

THE HON'BLE Dr. JUSTICE G. RADHA RANI

WRIT PETITION No.1121 OF 2022

ORDER:

This writ petition is filed by the employer aggrieved by the orders passed under Section 7-C of the Employees Provident Fund & Miscellaneous Provisions Act, 1952, dated 12.11.2021 by the Assistant Provident Fund Commissioner (C-IV) Employees Provident Fund Organization, Regional Office I, Hyderabad, who determined an amount of Rs.15,21,834/- as contribution in respect of an international worker namely Mrs. Leigh Fisher (Respondent No.2) as arbitrary, illegal ultra vires, without jurisdiction and violative of rights guaranteed under Article 14 of the Constitution of India.

2. Heard the learned counsel for the petitioner and learned Standing Counsel for the respondent No.1 as well as learned counsel for the respondent No.2.

3.1 The learned counsel for the petitioner submitted that the petitioner namely M/s. Aga Khan Academy was a not-for-profit charitable institution which was set up as a Centre for Excellence, providing financial assistance to more than 50% of the students. Dr. Geoffrey Fisher was the Head of the Academy (CEO), handling day to day affairs of the academy at the

relevant period. During his tenure he engaged his wife namely Mrs. Leigh Fisher as Consultant for the period from 28.02.2015 to 31.10.2015 and as an employee for the period from 01.11.2015 to 30.11.2018. Mrs. Leigh Fisher was a citizen of Australia. As a consultant, she was a freelancer. She had expertise in the specific field for which she was engaged. As per the provisions of Employees Provident Funds Act, a consultant was not an employee, as such, not covered under the Employees Provident Funds & Miscellaneous Provisions Act, 1952. Mrs. Leigh Fisher on the request of Dr. Geoffrey Fisher, visited India on business visa and her consultancy was renewed till October, 2015. Thereafter, she was employed as Manager-CSR, (External Relations and Partnership) with effect from 01.11.2015. Her services were terminated under the agreement of termination w.e.f. 30.11.2018.

3.2 Learned counsel for the petitioner further submitted that the first respondent initiated 7-A enquiry for the period from April, 2013 to June, 2015 and passed an order on 12.03.2018 determining the contributions payable as Rs.52,72,451/- in respect of domestic and international workers. Accordingly, the petitioner has paid the entire contributions as ordered by the Department. The 7-A order became final. While things stood thus, the 2nd respondent lodged a complaint with the 1st respondent alleging that the

PF contributions were not paid from 01.02.2015 to 01.11.2019. Basing on the said complaint, a show cause notice was issued by the 1st respondent on 14.01.2021. The petitioner gave reply to the show cause notice on 03.03.2021 and 30.03.2021. Thereafter, the 1st respondent commenced proceedings under Section 7-A of the EPF Act vide summons dated 19.03.2021. The petitioner submitted his objections on 23.06.2021 followed by a representation dated 05.07.2021. The Enforcement Officer submitted a detailed report dated 05.07.2021 and requested for conclusion of enquiry under Section 7-A r/w 26-B of EPF Scheme, 1952. But surprisingly the 1st respondent passed order under Section 7-C of EPF Act dated 12.11.2021.

3.3 He further submitted that the Impugned Order was passed without jurisdiction and ultra vires the provisions of EPF & MP Act, 1952. The issues 1 and 2 framed and determined by the authority would squarely fall within the scope and ambit of para 26-B of the Employees Provident Fund Scheme 1952. Para 26-B would mandate that the determination should be by the Regional Commissioner, but in the present case, the proceedings were decided by the Assistant Provident Fund Commissioner.

3.4 Issue No.3 would indicate that the enquiry concerned the nature and quantum of wages, on which the complainant was eligible for EPF. It would indicate that the determination sought to be made was first of its kind, whereas Section 7C of the EPF Act provided for determination of escaped amount which escaped determination of the dues under Section 7A. Likewise, the issue No.3 also would indicate that the enquiry concerned fixation of quantum of EPF dues which was also sought to be determined by the authority for the first time, but not the escaped amount. The authority commenced the proceedings by way of a show cause notice dated 14.01.2021. Thereafter, summon was issued on 19.03.2021 referring the proceedings to be under Section 7A. Thereafter, about 15 hearings were conducted by the respondent treating it as 7A proceedings and Diary No.82/2021 was allotted. The 1st respondent never gave an impression that the proceedings were under Section 7C of the Act. However, the respondents converted the 7A proceedings into 7C proceedings on 13.09.2021 by mentioning it as typographical error. The said procedure which was adopted by the respondent was illegal. The proceedings under Section 7A and 7C were dealing with two different legal aspects. 7C proceedings could be invoked only to determine the escaped amount. However, the impugned order would not speak about what was the

