

passed by the Assistant Provident Fund Commissioner (C), Regional Office Kandivli in exercise of the powers conferred by Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short "the said Act").

3) By the said order, it has been held that the Petitioner's outstanding provident fund dues are to the extent of 1,12,82,874/-. A perusal of the said order discloses the various dates on which the proceedings were heard and the purposes for which the proceedings were placed on a particular date. It appears that the representative of the Petitioner Company was directed to produce the relevant record by 30th December, 2010 by direction issued on 10th December, 2010. Prior thereto, the Director of the Petitioner Company, on 23rd November, 2010, had produced as many as 10 documents, which have been listed on the first page of the impugned order. The order further records that Smt. A. A. Shevale, who was the concerned Enforcement Officer, was directed to submit her report along with depositions which she accordingly did on 31st May, 2011 and it is on the basis of the report of the Enforcement Officer and the depositions that the matter came to be closed on 3rd June, 2011. The order further records that the Enforcement Officer has verified the documents which have been listed in the last paragraph on page 2 of the impugned order. It has been

recorded in the impugned order that if is after taking into consideration the documents and the depositions that the Authority has determined the dues payable by the Petitioners on account of Provident Fund, Pension fund and Insurance Fund. The dues have been calculated in the sum of Rs.1,17,56,222/- after giving credit for the amounts paid by the Petitioner from April, 2008 to August, 2008, the outstanding dues have been calculated at Rs. 1,12,82,874/-.

4) The Petitioner thereafter filed an application for review, which application has been rejected by the Assistant Provident Fund Commissioner, which rejection has been communicated by the office to the Petitioner by letter/order dated 11th February, 2013 and the rejection, as disclosed in the said letter, is on the ground that the Petitioner has failed to produce the records. As indicated above, it is the said order dated 15th July, 2011 passed by the Assistant Provident Fund Commissioner and the letter/order dated 11th February, 2013 of the said office communicating the rejection of the review filed by the Petitioner, which are taken exception to by way of the above Petition.

5) It has been averred in the Petition that the depositions and the report of the Enforcement Officer have not been furnished to the Petitioner, which averment can be found in paragraphs 23 and 24 of the Petition. It has further been averred that without identifying the

beneficiaries, the liability is sought to be fixed on the Petitioner, which averment is found in paragraph 26 and 28 of the Petition. Insofar as the averment in paragraphs 23 and 24 are concerned, the same are sought to be dealt with in paragraph 18 of the affidavit in reply.

Insofar as the furnishing of the depositions and the report is concerned, in the affidavit in reply filed by the Respondents, it has been stated that the E. O. has given the deposition and Mr. Rajendra Vichare, the director of the Petitioner Company was present and the proceedings bear his signature in respect of his attendance and the contents of the proceedings show that he never demanded the copy of the depositions. Hence, the fact that a copy of the depositions and the report was not furnished to the Petitioner has virtually not been disputed by the Authorities.

Insofar as the averments made in paragraph 26 and 28 are concerned, the said averments have also not been specifically dealt with by the Respondents, however, reliance is sought to be placed on clause 30(1) of the Scheme to justify the calculation made by the Respondents. It is in the backdrop of the aforesaid pleadings that the issue would have to be addressed.

6) The learned Counsel appearing for the Petitioner Shri. Naidu would contend that in the absence of the depositions and the

report being furnished to the Petitioner, the order stands vitiated, as the Authority had taken into consideration material, in respect of which the Petitioner was not given opportunity and therefore the order has been passed in breach of the principles of natural justice. The learned Counsel, in support of the said contention, placed reliance on the Judgment of a learned Single Judge of this Court in the matter of *Small Gauges Ltd. and Ors. vs. V. P. Ramaiah, Regional Provident Fund Commissioner, Pune*¹ as also an unreported Judgment of the same learned Single Judge in the matter of *Nasik Screw Industries and Anr. vs. Regional Provident Fund Commissioner, Maharashtra and Goa and Anr.*² dated 28th September, 2010. The learned Counsel would contend that the jurisdiction under Section 7A of the said Act has to be exercised in a manner so as to arrive at the difference in payment of contribution on the basis of identifying the workmen, and the power under Section 7A of the said Act is not conferred on the Commissioner to decide abstract questions of law. In support of the said contention, reliance is sought to be placed on the Judgment of the Apex Court in the matter of *Food Corporation of India vs. The Provident Fund Commissioner and Ors.*³ as also the Judgment of a learned Single Judge of this Court in the matter of *Sandeep Dwellers Pvt. Ltd., Nagpur vs. Union of India, through*

1 2008 (119) FLR 605

2 WP/423/1998

3 1990 I CLR S. C. 20

*Secretary, Ministry of Labour, New Delhi and Ors.*⁴. The learned Counsel lastly contended that the review application filed by the Petitioner under Section 7B of the said Act could not have been rejected by the Authority, without giving the Petitioner a hearing and therefore the second impugned order is vitiated on the said ground. In support of the said contention, the learned Counsel sought to place reliance on the order dated 9th April, 2013 passed in the matter of *Vindhyachal Security, Detective & Allied Services Pvt. Ltd. vs. The Assistant Provident Fund Commissioner*⁵, wherein, the learned Single Judge of this Court has held that since the authority is exercising quasi judicial power under Section 7B, the applicant who has preferred the application is required to be heard.

