

(2019) 11 BOM CK 0060
In the Bombay High Court
Case No : Writ Petition No. 6906 Of 2018

Municipal Council

APPELLANT

Vs

Assistant Provident Fund Commissioner, Employees'
Provident Fund Organization

RESPONDENT

Date of Decision : 18-11-2019

Acts Referred:

Employees' Provident Funds And Miscellaneous Provisions Act, 1952 — Section 7A, 7B, 7I, 7B(1), 7(B)(3), 7B(4), 7B(5), 7A(1)

Citation : (2019) 11 BOM CK 0060

Hon'ble Judges : Manish Pitale, J

Bench : Single Bench

Advocate : A.J. Pathak, H.N. Verma

Final Decision : Partly Allowed

Judgement

1. Heard.
2. Rule. Rule made returnable forthwith. Heard with consent of learned counsel for the rival parties.
3. The petitioner Municipal Council has challenged order dated 17/05/2018 passed by the respondent-Assistant Provident Fund Commissioner, whereby review application filed by the petitioner under section 7-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "Act of 1952") has been rejected. The petitioner has also challenged order dated 11/05/2016 passed under section 7-A of the Act of 1952, by the respondent of which review was sought by the petitioner before the respondent.
4. The petitioner being a Municipal Council, is a civic body established in the year 1945. After the enactment of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, it is governed by the provisions of the said Act.
5. The respondent issued a letter on 14/09/2011 to the petitioner informing it

about applicability of the Act of 1952. Thereafter, an enquiry contemplated under section 7-A of the said Act was undertaken and order dated 11/05/2016 was passed determining liability of Rs.2,98,50,805/- payable under the provisions of the Act of 1952 for the period from 08/01/2011 to 28/02/2014.

6. Aggrieved by the said order, the petitioner filed review application under section 7-B of the Act of 1952, inter alia, contending that all the employees of the petitioner were exempted employees from the purview of the said Act in terms of para-2(f) of the Employees' Provident Fund Scheme, 1952, wherein "excluded employee" was defined. It was submitted that the respondent had failed to take into consideration the said aspect of the matter while determining the aforesaid quantum of liability as against the petitioner. It was submitted that this was an error apparent on the face of the record and therefore, review was sought.

7. By order dated 17/05/2018, the respondent rejected the review application, only stating that despite several opportunities, the petitioner had failed to submit records and that therefore, review application was being rejected.

8. Aggrieved by the same, the petitioner filed the present writ petition. Mr. A.J.Pathak, learned counsel appearing for the petitioner, submitted that the impugned order rejecting the review application was cryptic in nature and the contentions raised on behalf of the petitioner were not at all considered by the respondent. It was submitted that specific contentions raised in the review application were not even adverted to and the review application was rejected by a single line order. On this basis, it was submitted that the impugned order rejecting the review application deserved to be set aside and it was further submitted that even the order passed by the respondent under section 7-A of the Act of 1952 determining liability was required to be set aside, because correct quantum of liability could be ascertained only after the specific contentions raised on behalf of the petitioner regarding excluded employees was taken into consideration and examined by the respondent-Authority. On this basis, the learned counsel appearing for the petitioner submitted that the writ petition deserved to be allowed and the matter was required to be remanded to the respondent-Authority for fresh consideration.

9. Mr. H.N.Verma, learned counsel appearing for the respondent, raised a preliminary objection that the writ petition was not maintainable, because alternative remedy of filing appeal under section 7-I of the aforesaid Act was available to the petitioner and the same was not exhausted. It was submitted that even if section 7-B(5) of the Act of 1952, specified that no appeal shall lie against an order rejecting a review application and section 7-I of the Act of 1952, also specified that appeal would not lie against an order rejecting an application for review under section 7-B(5) of the Act of 1952, a proper and conjoint reading of section 7-B with section 7-I of the Act of 1952, would show that by deeming fiction incorporated in section 7-B(5) of Act of 1952, an appeal would lie against an order rejecting a review application as if it was an original order passed by the

respondent-Authority under section 7-A of the Act of 1952. On the merits of the contentions raised on behalf of the petitioner, it was submitted that it was for the petitioner to have submitted relevant record before the respondent-Authority to buttress its submissions and having failed to do so, no error could be attributed to the impugned orders passed by the respondent-Authority.

10. The preliminary objection regarding maintainability of the writ petition raised on behalf of the respondent, needs to be addressed first. In order to examine the said contention, the relevant provisions need to be perused. Section 7-B and section 7-I of the Act of 1952 read as follows:-

"[7-B. Review of orders passed under Section 7-A.--(1) Any person aggrieved by an order made under sub-section (1) of section 7-A, but from which no appeal has been preferred under this Act, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of such order may apply for a review of that order to the officer who passed the order:

Provided that such officer may also on his own motion review his order if he is satisfied that it is necessary so to do on any such ground.