omission or failure on the part of the employer to make any document or report available, or to disclose, for determining the correct amount due. In the absence of any such allegation, the provisions of Section 7C could not be invoked. A detailed order under Section 7A was already passed on 12.03.2018 and no review application was filed and it was not challenged before the Central Government Industrial Tribunal (CGIT) or before the High Court. As such, the present application seeking review of 7A order was not maintainable. No application for review was filed within (45) days as mandated under Sec.7-B of the PF Act. Therefore, the respondent authority ought not to have received the complaint and ought to have rejected the same.

3.5 He further contended that Mrs. Leigh Fisher was a citizen of Australia and the Indian Government was having Social Security Agreement (SSA) with the said country. As per EPF scheme, an international worker would not needed to be covered under EPF Act if such international worker was originating from a country with whom Indian Government was having SSA. The Enforcement Officer admitted the same in his cross examination and inspite of the same, the 1st respondent passed impugned order observing that the employer had not furnished the Certificate of Coverage (COC). It was the duty of the

employee to produce the COC or in the alternative the respondent department had to summon those details from the concerned authorities. When once such objection was raised by the employer, the burden would lie on the other parties to prove their case and the employer was not expected to prove the case of the employee. The order passed by the respondent was contrary to the established basic principles of law and was liable to be set aside.

3.6 He further contended that Dr. Geoffrey Fisher, Head of Academy (CEO) after discussion with all the international workers employed by the academy decided to bifurcate the gross salary into basic pay and HRA with their consent. Accordingly, PF contributions were paid in the same manner. The complainant had not raised any objection in that matter and had withdrawn the amount without any protest. Hence, her complaint alleging that the salary was illegally bifurcated was devoid of any merit. The respondent authority ought not to have conducted any kind of enquiry. An application was filed by the petitioner seeking permission to cross examine Mrs. Leigh Fisher and also the Enforcement Officer and requested to summon both of them. But the 1st respondent had refused to grant permission to cross examine Mrs. Leigh Fisher vide proceedings dated

27.09.2021. As the impugned order was passed without examining the complainant, it was liable to be set aside on the said ground also.

3.7 He further contended that the complaint was vague and was entertained without any proper investigation. The 1st respondent ignoring all the basic requirements acted contrary to the instructions of the department's guidelines. The investigation officer verified the records of the appellant on the basis of the complaint filed by Mrs. Leigh Fisher and submitted a report dated 05.07.2021 arriving the dues payable by appellant for an amount of Rs.8,55,025/- for the period from November, 2015 to November, 2018 and suggested to conclude the enquiry under Section 7A r/w Para 26 (b) of EPF & MP Act, 1952. In his report the Enforcement Officer had not considered the period from February, 2015 to October, 2015 wherein the claimant worked as consultant, whereas the respondent while passing order had ignored the said report and unilaterally arrived at huge dues amount without any basis and hence the said order was not sustainable and liable to be quashed. The respondent authority also had not considered the amount paid towards administrative charges. The complainant claimed EPF contribution on net salary. The special allowance paid by the employer was non-monetary perquisite equal to the

PF contribution, Professional Tax and Income Tax to be paid by the employee.

3.8. As per the judgment of the Hon'ble Apex Court in the case of Regional Provident Commissioner, West Bengal Vs. Vivekananda Vidyamandir, the professional developmental allowances/expenses would not fall under the definition of wages, as such there was no further liability on the part of the academy. Professional development allowances/expenses were not paid to all the employees universally. Section 2-B (ii) of EPF Act excludes the House Rent Allowance (HRA). HRA would differ from company to company and employee to employee as such, it would not attract EPF contribution as it was a variable allowance.

