provident Funds Organisation in terms of communication issued by the third respondent to the petitioner on 28th December, 2011. The petitioner company transferred an amount of Rs. 5,48,72,171.90 paise to the respondent organisation on account of the entire past provident fund accumulation along with amount invested in various security deposits and the contribution for the

month of February, 2012 was also deposited under a separate challan. A certificate issued by the Chartered Accountant on 30th January, 2013 indicated a gap of Rs. 31,86,338.72 paise between the past accumulation and the assets transferred/yet to be transferred as on 30th January, 2013 which was also deposited by the company. Steps were taken to deposit an amount of Rs. 338.72 to the respondent upon reassessment of the dues. Despite there being no intentional delay on the part of the petitioner company in depositing the provident fund accumulation, the third respondent, by an order dated 20th August, 2015, directed the petitioner to pay an amount of Rs. 32,96,273 and 17,68,590 in terms of section 14B and 7Q of the Act of 1952. The said order was carried in appeal before the Learned Central Government Industrial Tribunal at Kolkata and the Learned Tribunal, by judgment dated 18th July, 2019, set aside the said order with a direction to the authority concerned to decide the matter afresh in the light of the observations in the body of the judgment.

3. Following registration of the petitioner with the Board of Practical Training, Eastern Region, Ministry of Human Resource Development (hereinafter referred to as BOPT) under the Apprentices Act, 1961, the petitioner engaged apprentices as per guidelines of the 1961 Act who do not come within the definition of "employee" as defined under section 2(f) of the Act of 1952.

4. A squad of the respondent organisation visited the office of the petitioner for enquiry with regard to provident fund contributions from April, 2011 to February, 2012 and forwarded a report to the authority on 10th September, 2021 alleging evasion in respect of 108 persons and claimed a sum of Rs. 59,19,968 and Rs. 35,90,181 though contribution from April, 2011 to 31st December, 2012 was transferred to the respondent organisation from the Trust Fund. A proceeding under section 7A of the Act of 1952 was initiated and the petitioner appeared therein. No opportunity was provided to the petitioner for adducing evidence, oral and documentary, in support of his contention and an order was passed on 22nd December, 2021 directing the petitioner to pay an amount of Rs. 95,10,149 within 15 days from the date of receipt of the order.

5. It is submitted on behalf of the petitioner that no opportunity was granted to the petitioner to either adduce evidence in support of his case, or cross examine any of the officers who prepared the report dated 10th September, 2021. The petitioner has been saddled with huge statutory liability despite transferring over five crores of rupees to the provident fund authority as shall appear from pages 134 to 148 of the writ petition. Learned counsel takes this Court to annexure P-3 to the writ petition which certifies transfer of funds by the petitioner to the provident fund authority. Referring to the list of apprentices in annexure P-20 to the writ petition, learned counsel places reliance on the definition of "employee" under section 2(f) of the Act of 1952 to demonstrate that such apprentices engaged under the Apprentices Act, 1961 are not employees within the meaning of the 1952 Act and are not covered by the Provident Fund Scheme. Employees drawing salary in excess of Rs. 15,000 per month are also not covered by the

said scheme.

6. The representation submitted by the petitioner before the authority on 27th October, 2021 was not dealt with in its proper perspective. The audit report also speaks in favour of the petitioner. The petitioner has prayed for setting aside the order impugned and reconsideration of the matter by the authority upon giving opportunity to the petitioner for adducing evidence, both oral and documentary before the authority.

7. In support of his contention, learned counsel for the petitioner has placed reliance on authorities in West Bengal Power Development Corporation Limited v/s. Union of India reported in 2012 LLR 835, General Manager, Electrical Rengali Hydro Electric Project, Orissa and Others v/s. Sri. Giridhari Sahu and Others reported in 2019 (12) Scale 285 and Uttar Pradesh Power Transmission Corporation Limited v/s. Cg Power and Industrial Solutions Limited reported in LAWS (SC)-2021-5-12.

