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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 27.08.2019

\+ W.P.(C) No.887/2013 & CM No.1685/2013 (for stay)

REGIONAL PROVIDENT FUND COMMISSIONER ..... Petitioner
Through Mr.Keshav Mohan, Adv.

versus

AHLUWALIA CONTRACTS (INDIA) LTD ..... Respondent
Through Mr.H.P. Arora, Adv. with Mr.Rajiv Arora, Adv.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. The present petition under Articles 226 and 227 of the Constitution of India filed by the Employees Provident Fund Organization (EPFO), through its Regional Provident Fund Commissioner assails the interim order dated 09.11.2012 passed by the Employees' Provident Fund Appellate Tribunal in ATA No.896(4) of 2012. Vide the said interim order the Appellate Tribunal, while admitting the appeal preferred by the respondent against the order dated 10.07.2012 passed by the petitioner, has granted a complete waiver of the condition of pre-deposit by exercising its powers under Section 7-O of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act").

2. The respondent, who is a Contractor carrying out construction

activities for the last many years, had been allowed a Provident Fund Code on 31.10.1980, but the same was made applicable w.e.f. 10.11.2010. However, the petitioner initiated proceedings under Section 7-A of the Act against the respondent/company for alleged non-compliance of the provisions of the Act in respect of its employees engaged at the commonwealth sites, i.e., Commonwealth Residential Sites and Dr.SPM Swimming Pool Complex located at Talkatora Stadium, New Delhi; and a notice to that effect was issued to the respondent on 30.09.2010. It is the admitted case of the parties that pursuant to the said notice, various hearings were conducted by the petitioner during the course of which, the respondent had provided the petitioner with records, including the copies of various inspection reports. After perusing these records produced by the respondent, the petitioner came to the conclusion that they were inadequate and therefore, by placing reliance on the value of the contract i.e., Rs.852,37,69,094/-, the petitioner assessed the costs of material and labour component to be in the ratio of 75:25. Resultantly, the labour component was calculated at Rs.213,09,42,274/-and the relevant extracts of the petitioner's findings are as under:-

> *"In the light of aforesaid discussion, the department representatives computed Labour component in the contract amount @ 25% of Rs.852,37,69,094/- which works out to Rs.213,09,42,274/-. Accordingly, the Provident Fund dues payable by the establishment in respect of the above cited two projects be quantified as under:-*

Wages/ Salary	A/c 1 (Rs.)	A/c II (Rs.)	A/c X (Rs.)	A/c XXI (Rs.)	A/c XXII (Rs.)	Total (Rs.)
Rs.213,09,42274	333918654	23440365	177507491	10654711	213094	54,57,34,315

3. The petitioner, accordingly, held the respondent liable to pay a sum of Rs.54,57,34,315/- as penalty for contravening the provisions of the Act as also to pay interest and damages in terms of Sections 7-Q and 14-B of the Act. Aggrieved by the petitioner's decision, the respondent preferred the subject appeal before the Tribunal along with an application under Section 7-O of the Act seeking waiver of the condition of pre-deposit.

4. By way of the impugned interim order dated 09.11.2012 the Tribunal has, after considering the submissions of both sides, granted complete waiver of the condition of pre-deposit to the respondent by observing as under:-

> *"3. The second issue raised by the appellant is regarding identification of beneficiaries. The Ld. APFC, Delhi has observed that the appellant had not produced complete records for identification of the eligible employees. In the records recovered by the squad of Enforcement officer there were significant manipulations, addition and alteration and fabrication as reported by the National Crime Record Bureau, Ministry of Home Affairs, Government of India, on the Muster Rolls and Forms-ll. The Ld. RPFC, Delhi has further observed that according to the judicial pronouncement given by the Hon'ble Supreme Court of India and the other High Courts, the responsibility towards identification of beneficiaries rests with the appellant. In this case, it is amply clear that the Provident Fund Liability have been assessed on the basis of the expenses incurred on total wages component. Further, there is no identification of*

