

(2007) 12 CAL CK 0035
In the Calcutta High Court

Case No : A.S.T. No. 1825 of 2007 with A.S.T. No. 1000 of 2007 (Stay Appln.)

Asstt. P.F. Commissioner, Employees" Provident Fund
Organisation

APPELLANT

Vs

Pawan Kumar Agarwala and Others

RESPONDENT

Date of Decision : 03-12-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 14A, 7(1), 7A, 7B

Penal Code, 1860 (IPC) — Section 406, 409

Citation : (2008) 1 CALLT 367 : (2008) 1 CHN 469 : (2008) 118 FLR 162 :
(2008) 2 LLJ 969

Hon'ble Judges : S.S. Nijjar, C.J.;Tapen Sen, J

Bench : Division Bench

Advocate : Kalyan Kr. Bandyopadhyay and Mihir Kundu, for the Appellant;Sakti Nath Mukherjee and Swapan Kumar Dutt, for the Respondent

Final Decision : Allowed

Judgement

S.S. Nijjar, C.J.—This appeal has been filed by the Assistant Provident Fund Commissioner challenging the order passed by the learned Single Judge dated 18th September, 2007 in W.P. No. 12455 (W) of 2007. The respondent Nos. 1 and 2 filed the aforesaid writ petition challenging various orders passed by the Assistant Provident Fund Commissioner under the Employees" Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Provident Fund Act). By these orders the writ petitioners had been directed to pay the balance amount within fifteen days of the receipt of the orders, failing which recovery action and proceedings for prosecution as provided under the Act and the Scheme framed thereunder and Section 406/409 of the Indian Penal Code shall be initiated without any further notice. The petitioners had challenged the orders on numerous grounds. The points of law involved in the writ petition were formulated by the petitioners thus:

1. Whether the determination of provident fund dues in a proceeding u/s 7A of the Act of 1952 can be provisional and the order dated 11th April, 2007 passed in the instant case is sustainable as the same discloses provisional determination dues?
2. Whether the order dated 11th April, 2007 passed ex parte in violation of the principles of natural justice and Section 7A of the Act of 1952 denying due opportunity of hearing to the petitioners is sustainable or not?
3. Whether the impugned order dated 11th April, 2007 not being a speaking one and having been passed without considering the payments already made is valid or not?
4. Whether the demands, order of attachment of proceeds of sale of tea, show-cause notices etc. subsequent to the impugned order dated 11th April, 2007 are sustainable or not?
5. Whether demands can be raised or prosecution can be made beyond the reasonable period?

2. In support of these points of law, factually, it had been pleaded that the petitioners Poobang Tea Garden were originally owned by Duncan Brothers. In 1969 it was sold to I.P. Karnani. Between 1975-1980 it was leased to Tea Sales & Allied Industries Private Limited. As the tea garden had been running into losses, it was totally closed on 21st August, 1980. It remained closed for a period of four years. In 1984 the petitioners brought and took over the tea garden, when it was in a pitiable condition. Again the management changed hands in the year 1985. The new management reopened the Tea Garden, and started running the same, with their own financial resources. They were unable to secure any financial aid from their Bank, i.e., Bank of Baroda. However, there were agitations due to which a lock out was declared by the management from 1st of October, 1992. On or about 23rd September, 1999 the then Enforcement Officer lodged complaints with the Officer-in-Charge under Sections 406 & 409 of the Indian Penal Code against the management for non-payment of provident fund dues. The petitioners filed Writ Petition No. 18936 (W) of 2000 in this Court wherein this Court passed the following order on 8th February, 2001:

Heard the learned Advocates for the parties. The learned Advocate for the Provident Fund Authorities, in his usual fairness, submitted that the matter can be decided by the Provident Fund Commissioner. This Court, therefore, directs the Provident Fund Commissioner to decide the matter in accordance with law within three weeks from the date of communication of this order. A copy of the writ application is to be served upon the Provident Fund Commissioner, West Bengal on or before next Monday (12.2.2001).

