

**M/s Ashmit Motors Private Limited, 145/2A, Near Hotel Chaitanya Classic,
Bolhegaon Phata, Manmad Road, Nagapur, Ahmednagar through its
Director Harish Lalchand Nayyar age 30 years, Occ. Business - Petitioner
@HASH The Assistant Provident Fund Commissioner**

Court: BOMBAY HIGH COURT (AURANGABAD BENCH)

Date of Decision: Sept. 19, 2016

Acts Referred: Constitution of India, 1950 - Article 226

Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 7A, Section 7B, Section 7I

Citation: (2017) 1 CLR 41 : (2017) 152 FLR 459 : (2017) LabLR 10 : (2017) LIC 1234 : (2016) 4 LLJ 315 : (2017) 1 MhLJ 885

Hon'ble Judges: Ravindra V. Ghuge, J.

Bench: Single Bench

Advocate: Shri R.N. Dhorde, Sr. Advocate i/b Shri V.R. Dhorde, Advocate, for the Petitioner; Shri K.B. Chaudhary, Advocate, for the Respondent

Final Decision: Partly Allowed

Judgement

Ravindra V. Ghuge, J.(Oral) - Heard learned Advocates for the respective parties.

2. Rule.

3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.

4. The petitioner is aggrieved by the order dated 14.7.2010, by which, the respondent allotted the Subscriber Code Number under the

Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("1952 Act"). The petitioner is also challenging the order dated 13.8.2015,

by which, the Review Application filed by the petitioner under Section 7B of 1952 Act, seeking review of the order passed on 10.6.2015 under

Section 7A of 1952 Act, has been rejected.

5. The petitioner submits that an ancestral property in the form of a land/plot was inherited by the two real brothers i.e. the petitioner/Director and

his real brother. Since both of them acquired a right, title and interest to equal shares in the same plot, the petitioner started the business of selling

cars upon having acquired the agency through a Car Manufacturer. The brother of the petitioner started a Proprietary Firm, by which, the After

Sales Service of the Cars was being handled in the said proprietary concern. Grievance is that the respondent authority has presumed that the Car

Agency as well as the Workshop amount to one and the same establishment and the two brothers are attempting to create a false picture that these

are two independent business establishments.

6. It is further submitted that the impugned order dated 14.7.2010 granting Subscriber Code Number and making the 1952 Act applicable to the

petitioner, was passed without hearing the petitioner. Similarly, the order under Section 7A, dated 10.6.2015, does not deal with the grievance of

the petitioner that the 1952 Act is not applicable to it. Hence the Review Petition at issue was filed under Section 7B and the same has been

rejected, without even issuing a notice of hearing.

7. The petitioner has relied upon the orders passed by this Court in the following cases:-

(i) Writ Petition No. 1002/2008 - Shri Gajanan Maharaj Sansthan v. Regional Provident Fund Commissioner, dated 27.8.2008 and

(ii) Writ Petition No. 3389 of 2011 - Lokvikas Sahakari Bank Ltd. v. The Assistant Provident Fund Commissioner, dated 2.5.2011.

8. Shri Chaudhary, learned Advocate for the respondent/PF authorities submits that the law does not contemplate any hearing of the Review

Applicant on the Review Application. He submits that unlike a hearing on a Review Application as is contemplated under Order 47 Rules 1 to 4 of

the Civil Procedure Code, the 1952 Act makes no provision for causing any hearing on the Review Petition, if the same is to be rejected. Only

when a Review Application is likely to be allowed, that a hearing is contemplated, so as to ensure that the beneficiaries of the order under Section

7A have no grievance of having not being heard.

9. Shri Chaudhary has placed reliance upon the following judgments:-

(i) Mansa Nagrik Sahakari Bank Ltd. v. Regional Provident Fund Commissioner [2003 (3) GLH. 500], and

(ii) Writ Petition (C) 2856 of 2008 - Bharat Polychem Ltd. v. Regional Provident Fund Commissioner (Delhi High Court), dated 20.7.2011.

10. I have considered the submissions of the learned Advocates, as have been recorded herein above and have gone through the record available.

11. Order 47 Rules 1, 3 & 4 of the CPC reads as under:-

1 . Application for review of judgment-

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or (c) by a decision on a reference from a Court of Small Causes, and who, from the

discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be

produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the

record of for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of

judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some

other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to

the Appellate Court the case on which he applies for the review.

