(1988) 09 GUJ CK 0011

In the Gujarat High Court

Case No : Special Civil Application No. 3254/88

Kirit Kumar Somalal Jani APPELLANT

Vs

Regional Provident Fund Commissioner and Another RESPONDENT

Date of Decision : 19-09-1988

Acts Referred:

Citation : (1989) 1 GLR 233 : (1989) 2 LLJ 236

Hon'ble Judges : S.B. Majmudar, J;I.C. Bhatt, J

Bench : Division Bench

Judgement

Majmudar, J.—The petitioner who wants to purchase a flat has made a grievance regarding the inaction on the part of respondent No. 1 in granting advance to the petitioner from the balance of his Provident Fund Account for the said purpose. Respondent No 2 is the employer under whom the petitioner serves. Respondent No. 1 - Commissioner refused to sanction that withdrawal on 31st May 1988. The reason for refusal is that as per Para 68-B of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952, second advance is not permitted for that purpose.

2. In order to appreciate the grievance of the petitioner, a few relevant introductory facts are required to be noted at the outset. The petitioner is a member of provident fund since 1966. He has completed more than 28 years as member of the said fund while serving in Silver Cotton Mill and since 1974, he is serving under respondent No. 2. The petitioner required Rs. 80,000/- to be withdrawn from his Provident Fund Account as he wanted to purchase a house. According to him, he was actually entitled to withdraw major part of the amount, but he was not sanctioned the same by respondent No. 1 on the ground that he had earlier withdrawn Rs. 5,100/- for repairs of the house in 1977. The petitioner was permitted to withdraw Rs. 5,100/- as above from his Provident Fund Account in October 1977. That was a withdrawal for effecting substantial alterations and modification in his flat. It is his case that the said withdrawal was not by way of advace for purchasing a flat or new house. That it was merely for repairs of the

existing house. But when he decided to purchase a new flat, he applied for advance as per the relevant provisions of the Scheme. The petitioner''s case is that as in the past, he had never taken advance and never asked for withdrawal from his Provident Fund Account, any amount for purchasing new flat or house, and the present demand is for the first time for such purpose and it could not have been rejected by respondent No. 1 on the wrong assumption that it would amount to withdrawal for the second time for the same purpose.

3. In response to the rule issued in the petition respondent No. 1 has filed the affidavit of one Mr. H. R. Shah, Assistant Provident Fund Commissioner. In para 4 of the affidavit, it has been submitted that the petitioner applied for advance under Para 68-B of the Act for addition/substantial alteration or substantial improvement necessary to the dwelling house owned by him on 15th September 1977. That the said application was entertained and he was given an amount of Rs. 5,100/- in November 1977. The petitioner again applied for purchase of flat on 1st April 1985. The said application was rejected on the ground that he had already been granted an advance under Para 68-B of the Scheme. In para 5 of the affidavit, it has been stated that the petitioner applied afresh in February 1988 for an advance under Para 68-B of the said Scheme. While Scrutinising the application, it came to the notice that the petitioner had already taken an advance as stated above. Accordingly, the petitioner''s application was rejected by virtue of the provisions of sub-para (6) of the Scheme.

4. Defence of respondent No. 1, therefore, is that such a request on the part of the petitioner cannot be granted in view of sub-para (8) of Para 68-B of the Scheme. In order to appreciate this stand of respondent No. 1, it is necessary to have a look at Para 68-B of the Scheme. The said provision reads as under :

"68-B. Withdrawal from the fund for the purchase of a dwelling house/flat or for the construction of dwelling house including the acquisition of a suitable site for the purpose. (1) The Commissioner, or where so authorised by the Commissioner, any officer subordinate to him, may on application from a member in such form as may be prescribed and subject to the conditions prescribed in the paragraph, sanction from the amount standing to the credit of the member in the Fund, an advance -

(a) for purchasing a dwelling house/flat including a flat in a building owned jointly with others out-right or on hire-purchase basis, or for constructing a dwelling house including the acquisition of suitable site for the purpose from the Central Government, the State Government, a Co-operative Society, an institution, a trust, a local body or a Housing Finance Corporation (hereinafter referred to as ''the agency/agencies'').

or

(b) for purchasing a dwelling site for the purpose of construction of a dwelling house or a ready built dwelling house/flat from any individual provided the said house/flat to be purchased is new and unlived one.

or

(c) for the construction of dwelling house on a site owned by the member or the spouse of the member or jointly by member and the spouse, or for completing/ continuing the construction of a dweling house already commenced by the member or the spouse, on such site or for purchase of a house/flat in the joint name of the member and the spouse under clause (a) and (b) above.

