

(2010) 10 MAD CK 0374

In the Madras High Court

Case No : Writ Petition (MD) No. 1880 of 2009 and M.P. (MD) No's. 1 and 2 of 2009

Lakshmi Metal Industries

APPELLANT

Vs

The Assistant Provident Fund Commissioner, Employees'
Provident Fund Organization, Recovery Officer, Employees'
Provident Fund Organization and Biju Thomas, Assistant
Provident Fund Commissioner, EPF Organisation

RESPONDENT

Date of Decision : 06-10-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7A,
7A(1), 7B, 7I
Foreign Exchange Management Act, 1999 — Section 35

Citation : (2011) 128 FLR 432 : (2011) 2 LLJ 36

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : P. Chandra Bose, for the Appellant; G.R. Swaminathan, for R1 and R2, for the Respondent

Judgement

K. Chandru, J.—The Petitioner is the management and they have come forward to challenge the order passed by the Respondent dated 20.01.2009 by exercising the power u/s 7(A)(1)(b) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952.

2. Notice of motion was ordered on 20.03.2009 and this Court granted interim stay of warrant of arrest. On notice from this Court, the Respondent have filed counter affidavit dated 03.06.2010.

3. The contention of the Petitioner was that they have been regularly paying subscription for the covered employees and therefore the power u/s 7A has not been properly exercised by the Respondent.

4. In the affidavit filed in support of the writ petition, the Petitioner contended

that he had appeared for all hearing and there is full cooperation. Even though it was claimed that their trade union of workers in the company had made a complaint, the Petitioner was not given a copy of the complaint and hence opportunities were denied.

5. The learned Counsel for the Petitioner placed reliance on the judgment of this Court in M.W.C. Production and Sales Society Lilimited v. R.P.F, Commissioner and Ors. reported in 2003 (3) LLN 674 to contend unless the pre conditions for exercising the power u/s 7A was made, it cannot be said to be a legal order and further challenge is available.

6. In the counter affidavit filed by the Respondent dated 03.06.2010 it was stated that hearings were held as many as on 9 occasions during the period of seven months and there was no effective cooperation on the side of the employer. The Petitioner had attempted to project even the regular workers as trainees which were not believed by the Respondents. There was no request made by the Petitioner to cross examine the squad members and though a complaint was received from the trade union, the basis of the present action was only on the basis of the report from the squad. Though the due payable by the Petitioner is to the tune of Rs. 43,49,817/-, so far the department has collected only Rs. 1,14,000/-.

7. Mr. G.R.Swaminathan, learned Counsel appearing for the department contended that so long as the order u/s 7A is not challenged in the manner known to law, this Court cannot embark upon despatch section of identification, fix the number of employees and the period of subscription.

8. The Petitioner contended that for filing an appeal there must an effective order. In the present case, they Respondent have denied reasonable opportunity.

9. It is not as if the Petitioner has no other option left open. If a proper procedure is not followed, Section 7B provides for revision before the same authority. Thereafter, the Act provides for regular appeal u/s 7I before the Appellate Tribunal. Therefore, the Petitioner ought to have file necessary appeal.

10. The contention raised by the Respondent is well founded. The Honourable Supreme Court vide judgment in A.P. Foods Vs. S. Samuel and Others, has held that if an act provides for a such remedy the aggrieved party has to exercise the power under the Act and the writ jurisdiction cannot be used to forestall the appeal remedy provided under the Act.

11. In the recent supreme Court in Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, it was held that even though the appellate remedy provides for a conditional pre deposit that by itself cannot be a ground to reject that forum and one can move the high Court under Article 226 of the Constitution of India. In paragraphs 30 to 32 of the said judgment it has been held as follows;

30. The argument that writ jurisdiction of the High Court under Article 226 of the

Constitution is a basic feature of the Constitution and cannot be ousted by parliamentary legislation is far too fundamental to be questioned especially after the judgment of the Constitution Bench of this Court in *L. Chandra Kumar v. Union of India*. However, that does not answer the question of maintainability of a writ petition which seeks to impugn an order declining dispensation of pre-deposit of penalty by the Appellate Tribunal.

31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the Appellant's counsel to demonstrate why the appellate jurisdiction of the High Court u/s 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

12. In the light of the binding precedent and there being an effective forum being available to the writ Petitioner under Sections 7B or 7I of the Act, the writ petition stands dismissed. Consequently, connected miscellaneous petitions are closed. No costs.