3.9. The observation of the respondent that PF contributions were to be paid on HRA was totally illegal and unconstitutional. Apart from HRA, the contribution was also arrived on consultancy charges. The head of the academy and Mrs. Leigh Fisher being husband and wife lodged complaint after leaving the services of the petitioner academy. The complainant had not approached the respondent with clean hands and prayed to set aside the impugned proceedings issued by the 1st respondent under Section 7C of EPF & MP Act, 1952.

4.1 Learned Standing Counsel for the 1st respondent submitted that the complaint was received from 2nd respondent, a citizen of Australia, who was engaged as an employee of the petitioner stating that the petitioner establishment defaulted in remitting the EPF contribution in respect of the complainant as per the provisions of the Act for the period from 01.02.2015 to 01.11.2018. Basing on the complaint, a show cause notice was served on the petitioner on 14.01.2021. In order to ascertain the dues, an inquiry under Section 26(b) of the EPF Scheme, 1952 r/w Section 7A was initiated and summons dated 19.03.2021 were sent to the petitioner. The case was initially allotted Diary No.82 of 2021 and later after noticing that a typographical error had taken place, with due approval of the competent authority, the inquiry was converted to Section 7C r/w Para 30 and 36 of the Act, 1952 and a new Dairy No.142 of 2021 was allotted. During the course of enquiry, the representatives of the petitioner establishment as well as complainant appeared. As per the principles of natural justice, the petitioner establishment was given sufficient opportunity at every stage of enquiry.

4.2 Having gone through the evidences adduced during the enquiry and the depositions submitted by the Area Enforcement Officer and by taking

into consideration the material facts and the documents available on record, the enquiry was concluded and the impugned order dated 12.11.2021 was passed by the authority under Section 7C of the Act, determining the escaped amount due from the petitioner. The enquiry conducted by the authority would hold good. It was conducted as per the rules laid down by the Act, 1952 and schemes framed there under.

4.3 Section 7C would refer to the payment of the escaped amount within a period of 5 years from the date of communication of the order passed under Section 7A or Section 7B. As such, the question of lack of jurisdiction would not arise. The determination of escaped amount due from the petitioner was made clear and it was justified. When Section 7A proceedings were not questioned, raising any doubt on the entitlement or induction of the respondent into the EPF scheme could not be raised now. The petitioner had not made out any valid grounds during the course of enquiry. The impugned order was passed after elaborate arguments and after considering various factual and legal propositions and prayed to dismiss the writ petition.

5. Learned counsel for the 2nd respondent contended that Section 7A proceedings were passed by the 1st respondent on 12.03.2018, no questions

were raised since then by the petitioner on the jurisdiction of the respondent in passing orders under Section 7A. Since section 7C would refer to payment of the escaped amount, the question of lack of jurisdiction would not arise. She was engaged by the petitioner not because of Dr. Geoffrey Fisher, but because of her qualification and rich experience. Her services were utilized notwithstanding the nomenclature of post/designation of her shown. Lesser contributions were paid and the amounts were erroneously computed in the proceedings under Section 7A. As such, further proceedings for payment of escaped amount were initiated. The visit of 2nd respondent to India on a business visa would not have any bearing on the present lis. There was no illegality in passing of the impugned order. The core issue was whether all the components of the salary were included for the computation of the PF contribution or not, which was ultimately decided by the impugned proceedings. The petitioner had an effective and an alternative remedy to file an appeal in the EPFA Tribunal under Section 7(1) of the Act. However, Rule 7 (2) of the EPFAT Rules would postulate depositing of 75% of the awarded amount. In order to avoid the same, the present petition was filed stating that the impugned orders were ultra vires the provisions of the Act and prayed to dismiss the writ petition.

6. Perused the record.

7. The record would disclose that 7A enquiry was conducted by the 1st respondent for the period from April, 2013 to June, 2015 and an order was passed on 12.03.2018 determining the contribution payable as Rs.52,72,451/- and that the petitioner paid the entire contribution as ordered by the department. Subsequently, the 2nd respondent lodged a complaint alleging that the PF contributions were not paid from 01.02.2015 to 01.11.2018 and basing on the said complaint, a show cause notice was issued by the 1st respondent to the petitioner on 14.01.2021 and summons under Section 7A of the EPF Act were issued to the petitioner on 19.03.2021. The show cause notice would disclose that if the petitioner failed to remit the dues and set right the omissions pointed out within 10 days, enquiry under Section 7A of the Act would be initiated to assess the dues under EPF & MP Act, 1952 and schemes framed there under. The petitioner filed his objections to the proceedings under Section 7A of EPF Act, 1952 vide his letter dated 05.07.2021 contending that the application filed by the 2nd respondent seeking review of Section 7A order was not maintainable as it had to be challenged within 45 days, as per the provisions of 7B of PF Act and the same was also not in the format prescribed under the Act. He also contended that as per the guidelines for

initiation of enquiry under Section 7A of the Act issued by the EPF Organization, New Delhi, dated 14.02.2020, the Enforcement Officer had to investigate the case of any complaint on the basis of admissible evidence gathered during investigation.