Explanation :- In this paragraph the expression ''Co-operative Society'' means a Society registered or deemed to be registered under the Co-operative Societies Act, 1912 (2 of 1912) or under any other law for the time being in force in any State relating to Co-operative Societies (Explanation 2 omitted.)

(2) The amount of withdrawal shall not exceed member''s basic wages and dearness allowance for twenty four months or the member''s own share of contributions together with that amount of the employer''s share of contributions admissible under sub-paragraph (2) of Paragraph 68-B had the member been allowed to withdraw his accumulation on the date of authorisation of payments with interest thereon, or together with the cost of construction thereon, the purchase of the dwelling house/flat or the construction of the dwelling house whichever is the least.

Explanation :- The actual cost toward the acquisition of the dwelling site or the purchase of dwelling hose/flat shall include the charges payable towards registration of such site house or flat.

3. (a) No withdrawal under this paragraph shall be granted unless -

(i) the member has completed five years'' membership of of the fund,

(ii) the member''s own share of contributions with interest thereon in the amount standing to his credit in the fund is not less than one thousand rupees.

(iii) the dwelling site or the dwelling house/flat or the house under construction is free from ecumbrance,

Provided that where a dwelling site or a dwelling house/flat is mortgaged to any of the agencies, referred to in clause (a) of sub-paragraph (1), solely for having obtained funds for the purchase of a dwelling house/flat or for the construction of a dwelling house, including the acquisition of a suitable site for the purpose, such a dwelling site or dwelling house/flat, as the case may be, shall not be deemed to be an encumbered property :

Provided further that a land acquired on a perpetual lease or on lease for a period of not less than 30 year for construction of dwelling house/flat, or a house/ flat, built on such leased land, shall also not be deemed to be an encumbered property;

Provided also that where the site of the dwelling house/flat is held in the name of any agency, referred to in cause (a) of sub-paragraph (i) and the allottee is precluded from the transferring, or otherwise disposing of the house/flat, without the prior approval of such agency, the mere fact the allottee does not have absolute right of ownership of the house/flat and the site is held in the name of the agency, shall not be a bar to the giving of a withdrawal under clause (a) of sub-paragraph (i), if the other conditions mentioned in this paragraph are satisfied.

(b) No withdrawal shall be granted for purchasing a share in a joint property or for constructing a house on a site owned jointly, with the spouse.

(4) Subject to the limitation prescribed in sub-paragraph (2).

(a) Where the withdrawal is for the purchase of a dwelling house/flat or a dwelling site from an agency, referred to in clause (a) of sub-paragraph (1), the payment of withdrawal shall not be made to the member but shall be made direct to the agency, in one or more instalments, as may be authorised by the member.

(b) Where the withdrawal is for the construction of dwelling house it may be sanctioned in such number of instalments as the Commissioner, or where so authorised by the Commissioner, any officer subordinate to him, thinks fit.

(c) Where the withdrawal is for the acquisition of dwelling site for the purpose of construction of a dwelling house thereon from any individual or any agency, the amount shall be paid in not less than two equal instalments, the first instalment at the time of the acquisition of the dwelling site and the remaining at his request at the time of construction of a dwelling house on such dwelling site.

(5) Where withdrawal is sanctioned for the construction of a dwelling house, the construction shall commence within six months of the withdrawal of the first instalment. Where the withdrawal is sanctioned for the purchase of a dwelling house/flat or for the acquisition of a dwelling site, the purchase or acquisition, as the case may be, shall be completed within six months of the withdrawal of the amount;

Provided that this provision shall not be applicable in case where a dwelling site is to be acquired or houses are to be constructed by a Co-operative Society on behalf of its members with a view to their allotment to the members.

(6) Except in the cases specified in sub-paragraphs (7) and (7A) no further withdrawal shall be admissible to a member under this paragraph.

(7) An additional withdrawal upto twelve months'' basic wages and dearness allowance or the member''s own share of contributions with interest thereon, in the amount standing to his credit in the fund, whichever is less, may be granted once and in one instalment only, for additions, substantial alterations or improvements necessary to the dwelling house owned by the member or by the spouse or jointly by the member and the spouse;

Provided that the withdrawal shall be admissible only after a period of five years from the date of completion of the dwelling house.