beneficiaries. In case the observations made by the Ld. RPFC, Delhi are accepted and also the PF amount determined is accepted and the appellant is directed to deposit the determined amount with the Provident Fund Commissioner, the question will arise and remain open as to who will receive the PF amount or how this determined amount will be disbursed among the beneficiaries. The identification of the beneficiaries is the primary responsibility of the Enquiry officer which the Ld. RPFC, Delhi had not discharged. In the case of Sandeep Dwellers Pvt. Ltd. Vs. Union of India, 2007(3) Bom.CR 898, the Hon'ble High court of Bombay had held that the quantification of dues without identifying the beneficiaries was unsustainable. Further, in the case of H.P. State Forest Corporation vs. RPFC, delivered on 03.04.2008 in CA No.5717/2001 with CA No.5718/2001, the Hon'ble Supreme court had held that the assessment of dues should be made only with respect of identifiable employees only. In nut shell, it is mentioned that the workers will have to be identified first before the amount is assessed and is recovered. Until and unless, the beneficiaries are not identified, the determined dues by taking hypothetical percentage of the total gages value or labour charges towards wages and recovering the same from the appellant's establishment would not help the workers as the money would not reach to them till the time they are identified. One of the observations made by the Enquiry Officer in the impugned order is that the appellant had not produced any records as to the workers deployed on its establishment through contracts. In this regard, it is noted that burden to identify the employees is initially on the respondent authority which it discharged by producing the records of inspection and showing it to be correct. The burden thereafter shifted to the appellant. The appellant had shown its inability to produce the records in relation to the workers as that record was not maintained or preserved. However, steps taken by the respondent authority in relation to the identification of workers are not apparent

and all requirements in this respect are to be fulfilled before effecting recovery. Expenditure shown as wages in balance sheet etc. has been acted upon without verifying the actual part thereof appropriately towards payment of wages by the appellant. The quantification of amount without identifying the beneficiaries or any attempt to recover it would therefore unsustainable. The finding out quantum of evaded contribution amount and its recovery has to be for workers who are identified and to whom the respondent authority can deliver their due savings. Inquiry, therefore, has to ascertain and identify such workers whose legal rights have been defeated and powers are to be used for this purpose. Under Section 7A(2) of the Act, the respondent authority has the same powers as are vested in court for trying a suit. Under section 7A of the Act, the respondent authority is authorized to enforce attendance in person on oath. He has powers requiring the discovery and production of documents. This power is given to the respondent authority not to decide abstract question of law, but only to determine the actual concrete differences in payment of PF contribution and other dues by identifying the employees. The respondent authority should exercise all his powers to collect all evidence and collate all material before coming to power conclusion. The 7-A respondent authority had failed to exercise these powers while collecting the necessary materials as to the identification of beneficiaries."

4. It is also relevant to note that the Hon'ble High court of Delhi in the case of Builders Association of India & Ors. Vs. UOI in WP(C) No.3588/2002 vide order dated July 07, 2004 had absolutely stayed the operation of the Assessment Order passed by the RPFC against the building contractors. The Hon'ble High Court of Delhi subsequently, vide its Order dated September 03, 2012 extended the benefit of Stay Order granted absolutely in its order dated July 07, 2004 to all the construction complained involved in construction work.

> *5. In view of the above discussion, I am of the view that a prima facie case has been made out for waiver of the condition of pre-deposit. The application filed under section 7 O of the Act is allowed. The appeal is admitted for the consideration. The operation of the impugned order is stayed till disposal of the present appeal. The respondent is directed not to take any coercive measures till disposal of the present appeal. Notice be issued to the respondent to file a reply within 4 weeks. List the matter for reply and final disposal of appeal for 13.12.2012."*

5. Mr.Keshav Mohan, learned counsel for the petitioner has made three primary submissions while assailing the aforesaid order. Firstly he submits that the learned Tribunal, while granting complete waiver from pre-deposit, has failed to appreciate that the respondent had erroneously relied on orders passed by this Court in ***Builders Association of India & Ors. Vs. Union of India*** WP(C) No.3588/2002 which is a blatant attempt to mislead the Tribunal, as the issues raised in the said petition were entirely different from those arising in the present case. He submits that whereas in the present case, the only plea adopted by the respondent before the petitioner/competent authority when the assessment order was being passed in the inquiry under Section 7-A of the Act, was that adequate steps had not been taken to identify those workmen who were the beneficiaries of the provident fund dues; however in ***Builders Association of India*** *(supra)* the issue of applicability of paragraph 26(2) of the Provident Fund (Miscellaneous) Provisions Scheme, 1952 had been raised insofar as temporary and/or casual workers engaged in multi-tier system were concerned. He, therefore, submits that on

this ground itself the decision of the Tribunal is liable to be set aside.

