(2010) 12 GUJ CK 0065

In the Gujarat High Court

Case No : Special Civil Application No. 8184 of 2010

Empire Hotels and Resorts Limited — APPELLANT

Vs

Regional Provident Fund Commissioner and Another — RESPONDENT

Date of Decision : 24-12-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7(A)
Industrial Disputes Act, 1947 — Section 11(2), 18, 2P, 8A, 8F

Citation : (2010) 12 GUJ CK 0065

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Dipak R. Dave, for the Appellant; Niral R. Mehta, for the Respondent

Judgement

K.A. Puj, J.—Rule. Mr. Niral Mehta, learned advocate appearing for the Respondent waives service of notice of rule.

2. Looking to the facts and circumstances of the case the matter is taken up for final hearing today.

3. The Petitioner has filed this petition under Articles 226 and 227 of the Constitution of India praying for quashing and setting aside the order dated 20.11.2009 passed by the Employees'' Provident Fund Appellate Tribunal at New Delhi in Appeal ATA No. 343(5) of 2003 confirming the order passed by the Assistant Provident Fund Commissioner u/s 7A of the Employees'' Provident Fund and Miscellaneous Provisions Act, 1952 on 9.4.2001.

4. Heard Mr. Dipak R. Dave, learned advocate appearing for the Petitioner and Mr. Niral R. Mehta, learned advocate appearing for the Respondent.

5. It is the case of the Petitioner that the Petitioner Company started a hotel named ''Hotel Shalin'' on 25.12.1991. The hotel was operational upto July, 1998 and is completely closed and not operational with effect from 4.8.1998. The Petitioner Company entered into a settlement with the employees of the

Company u/s 2P read with Section 18 of the Industrial Disputes Act on 4.8.1998. The Respondent No. 1 passed an ex-parte order dated 9.4.2001 u/s 7A of the Employees'' Provident Fund and Miscellaneous Provisions Act, 1952 raising the demand of Rs. 16,78,638/-. On 19.4.2001 the Petitioner wrote letter to the Respondent No. 1 that the hotel was closed with effect from August, 1998 and the entire operational staff was ceased to be in the employment. Despite this fact the Respondent No. 1 issued an order u/s 8A of the Act on 7.5.2001. Despite the efforts made by the Company to persuade about factual position of the staff strength of the Company after 4.8.1998, the Respondent No. 1 passed an order u/s 8F read with Section 11(2) of the Act on 6.12.2001 freezing the bank account of the Petitioner Company. Thereafter, recovery notice was issued on 8.4.2002. The Petitioner again wrote to the Respondent No. 1 on 16.4.2002. Subsequent to this, on 4.7.2002 a show cause notice was issued as to why warrant of arrest should not be issued against the Managing Director of the Company. The Petitioner raised dispute about the calculation of the provident fund determined by the Assistant Provident Fund Commissioner. Several letters were exchanged between the Petitioner and the Respondent No. 1.

6. Since no fruitful result was achieved the Petitioner filed Special Civil Application No. 4960 of 2003 before this Court. However, the said petition was disposed of on the ground that the Petitioner is having alternative remedy of appeal. The Petitioner preferred an appeal before the Employees'' Provident Fund Appellate Tribunal. In the said appeal the Appellate Tribunal passed an order on 29.5.2003 on the waiver application of the Petitioner and directed the Petitioner to deposit 50% of the amount.

7. Being aggrieved and dissatisfied with the order passed by the Appellate Tribunal as well as order of issuance of arrest warrant, the Petitioner filed Special Civil Application No. 4860 of 2004 before this Court and this Court vide its order dated 27.7.2004 granted interim relief on condition that the Petitioner shall deposit an amount of Rs. 1 lac with the Respondent No. 1. The said amount was deposited as directed by this Court. Ultimately the petition was disposed of observing therein that the amount of Rs. 1 lacs deposited by the Petitioner be treated as sufficient compliance of pre-deposit for hearing the appeal on merit. However, the appeal was also ultimately dismissed by the Appellate Tribunal.

8. It is this order of the Appellate Tribunal which is under challenge in the present petition.

9. Mr. Dipak Dave, learned advocate appearing for the Petitioner has submitted that the operational staff of the Company was relieved and, thereafter, no wages were paid to the said employees and hence there is no question of deduction of provident fund. He has further submitted that 2P Agreement was entered into by the Petitioner with its employees and each operational staff employee has signed the said 2P settlement. With effect from 4.8.1998 all the operational staff employees were relieved. He has, therefore, submitted that there was no liability after 4.8.1998 with regard to provident fund contribution. The learned Assistant

Provident Fund Commissioner has not taken into consideration this aspect of the matter. He has, therefore, submitted that when the hotel is closed and there are no employees, there is no question of any payment of provident fund contribution by the Petitioner. He has further submitted that the order u/s 7A was passed by the Assistant Provident Fund Commissioner determining the liability of more than Rs. 16 lacs pertaining the period from July, 1998 to February, 2001. There is no basis for the said determination.