Until the matter is decided by the Provident Fund Commissioner, no further steps, as suggested by the parties, will be taken up by the authority and if any adverse order is passed by the Provident Fund Commissioner, the same shall

remain stayed at least for a week.

I make it clear that I have not gone into the merits of the case as the matter is to be adjudicated upon by the Provident Fund Commissioner.

The writ petition is thus disposed of.

If an urgent xerox certified copy of this order, if applied for, the same may be supplied as early as possible.

3. In spite of the order passed by this Court, the SD JM continued with the criminal proceedings in G.R. Case No. 220(1) of 1999 against the petitioner No. 1 and the management in the meantime. The petitioners, therefore, filed the Writ Petition No. 18328 (W) of 2001 challenging the continuation of the criminal proceedings and implementation of the order passed by this Court on 8th February, 2001. On 24th December, 2001 this Court issued directions to implement the order dated 8th February, 2001 within four weeks from the date of communication of the order. In the meantime on 06.12.2002 the work at the Tea Garden had to be suspended due to the illegal activities of the workers. The garden was reopened on 27.06.2003 after intervention of the Minister-in-Charge of the Labour Department. In spite of the continuous labour problems which have been faced by the petitioners the Assistant Provident Fund Commissioner, Sub-regional Office, Darjeeling issued letter dated 13th April, 2004 intimating the petitioner that the authority had quantified and/or determined the outstanding provident fund dues in respect of Poobang Tea Estate up to 2002-03 and there was a short deposit of Rs. 1,46,527,07. The petitioners were directed to deposit the aforesaid short deposit amount immediately by letter dated 13th April, 2004. The petitioners entered into correspondence with the Assistant Provident Fund Commissioner seeking details about the short deposit amount monthwise. It was also stated that as soon as the details are furnished the amount will be deposited. In the meantime Poobang Tea Estate was declared sick by the Tea Board by order dated 18th January, 2005. A subsidy up to 5% subject to a ceiling limit of 35 lakhs to 50 lakhs was to be paid to the petitioner, on furnishing certain particulars as per the format provided in the letter 18th January, 2005. Since the petitioners failed to make out the short deposit, notices were issued to the petitioners u/s 7A of the Provident Fund Act even for the period of 2002-03. According to the petitioners the notices had been issued haphazardly. Copies of two such notices dated 27th July, 2005 and 23th August, 2005 have been attached to the petition. It is alleged that fresh determination was being made for the periods prior to 2002-03 for which the determination had already been made. The petitioners were directed to attend the office of the Assistant Provident Fund Commissioner at 11-00 a.m. but no date of hearing was mentioned. The notices, however, made it clear that it had been clearly endorsed in red ink to the effect "last notice before warrant to arrest is issued". Since the petitioners did not attend any of the hearings, order was issued on 29th November, 2005 mentioning therein that the petitioners were intentionally avoiding appearance before the authority concerned. The auctioneers of the tea