8. As per Section 13 (1) of EPF Act and extracted clauses 2 and 3 of the guidelines, it was stated that *“any enquiry or legal proceedings initiated without prima facie case is of the nature of fishing and roving enquiry and the same was impermissible. The minimum standard of evidence for commencement of any legal proceedings is “existence of a prima-facie case” and a mere complaint in itself would not constitute prima facie evidence sufficient to initiate an enquiry under Section 7A as complaint was only a source of information and not a legal proof of the allegations.”*

It was also extracted that *“the tendency to initiate inquiries on the basis of complaints alone is legally untenable and must be avoided as it would lead to surpassing the investigations required under law before initiation of any inquiry.”*

9. Thus, a show cause notice was issued by the 1st respondent under Section 7-A of the Act and the petitioner also gave his reply by way of

objections for initiating enquiry under Section 7A once again, as an enquiry was conducted under Section 7A once on 12.03.2018 and the same became final. The 1st respondent without issuing any notice under Section 7C converted the proceedings under Section 7A into 7C by making an observation in the impugned order that a typographical error took place. As such, 7A enquiry is converted to enquiry under Section 7C r/w Para 30 and 36 of the EPF & MP Act, 1952 by allotting a new diary No.142 of 2021.

10. Section 7C pertains to determination of escaped amount. Section 7C of EPF & MP Act reads as follows :

7C. Determination of escaped amount.—Where an order determining the amount due from an employer under section 7A or section 7B has been passed and if the officer who passed the order—
(a) has reason to believe that by reason of the omission or failure on the part of the employer to make any document or report available, or to disclose, fully and truly, all material facts necessary for determining the correct amount due from the employer, any amount so due from such employer for any period has escaped his notice;
(b) has, in consequence of information in his possession, reason to believe that any amount to be determined under section 7A or section 7B has escaped from his determination for any period notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the employer, he may, within a period of five years from the date of communication of the order passed under section 7A or section 7B, re-open the case and pass appropriate orders re-determining the amount due from the employer in accordance with the provisions of this Act:

Provided that no order re-determining the amount due from the employer shall be passed under this section unless the employer is given a reasonable opportunity of representing his case.

11. Thus, Section 7C could be invoked only to determine the escaped amount. But the impugned order would not disclose what was the omission or failure on the part of the employer for determining correct amount due. The impugned order also would not disclose framing of any issue with regard to the escapement of any amount. Four issues were framed by the Assistant Provident Fund Commissioner who passed the impugned order on 12.11.2021.

12. The first issue was with regard to whether Mrs. Leigh Fisher was eligible for enrollment into Provident Fund under the EPF and MP Act 1952 being an international worker? The second was with regard to what was the period for which the employer was liable to pay EPF dues in respect of the complainant, Mrs. Leigh Fisher? The third issue was with regard to what were the wages/salary/remuneration on which the complainant was eligible for EPF calculation? and the fourth issue was with regard to what was the quantum of EPF dues payable by the establishment, if due ?

Thus, all these issues would indicate that the determination sought to be made was first of its kind and would not indicate any escapement of amount which was already determined.

13. The Proviso to Section 7C would say that no order redetermining the amount due from the employer should be passed under this section unless the employer was given a reasonable opportunity of representing his case.

14. Though learned counsel for the respondent Nos.1 and 2 contended that the petitioner was given reasonable opportunity of representing his case at all stages, the show cause notice was issued under Section 7A of EPF and MP Act and all the proceedings were conducted giving him an impression that it was an enquiry conducted under Section 7A and no notice was issued to him under Section 7C of the Act. It was in violation of the proviso to Section 7C and also in violation of principles of natural justice. The issues framed and determined by the authority also would clearly fall within the scope and ambit of Para 26-B.

