

(2018) 12 BOM CK 0095
In the Bombay High Court
Case No : Writ Petition No. 248 Of 2017

M/S Vardhaman Construction Thr. Proprietor, Shri. Uday
Chandrashekhar Balapure

APPELLANT

Vs

Regional Provident Fund Commissioner, Akola

RESPONDENT

Date of Decision : 11-12-2018

Acts Referred:

Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 7A

Citation : (2018) 12 BOM CK 0095

Hon'ble Judges : Manish Pitale, J

Bench : Single Bench

Advocate : A.R. Deshpande, H.N. Verma

Final Decision : Dismissed

Judgement

Manish Pitale, J.

1. By this Writ Petition, a proprietary concern engaged in the business of construction for Government contracts, has challenged order dated 15-12-2016, passed by the Employees Provident Fund Appellate Tribunal, whereby the appeal filed by the petitioner has been dismissed and the liability assessed by the Regional Provident Fund Commissioner against the petitioner under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 [for short, 'the said Act'], has been confirmed.

2. The Assistant Provident Fund Commissioner, Akola, initiated an inquiry under Section 7-A of the said Act against the petitioner. A report dated 24-07-2012 was submitted by the Enforcement Officer before the Regional Provident Fund Commissioner, Akola, in respect of assessment of liability of the petitioner for the period November, 2004 to March, 2009. It was recorded in the said report that the petitioner had produced balance sheets for the period 2004-2005 and 2008-2009, on the basis of which a chart was prepared in the said report and liability was assessed on the basis of salary expenses, which was recorded as one of the

heads in the said chart.

3. On 22-05-2013, the Assistant Provident Fund Commissioner, passed order under Section 7-A of the said Act. The said authority recorded that a number of opportunities were granted to the petitioner establishment and finding that no record other than balance sheets were produced by the petitioner, the said authority concluded that on the available documents 25 % of total expenditure was to be taken as basis for levying liability payable by the petitioner establishment for the aforesaid period. The said amount came to Rs, 67,67,178/-. Aggrieved by the said order, the petitioner filed appeal before the Employees Provident Fund Appellate Tribunal. The said appeal was allowed by the Tribunal, only on the ground that the beneficiaries under the said Act were not identified while passing order under Section 7-A of the said Act. On this basis, the order of the Provident Fund Commissioner was set aside and a fresh enquiry was directed.

4. The Enforcement Officer undertook enquiries and submitted report dated 03-04-2014, to the Regional Provident Fund Commissioner, Akola, recording that despite repeated opportunities given to the petitioner establishment, no record was being produced and that the petitioner establishment was adopting policy of hide and seek. On this basis, upon taking into consideration the balance sheets available on record, the Enforcement Officer recommended recovery of Rs. 67,67,178/- from the petitioner establishment for the aforesaid period. Thereafter, the Regional Provident Fund Commissioner passed order dated 20-06-2014. It was recorded in the said order that despite repeated opportunities granted to the petitioner establishment, till date neither the petitioner establishment produced any record nor appeared during the course of inquiry. On analysis of the material, it was specifically recorded that delay tactics were adopted by the petitioner establishment and that it had failed to produce documents as directed by the Tribunal. The Regional Provident Fund Commissioner disposed of the said case by holding that the petitioner establishment was liable to pay amount of Rs. 67,67,178/- towards dues under the said Act for the aforesaid period. The said order was challenged by the petitioner establishment before the Tribunal.

5. By the impugned order dated 15-12-2016, the Tribunal dismissed the appeal and confirmed the liability against the petitioner establishment, recording that the petitioner establishment had failed to produce record and documents during the inquiry under Section 7-A of the said Act. Assessment made by the authorities below was found to be reasonable and on this basis the appeal stood dismissed.

6. Mr. A.R. Deshpande, learned Counsel appearing for the petitioner establishment, submitted that the documents had been produced by the petitioner establishment during the course of inquiry and it was recorded in the report of the Enforcement Officer itself that balance sheets were made available for the relevant period. It was submitted that since the petitioner establishment

had been closed down and the plant and machinery etc. had been sold, there was no further record available with the petitioner establishment. It was submitted that when the Enforcement Officer in the first report dated 24-07-2012 had made assessment only on the basis of the expenses incurred under the head of Salary Expenses, a subsequent change in approach was wholly unjustified. It was submitted that the chart prepared in the report of the Enforcement Officer, which was in turn relied upon by the Regional Provident Fund Commissioner consisted heads of expenses, which were not relatable to the liability under the provisions of the said Act. It was also submitted that when the Tribunal had passed the order dated 03-07-2013 specifically observing that the beneficiaries were not identified, the liability imposed on the petitioner establishment, in the absence of identification of the beneficiaries was not sustainable.

7. On the other hand, Mr. H.N. Verma, learned Counsel appearing for the respondent authority, submitted that the orders passed by the respondent and the Tribunal amply demonstrated that the petitioner establishment had deliberately held back relevant material and record from the respondent authority. In this situation, the approach adopted by the respondent assessing the liability of the petitioner establishment was reasonable. It was submitted that the onus was on the petitioner establishment to have placed on record relevant material for identifying the beneficiaries, as also to show as to the amount of expenses incurred by the petitioner establishment relatable to the liability under the aforesaid Act. Reliance was placed on judgments of the Hon'ble Supreme Court in the case of Employees' State Insurance Corporation vs M/s Harrison Malayalam Pvt. Ltd, reported at AIR 1993 SC 2655, Regional Director, E.S.I., Corporation vs Kerala State Drugs and Pharmaceuticals Ltd and others, reported at 1995 Suppl (3) SCC 148 and judgments of this Court in the case of Anuradha Sugar Mills Ltd vs Regional Provident Fund Commissioner and another (WP 5390 of 2010 dated 02-12-2010) and Bajaj Tempo Limited, Akurdi, Pune vs Employees' State Insurance Corporation, Pune, reported at 2006 II CLR 623.