(2) Every application for review under sub-section (1) shall be filed in such form and manner and within such time as may be specified in the Scheme.

(3) Where it appears to the officer receiving an application for review that there is no sufficient ground for a review, he shall reject the application.

(4) Where the officer is of opinion that the application for review should be granted, he shall grant the same:

Provident that,-

(a) No such application shall be granted without previous notice to all the parties before him to enable them to appear and be heard in support of the order in respect of which a review is applied for, and

(b) No such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be produced by him when the order was made, without proof of such allegation.

(5) No appeal shall lie against the order of the officer rejecting an application for review, but an appeal under his Act shall lie against an order passed under review as if the order passed under review were the original order passed by him under section 7-A.

7C.....

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7-I. Appeals to the Tribunal.- (1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government, or any authority, under the proviso to sub-section (3), or sub-section (4), of section 1, or section 3, or sub-section (1) of section 7A, or section 7-B [except an order rejecting an application for review referred to in sub-section (5) thereof], or section 7-C, or section 14-B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed."

11. It is the contention of the learned counsel for the petitioner that a proper reading of section 7-B(5) and section 7-I of the Act of 1952 would show that no appeal would lie against an order passed by the respondent rejecting a review application filed under section 7-B of the Act of 1952. It was submitted that when filing of appeal against the rejection of a review application was specifically prohibited, on a proper reading of the aforesaid provisions, filing of writ petition was the only alternative available before the petitioner to challenge the impugned order rejecting the review application. In this regard, the learned counsel for the petitioner placed reliance on judgment of this Court in the case of *Ashmit Motors v. Assistant Provident Fund Commissioner*, reported in 2017(1) Mh.L.J. 885 and judgment of Karnataka High Court in the case of *M/s. Deccan Education Society v. Union of India*, reported in 2016 (150) FLR 646. By placing reliance on the said judgments, it was submitted that there was substance in the preliminary objection raised on behalf of the respondent.

12. On the other hand, the learned counsel appearing for the respondent relied upon judgment of the Delhi High Court in the case of *Bharat Polychem Ltd. v. RPF Commissioner*, reported in 2012-I-LLJ-595 (Del), contending that it was clearly held therein that an appeal would lie against an order rejecting review application and that therefore, the present writ petition was not maintainable.

13. A reading of section 7-B(5) of the Act of 1952, quoted above, would show that the opening words clearly state that no appeal shall lie against an order passed by the respondent rejecting an application for review. These words are reiterated in section 7-I of the said Act stating that an appeal would not lie against an order rejecting an application for review referred to in section 7-B(5) of the Act of 1952. The learned counsel for the respondent has placed much emphasis on the subsequent words used in section 7-B(5) of the Act of 1952 to the effect that "but an appeal under this Act shall lie against an order passed under review as if the order passed under review was the original order passed

by him under section 7-A". On the basis of these words, it was contended on behalf of the respondent that an order rejecting a review application, by a deeming fiction was to be treated as if it was an original order under section 7-A of the Act of 1952 and therefore, an appeal under section 7-I of the Act of 1952 would lie as if the order of rejection of a review application was passed under section 7-A of the said Act.

14. In order to examine the said contention, it would be necessary to appreciate the entire provision of section 7-B of the Act of 1952. Sub-section (1) thereof specifies the grounds on which review jurisdiction could be exercised, which appear to be the same as the classic grounds for exercising review jurisdiction. Sub-section (2) thereof provides for the form and manner in which the review application would be filed and sub-section (3) thereof specifies that if the officer receiving such an application finds that there are no sufficient grounds for review, he shall reject the application. Sub-section (4) thereof specifies that if the officer is of opinion that the application for review should be granted, he shall grant the same subject to provisos (a) and (b). Thereafter, sub-section (5) of section 7-B of the Act of 1952, specifically states that no appeal shall lie against an order rejecting a review application, which is reiterated in section 7-I of the Act of 1952.

15. A proper reading of the aforesaid two provisions would show that the subsequent words in section 7-B(5) of the Act of 1952, can be relatable only to an order allowing a review application and thereby specifying that such an order would be treated as if it was an original order under section 7-A of the Act of 1952, further showing that an appeal under section 7-I of the Act of 1952 would be available. This Court in the case of *Ashmit Motors v. Assistant Provident Fund Commissioner* (supra) has taken note of the said position and after noting the judgment of the Delhi High Court in the case of *Bharat Polychem Ltd. v. RPF Commissioner* (supra), it has been held as follows:

"22. Considering the above, it needs mention that an order under Section 7-B rejecting the application is not an appealable order. Sub-section (5) clearly indicates that no appeal would lie against an order rejecting the application under Section 7-B. An appeal would lie only against the order under Section 7-A which is the subject matter of review under Section 7-B. So also, Section 7-I indicates that an order under Section 7-B allowing the review application is appealable under Section 7-I. This Court is, therefore, required to consider this petition as the impugned order dated 13-8-2015 rejecting the application under Section 7-B is not an appealable order and the petitioner has raised a grievance that the same has been passed without hearing the petitioner."