15. Para 26-B of the Employees Provident Fund Schemes, 1952 reads as under:

26B. Resolution of Doubts – If any question arises whether an employee is entitled or required to become or continue as a member, or as regard the date from which he is so entitled or required to become a member the decision thereon of the Regional Commissioner shall be final.

16. Para 26-B mandates that the determination thereof shall be by the Regional Commissioner. In the present case, the authority who passed the

impugned order was the Assistant Provident Fund Commissioner. As such, the order passed was also without jurisdiction and ultra vires the provisions of EPF and MP Act, 1952. It is well settled that statutory remedies were applicable to the orders passed intra vires the statute only but not applicable to the orders passed ultra vires the statute.

17. Though the learned counsel for 2nd respondent contended that the orders passed under Section 7C was appealable under Section 7I, but as the order was passed ultra vires, the statute, the writ petition under Article 226 of Constitution is maintainable.

18. Learned counsel for the petitioner contended that impugned order should be read as it was and it should not be supplemented by any counter affidavit etc., The word escape was not used in the entire order. The order also would not disclose any fresh notice issued to the petitioner under Section 7C of the Act. The date and stage at which the typographical error was committed was not indicated in the order and relied on the judgment of the Hon'ble Apex Court in Mohinder Singh Gill and another vs. Chief Election Commissioner, New Delhi and others reported in (1978) 1 Supreme Court Cases 405¹, wherein it was held that :

¹ (1978) 1 SCC 405

“8....when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji*: Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older.”

19. He also relied upon the judgment of the Hon’ble Apex Court in *Nawabkhan Abbaskhan vs. The State of Gujarat* reported in (1974) 2 Supreme Court Cases 121² wherein it was held that :

“14. Where hearing is obligated by a statute which affects the fundamental right of a citizen, the duty to give the hearing sounds in constitutional requirement and failure to comply with such a duty is fatal. May be that in ordinary legislation or at common law a Tribunal, having jurisdiction and failing to hear the parties, may commit an illegality which may render the proceedings voidable when a direct attack is made thereon by way of appeal, revision or review, but nullity is the consequence of unconstitutionality and so without going into the larger issue and its plural divisions, we may roundly conclude that the order of an administrative authority charged with the duty of complying with natural justice in the exercise of power before restricting the fundamental right of a citizen is void ab initio and has no legal efficacy. The duty to hear manacles his jurisdictional exercise and any act is, in its inception, void except when performed in accordance with the conditions laid

² (1974) 2 SCC 121

down in regard to hearing. May be, this is a radical approach, but the alternative is a travesty of constitutional guarantees, which leads to the conclusion of post-legitimated disobedience of initially unconstitutional orders. On the other hand law and order will be in jeopardy if the doctrine of discretion to disobey invalid orders were to prevail...”

20. The Hon’ble Apex Court held that when a fundamental right of the petitioner was encroached upon without due hearing, legal result was that the accused was never guilty of flouting an order which never legally existed. It observed that the order in violation of natural justice was void.

21. The Hon’ble Apex Court further observed that :

“...An order is null and void if the statute clothing the administrative tribunal with power conditions it with the obligation to hear, expressly or by implication. Beyond, doubt, an order which infringes a fundamental freedom passed in violation of the audi alteram partem rule is a nullity. When a competent court holds such official act or order invalid, or sets it aside, it operates from nativity, i.e. the impugned act or order was never valid...”

22. In the present case also Section 7C mandates that the employer shall be given reasonable opportunity of representing his case before redetermining the amount due from him. The word used is “*shall*”. But, as seen from the record, no opportunity was provided to the petitioner for representing his case before issuing proceedings under Section 7C of the Act. He was not given an opportunity to submit his objection with regard to initiation of proceedings under Section 7C of the Act. As such, it is

considered fit to set aside the impugned proceedings issued by the 1st respondent under Section 7C of EPF & MP Act, 1952 as illegal, unauthorized, without jurisdiction and ultra vires the provisions of the EPF & MP Act, 1952 and violative of the petitioner's rights.

23. As such, the writ petition is allowed by setting aside the impugned proceedings dated 12.11.2021. No order as to costs.

24. Miscellaneous Petitions pending, if any, shall stand closed.

June 06, 2022
PSSK

Dr. G. RADHA RANI, J