of the petitioners were informed that the amount which was due and payable to the Provident Fund Commissioner from the petitioners was to remain attached till further orders. The petitioners, therefore, filed an application being CAN 15826/05 in connection with W. P. No. 18328 (W) of 2001, inter alia, praying for a direction upon the authorities to allow the petitioners to deposit the amount of Rs. 1,46,527.07 as demanded by letter dated 13th April, 2004 and the order restraining the authorities from taking any step or penal action against the petitioners for the period of 2002-03. During the pendency of the aforesaid CAN application warrants of arrest were issued against the petitioner No. 1. However, by letter dated 12th December, 2005 the Assistant Provident Fund Commissioner had revoked the attachment order and the warrant of arrest. According to the petitioners the Assistant Provident Fund Commissioner concerned had fixed the dates of hearing and issued several notices up to 27th February, 2006 without serving notice additionally upon the learned Advocate-on-Record of the petitioner. However, without hearing the petitioners the Assistant Provident Fund Commissioner had for the first time issued a notice u/s 7A of the Provident Fund Act fixing 4th April, 2006 as the next date of hearing. On 8th March, 2006 a proper notice in compliance with the order of the Hon'ble High Court dated 24th December, 2001 was issued. Ultimately by order dated 27th April, 2006 the Assistant Provident Fund Commissioner determined the dues for the period of August, 2005 to December, 2005 in the sum of Rs. 5,45,123/-. The petitioner-company was directed to pay the same, failing which recovery action and prosecution would have been initiated. This order was objected to by the petitioner on the ground that monthwise statement of dues had not been furnished to the petitioner. Thereafter, the Assistant Provident Fund Commissioner passed another order u/s 7A on 9th May, 2006 for the period May, 2004 to July, 2005 in the sum of Rs. 10,15,273/-. When the petitioners failed to pay, show-cause notice was issued on 8th August, 2006 directing the petitioner to show-cause why they should not be prosecuted under Sections 14 and 14A of the Act of 1952 for non-deposit of the provident fund and the allied dues for a sum of Rs. 2,44,160/- for the period of August, 2005 to December, 2005. Another show-cause notice dated 8th August, 2006 was issued in relation to the period January, 2006 to June, 2006 for non-payment of a sum of Rs. 3,48,484/-. Another notice was also issued on 22nd August, 2006 intimating the petitioners that warrant of arrest would be issued and property of the petitioners would be attached in case the dues were not paid. On 31st August, 2006 after hearing the parties, this Court passed an order in CAN No. 15826 of 2005 setting aside the notice dated 28th October, 2005. The petitioners were, however, directed to deposit a sum of Rs. 1,46,527.07 pursuant to the notice dated 13th April, 2004. It was further directed that if there is any outstanding dues for any year, appropriate action may be taken by the Provident Fund Authorities in accordance with law. Thereafter, the petitioners made an application for recalling the order dated 31st August, 2006 passed by this Court in W.P. 18328 (W) of 2001 including CAN No. 7084 of 2006. The petitioners continued with challenging the notices and orders issued by the competent authority for one reason or the other

till ultimately the present writ petition had been filed challenging the orders dated 11th April, 2007 and 21st May, 2007. Along with the writ petition the petitioners had filed an application for stay of operation of the numerous orders which had been passed in various proceedings, i.e. letter dated 24th January, 2007, letter dated 31st March, 2007, 2nd April, 2007, order dated 11th April, 2007 and 9th May, 2007 and the show-cause notice dated 21st May, 2007.

4. The learned Single Judge has disposed of the application for stay by order dated 18th September, 2007. The learned Single Judge notices the facts as given by the petitioners. It has been noticed that the provident fund authorities have given credit to the petitioners of the payments and adjusted for some of the periods mentioned in the notices. In some cases the final decision has not yet been taken. The learned Single Judge has come to the conclusion after perusing the record that the orders passed by the department suffered from non-application of mind. It is noticed that no particulars of the employees engaged, salaries paid and deductions made have been given. The details had to be given to the petitioners as they were necessary for determination of the dues u/s 7A. Since the details have not been furnished, the decision of the authorities has been vitiated as the decision making process was not in accordance with law. It is held that no appeal u/s 7(1) can be filed from proceedings initiated u/s 8 of the 1952 Act. Therefore, the bar of alternative remedy is not applicable in this case. The learned Single Judge notices the preliminary objections raised by the Provident Fund Department i.e.-

- (a) The writ petitioner had an alternative remedy by way of a statutory appeals;
- (b) The petitioner ought to have invoked Section 7B as the issues raised are mixed questions of law and fact;
- (c) No writ can be filed merely against a show-cause notice.

5. On consideration of the submissions of the parties the learned Single Judge has held that since there is an error in combining the notice period, the notices would be against the provisions of the Act. The judgments of the Supreme Court cited by the Department have been brushed aside by the learned Single Judge without making any effort to distinguish the same. Learned Single Judge has also held that alternative remedy is not an absolute bar in filing of the writ petition. It is only an order u/s 7A of the Act of 1952 which is appealable u/s 7(1) of the Act. Thereafter the learned Single Judge has stayed the operation of the impugned orders during the pendency of the writ petition. Hence the present Letters Patent Appeal.