Explanation - The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the

subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.

2 (Repealed)

3 . Form of applications for review - The provisions as to the form of preferring appeals shall apply mutatis mutandis, to applications for review.

4. Application where rejected - (1) Where it appear to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) Application where granted - Where the Court is of opinion that the application for review should be granted, it shall grant the same:

Provided that-

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the

decree or order, a review of which is applied for; and (b) no such application shall be granted on the ground of discovery of new matter or

evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or

made, without strict proof of such allegation.

5.

12. Section 7B of the 1952 Act reads as under:-

7B. Review of orders passed under section 7A.-

(1) Any person aggrieved by an order made under subsection (1) of section 7A, but from which no appeal has been preferred under this Act, and

who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could

not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for

any other sufficient reason, desires to obtain a review of such order may apply for a review of that order to the officer who passed the order:

Provided that such officer may also on his own motion review his order if he is satisfied that it is necessary so to do on any such ground.

(2) Every application for review under sub-section (1) shall be filed in such form and manner and within such time as may be specified in the

Scheme.

(3) Where it appears to the officer receiving an application for review that there is no sufficient ground for a review, he shall reject the application.

(4) Where the officer is of opinion that the application for review should be granted, he shall grant the same:

Provided that,-

(a) no such application shall be granted without previous notice to all the parties before him to enable them to appear and be heard in support of

the order in respect of which a review is applied for, and (b) no such application shall be granted on the ground of discovery of new matter or

evidence which the applicant alleges was not within his knowledge or could not be produced by him when the order was made, without proof of

such allegation.

(5) No appeal shall lie against the order of the officer rejecting an application for review, but an appeal under this Act shall lie against an order

passed under review as if the order passed under review were the original order passed by him under section 7A.

13. Even though there is no specific provision under Order 47 Rules 1, 3 and 4, a hearing has been contemplated as is the settled position in law. If

the language of Section 7B is compared with Order 47, it is practically the same.

14. The thrust of Shri Chaudhary's submissions is that the officer receiving an application for review is only required to scrutinise the application

and find out whether there is any ground for review and that no hearing is required. I do not find that the said submission could be entertained for

the reason that the whole purpose of filing a review application is by way of an opportunity to the aggrieved party to make out a case that some

material is discovered or an important document or piece of evidence, which could not be placed before the authority under Section 7A

proceeding, despite due diligence, is now available and needs to be canvassed. Section 7B(1) makes it abundantly clear that such material or

evidence will have to be produced inasmuch as the review applicant will have to make out a mistake or error, apparent on the face of the record or

for any other sufficient reason owing to which, the order at issue needs to be reviewed.

15. If the submissions of Shri Chaudhary are to be accepted, it would mean that it will have to be left to the reviewing authority to scrutinise the

application, refer to the record placed along with the review application and then pass an order rejecting an application for the reason that the

reviewing authority is not satisfied. I find the said submissions to be unsustainable for the reason that the reasons for seeking review and the

material placed will have to be canvassed by the parties so as to make out a sufficient ground or reason or cause for reviewing the order under

Section 7A. This cannot be left to the reviewing authority alone to consider the application on the basis of the pleadings. A review applicant may

not always be able to set out grounds for review in a manner so that a mere reading of the grounds would convince the reviewing authority. An

opportunity to address the mind of the reviewing authority and canvass the importance and significance of the grounds for review and documents

placed on record within the ambit of Section 7B(1), could be available only through a hearing of the party by the reviewing authority.

16. This Court in the matter of Shri Gajanan Maharaj Sansthan (supra), has observed in paragraph Nos. 2 and 3 as under:-

2. It is not in dispute that the petitioner filed review petition under Section 7-B of the Employees' Provident Fund Act. The review petition was

required to be decided by Assistant Provident Fund Commissioner, Sub-Division Office, Akola. There is no dispute before me that the said review

petition was decided without hearing the petitioner or without issuing notice of hearing to the petitioner and the learned Counsel for the respondent

- organisation states that the same was decided with a well reasoned order, and therefore, there is no need to remand the proceedings. It is not

possible to accept the contention raised by learned Counsel for the organisation because the provisions of Section 7-B of the Act specifically

provides for review and the same will have to be decided after issuing notice to review petitioner and all concerned parties, and obviously after

hearing them. There has to be adjudication of the review petition. Therefore, whether the authority gave a reasoned order or not will not make any

difference. In view of the above discussion, I make the following order.