16. In this connection, the judgment of the Karnataka High Court in *M/s. Deccan Education Society v. Union of India* (supra) is also relevant, because it deals with the said question of maintainability of the writ petition against an order rejecting a review application under section 7-B of the Act of 1952. It has been held in the said judgment as follows:

"9. A bare perusal of Section 7-B(5) clearly reveals that the said sub-section can be divided into two parts. While the first part debars filing of an appeal against an order of the Officer rejecting an application for review, the second part permits an appeal against an order passed under review, and creates a legal fiction that the said order shall be deemed to have been passed under Section 7-A of the Act.

10. The first part of Section 7-B(5) of the Act is further reiterated in Section 7-I of the Act. For Section 7-I clearly lays down that although a person aggrieved by the order under Section 7-B may file an appeal, but a person is not permitted to file an appeal against an order rejecting an application for review as referred to in sub-section (5) of Section 7-B. Therefore, an harmonious reading of both these provisions make it abundantly clear that in case a review application were rejected under Section 7-B of the Act, then no appeal shall lie against such rejection order before the Appellate Tribunal. Hence, the preliminary objection raised by the learned counsel for respondent No.2 that the petitioner has efficacious alternative remedy is belied by Sections 7-B and 7-I of the Act. Thus, preliminary objection is hereby rejected."

17. Thus, it becomes patently clear that a proper interpretation of the said provisions of the Act of 1952 would show that the first part of section 7-B(5) of the said Act prohibiting filing of appeal against the order rejecting review application is relatable to exercise of power under section 7-(B)(3) of the Act of 1952 for rejection of review application and further that the second part of section 7-B(5) of the Act specifies that when a review application is granted under section 7-B(1) and (4) of the Act of 1952, it has to be treated as if it is an original order passed by the concerned officer under section 7-A of the Act of 1952, against which an appeal would lie under section 7-I of the Act of 1952. Therefore, on a conjoint, harmonious and proper reading of sections 7-B and 7-I of the Act of 1952, it has to be held that an appeal under section 7-I thereof is not available when a review application is rejected under section 7-B of the said Act. Hence, the preliminary objection raised on behalf of the respondent is rejected and it is held that the present writ petition is maintainable.

18. On the merits, it is specifically contended that the aspect of the employees of the petitioner being excluded from the purview of the scheme under the said Act, was not appreciated by the respondent at all while passing the impugned orders. It was contended that all the employees were being paid pay per month exceeding the then amount specified under para-2(f) of the said Scheme. On this basis, it was contended that the quantum of liability imposed by the respondent by impugned order dated 11/05/2016 was rendered wholly unsustainable. It was submitted that this aspect was not taken into consideration properly by the respondent while conducting the enquiry and passing order under section 7-A of the Act of 1952.

19. A perusal of the impugned order dated 11/05/2016 passed under section 7-A of the Act of 1952 and the impugned order dated 17/05/2018 passed under

section 7-B of the Act of 1952, would show that the said contention has not been considered by the respondent at all. The said aspect sought to be raised by the petitioner goes to the very root of the matter and it could not have been ignored by the respondent. The contention raised on behalf of the respondent that a proper interpretation of the scheme under the Act would show that even if the employees were to be covered under the definition of "excluded employee" under para-2(f) of the said Scheme, there would yet be liability on the petitioner, could be considered only after proper opportunity was granted to the petitioner in that regard.

20. The impugned orders do not show any consideration of the aforesaid aspect of the matter and the petitioner being a Municipal Council and a public body deserved consideration of the said contention and its determination on merits by the respondent. The impugned order passed under section 7-A of the Act of 1952, has not adverted to the said aspect of the matter and, as noted above, the impugned order under section 7-B of the Act of 1952, rejecting the review application is absolutely cryptic and the review application has been rejected by a one line order. In view of the above, this Court is of the opinion that the writ petition deserves to be partly allowed and the matter needs to be remanded to the respondent for fresh enquiry and determination of liability of the petitioner for the concerned period, if any, after granting opportunity to the petitioner to place on record material in respect of the said contention. It would serve the ends of justice that a proper opportunity is granted to the petitioner and thereupon its liability is determined by the respondent.

21. Accordingly, the writ petition is partly allowed. The impugned orders passed by the respondent are quashed and set aside and the matter is remanded to the respondent for conducting fresh enquiry and proceedings under section 7-A of the Act of 1952.

22. Rule is made absolute in the above terms. No order as to costs.