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-2/32/2022

M/s. ACIL Ltd. Appellant

VS.

RPFC, Gurgaon (W) Respondent

ORDER DATED :-28/11/2022

Present:- Shri Toofan Singh, Ld. Counsels for the Appellant.
Shri B B Pradhan, Ld. Counsel for the Respondent.

This order deals with the admission of the appeal and a separate application for stay on the execution of the impugned order passed u/s 14B and 7Q of the EPF and MP Act.

The facts pleaded in the appeal in short is that the appellant is a Pvt. Ltd. company engaged in the manufacturing of High Precision Engineering Automotive Component and its manufacturing plant is situated at Gurgaon, Haryana. On 08.08.2018 the NCLT Principal Bench New Delhi initiated CIRP against the appellant under the IBC 2016. The IRP was appointed and an order of moratorium was passed prohibiting institution or continuation of any proceeding against the appellant. The said IRP was converted to Resolution Professional and on 05.08.2019 a Resolution Plan was approved for revival and restructuring of the corporate debts. While the matter stood thus on 01.03.2021 the appellant received an email from the enforcement officer directing production of records of the appellant establishment for an inspection under the EPF and MP Act. Accordingly all the records were produced and on 06.07.2021 the enforcement officer

submitted his inspection report observing that the appellant is undergoing CIRP as per the order dated 08.08.2018 passed by the NCLT Delhi. But from the perusal of the salary sheets maintained by the establishment the enforcement officer observed that the establishment has been paying special allowance to all the employees which is nothing but a camouflage of dearness allowance in respect of which EPF Contribution is payable. He also observed that in respect of some period there is delay in deposit of the dues. The EO calculated the special allowance paid subject to a wage ceiling of Rs. 15,000/- for the period 16.04.2016 to 21.02.2021 amounting to Rs. 26,82,291/- as the deficit PF contribution on the basic wage including the dearness allowance. The enforcement officer thus recommended inquiry u/s 7A, 14B and 7Q of the EPF and MP Act. Pursuant to the observation of the EO the respondent initiated the inquiry and two separate summon u/s 7A and 14B and 7Q of the Act were served on the establishment.

The establishment appeared and raised objection that the report of the EO has not been served on them for reply. On 22.07.2021 another joint notice-cum-summon u/s 14B and 7Q of the Act was served and hearing was conducted on multiple dates. During the inquiry the EO carried out a re-verification and submitted a revised inspection report on 17.12.2021. The said report was disputed on the ground that the EO had failed to consider the legal and factual submission made during the inspection. But the commissioner did not consider any of the submissions made by the appellant and ignoring the fact that moratorium has been granted by the NCLT passed the impugned order u/s 14B and 7Q of the Act levying Rs. 1501180/- as damage and Rs. 771366/- as interest. In this appeal the appellant has stated that the damage and interest are leviable only after the unpaid amount is assessed. In this case since, the order of assessment passed u/s 7A has been stayed by this tribunal in appeal no. D-2/17/2022, the order imposing damage and interest are illegal and liable to be set aside. It has also been stated that the commissioner while passing the order took a wrong view of the law decided in the case of Vivekanand

Vidya Mandir and on that ground alone the order passed u/s 7A of the Act is likely to be set aside. If the appeal challenging the orders passed u/s 14B and 7Q would not be admitted and execution of the order would not be stayed serious prejudice shall be caused to the appellant. He also described the order as a composite order since, a common summon was issued and common proceeding was held though two separate order has been passed by the commissioner. The ground also taken is that the impugned order does not contain any finding or reasoning supporting the liability for imposition of damage and no finding has been given on the mensrea. He thereby argued that the appeal be admitted and the impugned order be stayed without any condition till disposal of the appeal.

Notice being served the Ld. Counsel Mr. Pradhan appeared for the respondent and submitted that the impugned order has been passed for delay in remittance for a period which spams over more than 6 years. During this period the employees were deprived of their lawful rights. He also submitted that initiation of CIRP, grant of moratorium or sanction of resolution Plan no way affects the inquiry held by the commissioner. He also argued that the courts have clearly held that the Provident Fund dues have first charge over any other organization or payments. This being a priority liability the order of the commissioner cannot be viewed as wrong. He also submitted that the representative of the establishment were regularly attending the court and at no point of time the issue like no liability for the moratorium granted was raised.

Perusal of the record clearly shows that the impugned orders were passed separately though a common notice was issued. Thus, the contention that the orders passed u/s 14B and 7Q of the Act are composite in nature cannot be accepted. The position of law as discussed by the Hon'ble Supreme Court in the case of Arcot Textile is clear on the point that when the two separate orders were passed u/s 7A and 7Q of the Act those cannot be construed as composite order. In this proceeding two separate orders have been passed u/s 14B and 7Q of the Act. There is no evidence at present whether a composite

proceeding was held or not. This position as discussed by the Hon'ble High Court of Delhi in the case of Gaurav Enterprises vs. UOI has been challenged in a Division Bench and as such the same does not hold good as against the judgment passed in the case of Arcot Textile. There is no other defect pointed out by the Registry. Hence, the appeal as framed is admitted.