6. We have heard the learned Counsel for the parties. Mr. Bandyopadhyay has submitted that the learned Single Judge committed an error of jurisdiction in not rejecting the writ petition at the threshold as not being maintainable. This point was specifically argued before the learned Single Judge. It was submitted that remedy of appeal being statutory in nature cannot be brushed aside on the ground that alternative remedy is not an absolute bar. In support of this

submission the learned Counsel has relied on a judgment of the Supreme Court in the case of Sumedico Corporation and Anr. v. Regional Provident Fund Commissioner reported in 1999 (81) FLE 888. The writ petition would also not be maintainable in case it is pleaded by the petitioner that only show-cause had been issued. In support of this submission the learned Counsel had relied on the judgments of the Supreme Court in the cases of The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another, and Union of India v. Kunisetty Satyanarayan reported in AIR 2007 SCW 607.

7. On the other hand, Mr. Mukherjee, learned Senior Advocate has submitted that since the impugned orders suffer from non-application of mind, the writ petition would be maintainable. The fact that the orders suffered from non-application of mind is evident from the fact that the authorities were correcting the mistakes committed in the orders as they were being pointed out during the pendency of the proceedings in this Court. According to the learned Counsel a bare perusal of the impugned notice would show that different periods have been intermingled. Proceedings have been issued even against the periods for which the amounts had already been determined. The learned Single Judge, therefore, did not commit any error in holding that the writ petition is maintainable and granting the interim order.

8. We have considered the submissions made by the learned Counsel for the parties. We are of the considered opinion that remedy of appeal having been provided before the Appellate Tribunal the writ petition would not be maintainable. It is a settled position of law that the High Court ought not to entertain a writ petition under Article 226/227 of the Constitution of India when an adequate alternative remedy of appeal is provided in the statute itself. This may not be an absolute bar but it is not to be lightly ignored or by-passed. Indeed a writ petition may be entertained only to correct an error apparent on the face of the record or grave errors of jurisdiction. Therefore, only in exceptional circumstances can a writ petition be entertained. The law with regard to the principles governing the exercise of jurisdiction by the High Court under Article 226/227, when the remedy of statutory appeal is available have been restated by the Supreme Court in the case of U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another, . Hon"ble Justice Arijit Pasayat, speaking for the Bench, observed:

...16 There are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings themselves are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

17. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute....

20. In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

21. In *U.P. State Bridge Corporation Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh* it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect are the decisions in *Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke Hajaathan SRTC v. Krishna Kant, Chandrakant Tukaram Nikam v. Municipal Corporation of Ahmedabad* and in *Scooters India v. Vijai E.V. Eldred*.

9. The same view is reiterated by the Supreme Court in the case of *Uttaranchal Forest Development Corpn. and Another Vs. Jabar Singh and Others*, . Hon''ble Justice Dr. AR Laxshmanan, speaking for the Bench, observed:

44. In the instant case, the workmen have not made out any exceptional circumstances to knock the door of the High Court straightaway without availing the effective alternative remedy available under the Industrial Disputes Act. But the dispute relates to enforcement of a right or obligation under the statute and a specific remedy is, therefore, provided under the statute. The High Court should not deviate from the general view and interfere under Article 226 of the Constitution except when a very strong case is made out for making a departure. There are several decisions to the same effect. The respondents have not made out any strong case for making a departure. Accordingly, the conclusion is inevitable that the High Court was not justified in entertaining the writ petition.