8. Heard Counsel for the parties and perused the record. The reports of the Enforcement Officer and the orders passed by the Regional Provident Fund Commissioner in the two rounds of litigation in the present case show that other than submitting balance sheets for the period 2004-2005 and 2008-2009, the petitioner establishment failed to produce any other document or record before the respondent. The order dated 22-05-2013, passed by the Assistant Provident Fund Commissioner in the first round of litigation in the present case, vividly records the number of adjournments taken by the petitioner, for producing record. It is specifically recorded in the said order that the inquiry against the petitioner establishment continued for three years and it was adjourned 45 times to enable the petitioner establishment to produce relevant material on record. The petitioner establishment failed to produce relevant record before the authorities below. A perusal of the report of the Enquiry Officer and the order passed by the Regional Provident Fund Commissioner in the second round of

litigation in the present case show that despite another opportunity granted to the petitioner establishment, no material was placed on record. In this situation, the only material on which the Enforcement Officer could assess the liability of the petitioner establishment under the said Act was the balance sheet. The chart which forms part of the report of the Enforcement Officer, as also the orders passed by the Regional Provident Fund Commissioner, shows that there were various heads taken into consideration. All these heads pertained to contracts, sub contracts and labour charges that were culled out from the material on record. All these were clearly relatable to the services that were taken by the petitioner establishment either directly or indirectly for executing the contracts of construction. The said chart consisting of various heads was the only material on the basis of which the respondent authorities could have assessed liability of the petitioner establishment. In this situation, the Regional Provident Fund Commissioner undertook a reasonable approach for assessment, by taking into consideration the total amount that could be calculated on the basis of the material available on record and then taking into consideration 25% of the total expenditure to then further work out the liability of the petitioner establishment, calculated at Rs. 67,67,178/-.

9. The petitioner establishment made no efforts to place on record any material to assist the respondent authority to arrive at the liability that was payable by the petitioner establishment under the said Act. In this situation, it cannot lie in the mouth of the petitioner establishment to claim that the respondent authority had erred in calculating the quantum of liability because the details of salary expenses were not properly worked out and that the beneficiaries were not identified. In this regard, the learned counsel appearing for the respondent is justified in relying upon the judgment of the Hon'ble Supreme Court in the case of Employees' State Insurance Corporation vs M/s Harrison Malayalam Pvt. Ltd. (supra), wherein it has been categorically held that when the details of the workers employed by the establishment and its contractors are within the exclusive knowledge of the establishment, failure to prove details of the same cannot be said to be beneficial to the said establishment. The learned Counsel has also correctly relied upon judgment of the Hon'ble Supreme Court in the case of Regional Director, E.S.I. (supra), wherein it has been held that once an establishment is found to be covered under the provisions of the relevant statute, the fact that the employees are unidentifiable becomes irrelevant so long as contribution was liable to be paid on their behalf when they were in employment. This shows that the contention raised on behalf of the petitioner establishment that it has now closed down and therefore, it was not liable to provide further details and record, cannot be accepted. The principle laid down in the said judgments of the Hon'ble Supreme Court is clearly applied to the cases under the present Act. The principle being that an establishment cannot hold back relevant information and record from the respondent authorities and then turn around and claim benefit of absence of record.

10. The said principle has been recognized and followed by this Court in the

judgments relied upon by the learned Counsel appearing for the respondent. The identification of beneficiaries clearly depends upon the record of the petitioner establishment which when held back by the establishment cannot enure to the benefit of the very same establishment. As regards the principle to be applied when an establishment like the petitioner herein refuses to part with relevant information and record, the respondent authority has relied upon precedents to calculate the quantum of liability payable by the petitioner establishment. In this regard, the judgment passed by this Court in the case of Bajaj Tempo Limited, Akurdi, Pune (supra) is relevant. A perusal of the said judgment shows that in the said judgment earlier precedent of the Hon'ble Supreme Court and other High Courts have been referred and it has been laid down that 75% deduction is to be given in respect of costs and 25% of the available amount as fund, on the basis of the material on record, can be taken as the basis for calculating liability under the Act. The learned Counsel appearing for the petitioner establishment has pointed out that this judgment pertains to the Employees' State Insurance Act and therefore, it cannot be applicable in the present case. But the principle laid down in the said judgment clearly applies to the facts and circumstances where an establishment like the petitioner establishment has failed to produce relevant record, despite repeated opportunity granted to it. The record shows that the petitioner establishment held back relevant record from the respondent in order to later claim that the principle applied by the respondent authority for calculating liability was not sustainable.

11. It is interesting that in the first round of litigation, the Tribunal remanded the matter before the respondent authority for fresh inquiry only on the ground that the beneficiaries had not been identified. This could not be a ground for remand, in the light of the ratio of the aforesaid judgments passed by the Hon'ble Supreme Court. The orders were passed by the respondent authority based on principles applicable for calculating liability under the provisions of the said Act and that the petitioner establishment could not complain about lack of opportunity to present its side before the respondent authority. The Tribunal has recorded that the petitioner establishment failed to produce relevant record and that the order passed by the respondent authority did not deserve interference.

12. No error can be attributed to the Tribunal in dismissing the appeal filed by the petitioner establishment. In the light of the above, the Writ Petition is dismissed.