7) Per contra, the learned Counsel appearing for the Respondents i.e. the Provident Fund Authorities would seek to justify the impugned order dated 15th July, 2011 passed by the Assistant Provident Fund Commissioner. The learned Counsel would contend that though opportunity was granted to the Petitioner, the Petitioner has not produced the documents and therefore the review application filed by the Petitioner came to be dismissed. The learned Counsel would contend that since the Petitioner was present on the date when the

4 2006 III CLR 748

5 WP/154/2013

report and the depositions were submitted, grievance could not be made that the said reports were not furnished to him.

8) Having heard the learned Counsel appearing for the parties, I have considered the rival contentions. As indicated above, the fact that the depositions and the report of the Enforcement Officer was not furnished to the Petitioner has virtually been accepted by the Respondents, as the Respondents, in answer to paragraph 23 and 24 of the Petition have stated that though the Petitioner was present, he had not asked for the report. The question is not whether the Petitioner asked for the report or not, the question is if the said material was to be taken into consideration in the course of an inquiry under Section 7A of the said Act, the said material had to be put to the Petitioner so as to enable the Petitioner to deal with the same. In view of the fact that the said depositions and the report having not been furnished to the Petitioner and the same having been relied upon for arriving at a conclusion as regards the outstanding Provident Fund dues of the Petitioner, in my view, the order is vitiated on the said count.

9) The facts in the Judgments of the learned Single Judge, which have been relied upon by the Petitioner in the case of *Small Gauges Ltd. and Ors.* (supra) and *Nasik Screw Industries and Anr* (supra), were almost identical, inasmuch as in the inquiry under Section 7A, the

report and the depositions were not furnished to the Employer in the said cases. It is in the said context that the learned Single Judge held that the orders stood vitiated on account of the violation of the principles of natural justice and the matter was therefore required to be relegated back to the authority for a de-novo hearing.

10) Now, coming to the aspect of the identifying the beneficiaries is concerned, the order itself discloses that the calculations have been made on the basis of the documents on record. A perusal of the depositions, which is a statement, which has been prepared by the Enforcement Officer *ex-facie* discloses that the calculation is made on the basis of the balance-sheet of the Petitioner and there does not seem to be any exercise carried out of identifying the beneficiaries. Having regard to the Judgment of the Apex Court in *Food Corporation of India* (supra), wherein the Apex Court has in terms observed that the proceedings under Section 7A are not for deciding abstract questions of law but for calculation of the differences of dues payable by identifying the beneficiaries. The said view has been followed by the learned Single Judge of this Court in the Judgment rendered in the case of *Sandeep Dwellers Pvt. Ltd.* (supra), wherein the learned Single Judge has, in the facts of the said case, observed that calculations in the said case were made on average basis on the basis of the record made

available by *Sandeep Dwellers* in relation to all five contractors, and the steps taken by the Authority in relation to identification of the workers were not apparent. The learned Single Judge further observed that all requirements in this respect are to be fulfilled before effecting recovery. The learned Single Judge further observed that the expenditure shown as wages in balance sheet has been acted upon without verifying the actual part thereof appropriated towards payment of wages by Employer. The quantification of amount without identifying beneficiaries or any attempt to recover it is therefore unsustainable. The judgment of the Apex Court in *Food Corporation of India* (supra) would therefore apply with equal force to the facts of the present case. The impugned order is therefore not sustainable on the said ground also.

11) Now coming to the aspect of review, the said letter dated 11th February, 2013 discloses that the review has been rejected on the ground that the Petitioner has not produced documents. This Court is informed across the Bar that the said letter is in fact an order. Be that as it may, the said order can be said to be laconic, as there are no reasons mentioned in the said order as to on what basis the Assistant Provident Fund Commissioner has come to a conclusion that no documents have been filed by the Petitioner, when in the order dated 15th July, 2011, a reference has been made to 10 documents which were

filed by the Petitioner and which have been listed on the first page. As observed by the learned Single Judge of this Court in the order dated 9th April, 2013 in Writ Petition No. 1564 of 2013, even in respect of an application under Section 7B, a hearing has to be afforded to the parties. In the instant case, admittedly, no hearing was afforded to the Petitioner. The said order having been passed without hearing the Petitioner, has therefore been passed in violation of the principles of the natural justice and is therefore not sustainable on the said ground.

12) Hence, for the reasons aforesaid, the impugned order dated 15th July, 2011 passed by the Assistant Provident Fund Commissioner as also the letter/order dated 11th February, 2013 and the consequential orders dated 21st May, 2012 (attaching the property of the Petitioner), 13th Aug, 2012, 6th October, 2012 and 22nd February, 2013 would stand quashed and set aside and the matter is relegated back to the Assistant Provident Fund Commissioner for a de-novo hearing under Section 7A of the said Act in terms of the observations made hereinabove and in terms of the following directions:

- (i) The Respondents to provide the documents relied upon by them in the said 7A proceedings either to the Petitioner or to his Advocate within four weeks from date.
- (ii) The liberty is granted to the Petitioner to file additional pleadings and/or documents before the Authority within six weeks from date.
- (iii) The Authority, thereafter to decide the proceedings as expeditiously as possible and not later than eight weeks after the initial six weeks' period has come to an end.

13) The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

(R. M. SAVANT, J.)

Bombay High Court