10. Mr. Dave further submitted that the entire property of the Petitioner Company has been sold and approximately an amount of Rs. 15.10 crores has been obtained, which came to be deposited before this Court. The Provident Fund Authority has also lodged its claim which is under consideration before this Court. He has, therefore, submitted that when the properties are already disposed of and amount is lying with this Court, the Respondent No. 1 is required to be directed not to proceed further against the Directors of the Company. He has, therefore, submitted that the impugned orders passed by the Assistant Provident Fund Commissioner as well as Appellate Tribunal are required to be quashed and the matter is required to be remanded back to Assistant Provident Fund Commissioner for determination of the exact amount of provident fund. In any case, it shall not be more than Rs. 1 lac which is already deposited by the Petitioner. He has, therefore, submitted that the petition deserves to be allowed with the aforesaid directions.

11. Mr. Niral Mehta, learned advocate appearing for the Respondent, on the other hand, has submitted that the Petitioner chose not to remain present before the authority and order u/s 7A was passed. The learned Assistant Provident Fund Commissioner has in turn observed in his order that nobody appeared on behalf of the establishment nor any written statement was filed. In absence of any details filed with the Assistant Provident Fund Commissioner, he determined the liability of Rs. 16,84,576/- for the period from July, 1998 to February, 2001. He has further submitted that the Petitioner has itself agreed in several communications that even after relieving of the operational staff, considering the number of the employees retained, the outstanding amount would not be more than 30% of amount as calculated by the Assistant Provident Fund Commissioner. He has further submitted that the Petitioner has admitted specifically in the said communications that certain administrative staff were retained and salary were paid to them. No contribution was deducted. The Petitioner has, therefore, asked for time to make payment. In view of this specific admission the Petitioner is required to make payment atleast to the extent of 30% before the impugned orders are set aside and the matter is remanded back to the Provident Fund Commissioner. He has, therefore, submitted that the Court should not show any indulgence in the order passed by the authorities below unless and until substantial amount is paid by the Petitioner.

12. Having heard the learned Counsels appearing for the parties and having gone through the orders passed by the learned Assistant Provident Fund Commissioner

as well as the Appellate Tribunal and the documents placed on record, the Court is of the view that there is no dispute about the fact that the original order passed u/s 7A of the Provident Fund Act is an exparte order. The demand was raised for the period from July, 1998 to February, 2001. Admittedly 2P settlement was arrived at between the Petitioner and the employees on 4.8.1998. The said settlement is signed by the Manager and the workers. In the said settlement it is clearly stated that they have willingly tendered their resignation and there was no claim left after the settlement. This settlement was not taken into consideration by the Assistant Provident Fund Commissioner. Even if this settlement is not binding on the department, these persons were not there after 4.8.1998 and no salary was paid to them. Hence even if there is any liability to pay contribution, it is in respect of only those persons who were retained by the Petitioner Company after the unit was closed or after the said settlement was arrived at. This exercise was not undertaken by the Assistant Provident Fund Commissioner and hence matter requires reconsideration. The proper course would be to remand the matter back to the Assistant Provident Fund Commissioner with the direction to adjudicate the claim afresh in light of the evidence that may be produced by the Petitioner before the Assistant Provident Fund Commissioner.

13. In the above view of the matter, both the orders challenged in this petition are hereby quashed and set aside and the matter is remanded to the Assistant Provident Fund Commissioner with a direction to adjudicate the claim afresh and pass an appropriate order u/s 7A of the Act, after giving an opportunity of being heard and of leading an evidence in the matter.

14. So far as submission of Mr. Mehta with regard to deposit of 30% amount is concerned, it is necessary to take note of the fact that the Petitioner has already deposited an amount of Rs. 1 lac with the Assistant Provident Fund Commissioner pursuant to the earlier order passed by this Court. It is also on record that on sale of the properties of the company, an amount of Rs. 15 crores is lying with this Court and the Provident Fund Department has already lodged its claim which is under consideration. Even otherwise, majority of the staff has already been relieved and hence liability remains only with regard to persons who have been retained after the unit was closed and settlement was arrived at. In this view of the matter, possibly the amount of Rs. 1 lac or in any case the amount lying with this Court will take care of the liability, if any, that may arise as a result of the fresh order passed by the Assistant Provident Fund Commissioner u/s 7A of the Act. It is presumed for the time being that the said liability will not be discharged from the sources as indicated above, in that case, the Director - Shri Hasmukh C. Shah is directed to file an undertaking before this Court to which Mr. Dave has also agreed that he will undertake to discharge the liability which may not be discharged from the above referred resources.

15. It is made clear that this order is passed by the Court looking to the peculiar facts of the present case and it shall not be treated as a precedent for other

matters. The Petitioner shall cooperate with the Assistant Provident Fund Commissioner in the inquiry that may be undertaken by him while passing the order u/s 7A of the Act and produce all necessary evidence that may be called for.

16. In the above view of the matter and subject to above directions this petition is accordingly disposed of without any order as to costs.

