

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 17025 of 2019

Four Star International
Versus
Employees' Provident Fund Commissioner & Ors.

For the petitioner : Mr. Ranjay De
Mr. Basabjit Banerjee
Mr. A. A. Bose

For the respondents : Mr. Shiv Chandra Prasad

Heard on : 16th November, 2023

Judgment on : **16th November, 2023.**

Raja Basu Chowdhury, J:

1. The present writ petition has been filed, *inter alia*, challenging the order dated 23rd March, 2019 passed under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the "said Act") as also the order dated 1st July, 2019 passed under Section 7B of the said Act.

2. The petitioner claims that the petitioner is covered under the provisions of the said Act. The petitioner was served with a show-cause

dated 7th March, 2018, *inter alia*, calling upon the petitioner to show-cause as to why penal action be not initiated against the petitioner under the provisions of the said Act on account of the petitioner allegedly not extending the provident fund benefit to its employees and/or on account of non-deposition of provident fund dues.

3. Since the aforesaid notice was based on and referred to a report of the enforcement officer dated 5th February, 2018, by a communication in writing dated 12th March, 2018, the petitioner had requested the Assistant Provident Fund Commissioner, Employees' Provident Fund Organization to favour the petitioner with a copy of the said report for the petitioner to appropriately respond to the said show-cause.

4. Despite such request, the petitioner was not favoured with the copy of the report dated 5th February, 2018. Subsequently, hearing took place before the Regional Provident Fund Commissioner, Employees' Provident Fund Organization's office, Kolkata, and ultimately by an order dated 29th March, 2019, the Regional Provident Fund Commissioner had determined the contributions payable by the petitioner for the period April, 2014 to November, 2017 by basing its findings on the report dated 5th February, 2018.

5. Since, the petitioner did not get appropriate opportunity to set up its defence, on the ground of failure on the part of the provident fund authorities to favour the petitioner with a copy of the aforesaid report dated 5th February, 2018, the petitioner had filed an application for

review under sub-section (1) of Section 7B of the said Act read with section 79A of the Employees' Provident Fund Scheme, 1952 by relying on certain documents. By an order dated 1st July, 2019 the Regional Provident Fund Commissioner by, *inter alia*, observing that the petitioner had been given enough opportunity to respond to the show-cause and the petitioner having failed to produce any document including the document relating to "Godown imprest" in course of the enquiry, was pleased to reject the said application under Section 7B of the said Act and directed the petitioner to comply with the order dated 29th March, 2019 passed under Section 7A of the said Act.

6. Challenging the aforesaid order, the instant writ petition has been filed.

7. When the aforesaid writ petition had earlier come up for consideration, a Coordinate Bench of this Hon'ble Court by taking note of the statements made by the petitioner as regards non-supply of the enforcement officer's report and the determination made by the respondents without favouring the petitioner with a copy of such report was, *inter alia*, pleased to admit the said application by observing as follows:-

"In view of the fact that the order passed under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 is based on a report that was never handed over to the petitioner. I am of the prima facie view that the entire order is vitiated and does not stand the test of law. The principles of natural justice clearly provide that an authority must provide the copies of the documents that are relied upon, especially

when the said document/report deals with the culpability of the petitioner”.

8. Having regard to the aforesaid, the Coordinate Bench of this Hon'ble Court was pleased to stay the order passed under Section 7A of the said Act, for a limited period. The aforesaid interim order has, however been extended from time to time and is still subsisting.

9. Mr. De, learned advocate representing the petitioner by drawing attention of this Court to the order dated 29th March, 2019 submits that no independent summons was issued on the petitioner in connection with the determination made under Section 7A of the said Act, apart from the show-cause notice dated 7th March, 2018. Although, the enforcement officer's report dated 5th February, 2018 forms part of not only the show-cause/summons issued in connection with the determination made under Section 7A of the said Act and the order passed under Section 7A of the said Act, such report was never supplied to the petitioner. The aforesaid constitutes violation of principles of natural justice.

10. By placing reliance on the document appended to the petition which are extracts of the sub-ledger, he submits that the figure under the head “Godown imprest” has been treated by the respondents as salary/wages payable to the employees of the petitioner and the determination under section 7A of the said Act has been made on the basis thereof.

11. Since, the petitioner was never supplied with the copy of the report dated 5th February, 2018, the petitioner could not appropriately

respond and/or highlight the aforesaid. It is submitted that the aforesaid show-cause notice/summons, which forms the foundation of the determination made by the respondents, was served to the petitioner in an incomplete manner, which has led to denial of justice.

12. Mr. De, further contends that the respondents in their affidavit-in-opposition disclosed the document dated 5th February, 2018, for the first time though, no averments as regards service of copy thereof on the petitioner has been made.