10. In the present case we have grave doubt as to whether the proceedings can be said to be without jurisdiction. In our opinion, the learned Single Judge has also misconstrued the second objection raised by the appellant to the maintainability of the writ petition on the ground that if the case pleaded by the petitioner is that only show cause notices have been issued u/s 7A, the writ petition would not be maintainable. The objection was not only that the alternative remedy would be available under the provisions of the Provident Fund Act, but also that no legal right of the petitioner had been infringed. The legal

position with regard to this proposition was clearly laid down by the Supreme Court in the case of Mohd. Ghulam Ghouse and Anr. (supra). In this case it has been clearly held as follows:

5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the Court. Further, when the Court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted.

11. This view has been reiterated by the Supreme Court in the case of Kunisetty Satyanarayan (supra) in the following words:

14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or chargesheet is that at that stage the writ petition may be held to be premature. A mere chargesheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well-settled that a writ lies when some right of any party is infringed. A mere show-cause notice or chargesheet does not infringe the right of any one. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or chargesheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a chargesheet or show-cause notice if it is found to be wholly without jurisdiction

or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such matter.

12. In view of the law laid down by the Supreme Court in the aforesaid judgments, it becomes evident that the writ petition was not maintainable on the pleaded case of the petitioners to the effect that the orders issued u/s 7A were in the nature of show-cause notices.

13. There is yet another alternative remedy available to the petitioners u/s 7B of the Act. This would be an additional ground to hold that the writ petition is not maintainable.

14. We are satisfied that the present writ petition is not maintainable and the parties have to be relegated to their normal remedy of appeal before the Appellate Tribunal. The learned Single Judge while granting the interim relief has reached at certain prima facie conclusions. However, in view of the conclusion reached in this order, the observations made by the learned Single Judge made on merits of the case would not survive. The observations of the learned Single Judge, therefore, will not be taken into consideration by the appellate authority in deciding the appeal on merits in case such an appeal is filed by the writ petitioners. This view of ours will find support from the observation of the Supreme Court in the case reported in Sumedico Corporation and Another Vs. Regional Provident Fund Commr., wherein it was held as follows:

5. So far as the judgment and order of the High Court under appeal in C.A. No. 5540 of 1983 are concerned, once we relegate the appellant to the remedy of statutory appeal u/s 7D pursuant to the present order, the observations made by the High Court on the merits of the impugned Section 7A order would not survive any further and will be treated to be of no legal consequence. Meaning thereby, the entire controversy centering round Section 7A order will have to be decided on its own merits by the Tribunal unfettered by any earlier observations made by the High Court in this connection and which observations are treated to be of no consequence by our present order.

10. Now it must be observed that by subsequent amendment to the Act, Section 7D was brought on the statute book by the legislature and a statutory remedy of appeal before the Appellate Tribunal was made available for challenging the order u/s 7A of the Act. Such a Tribunal is also established vide a notification dated 30.6.1997. We have already made necessary observations in this connection in our judgment and order passed today in Civil Appeals Nos. 5540-41 of 1983. Consequently, in the light of our observations in the aforesaid decision, it must be held that the present, appellant also is required to be relegated to the statutory remedy of appeal before the Appellate Tribunal, Delhi functioning u/s 7D of the Act. For that purpose, we grant two months" time to the appellant to file appropriate statutory appeal against the impugned Section 7A. Once this appeal is filed, it will be open to the appellant to put forward all "legally permissible contentions against the Section 7A order including the contention, if

any, pertaining to the jurisdiction of the authority passing such orders. All these contentions will be examined by the Tribunal on their own merits after hearing the parties concerned.

15. In view of the above, the appeal is allowed. The order of the learned Single Judge is set aside. The petitioner is relegated to the remedy of appeal before the Employees' Provident Funds Appellate Tribunal. The appeal shall be decided by the Tribunal in accordance with law without making any reference to the observations made by the learned Single Judge in the order dated 18th September, 2007. The writ petition is dismissed.

16. The petitioner is at liberty to make an application for condonation of delay before the Appellate Tribunal in accordance with law. Urgent Xerox certified copy of this order, if applied for, be given to the learned Counsel for the parties.

Tanen Sen, J.

I agree.