(2023) 06 MP CK 0073

In the Madhya Pradesh High Court

Case No : Writ Petition No. 310 Of 2022

M/S Pure Pharma Ltd. Thr — APPELLANT

Vs

Regional Provident Fund Commissioner — RESPONDENT

Date of Decision : 16-06-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Order 18 Rule 4
Environment (Protection) Act, 1986 — Section 7A
Indian Penal Code, 1860 — Section 193, 196, 228

Citation : (2023) 06 MP CK 0073

Hon'ble Judges : Vivek Rusia, J

Bench : Single Bench

Advocate : Girish Patwardhan, Oshin Upadhyay, Shirwad Josh, Gaurav Laad

Final Decision : Allowed

Judgement

Vivek Rusia, J

1- The petitioner has filed the present petition being aggrieved by the daily order dated 22.12.2021 whereby the request made by the petitioner for examination of Manas Mishra, Enforcement Officer in proceedings under Section 7A of the EPC Act has been rejected by the Provident Fund Commissioner.

The facts of the case in short are as under: -

2- The petitioner is a company registered under the provision of the Companies Act. Respondent No.1 is an organization established under the Employees Provident Fund Act. Respondent No.3 made a complaint before respondent No.1 in respect of non-payment of his P.F. dues. The complaint was registered under Section 7A of EPF and notices were issued to the petitioner. The representative of the petitioner appeared and sought time to produce the reply and documents. Because of the complaint made by respondent No.3, respondent No.1 directed Shri Kailash Danderwal Enforcement Officer to conduct an investigation in the establishment of the petitioner. Shri Danderwal submitted a report which is filed as Annexure P/4. Respondent No.3 submitted an objection to the said report. In order to obtain another report, respondent No.1 directed respondent No.2 to prepare another inspection report. The respondent No.2 conducted the inspection of the petitioner's establishment and submitted a report.

3- The report submitted by respondent No. 2 was taken on record on 16.11.2021 and a copy was directed to send to the petitioner as well as respondents with document to submit their comments on the next date of hearing. Since Shri Danderwal and respondent No.2 gave contrary inspection reports, therefore, petitioner submitted an application on 22.12.2021 requesting for cross-examination of respondent No.2. Vide impugned order dated 22.12.2021, the said request has been turned down, hence, present petition before this Court. 4- Learned counsel appearing for respondent No.3 submits that enquiry under Section 7A is pending for the last four years, if the petitioner is permitted to cross-examine the witnesses, it would cause further delay. Respondent 1 has also filed a reply seeking dismissal of the Writ petition.

5- Shri Patwardhan, learned Senior counsel submits that request for cross-examination has been rejected solely on the ground that the petitioner's representative on earlier three-four occasions was making demands of documents one after another and when the documents have been provided he changed his mind and later stage asked to cross-examine the Enforcement Officer. The ground of rejection is unsustainable in law, since respondent No.2 gave a report against the petitioner, therefore, petitioner is entitled to cross-examine him in order to take out the truth.

6- Learned counsel for respondent No.3 submits that there is no such practice in the establishment of the EPF for cross-examination of the witnesses. The entire dispute is based on documentary evidence for which no cross-examination is required.

Appreciation and conclusion

7- Respondent No.3 is working since 1987 in the establishment of the petitioner and the petitioner is deducting the P.F. contribution since 1989. Though an appointment order was not given he has produced attendance cards to show the deduction of prima facie contribution. A number of co-employees have given an affidavit that respondent No.3 is also working in the establishment.

8- In the present case the only issue as to whether the petitioner is entitled to cross-examine the witness in the proceedings under Section 7A. Section 7-A is reproduced below:-

[7A. Determination of money 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 3[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 4[***] shall be made under sub-section (1), unless 5[the employer concerned] is given a reasonable opportunity of representing his case. 6[(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.] 7[(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.]]