6. Mr.Mohan further submits that even otherwise, in granting the waiver of pre-deposit to the respondent, the Tribunal has overlooked the fact that the petitioner/EPFO is a creation of the Act which is a social welfare legislation and the petitioner, being the competent authority under the Act, is only concerned with protecting the interest of poor workmen. In support of his aforesaid contention, he places reliance on the order dated 08.05.2018 passed by a Co-ordinate Bench of this Court in ***G5S Facility Services India Pvt. Ltd. Vs. Regional Provident Fund Commissioner-I*** *[WP(C) No.1390/2018]*. He, therefore, submits that this was not a case where the respondent was entitled to any indulgence by granting him a complete waiver from pre-deposit. Mr.Mohan further submits that even otherwise, a perusal of the Assessment Order shows that it is the respondent who was responsible for it own predicament brought on by its failure to not produce complete records and its attempt to produce forged records before the petitioner. For this purpose, he places reliance on the provisions of Section 7-A(3) of the Act and contends that whenever an employer does not co-operate in an inquiry conducted under Section 7-A of the Act or does not produce relevant records during the inquiry proceedings, the competent authority under the Act i.e. the petitioner, is well within its right to arrive upon its own conclusions and determine the amount of penalty which can be levied on the basis of the documents available on record. Mr.Mohan also places reliance on the decision of the Kerala High Court in ***Lakeshore Hospital & Research Centre Ltd. Vs. Employees Provident Fund Appellate***

Tribunal & Anr. *(2014) 140 FLR 493*, and submits that even though the Act bestows a discretion upon the Tribunal to grant waiver of pre-deposit, the said discretion has to be exercised in accordance with the facts of each case and cannot be granted merely at the asking of the respondent/employer. He relies on the decision of the Bombay High Court in ***O.G. Bajaj Construction Vs. Assistant Provident Fund Commissioner, Nagpur*** *2010 (3) Mh.L.J. 325*, to contend that such a waiver from pre-deposit cannot be granted on the basis of some vague assertion as has been done in the present case.

7. Mr.Mohan also places reliance on paragraphs 3, 4 and 5 of the decision of the Supreme Court in ***Regional Director, ESI Corporation, Thrissur Vs. Kerala State Drugs & Pharmaceuticals Ltd.*** *1995 Suppl. (3) SCC 148* in support of his contention that even if the employees have not been identified, the employer is liable to make the requisite deposit which he contends has not been done in the present case. Finally, Mr. Mohan places reliance on the decision dated 23.05.2019 of a Co-ordinate Bench of this Court in ***Ansal Housing & Construction*** and submits ***Limited v. Regional Provident Fund Commissioner-II, Delhi*** *(2019 LLR 812)* that in a case where there is a default on the part of the employer to make the requisite deposits, no indulgence ought to be granted to such defaulting employers.

8. On the other hand, Mr.Arora, learned counsel for the respondent while defending the impugned order, submits that once the Tribunal has exercised its discretion on the basis of the facts on record, there is no reason as to why this Court should interfere with the same. He submits that the decisions relied upon by the petitioner

in themselves show that once the Tribunal has exercised the discretionary jurisdiction vested in it by the Act, the Court should not ordinarily interfere with the same unless it is shown to be based on wholly capricious material or on facts totally irrelevant to the issue in hand. Mr.Arora further submits that the petitioner's plea that the decision in ***Builders Association of India*** *(supra)* was not applicable to the facts of the present case, is wholly misconceived. He submits that in fact one of the issues raised in the said case also related to identification of the workmen evident from the order passed by the Supreme Court in the Special Leave Petition preferred by Builders Association of India, challenging the order dated 16.10.2015 passed by the Division Bench of this Court dismissing their LPA. For this purpose, he hands over a copy of the said order dated 02.05.2016 passed by the Supreme Court in SLP (C) No. CC No.8035/2016, which reads as under:-

> *"Delay condoned.*
>
> *Apprehension of the petitioner appears to be that without identifying the beneficiary workmen, the contribution is being sought. Without identification, the petitioner will not be liable to make the contribution, it is submitted. That process of identification will arise only at the stage of enquiry that is to be conducted by the respondent-Organization. Therefore, it is made clear that during the process of enquiry conducted by the respondent-Organization, the steps will also be taken to identify the workmen either of the petitioner or engaged through contractors.*
>
> *Needless to say that the Organization will ensure that the contribution taken from the petitioner will actually go to the benefit of the employees concerned.*
>
> *Subject to the above observations, special leave*

petition is dismissed.