Without delving into the other details as pointed out by the appellant but on perusal of the impugned order which does not contain any finding on the mitigating circumstances or reason behind imposition of the damage at the highest rate as prescribed under the scheme, it is held that the appellant has a strong case to argue in the appeal. Unless the execution of the order impugned in the appeal assessing damage would be stayed pending disposal of the appeal the relief sought in the appeal would be illusory. But at the same time it is held that the stay cannot be unconditional. The appellant is directed to deposit 25% of the damage assessed by way of challan within 4 weeks from the date of this order as a pre condition for stay of the impugned order assessing damage. But there would be no stay on the order calculating interest u/s 7Q of the Act. Call the matter on 04.01.2023 for compliance of the direction given above and reply by the respondent. Interim stay granted earlier shall continue till the next date. It is directed that the direction if not complied by the next date there would be no stay on the impugned order.

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. 31(16)2016

M/s. Denyo India Pvt. Ltd. Appellant

VS.

APFC/RPFC, Gurgaon Respondent

ORDER DATED :-28/11/2022

Present:- Shri S. K Gupta, Ld. Counsel for the Appellant.

Shri Chakradhar Panda, Ld. Counsel for the Respondent.

This appeal challenges the orders passed by the APFC Gurgaon and communicated on 30/12/2015, u/s 7A of the EPF and MP Act 1952 (herein after referred to as the Act) assessing Rs. 16,14,817/- payable by the appellant establishment towards deficit P F dues of it's employees for the period 02/2012 to 07/ 2013 of the ACT.

The plea of the appellant taken in this appeal is that it is a private Limited company and had applied for voluntary coverage in terms of sec 1(4) of the Act w. e. f. 01.05.2009. But no order/notification to that effect has been issued yet. It was also never covered as per the provisions of sec 1(3) of the Act. Hence the Respondent authority has no power to initiate inquiry against the establishment. However, since inception, and after applying for voluntary coverage, the establishment has been remitting the PF dues of it's eligible employees regularly on the basic wage paid. Notice dated 29.05.2014, was issued to the establishment to appear and participate in the inquiry to be held on 11.06.2014 u/s 7A of the Act, as it was noticed that there is deficit in deposit of PF dues for the period 05/2009 to 07/2013. Prior to that the AEO had visited the premises of the establishment and inspected all relevant records. Pursuant to the notice, the appellant establishment appeared on the date fixed and submitted that the establishment has been remitting he PF contribution of their eligible employees regularly as per sec 2(b),sec 6 of the Act read with Para 2(f) and 29 of the scheme and also submitting the monthly returns as required under the law. On 11.10.2013, a written submission was filed by the establishment, stating therein that the two International Workers in respect of whom the inquiry has been proposed were excluded employees as their country of origin is Japan and with that country India has entered in to a Social Security Agreement and they are duly covered under the social security scheme of their country i.e Japan. Proof of their membership under the social security scheme of their country of origin along with all other relevant documents were placed during the inquiry held u/s 7A of the Act. But the APFC in a fanciful manner proceeded to decide the matter even though he has no power to decide the eligibility of the worker when a dispute in that regard is raised. The commissioner thereby assessed the amount allegedly not remitted and directed the establishment to deposit the amount along with the interest payable for the delay in remittance. It has also been pleaded that the said International Workers have left the service of the appellant establishment and the establishment had never deducted the

contribution on their gross salary. In such a situation, the commissioner should not have assessed the amount on the gross salary of the said employees. With this the appellant has pleaded that the impugned order suffers from patent illegality and an outcome of improper appreciation of fact and law and liable to be set aside.

The respondent filed reply refuting the stand taken by the appellant. The main objection taken by the Respondent is that the appellant has misled the Tribunal by filing some documents in support of the fact that the IWs in respect of whom assessment has been made are excluded employees. In fact the act brought the IWs under it's fold after amendment and introduction of Para 83 of the scheme w. e. f. 03.09.2010. There is no wage limit prescribed there under for contribution to the provident fund which means, the contribution in respect of IWs on wage to the Provident Fund shall be on the higher side of the wage i.e on the gross wage. But the contribution to the pension scheme be on the statutory limit of the wage as in the notification dated 03.09.2010, there is no specific direction for the pension. The appellant establishment got coverage under the Act w. e. f. 01.05.2009 u/s 1(4) of the Act and when the employee strength became more than 19 w. e. f. 01.08.2010, it got covered u/s 1(3) of the Act and the same was intimated and communicated during the inspection of the EO. Accordingly the assessment has been made for the period 05/2009 to 07/2013. Thus, the order of the commissioner assessing contribution to the pension Fund on the total wage may be modified to the extent of the wage limit prescribed for other Indian Employees.While supporting the impugned order, it has been stated that the commissioner had given ample opportunity to the establishment for deposit of the deficit EPF dues which were found to have been restricted to the wage limit like other Indian employees, though as per notification dated 03.09.2010, the contribution is payable on the gross wage in respect of IWs. The respondent has further pleaded that the Social Security Agreement between the Govt. of India and the Govt. of Japan though signed was not notified for the

