(2014) 03 GUJ CK 0024

In the Gujarat High Court

Case No : Letters Patent Appeal No. 1136 of 2006 in Special Civil Applications No. 22480 of 2005

Banner Computers and Matching Pvt. Ltd. — APPELLANT

Vs

Assistant Provident Fund Commissioner — RESPONDENT

Date of Decision : 25-03-2014

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7A, 7B, 7Q
Penal Code, 1860 (IPC) — Section 193, 196, 228

Citation : (2014) 142 FLR 297

Hon'ble Judges : K.S. Jhaveri, J;Abdullah Gulamahmed Uraizee, J

Bench : Division Bench

Advocate : K.M. Patel and Yogini V. Parikh, Advocate for the Appellant; P.K. Shukla, Advocate for the Respondent

Judgement

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K.S. Jhaveri, J.—Heard Mr. K.M. Patel, learned Senior Counsel appearing with Mrs. Yogini Parikh, learned advocate for the appellant and Mr. P.K. Shukla, learned advocate appearing for respondent. Being aggrieved and dissatisfied with the judgment and order dated 1.8.2006 passed by the learned Single Judge of this Court in Special Civil Application No. 22480 of 2005, the appellant has preferred the present appeal under Clause 15 of the Letters Patent.

The appellant filed writ petition before the learned Single Judge assailing the order dated 25.05.2004 passed under section 7-A of the Employees'' Provident Funds & Misc. Provisions Act, 1952 proceedings, order dated 21.5.2004 passed in review application preferred under section 7-B of the Act and order dated 11.11.2004 passed in Appeal No. 750(5)/2005 whereby the Tribunal had dismissed the appeal preferred by the appellant on the ground that there is a delay of 240 days in preferring the review application and consequently the appeal was also dismissed as time barred. 2. The facts in brief as pleaded before the learned Single Judge and this Court are that the concerned authority had determined a sum of Rs. 11,74,333/-towards provident fund dues under section 7-A of the Employees'' Provident Fund & Misc. Provisions Act, 1952 (hereinafter referred to as ''the Act'') and an amount of Rs. 5,50,932/- towards interest under section 7-Q of the Act. It is the case of the authorities that in spite of affording ample opportunities to the appellant and the inquiry being pending for more than three years, the appellant had failed to produce relevant documents and hence there was no alternative but to determine the dues on the basis of information made available by the representatives of the employees.

Being aggrieved by the same, the appellant preferred review application under section 7-B of the Act and para 79-A of the Scheme raising substantial issues and seeking reconsideration on merits and the review application having been rejected, the appellant preferred appeal which was also rejected on the ground that it was hopelessly time barred, since even counting from the date of the order in review, there was delay of about 240 days in filing the appeal. The appellant assailed the said orders before the learned Single Judge and the learned Single Judge has disposed of the writ petition with certain observations and directions. Being aggrieved by the said order, the present appeal has been filed.

3. Mr. K.M. Patel, learned Senior Counsel appearing with Mrs. Parikh for the appellant contended that the learned Single Judge failed to appreciate the fact that the appellant was not given reasonable opportunity before passing the impugned order by the respondent. He submitted that section 7-A of the Act clearly provides that the employer concerned is required to be given reasonable opportunity of representing his case before passing an order under section 7-A of the Act. He submitted that the respondent had relied upon certain documents while passing the impugned order but the said documents were never supplied to the appellant though time and again vide several communications the appellant had requested the respondent to supply the said documents. He submitted that letter dated 31.3.1997 and section 7-A summons copy dated 1.12.1998 were supplied to the appellant vide a covering letter dated 29.3.2004 which was received by the appellant on 2.4.2004, however, no document worth the name had been supplied with the said summons copy to the appellant. He submitted that therefore it can be said that the appellant was not given a reasonable opportunity of hearing and the same has prejudicially affected his right to defend his case.

Mr. Patel contended that the respondent without holding any inquiry and without deciding, determining and adjudicating the liabilities of the appellant to pay provident fund in respect of employees and the liability to make payment of the contribution of the employees who were never appointed by the appellant imposed liability upon the appellant. He submitted that the Tribunal without taking into consideration the pleadings of the appellant and without considering the case on merits dismissed the application for condonation of delay.