13. By placing reliance of provisions of Section 7A of the said Act, it is submitted that the statute recognizes the manner in which the evidence shall be lead in connection with an inquiry held under Section 7A of the said Act. The report dated 5th February, 2018, which contains diverse allegation was neither been disclosed nor was it presented in course of the enquiry. The author of the report did not come forward so as to vouch the contents of such report. No opportunity was given to the petitioner to cross-examine the author of the report so as to test the veracity of the evidence lead. The said document has been exhibited in a manner which is unknown to law. In support of his contention reliance is placed on the judgement delivered by a Coordinate Bench in the case of ***Central Tool Room & Training Centre v. Employees' Provident Fund Organization & Ors.***, reported in **2022 SCC OnLine Cal 605**.

14. By placing reliance on another judgment delivered by a Coordinate Bench of this Court in the case of ***West Bengal Power***

Development Corporation Limited v. Union of India reported in **(2012) 3 CHN 513**, he submits that it is the obligation of the authority to supply all relevant documents including any inspection report, while making a determination under Section 7A of the said Act. Failure to supply a report prepared by the enforcement officer which was relied on for the purpose of making a determination under Section 7A of the said Act, constitutes failure of natural justice and the same is unsustainable in law. In the given facts, he submits that the orders impugned cannot be sustained and the same should be set aside and quashed.

15. *Per contra*, Mr. Prasad, learned advocate representing the provident fund authorities has placed before this Court the affidavit-in-opposition. He has not only drawn the attention of this Court to the show-cause notice dated 7th March, 2018, but the daily orders. He has also invited the attention of this Court to a statement prepared by the enforcement officer which had been submitted to the Regional Provident Fund Commissioner on 25th November, 2018. The said statement was duly made available to the petitioner. According to the respondents, the petitioner was well aware with regard to not only the period for which the determination was being made but also the exact quantum, which the enforcement officer had identified. Despite being afforded with such opportunity, the petitioner chose not to raise any objection. The purported document which has been disclosed in the petition being the extract of sub-ledger and the rent slips were never disclosed before the Regional Provident Fund Commissioner. Simply

because the petitioner had not been supplied with the enquiry report dated 5th February, 2018, the same does not and cannot render the entire determination bad. According to Mr. Prasad, the petitioner was repeatedly called upon to comply with the terms of said report dated 5th February, 2018. The said report would further demonstrate that the findings returned in the said report are based on disclosure made by the petitioner's representative. As such, the petitioner cannot feign ignorance as regards the said report, and bypass the statutory remedy to overcome the mandatory deposit required to be made for maintaining an appeal under Section 7(I) of the said Act. The present writ petition is an abuse of process of Court and should be dismissed with costs. It is still further submitted that the petitioner has an alternative remedy and on such ground as well, the writ petition should be dismissed.

16. Heard the learned advocates appearing for the respective parties and considered the materials on record. Although, the question of alternative remedy has been raised at this stage of final hearing, yet I find that a Coordinate Bench of this Court at the admission stage by an order dated 23rd September, 2019 was, *inter alia*, pleased to entertain the writ application on the ground of violation of principles of natural justice and had issued direction for exchange of affidavits. At that stage, the point of maintainability was not raised. However, since, the point of maintainability on the ground of alternative remedy has been raised, the same needs to be decided.

17. It is well-settled that an alternative remedy is not a complete bar for exercising jurisdiction by this Court under Article 226 of the Constitution of India. The refusal to exercise jurisdiction by this Court on account of alternative remedy is, however, subject to three exceptions:- 1) Jurisdictional error, 2) failure of natural justice and 3) violation of fundamental rights. Admittedly, in this case, I find the petitioner complains of violation of principles of natural justice, which goes to the root of the matter. The aforesaid also infringes upon the petitioner's rights under Article 14 of the Constitution of India. Having regard to the aforesaid, the objection raised by the respondents fails.

18. Admittedly in this case I find that a proceeding has been initiated on the basis of show-cause/summons dated 7th March, 2018 issued under Section 7A of the said Act. Such show-cause was based on an enforcement officer's report dated 5th February, 2018. Admittedly, such report had not been supplied to the petitioner notwithstanding the petitioner by notice in writing, calling upon the respondents to favour the petitioner with the same, for the petitioner to appropriately respond to the summons. Mr. Prasad, however, by relying on the selfsame report and a statement prepared by the enforcement officer which was submitted before the Regional Provident Fund Commissioner on 25th November, 2018 submits that the petitioner was all along aware with regard to the issues and the shortcomings and as such, the petitioner cannot complain of violation of principles of natural justice.

19. By relying on the report dated 5th February, 2018, it is submitted that the findings returned by the enforcement officer are based on the disclosure made by the petitioner's representative. Since, the report had been prepared on the basis of the disclosure made by the petitioner and its representative, the petitioner cannot be permitted to question the said report. I, however, notice that the said report was not disclosed to the petitioner until the affidavit in opposition to the writ petition was filed.

