

(2009) 10 AHC CK 0191

Allahabad High Court

Case No: None

Tulsi Ram Maheshwari Public
School

APPELLANT

Vs

Employees Provident Fund
Appellate Tribunal and Others

RESPONDENT

Date of Decision: Oct. 15, 2009

Acts Referred:

- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 7Q

Citation: (2010) 1 AWC 746

Hon'ble Judges: B.K. Narayana, J

Bench: Single Bench

Final Decision: Allowed

Judgement

B.K. Narayana, J.

Heard Sri S.S. Nigam, learned Counsel for the petitioner and Sri. D. Awasthi, for the respondent No. 1 and Sri Amit Negi for the respondent Nos. 2 and 3.

2. Brief facts of the case as stated in the writ petition are that the petitioner is a public school engaged in imparting education and the school is run by the trust, namely Tulsi Ram Maheshwari Parbraham Anglo Sanskrit School Trust Society. The trust suffered heavy losses continuously for seven years and as such the employer's contribution to the Employees Provident Fund could not be deposited by the petitioner, as a result a recovery certificate was issued by the Assistant Regional Provident Fund Commissioner, directing the petitioner to deposit the sum due against the petitioner towards its contribution to the provident fund together with interest chargeable u/s 7Q of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act) total amount of Rs. 25,04,085. The recovery certificate Was followed by issuance of a demand notice dated 22.5.2007 requiring the petitioner to deposit an amount of Rs. 25,04,085

failing which proceedings for recovery of the said amount shall be taken u/s 8(2) of the Act. Since the recovery certificate dated 17.4.2007 was issued by the respondent No. 2 without passing any assessment orders u/s 7A(1)(b) or 7Q of the Act and without issuing any show-cause notice to the petitioner, the petitioner preferred an appeal u/s 7-I of the Act, however the said appeal was dismissed as not maintainable by the respondent No. 1 vide order dated 19.9.2007 copy whereof has been filed as Annexure-4 to the writ petition.

3. Learned Counsel for the petitioner very fairly conceded that no appeal lies u/s 7-I of the Act against a recovery certificate issued u/s 8 of the Act and the order passed by the respondent No. 1 dismissing the petitioner's appeal as not maintainable cannot be faulted with.

4. He has further been submitted that he is confining his challenge in this writ petition only to the recovery certificate dated 17.4.2007 and the demand notice dated 22.5.2007.

5. It has been submitted on behalf of the petitioner that unless assessment orders are passed under Sections 7A(1)(b) and 7Q of the Act fixing the liability on an establishment, recourse to Section 8B of the Act cannot be taken. He further submitted that the respondent No. 2 till date has neither passed any order u/s 7A(1)(b) of the Act assessing the dues payable by the petitioner towards the employer's contribution to the Employees Provident Fund nor any order u/s 7Q of the Act has been passed assessing the interest amount which the petitioner may be held liable to pay on the arrears of provident fund dues and hence the issuing of recovery certificate by the respondent No. 2 in the purported exercise of power u/s 8B of the Act for recovery of dues which have not been determined in accordance with the prescribed manner is absolutely illegal and arbitrary.

6. Sri Amit Negi learned Counsel for the respondent Nos. 2 and 3 has failed to show that any order has been passed by the respondent No. 2 u/s 7A(1)(b) or Section 7Q of the Act before the issuing of the recovery certificate. He however submitted that the impugned recovery certificate and demand notice have been rightly issued.

7. I have examined the submissions made by the learned Counsel for the parties and have also perused the record. In order to appreciate the submissions made by the learned Counsel for the parties, it is necessary to extract the relevant provisions of Employees Provident Fund and Miscellaneous Provisions Act which read as below:

7A. Determination of moneys due from employers.--(1) The Central Provident Fund Commissioner, any Additional Central . Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order--

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment,, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the (Pension) Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purpose may conduct such inquiry as he may deem necessary.

(2) The officer conducting the inquiry under Sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908), for 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; and

(d) issuing commissions for 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).

(3) No order (***) shall be made under Sub-section (1), unless (the employer concerned) is given a reasonable opportunity of representing his case.

(3A) Where the employer, employee or any other person required to attend the inquiry under Sub-section (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.

