BEFORE THE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT-II, ROUSE AVENUE, DISTRICT COURT COMPLEX, DELHI.

Present:

Smt. Pranita Mohanty,
Presiding Officer, C.G.I.T.-Cum-Labour
Court-II, New Delhi.

ATA No. 1040(16)2014

M/s. E. Shakti.Com — Appellant

VS.

APFC/RPFC, Gurgaon — Respondent

ORDER DATED :-20/12/2022

Present:- Shri Radhey Shyam, Ld. Counsels for the Appellant.
Shri S. N Mahanta, Ld. Counsel for the Respondent.

This appeal challenges the order dated 02.09.2014, passed by the APFC Gurgaon under section 7A of the EPF and MP Act 1952 (herein after referred to as The Act) directing the appellant establishment to make deposit of the EPF contribution of it's eligible employees not reported and not remitted for the period 04/2012 to 07/2013 w.e.f the last date of inspection. Challenging the said order and liability there under, this appeal has been filed.

The Respondent appeared through it's counsel and filed written reply to the grounds taken in the appeal. Both the counsels advanced their elaborate arguments during the hearing.

The stand taken by the appellant is that the appellant E. Shakti. Com Pvt. Ltd is a registered company covered under the provisions of EPF&MP Act and diligent in complying the statutory deposits in respect of it's employees. Notice dated 30.12.2013 was served on the establishment calling to show cause as to why the deficit PF contribution shall not be determined. The AEO visited the establishment and submitted his report dated 22.08.2013 observing that the establishment has defaulted in depositing

the PF contribution of the eligible employees for the period 04/2012 to 07/2014. On the basis of that inspection report of the EO, the APFC issued summon dated 18.03.2014 for holding an inquiry u/s 7A of the Act to assess the un-remitted PF contribution of the employees. In response to the summon, the AR for the appellant establishment appeared and wanted to submit all relevant documents including form 11, appointment letter, salary sheets, records relating to the ESI etc. but the commissioner did not accept the said relevant documents though those were material for the inquiry and to arrive at a correct decision. The offer made by the establishment to examine the employees whom the EO observed to be the eligible employees and the appellant establishment stated to be excluded employees, were denied by the Respondent commissioner. On the direction of the commissioner the EO revisited the establishment of the appellant and the EO confirmed his earlier observation. The commissioner then without appreciating the matter in proper prospective, and without considering the factual position, passed the impugned order. The respondent having power to summon the documents, never exercised the said power to find out the truth. On the other hand due opportunity to explain the facts, was denied to the appellant which amounts to violation of the Principles of Natural Justice. Thereby the appellant has pleaded that the impugned order is not based upon any reasoning by the commissioner who accepted the report of the EO in toto and denied proper opportunity to the appellant to set up it's stand. The order being illegal is liable to be set aside.

The respondent filed written reply refutting the stand taken by the establishment. While pleading on the legislative intention behind the beneficial legislation, it has been stated that the appellant establishment was given adequate opportunity to produce evidence and establish that the employees in respect of whom, the EO has recommended the inquiry and assessment, are in fact the excluded employees and drawing wage more than the upper limit prescribed during the period of inquiry. The establishment had produced the incomplete form 11 of those employees without the signature of the employees, during the inspection held by the EO. Those Form 11 were found un worthy of acceptance and hence not accepted. It has been also pleaded

that the commissioner had no occasion of calling for the records as the records as per the admission of the establishment were produced before the EO and verified. During the inquiry no request was ever made seeking permission to produce witnesses or to produce documents. Hence the allegation that opportunity to adduce evidence was denied is an unfounded allegation.

The appellant has not disputed that the assessment was made in respect of omitted employees whom it describes as excluded employees.

Sec 7A of the Act lays down the mode of determination of money due from the employer. For this, the authority may conduct an inquiry, as has been done in this case. The power has been vested with the authority conducting the inquiry to summon the witnesses and witnesses if required to arrive at a just and proper conclusion. In the memo of appeal it has been stated that the oral request made by the establishment to produce the documents and witnesses was rejected and the commissioner while discharging the quasi judicial function did not exercise his own power to call for the witnesses and the documents. But the observation made by the commissioner in the impugned order does not support the said stand in any manner. The commissioner in the impugned order has clearly observed that the EO had examined the Form 11 submitted by the establishment during the inspection and re examined the same during the inquiry held u/s 7A of the Act. On both the occasions, the said Form 11 were found incomplete and with post dated signature of the employees. Hence the same were not accepted to hold that the employees are excluded employees.