20. Unfortunately, the show-cause notice/summons dated 7th March, 2018 not only relies on the aforesaid report, the determination made under section 7A of the said Act, is also based on the aforesaid report dated 5th February, 2018. As such, the aforesaid clearly constitutes violation of natural justice.

21. Independent of the above, Mr. De has also made out a case of procedural irregularity on the part of Regional Provident Fund Commissioner in receiving evidence. To appreciate the contention of Mr. De as regards the mode and manner of receiving evidence by an authority under Section 7A of the said Act, the provision of Section 7A(2) of the said Act, is extracted hereinbelow:-

“(2) The officer conducting the inquiry under subsection (1) shall, for the purpose of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure 1908 (5 of 1908) 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).”

22. Admittedly, the report dated 5th February, 2018 was not exhibited in the mode and manner known in law. The author of the said report had not come forward to prove the contents of the said report or to vouch as regard contents of the same. The petitioner did not get any opportunity to cross-examine the author of the said report. Despite the Regional Provident Fund Commissioner being vested with the power and authority, as are vested in a Court under the Code of Civil Procedure while trying suit in relation of matters of receiving evidence, the said authority had failed to exercise such powers as are necessary while receiving evidence. The Regional Provident Fund Commissioner without giving the petitioner any opportunity to controvert the contents of the said report or to test the veracity thereof, not only had taken the said report on record but had passed his order based on the said report, which in itself constitutes violation of principles of natural justice to say the least.

23. The petitioner, thus, has been deprived of its opportunity to place its case and/or appropriately defend. The disclosures of statement by the enforcement officer on 25th November, 2018 is of no substitute to the disclosure of the enforcement officer’s report dated 5th February, 2018,

which forms the very basis of the order dated 25th March, 2019. Since, the order was passed without complying with the principles of natural justice as noted hereinabove, the petitioner had even approached the respondents to review the said order by filing an application under Section 7B of the said Act. Unfortunately, such application was rejected, *inter alia*, observing as follows:

“Furthermore, numerous opportunities were given to you by issuing Show Cause Notice, Adjournment Notices as well as providing copy of dues deposition statement prepared by the Enforcement Officer on the basis of documents as produced by you duly directing to submit clarification along with supporting documents if any in proof of your contentions.

Regarding non production of documents related to “Godown Imprest” there is no justification as to why the same was not produced during the course of hearing in spite of repeated opportunities given.

In view of the above, the appeal by you only appears as a delaying tactics and hence the request for initiating review U/S 7B is rejected and you are once again directed to comply with the 7A order vide dated 29/03/2019 and deposit the assessed amount immediately”.

24. As rightly pointed out by Mr. De, I find that a Coordinate Bench of this Court in the case of **Central Tool Room & Training Centre** (supra) while considering the scope and object of Section 7A(2) of the said Act, in paragraph 19 thereof, after quoting section 7A(2) of the said Act, has been, *inter alia*, pleased to observe as follows:-

“19. 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”.

25. Another Coordinate Bench of this Court in the case of **West Bengal Power Development Corporation Limited** (supra) has already held that while making a determination under Section 7A of the said Act, it is the obligation of the respondents to disclose the report of the Additional Provident Fund Commissioner.

26. Non-disclosure of such report to the petitioner and the acceptance thereof, in a casual manner by the Regional Provident Fund Commissioner without affording opportunity to the petitioner to examine the same renders the decision making process arbitrary and the decision bad.

27. Having regard to the aforesaid and taking note of the fact that the final determination has been made without giving the petitioner an opportunity, either to consider or contest the report dated 5th February, 2018, the entire proceedings stand vitiated, including the determination made under Section 7A thereof.

28. In view thereof, the order dated 25th March, 2019 passed under Section 7A of the said Act and the order dated 1st July, 2021 passed under Section 7B of the said Act, stand set aside and quashed. However, taking note of the fact that the petitioner has now been

supplied with the copy of the enforcement officer's report dated 5th February, 2018, I am of the view that the determination to be made under Section 7A of the said Act, should continue from the stage of show-cause dated 7th March, 2018.

29. The petitioner shall be permitted to file a response to the aforesaid show-cause within a period of four weeks from date. If such response to such show-cause is filed by the petitioner within the period of four weeks from date, or in absence thereof, on the expiry of the aforesaid period, the Regional Provident Fund Commissioner shall determine the liability of the petitioner, if any, under Section 7A of the said Act within twelve weeks therefrom, after affording reasonable opportunity of hearing but without granting any unnecessary adjournments to either of the parties.

30. Needless to note that the Regional Provident Fund Commissioner while making such determination shall comply with the statutory provisions.

31. With the aforesaid observations/directions the writ application stands disposed of.

32. There shall, however, be no order as to costs.

33. Urgent certified copy of this order, if applied for, be given to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)