Pending application(s) shall stand disposed of."

9. Mr.Arora further submits that the Tribunal granted waiver of deposit to the respondent only after it found that the findings in the assessment order were prima facie unsustainable. He submits that the impugned interim order was not merely by relying on the decision in ***Builders Association of India*** (supra) as is sought to be contended by the petitioner. For this purpose, he draws my attention to paragraph 3 of the impugned order and submits that the Tribunal had categorically observed that there was a failure on the part of the petitioner to exercise its power under the Act to identify the beneficiaries and, therefore, the order of recovery was prima facie unsustainable.

10. He further submits that the Assessment Order clearly shows that the formula used by the petitioner to assess the labour component at the rate of 25% of the contract value was contrary to the circular dated 20.01.2010 issued by the Additional Central Provident Fund Commissioner specifically directing that the said formula should not be resorted to for determining the value towards the labour component. The circular further advised the authorities to determine the PF dues against an establishment after due application of mind to the facts of each case alongwith giving reasons therefor in the assessment order itself. He further submits that in terms of paragraph 34(4) of the Provident Fund (Miscellaneous) Provisions Scheme, 1952, the only onus on the respondent was to maintain all inspection records which it has done and for which purpose, he draws my

attention to the inspection note placed as Annexure R-1 . He further submits that the said inspection report did not find that the respondent had acted mala fide in any manner or had not co-operated with the inquiry. He, therefore, prays that the writ petition be dismissed.

11. I have considered the submissions of learned counsel for the parties and with their assistance, perused the record.

12. Undoubtedly, keeping in view its object and the context in which it was enacted, the Act is a social welfare legislation designed for the benefit of the labour class and the workforce of this country. I find merit in the submission of the learned counsel for the petitioner that the discretion to grant complete waiver from pre-deposit while entertaining an appeal, should not be lightly or mechanically exercised. It cannot, however, be said that the Tribunal is not empowered to grant such waiver in any case. Evidently any concession or waiver granted to an employer, who has failed to honour the provisions of the Act, must be granted after duly considering the facts of each case. Therefore, the only issue arising for the consideration of this Court is whether the employer had produced sufficient material before the Tribunal entitling it to such waiver or whether the decision of the Tribunal to grant the said waiver is arbitrary or based on extraneous material. In the event it is found that there was adequate material placed before the Tribunal thereby compelling it to exercise its discretion to waive the condition of pre-deposit, a writ Court exercising its jurisdiction under Article 226 of the Constitution of India cannot lightly interfere with the decision of the Tribunal.

13. In the facts of the present case, what emerges is that the Tribunal has not only heard both parties at some length and taken note of the contentions raised by them but had also arrived at a prima facie finding that the steps taken by the competent authority, while acting under Section 7-A of the Act in relation to identification of the workers, were not apparent. The Tribunal also came to a prima facie conclusion that the pre-requisites for passing an order for recovery had not been fulfilled as the competent authority had failed to exercise its powers to collate proper evidence and all relevant material before concluding any liability on the part of the employer. No doubt, the aforesaid findings of the Tribunal are only prima facie and the Tribunal is yet to arrive at a final determination on these aspects. In my view, the Tribunal at that stage, could not be expected to elaborately deal with all the submissions made by the parties.

14. In the light of the aforesaid, I do not find any merit in Mr.Mohan's submission that the respondent had misled the Tribunal by placing reliance on the orders passed by this Court in ***Builders Association of India & Ors.*** *(supra)*. Firstly, I find that this was not the sole ground on which the Tribunal had exercised its discretion in favour of the respondent. As noted hereinabove, the Tribunal had also arrived at a prima facie finding that the conclusions in the Assessment Order were not sustainable and, therefore, it cannot be said that the Tribunal granted waiver to the respondent merely by relying on the orders passed in ***Builders Association of India*** *(supra)*. Even otherwise, I find that after the dismissal of both the aforesaid writ petition and the consequential LPA by this Court, when the Builders

Association approached the Supreme Court by way of a Special Leave petition, which came to be dismissed, it was clarified by the Supreme Court that when the process of inquiry was to be conducted by the EPFO, steps would be taken to identify all the affected workmen. The Supreme Court had further directed the EPFO to ensure that all contributions taken from the employer is actually disbursed to the concerned employees. It is, thus, apparent that the petitioner's plea that the said writ petition only dealt with paragraph 26(2) of the Provident Fund (Miscellaneous) Provisions Scheme, 1952 is wholly unsustainable as this Court had also dealt with the question of identification of employees therein. In these circumstances, the sole ground on which the petitioner has challenged the order passed by the Tribunal does not survive and ultimately, it cannot be said that the Tribunal has erred in referring to the orders passed in ***Builders Association of India*** *(supra)*.