8. Per contra, learned counsel for the respondents has challenged the maintainability of the writ petition on the ground of availability of alternative efficacious remedy. It is submitted by learned counsel that the order impugned is an appealable order and the petitioner was at liberty to approach the appellate forum for redressal. The matter was heard at length by the concerned authority being the Regional Provident Fund Commissioner-II, Assessing Officer and sufficient opportunity was granted to the petitioner to place his contention before the authority. The representation submitted by the petitioner was taken into consideration by the authority who disposed of the matter by a reasoned and speaking order.

9. Though the contractual trainees employed with the petitioner are entitled to provident fund benefit, they have been deprived by the petitioner on the frivolous pretext of such employees being appointed under the Apprentices Act, 1961 and not coming under the definition of “employee” under section 2(f) of the Act of 1952.

10. Placing reliance on the report in the form of affidavit submitted by the respondents, learned counsel takes this Court to annexure P to the report which demonstrates as hereunder:-

1) The petitioner could not provide challans in support of payment to the 72 contractual employees, nor was it found in the system and it is evident that such benefit was not extended to the 72 contractual employees.

2) The petitioner has been evading payment of provident fund to 108 of its employees for the period from April, 2011 to February, 2016.

3) In course of the 7A proceedings evidence of the petitioner was recorded and the order sheet reflected in the e-court system.

11. Learned counsel submits that there is no illegality or irregularity in the order

impugned that calls for intervention of this Court and the writ petition is liable to be dismissed both on the issue of maintainability as well as on merits.

12. Learned counsel has placed reliance on the authorities in Pawan Hans Limited and Others v/s. Aviation Karmachari Sanghatana and Others reported in (2020) 13 Supreme Court Cases 506, Genpact India Private Limited v/s. Deputy Commissioner of Income Tax and Another reported in 2019 SCC Online SC 1500, M. Nagaraj v/s. The Managing Director, Tamil Nadu State Marketing Corporation Ltd., & Others passed on 26th July, 2018 by the High Court of Judicature at Madras, Mina Perween v/s., The State of West Bengal and Others reported in 2018 SCC Online Cal 3962 and a judgment of a coordinate bench of this Court passed on 2nd February, 2021 in WPA 17736 of 2013 in support of his contention.

13. I have considered the submissions made on behalf of the parties.

14. The respondents have raised a preliminary objection with regard to maintainability of the writ petition in view of availability of alternative efficacious remedy under the provisions of Employees Provident Funds and Miscellaneous Provisions Act, 1952. Placing reliance on the judgments in Genpact India Private Limited, Mina Perween, M. Nagraj and W.P.A. 17736 of 2013 (supra), learned counsel has submitted that the Hon'ble Supreme Court as well as this Court has time and again observed that a writ Court shall decline to exercise jurisdiction under Article 226 of the Constitution of India when an alternative efficacious remedy is available to the writ petitioner unless exceptional circumstances are made out.

15. In Genpact India Private Limited (supra), the Hon'ble Supreme Court has observed that such writ petition can be entertained by the Court under Article 226 when there has been a breach of the principles of natural justice or where the procedure required for decision has not been adopted. The authority in M.Nagaraj (supra) also recognises two exceptions to the doctrine of exhaustion of statutory remedies- firstly, when the proceeding before the forum is ultravires and secondly, when the impugned order has been made in violation of the principles of natural justice. The judgments of this Court deal with situations where no exceptional circumstance was made out by the petitioner, which led to dismissal of the writ petitions on the ground of alternative remedy.

16. The authorities relied upon by the petitioner are relevant. In Uttar Pradesh Power Transmission Corporation Limited (supra), the Hon'ble Supreme Court has held that the High Court may entertain a writ petition notwithstanding the availability of an alternative remedy in at least four contingencies:- (i) where the writ petition seeks enforcement of a fundamental right; (ii) where there is a failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction and (iv) the vires of an Act is under challenge. Similar observation has been made by the Hon'ble Supreme Court in General Manager, Electrical Rengali Hydro Electric Project, (supra) that a writ lies where the Court or Tribunal acts illegally or improperly and decides a question

without giving an opportunity of hearing to the affected party or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. The said report also says that a finding of fact which is not supported by any evidence would be perverse and would constitute an error of law enabling the Writ Court to interfere.