The appellant, admittedly had not given any written submission during the 7A inquiry seeking permission to produce documents and witnesses. As seen from the order the inquiry was concluded and order was passed on 02/09/2014. A document has been filed by the appellant along with the appeal memo, which has an affixture of the receipt seal of the Respondent dated 13th March 2014, addressed to the APFC conducting the inquiry. This appears to have been given by the establishment during the inquiry.

But surprisingly, the said letter addressed to the APFC, only contains the submission that the contributions have been deposited in time in respect of eligible employees and the establishment takes strong objection on the proposed assessment in respect of employees who are drawing basic wage more than the ceiling limit and thus are excluded employees. Nowhere in the said representation, it has been mentioned that the establishment wanted to produce documents and examine witnesses to disprove the proposed assessment. When there was no submission for production of documents, the allegation that opportunity was denied seems un founded. It would not be out of place to mention that while filing the appeal, the appellant had the opportunity of filing documents in support of it's stand, which was not done by the appellant.

In this case the dispute is with regard to the eligibility of some employees of the appellant. The appellant has alleged that the documents should have been called fro or summoned by the commissioner instead of relying on the report of the EO. It is true that the commissioner had not summoned the documents. But the said inaction of the commissioner will certainly not absolve the establishment of it's responsibility of producing the documents which could have thrown light on the point of controversy. The Hon'ble S C in the case of **Gopal Krishnaji Kedkar vs. Mohhamad Haji Latif and others reported in AIR 1968 SCC 1413.** A similar view was taken by the Hon'ble Division Bench of the Supreme Court in the case of **Bal Kishan vs. Presiding Officer reported in 1996(3) SCT 548** have clearly held that the party in possession of best evidence which could have thrown light on the point of controversy is duty bound to produce the same notwithstanding the fact that the burden of proof lies on the adversary. Moreover the burden of proof lies with the party which asserts existence of a particular fact. In this case, since the Form 11 were not accepted by the EO and on re verification, the same were found to have contained post dated signatures of the employees, the commissioner did not find those acceptable. No better evidence having been filed during the inquiry, and no material being placed on record of the appeal to prove that the request for submitting documents and to produce witnesses was turned down by the commissioner, it is held

not to be an acceptable submission that the principles of natural justice was violated and no proper opportunity was allowed for setting up a defence during the inquiry. Thus no infirmity is noticed in the impugned order of the commissioner entailing interference with the same. Hence, ordered.

ORDER

The appeal be and the same is dismissed as without merit. The impugned order passed by the commissioner is hereby confirmed. Consign the record as per Rules.

Presiding Officer

BEFORE THE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT-II, ROUSE AVENUE, DISTRICT COURT COMPLEX, DELHI.

Present:

Smt. Pranita Mohanty,
Presiding Officer, C.G.I.T.-Cum-Labour
Court-II, New Delhi.

ATA No. D-2/36/2022

M/s. IPSAA Holding Pvt. Ltd. Appellant

VS.

RPFC, Gurgaon (E) Respondent

ORDER DATED :-20/12/2022

Present:- Shri M K Pandey, Ld. Counsels for the Appellant.
Shri Chakaradhar Panda, Ld. Counsel for the Respondent.

This appeal has been filed by the appellant establishment challenging the order passed u/s 7A on 13/08/2020 & 7B on 12/08/2022 of the EPF& MP Act by the RPFC Gurgaon, where in the appellant has been directed to deposit Rs. 24,17,321/- towards the EPF contribution of it's employees, omitted from being remitted for the period 04/2016 to 01/2019. On registration of the appeal notice was issued to the Respondent Adv. Sh C D Panda appeared and participated in the hearing on admission of the appeal and prayer made for waiver of the condition stipulated u/s 7O of the Act.

As reported by the Registry, the appeal has been filed within the prescribed period of limitation.