(4) Where an order under Sub-section (1) is passed against an employer ex parte, he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show-cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry:

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show-cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Explanation.--Where an appeal has been preferred under this Act against an order passed ex parte and such appeal has been disposed of otherwise than on the

ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the ex parte order.

(5) No order passed under this section shall be set aside on any application under sub-section (4) unless notice thereof has been served on the opposite party.

7Q. Interest payable by the employer.--The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment:

Provided that higher rate of interest specified in the scheme shall not exceed the lending rate of interest charged by any scheduled bank.

8. Mode of recovery of moneys due from employers.--Any amount due--

(a) from the employer in relation to (an establishment) to which any (Scheme or the Insurance Scheme) applies in respect of any contribution payable to (the fund or, as the case may be, the insurance fund) damages recoverable u/s 14B, accumulations required to be transferred under Sub-section (2) of Section 15 (or under Sub-section (5) of Section 17), or any charges payable by him under any other provision of this Act or of any provision of the (Scheme or the Insurance Scheme); or

(b) from the employer in relation to an exempted (establishment) in respect of any damages recoverable u/s 14B or any charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified (under Section 17 or in respect of the contribution payable by him towards the (Pension) Scheme under the said Section 17),

may, if the amount is in arrear, (be recovered (in the manner specified in Sections 8B to 8G.)

8A. Recovery of moneys by employers and contractors.--(1) (The amount of contribution (that is to say the employer's contribution as well as the employee's contribution in pursuance of any scheme and the employer's contribution in pursuance of the Insurance Scheme), and any charges (* * *) for meeting the cost of administering the fund paid or payable by an employer in respect of any employee employed by or through a contractor may be recovered by such employer from the contractor, either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

(2)....

(3) Notwithstanding any contract to the contrary, no contractor shall be entitled to deduct the employer's contribution or the charges referred to in Sub-section (1) from the basic wages, dearness allowance, and retaining allowance (if any) payable to an employee employed by or through him or otherwise to recover such contribution or charges from such employee.

Explanation.--In this section, the expressions, "dearness allowance" and "retaining allowance" shall have the same meaning as in Section 6.)

8B. Issue of certificate to the Recovery Officer.--(1) Where any amount is in arrear u/s 8, the authorised officer may issue, to the recovery officer, a certificate under his signature specifying the amount of arrears and the recovery officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the establishment or, as the case may be, the employer by one or more of the modes mentioned below:

(a) attachment and sale of the movable or immovable property of the establishment or, as the case may be, the employer ;

(b) arrest of the employer and his detention in prison; and

(c) appointing a receiver for the management of the movable or immovable properties of the establishment or as the case may be, the employer:

Provided that the attachment and sale of the property under this section shall first be effected against the properties of the establishment and where such attachment and sale is insufficient for recovering the whole of the amount or arrears specified in the certificate, the recovery officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.

(2) The authorised officer may issue a certificate under Sub-section (1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

8. Thus, what follows from the reading of the aforesaid provisions is that Section 8 of the Act enumerates the arrears which may be recovered in the manner prescribed in Sections 8B to 8G of the Act. Section 8B of the Act provides that where any amount is in arrears u/s 8 the authorised officer may issue to the recovery officer a certificate under his signature specifying the amount of arrears and the recovery officer upon receipt of such certificate shall proceed to recover the amount specified therein from the establishment or the employer as the case may be, by one or more of the modes provided under the said section. Thus, before a recovery certificate can be issued u/s 8B of the Act in respect of any arrear of employer's contribution to the provident fund and the interest accrued thereon there has to be an order passed by the authorised officer determining the dues payable by the employer/establishment under Sections 7A(1)(b) and 7Q of the Act and the employer or the establishment as the case may be, has failed to deposit the dues so determined.

9. In the instant case, there is no dispute that no order has been passed against the petitioner u/s 7A(1)(b) or 7Q of the Act. The respondents thus have not complied with the requirements of the Act before issuing the recovery certificate and the demand notice against the petitioner and hence the impugned action cannot be

sustained. Recovery certificate and the demand notice issued by the respondent No. 3 for recovery of the amount which has not been determined in accordance with Section 7A(1)(b) and Section 7Q of the Act are liable to be quashed.

10. The writ petition is accordingly allowed and recovery certificate dated 17.4.2007 and the demand notice dated 22.5.2007 are hereby quashed. However, it will be open to the respondents to proceed against the petitioner in accordance with law.