3. Writ Petition is partly allowed. The impugned order is quashed and set aside. The review petition is remitted to the Assistant Commissioner of

Provident Fund, Akola, who shall hear the review petitioner and concerned parties and decide the same afresh in accordance with law as

expeditiously as possible and in any case within a period of two months from the date of receipt of writ from this Court.

17. This Court has also considered a similar issue in the matter of Lokvikas Sahakari Bank Limited (supra), in which it was held in paragraph Nos.

3 and 4 as under:-

3. With the assistance of both learned counsel I have perused the relevant provision. It is not in dispute that powers to be exercised either under

section 7A or under section 7B of 1952 Act are quasi judicial in nature. The review can be sought by a person aggrieved by an order passed

under section 7A. The grounds on which review can be sought are not very relevant at this stage but then it is important to note that the proviso to

section 7B (1) also permits competent authority which has passed order under section 7A to have a review of its own order if it is satisfied that it is

necessary to do so on the valid grounds. Sub-section (2) then stipulates filing of application for review within limitation and the mode and manner in

which same can be filed. Sub-section (3) enables authority receiving that application to reject the same if it "appears" to him that there is no

sufficient ground" for review.

4. The grounds on which review can be sought become relevant for the purpose of subsection (3). Those grounds as given in subsection (1) are

discovery of new and important matter or evidence not within knowledge despite due diligence, some mistake or error apparent on fact of record

or any other sufficient reason. Thus, an aggrieved person like present petitioner can seek review on any of these three grounds before the

respondent. The Respondent is also competent to review its own order if it finds that a case for review in favour of department on these grounds is

made out. Words "appears" and "no sufficient ground" employed in subsection (3) of section 7B cast an obligation upon that authority to record

finding at least prima facie about availability or nonavailability of such grounds. Subsection (4) permits that authority to grant the review. Proviso to

subsection (4) then stipulates that such review shall not be granted without previous notice to all parties before the authority. It is, therefore,

obvious that at the stage when review application is being considered under subsection (3) the aggrieved party alone needs to be given a hearing to

find out whether a case for review is made out or not. If, according to the authority, no such case is made out there is no question of proceeding

further to hear all other parties, as contemplated by proviso (1) of subsection (4) thereof.

18. In the instant case, issue of functional integrality in between the petitioner - Ashmit Motors, of which, Shri Harish Lalchand Nayyar is a

Director and M/s Jai Malhar Hyundai, which is a proprietary firm owned by the brother of the petitioner namely, Shri Manish Lalchand Nayyar.

Both are said to be registered under the Bombay Shops and Establishments Act. This issue can be considered by the respondent/authority and

since the grievance of the petitioner is that this issue has not been properly considered and on the basis of which the number of employees are held

to be 20 or more, needs to be considered by the respondent/authority only after hearing the petitioner in it's review application.

19. Shri Chaudhary has placed reliance upon paragraph Nos. 7 and 8 of Mansa Nagarik Sahakari Bank Case (supra), which read as under:-

7. The establishment has come forward with a dishonest plea that the establishment was not heard at the time of 7A inquiry. It is clear from the

order dated 29-5-2001 that not one, but two officers of the establishment were heard and it was only after hearing these two officers and after

taking into consideration the material produced by the establishment, like month wise statements that the authorities passed the order under Section

7A of the Act. From the record it clearly transpires that the establishment was bent upon to avoid payment of the amount ordered by the

authorities, that is why knowing well that an appeal is maintainable against the order passed under Section 7A of the Act, a review application was

filed. It can be inferred that this was with a view to delay the payment. After the review application is rejected, the present petition is filed seeking

intervention of this Court in a matter where a statutory appeal is provided.

8. Mr. Shah, the learned Advocate for the petitioner establishment with a view to explain the filing of the present petition instead of statutory

appeal, pointed out a decision of "the appellate authority" under the Act, wherein it is stated that the appellate authority is not having full

infrastructure and other facilities. However, a copy of the said decision is not produced by Mr. Shah. Even if it is so, then also the decision reflects

the position which prevailed at the relevant time. That cannot be ground for not filing a statutory appeal. Mr. B.T. Rao, the learned Advocate

makes a statement that the appellate authority is functioning full-fledged, the said observations are not applicable as on date.