17. In the present case, the petitioner is aggrieved by the decision making process of the authority for the reason that no opportunity was granted to the petitioner for adducing evidence in support of his contention or cross examining the enforcement officers who submitted the report before the authority on the basis of which the proceeding was initiated. The representation submitted by the petitioner was also not considered in its proper perspective. The report of the enforcement officers was not admitted in evidence though the order was passed solely on the anvil of such report. A case of violation of principles of natural justice has therefore prima facie been made out by the petitioner and the writ petition being filed under exceptional circumstances as observed in the judgments referred to hereinabove, cannot be dismissed on the ground of alternative remedy.

18. On merits, the order impugned demonstrates that the representation filed by the petitioner was taken on record but no opportunity was extended to the petitioner to adduce evidence in support of his case as made out in the representation. The proceeding was initiated on the basis of report submitted by the enforcement officers upon inspection of the petitioner establishment but the said report was not admitted in evidence, nor were the authors of the report examined before the authority. As a consequence, the petitioner was deprived of the opportunity to cross examine the said authors. The report was in fact blindly relied upon by the authority and used as evidence against the petitioner.

19. It shall be useful to reproduce section 7A (2) of the Act of 1952.

“7-A (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.”

20. This provision of law vests the same powers on the authority as are vested in a Court under the Code of Civil Procedure in dealing with a proceeding under

section 7A of the Act. In the case in hand, the authority has failed to exercise such power that was necessary for adjudicating the issue. Borrowing wisdom from the authority in West Bengal Power Development Corporation Limited (supra), this Court is of the view that the proceeding was conducted in a most casual manner and decided against the petitioner arbitrarily, thereby violating the principles of natural justice.

21. The order impugned is, in substance, reflection of the contents of the report submitted by the enforcement officers and the authority concerned has only accepted/reiterated the contention of the enforcement officers without independent application of mind thereto. Though several dates of hearing are recorded in the order, there is no indication therein as to any submission made by the petitioner before the authority, let alone consideration of such submission. The report which forms the basis of the entire proceedings as well as decision taken therein has been accepted in its entirety without offering the same for testing its veracity by way of cross examination by the petitioner. The petitioner was in fact deprived of the opportunity of proving his case and at the same time disproving the case of the enforcement officers, as enjoined in law.

22. Therefore even without entering into the merits of the order impugned, this Court is of the view that the order has been passed in violation of the principles of natural justice and is required to be set aside. The petitioner ought to be given an opportunity by the authority concerned to adduce evidence in support of his case and deal with the report submitted by the enforcement officers before the authority and the authority should dispose of the matter by a speaking and reasoned order after taking into consideration the evidence, if any, led by both the parties before it.

23. The authority in Pawan Hans Limited and Others (supra) relied upon by the respondents deals with the merits of the case before the authority concerned and is not applicable in the facts and circumstances of the present case as this Court has not gone into the merits of the case disposed of by the authority concerned, in the present writ petition.

24. In view of the above, the order impugned dated 22nd December, 2021 is set aside/quashed.

25. The second respondent is directed to decide the proceeding under section 7A of the Act of 1952 afresh after giving reasonable opportunity to both the parties to adduce evidence, if any, both oral and documentary, in support of their respective contentions in terms of section 7A (2) of the Act of 1952, by a speaking and reasoned order, within three months from the date of communication of this order.

26. The second respondent shall deal with the matter independently on merits without being influenced by any observation made in the body of this judgment.

27. Accordingly, W.P.A. 734 of 2022 is allowed.

28. There shall be however no order as to costs.

29. Urgent certified website copies of this judgment, if applied for, be supplied to the parties expeditiously on compliance with the usual formalities.