15. I have also considered the decisions in ***O.G. Balaji Construction v. Assistant Provident Fund Commissioner*** *(supra)*, ***G4S Facility Services India Pvt. Ltd. v. Regional Provident Fund Commissioner-1*** *(supra)* and ***Lakeshore Hospital and Research Centre Ltd. v. Employees Provident Fund Appellate Tribunal*** *(supra)*, reliance upon which has been placed by learned counsel for the petitioner; I find that these decisions are not applicable to the facts of the present case. In fact, these three decisions of the Bombay High Court, the Kerala High Court and this Court deal with cases where the High Courts have, in exercise of their writ jurisdiction under Article 226 of the Constitution of India, declined to interfere with the

discretion exercised by the Tribunal whereunder the grant of complete waiver had been refused to the employer. On the other hand, in the present case, the Tribunal has exercised its discretion to grant waiver and no sufficient ground has been made out by the petitioner before this Court for interfering with the said decision of the Tribunal. The reliance upon ***Regional Director, ESI Corporation, Thrissur Vs. Kerala State Drugs & Pharmaceuticals Ltd.*** *(supra)* is also misplaced as the said decision deals with an entirely different Scheme under a different statute, namely, the Employees State Insurance Act, 1948. I have also considered the decision in ***Ansal Housing & Construction Limited v. Regional Provident Fund Commissioner-II, Delhi*** *(supra),* on which reliance has been sought to be placed by the petitioner, and find that the same also does not in any manner forward the case of the petitioner. The said decision related to a case where the order of the Tribunal refusing to interfere with the assessment order was under challenge, which is not the situation in the present case as the respondent's statutory appeal is still pending before the Tribunal and the petitioner is seeking interference with an interim order passed therein.

16. In the light of the aforesaid, I am unable to find any manifest illegality or perversity in the exercise of discretion by the Tribunal to grant a waiver from pre-deposit in favour of the respondent. Once the Tribunal has, on the basis of the material available on record, arrived at a prima facie conclusion that an attempt to recover the amount was being made without identifying the beneficiaries-workmen, the said findings go to the root of the validity of the assessment order.

Therefore it cannot be said that in the facts of the present case, the exercise of discretion by the Tribunal was either without jurisdiction or otherwise vitiated on any count. Merely because the amount as determined unilaterally by the petitioner is claimed to be huge cannot be a ground for this Court to interfere with the Tribunal's discretion. I, therefore, find absolutely no reason to interfere with the impugned interim order passed by the Tribunal.

17. Mr.Mohan has also endeavoured to demonstrate that there is no infirmity in the assessment order as the same had been passed on account of the respondent's failure to maintain and produce relevant records and, therefore, the appeal itself is liable to be dismissed by the Tribunal. On the other hand, Mr. Arora learned counsel for the respondent has taken pains to demonstrate that the assessment order is wholly unsustainable and the same has been passed in contravention of the petitioner's own circular dated 20.01.2010. In my view, once the scope of the present writ petition is limited only to the interim order passed by the Tribunal while admitting the appeal, it would not be appropriate for this Court to examine the merits of the respondent's appeal, which is presently pending adjudication before the Tribunal. The issue regarding the validity of the Assessment Order is to be examined by the Tribunal while finally disposing of the appeal and it is not open for this Court to express its opinion on the same at this stage.

18. For the aforesaid reasons, I find no merit in this petition which is dismissed along with the pending application.

19. During the pendency of the present petition, since this Court

had stayed the operation of the impugned interim order, the hearing of the appeal before the Tribunal has also been kept in abeyance. The Tribunal is, therefore, requested to decide the respondent's pending appeal on its merits, expeditiously and preferably within a period of 6 months.

(REKHA PALLI)
JUDGE

AUGUST 27, 2019/aa