20. In the above-said case, the Court was dealing with the issue of a dishonest plea being put forth by the establishment as a ground for delaying

the recovery of the amount under Section 7. In the instant case, the amount assessed under Section 7A is about Rs. Nine Lakhs and odd. An

amount of Rs. Eight Lakhs and odd have already been recovered by the respondent by adopting coercive steps as permitted under the 1952 Act.

I am, therefore, unable to accept the submission of Shri Chaudhary that the petitioner is attempting to delay the matter so as to avoid the payment

of assessed dues, when an amount equal to almost 90% has already been recovered.

21. In the matter of Bharat Polychem Ltd. (supra), Shri Chaudhary relies upon paragraph No. 4 of the judgment, which reads as under:-

4. The petitioner preferred a review of the aforesaid order and which as aforesaid has been dismissed vide order dated 16th March, 2007

impugned in this writ petition.

The counsel for the respondents has contended that the order under Section 7A was appealable and the petitioner having not preferred appeal

there against, the same has attained finality. A perusal of Section 7B and particularly sub-section (5) thereof also shows that though no appeal lies

against an order rejecting an application for review but appeal is permitted against an order passed under review as if the order passed under

review were the original order under Section 7A.

A perusal of the order dated 16th March, 2007 shows that APFC literally reviewed the order dated 17th May, 2006 and reached a conclusion

that there was no error as pointed out in the order dated 17th May, 2006. An appeal against such an order would lie under Section 7B(5) (supra).

This writ petition is not maintainable for said reason.

22. Considering the above, it needs mention that an order under Section 7B rejecting the application is not an appealable order. Subsection (5)

clearly indicates that no appeal would lie against an order rejecting the application under Section 7B. An appeal would lie only against the order

under Section 7A which is the subject matter of review under Section 7B. So also, Section 7-I indicates that an order under Section 7B allowing

the review application is appealable under Section 7-I. This Court is, therefore, required to consider this petition as the impugned order dated

13.8.2015 rejecting the application under Section 7B is not an appealable order and the petitioner has raised a grievance that the same has been

passed without hearing the petitioner.

23. It is informed that the record of the petitioner has been seized by the respondent/authority and the same is in the custody of the respondent.

Consequently, if the petitioner is to address the mind of the respondent by its review application, the said record would be relevant. It is further

pointed out that the review application was filed by the petitioner after the learned Division Bench of this Court granted the liberty to do so by its

order dated 28.7.2016, passed in Writ Petition No. 8110 of 2016 that was filed by the petitioner since it was not aware as to the fate of its

review application.

24. In the light of the above, this petition is partly allowed. The impugned order dated 13.8.2015, passed by the respondent/authority under

Section 7B, without issuing notice and without hearing the petitioner is quashed and set aside. The review application No. MH/55857/PF/C-

II/SRO/NSK/EF/894 is restored to the file of the respondent under the following conditions:-

(A) The petitioner shall appear before the respondent/authority on 3.10.2016 at 11.00 A.M. and shall tender such documents/applications, as it

may deem proper.

(B) The record seized by the respondent shall be returned to the petitioner so as to allow the petitioner to prepare a Photostat set of all the said

documents in the said file and subject to scrutiny by the respondent, shall tender the Photostat copies to the respondent authority within one week

from the date of appearance.

(C) The respondent would be at liberty to direct the petitioner to produce such documents as it may deem appropriate.

(D) The respondent shall hear the authorised representative of the petitioner on such dates as it may think appropriate and after completing the

hearing on the review application shall proceed to decide the same within 30 days from the date of concluding the hearing.

(E) The issue of coverage of the 1952 Act and the issue of functional integrity shall be considered by the respondents/authorities and if need to be

and in order to ensure a proper hearing, the other proprietary firm namely, M/s Jai Malhar Hyundai may also be served with a notice of hearing

and the said establishment may be granted a hearing in the said matter.

(F) Needless to state, the order dated 14.7.2010 allotting a Subscriber Code Number to the petitioner and the order dated 10.6.2015, passed

under Section 7A shall be subject to the result of the proceedings under Section 7B.

(G) Consequentially the order under Section 8F, attaching the Bank account of the petitioner held with the State Bank of India, Industrial Area

Branch, Ahmednagar and ICICI Bank, Ahmednagar Branch, is set aside as 90% of the assessed dues have already been deposited.

(H) The order under Section 7B, which shall be a reasoned order, shall be supplied to the petitioner, expeditiously.

25. Rule is made partly absolute in the above terms.