Mr. Patel further submitted that pursuant to the summons under section 7-A of the Act in the year 1998, without supplying the necessary documents to the appellant, the impugned order was passed after a period of five years. He submitted that the delay of five years was on the part of the respondent authorities and that the appellant may not be penalised for the same by directing payment of interest.

Mr. Patel contended that one Mr. Malay Parikh, the sole Proprietor of Pooja Incorporated who was running the business of restaurant was a tenant of the appellant and that the appellant was not receiving any payment of rent from Pooja Incorporated. He submitted that as there was failure of payment of rent on the part of Pooja Incorporated to the appellant, the appellant had preferred a civil suit for possession of the premises and execution proceedings for recovery of the amount. He submitted that a consent decree was passed in the said matter between the appellant and Pooja Incorporated and another which though may not be binding to the respondent but at least the appellant could be given a chance to put such facts before the respondent authorities for which his case is required to be heard on merits. He submitted that criminal proceedings are also pending against the director - Mr. Malay Shah.

Mr. Patel submitted that out of the total principle amount of Rs. 11,74333/-, an amount of Rs. 3,23,051/- towards principle has already been deposited before the authorities. Mr. Patel submitted that out of the amount of Rs. 3,23,051/- deposited, Rs. 1,87,949/- has been deposited by the appellant for the period from February, 1999 to September, 2001, challans of which are produced on record of the writ petition and Rs. 1,35,102/- has been deposited by Pooja Incorporated for the period from 27.8.1998 to 19.1.1999 which information has been received by the appellant under the RTI Act. He submitted that for the remaining amount of Rs. 8,51,282/-, a demand draft has been drawn by the appellant as per the suggestion of this Court, copy of which has been placed on record.

Mr. Patel has submitted that for the alleged recovery of approximately Rs. 17 lakhs, the respondent has attached the appellant''s property worth Rs. 4 crores which is arbitrary. He summed up his submissions to the extent that when the appellant was not supplied with relevant documents which were collected by the respondent to make out a case against the appellant the company would not be in a position to defend its case. He submitted that it is the bounden duty of the respondent to furnish the appellant with the summoning evidence against him. In support of his submission, Mr. Patel has relied upon a decision of the Apex Court in the case of Food Corporation of India Vs. Provident Fund Commissioner and Others, .

4. Mr. Shukla, learned advocate appearing for the respondent supported the impugned orders and submitted that the respondent authority has rightly covered and assessed the dues on the basis of available records. He submitted that the appellant had not produced any records even though reasonable

opportunity was given for the same. He submitted that therefore in absence of cooperation from the appellant the respondent assessed the dues on the basis of complaints and other documents available with the authority.

Mr. Shukla submitted that on receipt of the complaints from the employees, the respondent had initiated inquiry against the establishment - appellant under section 7-A of the Act. He contended that the review application was rejected by way of a speaking and reasoned order on 11.11.2004 and that the appeal which was required to be filed within 60 days from the date of passing of order was hopelessly time barred as it was filed after 240 days of the passing of the order in review application.

Mr. Shukla contended that considering the concurrent findings arrived at by the authorities below and the directions issued by learned Single Judge, this appeal may not be entertained as the orders passed by the authorities below are in accordance with law.

5. At the outset we would like to mention that there are two companies involved in the present matter namely (1) Pooja Incorporated and (2) M/s. Banner Computers & Matching Pvt. Ltd - appellant herein. It is the say of the appellant that the business of the appellant was closed in the year 1993 and that the premises owned by the appellant was rented out to M/s. Pooja Incorporated which is a proprietorship concern of one Mr. Malay Parikh who had started a venture under the name of ''10-The Restaurant'' in the year 1993 in the said premises. There are serious questions involved in this matter which require serious consideration as to whether the appellant was the employer prior to February, 1999 and whether the appellant is the signatory to the documents relied upon by the respondent authorities and whether the documents which were sought for by the appellant were given to the appellant or not.