(7A) A further advance equivalent to the amount of difference between the amount of advance admissible to a member under sub-paragraph (2) above as on the date of fresh application and the amount of advance that was drawn by a member under this paragraph any time during 6 years preceding 3rd October 1981 may be granted to such a member (i) who had availed the earlier advance for purchase of a dwelling site and has now proposed to construct a dwelling house on the land so purchased or (ii) who had availed the earlier advance for making initial payment towards the allotment/purchase of a house/flat from any agency as referred to in clause (a) of sub-paragraph (1) above and his now proposed to avail an advance for completing the transaction to get the sole ownership of the house/flat so purchased or (iii) who had availed the earlier advance for construction of a house but could not complete the construction in time due to lack of funds"

5. A mere look at the aforesaid provisions of Para 68-B shows that the concerned subscriber is entitled to have one withdrawal from the fund for purchase of a dwelling house or flat or for construction of a dwelling house including the acquisition of suitable site for the purpose. That right of his is indicated in sub-paras (1) to (5) of Para 68-B. Then comes sub-para (6) which reads "except in the cases of specified in sub-paragraphs (7) and (7A) no further withdrawal shall be admissible to a member under this paragraph". Consequently, sub-paras (7) and (7A) deal with further withdrawals from the fund in the contingencies contemplated to those sub-paras. When we turn to sub-paras (7) and (7A), we find that additional withdrawals can be permitted to a member who has already withdrawn once for the purpose of acquisition of new house or for its construction or for acquisition of suitable site for that purpose under limited circumstances contemplated by para (7) and they refer to the additions, substantial alterations or improvement necessary to the dwelling house owned by the member or by the spouse or jointly by the member and the spouse. It, therefore follows that additional withdrawals as contemplated by sub-para (7) of Para 68-B has to be in connection with dwelling house for which first advance was taken under sub-paras (1) to (4) of Para 68-B and such dwelling house, if further expenses are to be incurred for effecting substantial alterations or improvement therein, additional withdrawals as contemplated by sub-para (7) can be granted. Sub-para (7A) similarly contemplates additional advance in connection with dwelling house for which first advance was granted under sub-paras (1) to (4) of Para 68-B. It has, therefore, to be noted that under the Scheme of Para 68-B, two types of advance are contemplated : (i) initial advance for acquisition or construction of a new house or for acquisition of a dwelling site, (ii) additional advance in connection with such dwelling house for which initial advance was granted, under the circumstances contemplated by sub-para (7) of Para 68-B. All that was granted to him in 1977 was an advance for the purpose of effecting repairs to his existing dwelling house. It appears that such type of advance was granted under sub-para (7) of Para 68-B. We are not concerned

with the legality and propriety of grant of such advance. However, the fact remains that for construction of a new house or for purchase of a new flat, or a dwelling site, the petitioner was never granted any advance under sub-paras (1) to (4) of 68-B uptil now. Consequently, there was no occasion for respondent No. 1 to grant any additional advance as per sub-para (7) of 68-B so far as such new dwelling house was concerned. Mr. Ajmera for the respondents could not persuade us to take the view that advance asked for by the petitioner was second advance for the same purpose. It was, therefore, to be held that it has been wrongly assumed by respondent No. 1 that the present request of the petitioner for being granted advance for the purchasing a flat, amounts to second advance of its kind. In fact, it would be only the first advance of its kind for that purpose. Earlier advance of 1977, by no stretch of imagination, can be considered or construed as the advance for the purpose of purchasing or constructing a new house or flat. If that advance was for that purpose, then obviously, for that very purpose, the petitioner could not have been given any additional advance save and except as per provisions of sub-para (7). But such an eventuality has never happened on the facts of the present case. Consequently, the assumption on the part of the first respondent that the present request would amount to second withdrawal for the purpose of construction of new house in factually incorrect. Consequently, there is no question of applicability of sub-para (6) of para 68-B by treating this to be further withdrawal for that purpose. In that view of the matter, the first respondent had patently erred in law and failed to exercise his jurisdiction in not granting the request of the petitioner for being given first advance from his Provident Fund Account for the purpose of purchasing a new flat and, therefore, his decision at annexure ''A'' has to be quashed and set aside. Respondent No. 1 is directed to release suitable amount in accordance with law and rules and regulation, to the petitioner from his Provident Fund Account for the purpose of enabling him to buy a dwelling house or a flat as per his resubmitted application dated 24th February 1988. Respondent No. 1 is directed to release necessary amount pursuant to this order within four weeks of the receipt of writ of this order at his end. Rule is made absolute accordingly with no order as to costs.