Sub-section (1) of Section 7A says that the Provident Fund Commissioner, may by order decide the dispute arises regarding the applicability of this Act and determine the amount due from any employer under any provision of this Act and the Scheme. Sub-Section (2) provides that the officer conducting the enquiry 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 in respect of the enforcing the attendance of any person or examining him on oath; requiring the discovery and production of documents, receiving evidence on affidavit etc. and such inquiry shall be deemed to be a judicial inquiry, therefore, either party i.e. employer and employee filed an affidavit under Order 18 Rule 4 of C.P.C. the opposite party shall have right to cross examine him. The Apex Court Ayaaubkhan Noorkhan Pathan Vs. State of Maharashtra and others (2013) 4 SCC 465 has held that the cross-examination is one part of the principle of natural justice and further held that the evidence of the opposite party should be taken in presence and he should be given an opportunity of cross-examination the witnesses given by that party. Relevant portion is reproduced below:

24. A Constitution Bench of this Court in State of M.P. v. Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: Union of India v.T.R. Varma, AIR 1957 SC 882; Meenglas Tea Estate v. Workmen, AIR 1963 SC 1719; M/s. Kesoram Cotton Mills Ltd. v. Gangadhar & Ors., AIR 1964 SC 708; New India Assurance Company Ltd . v . Nusli Neville Wadia and Anr., AIR 2008 SC 876; Rachpal Singh & Ors. v. Gurmit Singh & Ors., AIR 2009 SC 2448; Biecco Lawrie & Anr. v. State of West Bengal & Anr., AIR 2010 SC 142; and State of Uttar Pradesh v. Saroj Kumar Sinha, AIR 2010 SC 3131).

25. In Lakshman Exports Ltd. v. Collector of Central Excise, (2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. audi alteram partem.

26. In New India Assurance Company Ltd., v. Nusli Neville Wadia & Anr., AIR 2008 SC 876; this Court considered a case under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and held as follows :-

“If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity to cross- examine. The witness who intends to prove the said fact has the right to cross-examine the witness. This may not be provided by under the statute, but it being a part of the principle of natural justice should be held to be indefeasible right.” (Emphasis added) In view of the above, we are of the considered opinion that the right of cross-examination is an integral part of the principles of natural justice.

26. In K.L. Tripathi v. State Bank of India & Ors., AIR 1984 SC 273, this Court held that, in order to sustain a complaint of the violation of the principles of natural justice on the ground of absence of opportunity of cross-examination, it must be established that some prejudice has been caused to the appellant by the procedure followed. A party, who does not want to controvert the veracity of the evidence on record, or of the testimony gathered behind his back, cannot expect to succeed in any subsequent grievance raised by him, stating that no opportunity of cross-examination was provided to him, specially when the same was not requested, and there was no dispute regarding the veracity of the statement. (See also: Union of India v. P.K. Roy, AIR 1968 SC 850; and Channabasappa Basappa Happali v. State of Mysore, AIR 1972 SC 32).

27. In Transmission Corpn. of A.P. Ltd. v. Sri Rama Krishna Rice Mill, AIR 2006 SC 1445, this Court held:

“ In order to establish that the cross-examination is necessary, the consumer has to make out a case for the same. Merely stating that the statement of an officer is being utilised for the purpose of adjudication would not be sufficient in all cases. If an application is made requesting for grant of an opportunity to cross-examine any official, the same has to be considered by the adjudicating authority who shall have to either grant the request or pass a reasoned order if he chooses to reject the application. In that event an adjudication being concluded, it shall be certainly open to the consumer to establish before the Appellate Authority as to how he has been prejudiced by the refusal to grant an opportunity to cross-examine any official”.

28. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He can therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross- examination.

29. In Rajiv Arora v. Union of India & Ors., AIR 2009 SC 1100, this Court held:

“Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review.”

30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.

9- In view of above, annexure A-8 dated 22.12.2021 is hereby quashed. Respondent No.1 is directed to provide an opportunity to the petitioner to cross-examination of the witnesses. Respondent No.3 shall also have liberty to cross-examination witnesses produced by the petitioner.

Writ Petition is allowed in terms of above direction. No order as to cost.