period under assessment. Hence, all the Japanese workers employed in India were treated as International workers and eligible for contribution on the full basic wage and DA paid to them. As such, the respondent has pleaded that the objections raised during the inquiry having been considered properly, the impugned order does not suffer from any infirmity and the appeal challenging the same is liable to be dismissed.

During course of argument the learned counsel for the appellant while pointing out to the provision of sec 26 B of the Act, submitted out that the impugned order has been passed by the APFC, who lacks the jurisdiction to decide the eligibility of the worker for contribution. The objection in this regard when raised during the inquiry, he should have referred the matter to the RPFC, for a decision on the eligibility.

But on perusal of the proceeding available in the LCR, called from the office of the Respondent Dept and the copy of the written submission filed by the appellant during the inquiry and placed on this record as Annexure A-4, no such plea challenging the jurisdiction was ever raised. Even other wise, a plea challenging the jurisdiction if found without basis will not make it obligatory on the part of the adjudicating authority to refer the matter to the higher authority holding primarily that he lacks the jurisdiction. The party challenging the jurisdiction has to satisfy the authority holding the inquiry in that regard. In this case neither such an objection was raised nor it was pointed out that the appellant establishment is disputing the eligibility, which need to be decided at the first instance. Hence the argument advanced by the appellant challenging the power of APFC to decide the matter is not accepted.

Photocopy of the agreement purported to have been signed between the Republic of India and Japan on social security has been placed on record by the appellant and on the basis of the same argument was advanced that the IWs in respect of whom inquiry was held are excluded employees and as such the PF contribution in respect of those employees was rightly made on the wage limit prescribed under the statute.

Admitted position is that the establishment had engaged some citizen of Japan holding passport of their country of origin and extended the benefit of the EPF Act to those IWs by making contribution on their wage up to the limit prescribed, as in case of all other Indian workers. Para 83(2)(f) of the EPF Scheme as amended on 3rd Sept 2010, was introduced as a special provision to deal the IWs as excluded employees if they are contributing to the social security program of the country of his origin and India has entered in to a social security agreement with that country on reciprocity basis. In this case the copy of the social security agreement between India and Japan was placed on record by the establishment to argue that the IWs are excluded employees in view of the amendment introduced as Para 83(2)(f) and the agreement signed between the two countries. It is seen from the LCR that the APFC holding the inquiry sought a clarification from the higher authorities on the applicability of the same by writing a letter dated 09.04.2015 and the RPFC-II(International Workers Unit) by his reply dated 21.04.2015 had clarified that the social security agreement between India and Japan, though has been signed, the same is yet to be notified and given effect to.

In view of the said clarification, the position is clear that for the relevant period of inquiry, there was no social security agreement between India and Japan and as such the citizen of Japan holding

passport of his country of origin and working in India is to be treated as an IW as defined in Para 83 of the scheme. In that view of the matter, the assessment made in respect of the IWs is held to be legal and proper. The argument advanced to the effect that for the inquiry period the contribution to the pension fund is to be made as per the wage limit fixed is not accepted for the reason that, the relevant provision directs that the contribution as per the percentage prescribed under Para 29 of the scheme is to be made by depositing the same with the EPFO and the percentage of contribution of the employee and employer shall be the same. How much of the total contribution shall be assigned to which Fund does not bring any change to the amount of contribution, which has been prescribed under Para 29. For the reasons recorded, the order impugned in this appeal is found not suffering from any infirmity and does not invite interference.

ORDER

The appeal be and the same is dismissed on contest. The impugned order passed u/s 7Aof the EPF and MP Act is hereby confirmed. Consign the record as per Rules and return the LCR forthwith.

Presiding Officer

BEFORE THE HON'BLE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT, DELHI; ROOM No.208 ROUSE AVENUE, DISTRICT COURT COMPLEX, NEW DELHI-110002.

Appeal No. D-2/15/2019

M/s. Paramvir Security — Appellant
Through None for the Appellant

Vs.

APFC/ RPFC, Gurgaon — Respondent
Through Sh. B.B Pradhan, Ld. Counsel for the Respondent

ORDER DATED :- 14/11/2022

The office has recievd an adjournment request on behalf of the Ld. Counsel for the Appellant through email. Accordingly, the adjournment is granted. List the matter on 12.01.2023 for final arguments.

Presiding Officer