The learned counsel for the appellant submitted that the impugned order has been passed without application of mind and without considering the submission of the appellant on facts, made during the inquiry. It is submitted that the appellant establishment is a Pvt. Ltd. Company and has been covered under The Act since 6th May 2016. It was depositing the statutory contribution regularly and diligently

in respect of it's employees. The commissioner served the notice of 7A inquiry for the period 04/2016 to 01/2019 on the basis of a report submitted by the area enforcement officer. The area enforcement officer had made the verification with regard to the deposit of PF dues by the appellant establishment and observed omission of deposit in respect of some allowance such as Leave Encashment, Washing Allowances, Tiffin Allowances and Overtime Allowances etc. In response to the notice the appellant submitted it's reply stating that the said allowances are not universally paid and thus can not be included to basic wage for calculation of PF Contribution. The establishment also raised dispute with regard to the calculation arrived at by the enforcement officer. All the relevant records were submitted for verification and necessary co operation was extended. But the commissioner failed to consider the facts pointed out and legal submissions made and passed the impugned order solely accepting the report of the EO. The specific significance and methodology of various allowances granted by the establishment to it's employees was wrongly and arbitrarily considered to conclude the said allowances as part of the basic wage. But the inquiry was closed without considering the said submission and the commissioner took a wrong and misconceived view of the matter and passed the order of assessment.The assessment based upon the report of the EO only is illegal and liable to be set aside. Being aggrieved the establishment had filed an application u/s 7B of The Act for review of the order passed u/s 7A. But the same was rejected without proper consideration and only by confirming the previous order passed u/s 7A.

The appellant has thus prayed for admission of the appeal waiving the condition of deposit contemplated u/s 7O of the Act on the ground that it has a strong arguable case in the appeal. He also submitted that the impugned order suffers from patent illegality and the appellant has a fair chance of success. Insistence for the deposit in compliance of the provisions of sec 7-O of the Act will cause undue hardship to the appellant whose commercial activity has been impacted by the post COVID slow down. He there by prayed for waiver of the condition of pre deposit pointing out that the Tribunal has the discretion to do so in the facts and circumstances of this case. He also submitted that the

appellant has least chance of running away from the reach of Law. At the end of the hearing of the appeal, if the amount assessed is found payable it will be paid.

In reply the learned counsel for the respondent, while supporting the impugned order as a reasoned order pointed out the very purpose of the beneficial legislation and insisted for compliance of the provisions of sec 7-O by depositing 75% of the assessed amount. Learned counsel for the respondent also cited the order passed by the Hon'ble High Court of Madras in the case of **M/S JBM Auto System Pvt. Ltd VS RPFC**, to submit that the Tribunal can not grant waiver in a routine manner which will have the effect of defeating the very purpose of the Act.

The impugned order, it seems is based upon the report of the EO. But the written submission made by the establishment and now placed on record, it seems, was not considered by the commissioner. Besides this, the learned counsel for the appellant also argued on the merit of the appeal relying upon various judicial pronouncements relating to special allowances and the factors to be considered before concluding on the liability of PF contribution on those allowances.

Considering the submission advanced by the counsel for both the parties an order need to be passed on the compliance/waiver of the conditions laid under the provisions of sec 7-O of the Act. For the same, factors which need to be considered are the period of default in respect of which inquiry was initiated and the amount assessed Without going to the other details as pointed out by the appellant challenging the order as arbitrary, and at this stage of admission without making a roving inquiry on the merits of the appeal , it is felt proper to pass an order keeping in view the principle decided in the case of M/S Benars Valves Ltd & Others vs. Commissioner of Central Excise, decided by the Hon'ble Supreme Court wherein it has been held that **"if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assesse to pay the full or a substantial part of the assessed amount."** Hence relying on the said judgment as well as considering the grounds of the appeal, the period of default,

the amount assessed etc, it is felt that insistence for deposit of 75% of the assessed amount would amount to undue hardship to the appellant.

But at the same time, considering the submission of the parties, it is held that the circumstances do not justify total waiver of the condition of pre deposit. But the ends of justice would be met by reducing the amount of the said pre deposit from 75% to 30%. Accordingly ,the appellant is directed to deposit 30% of the assessed amount within six weeks from the date of this order towards compliance of the provisions of sec 7-O of the Act by way FDR in the name of the Registrar of CGIT initially for a period of one year with provision for auto renewal. On compliance of the above said direction, the appeal shall be admitted and there would be stay on execution of the impugned orders till disposal of the appeal. List the matter on 01February, 2023 for compliance of the direction failing which the appeal shall stand dismissed. The interim order of stay granted on the previous date shall continue till then. Both parties be informed accordingly.

Presiding Officer