It is borne out from the records mat the appellant had addressed various communications demanding documents from the respondents which they relied upon but the respondents vide a covering letter dated 29.3.2004 supplied only the Code Draft Letter dated 21.3.1997 and 7-A Summon Copy dated 1.12.1998. We put a specific query to Mr. Shukla, learned advocate for the respondent as to what reply was given to the letter dated 21.9.1999 by the respondent addressed by the appellant to the respondent wherein the appellant had requested for the inspection and Xerox of the records on the basis of which the cover letter was issued and the inquiry had been initiated. No plausible explanation came from Mr. Shukla in this regard. Nothing is pointed out from the materials on record also that the respondent authorities have supplied the relevant documents to the appellant.

In the case of Food Corporation of India (supra) the Apex Court has observed in paras 7 to 9 as under:

"7. The question, in our opinion, is not whether one has failed to produce evidence. The question is whether the Commissioner who is the statutory authority has exercised powers vested in him to collect the relevant evidence before determining the amount payable under the said Act.

8. It is of importance to remember that the Commissioner while conducting an inquiry under section 7-A has the same powers as are vested in a Court under the Code of Civil Procedure for trying a suit. The section reads as follows:

"Section 7-A. Determination of Moneys due from Employer--

(1) The Central Provident Fund Commissioner, any Deputy Provident Commissioner or, any Regional Provident Fund Commissioner may, by order determine the amount due from any employer under any provision of this Act (the scheme or the Family Pension Scheme or the Insurance Scheme as the case may be) and for this 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, 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;

(d) issuing commissions for the 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."

9. It will be seen from the above provisions that the Commissioner is authorised to ''enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person."

6. In our considered opinion, the points raised by the appellant require serious consideration by the authorities inasmuch as the appellant ought to have been given the documents relied upon by the authorities in view of the fact that the appellant''s main defence is that he was not the employer prior to Feb., 1999 and that the actual employer was Pooja Incorporated. This is a matter for adjudication by the concerned competent authority. We do not enter into the

merits of the same, however, we think it fit to direct the respondent authority to reconsider the case of the appellant on merits after providing relevant and requisite documents to the appellant based on which the respondent authority has proceeded with the section 7-A proceedings. In view of the same, in the interest of both the sides, the following order is passed: (i) The order dated 1.8.2006 passed by the learned Single Judge of this Court in Special Civil Application No. 22480 of 2005 as well as order dated 25.5.2004 passed under section 7-A proceedings and order dated 21.5.2004 passed in review application preferred under section 7-B of the Act are hereby quashed and set aside.

(ii) The appellant shall deposit a sum of Rs. 8,51,282/- by way of demand draft in favour of Regional Provident Fund Commissioner, Ahmedabad on or before 4.4.2014 irrespective of its liability being employer or not.

(iii) So far as the liability of the appellant qua interest amount is concerned, the same is a matter for adjudication as the issue whether the appellant would be liable for payment of the amount or Pooja Incorporated is required to be resolved by the competent authority after giving the appellant due opportunity of defending his case and making his submissions. Therefore, we are not expressing any opinion on the same.

(iv) The appellant shall remain present before the Assistant Provident Fund Commissioner on 7.4.2014.

(v) The concerned authority shall supply all the relevant documents sought for by the appellant so as to enable him to make due submissions and defend his case.

(vi) If the said documents are not ready with the concerned authority the same shall be supplied to the appellant within a period of ten (10) days from 7.4.2014.

(vii) The appellant shall, thereafter, file reply on or before 29.4.2014.

(viii) The concerned authority is directed to hear and dispose of the proceedings in accordance with law and on merits on or before 31.7.2014.

(ix) It is clarified that this Court has not entered into the merits of the matter and that this order is passed only in view of the fact that the appellant was not supplied with requisite documents.

(x) It is further clarified that in case the appellant succeeds before the Provident Fund Commissioner he shall not claim the amount from the respondent but it shall be open to the appellant to claim the same from Pooja Incorporated by way of appropriate proceedings. Therefore, the payment of principal amount to the respondent shall stand satisfied with this order.

(xi) In the meantime, the sealed premises on the Ground Floor and Mezzanine Floor of Urja House, Swastik Cross Roads, C.G. Road, Ahmedabad shall be opened pursuant to deposit of Rs. 8,51,282/- before the stipulated time.

(xii) The seal of third floor of the said premises shall not be disturbed till the final adjudication of dispute between the parties even before the appellate authority. With the above observations and directions, appeal is partly allowed.

