

(2019) 09 BOM CK 0072
In the Bombay High Court
Case No : Writ Petition No. 2190 Of 2016

M/s Balaji Ginning Factory	Vs	APPELLANT
Assistant Provident Fund Commissioner		RESPONDENT

Date of Decision : 03-09-2019

Acts Referred:

Employees' Provident Funds And Miscellaneous Provisions Act, 1952 — Section 7A, 7I, 7A(4), 14B
Employees' Provident Fund Appellate Tribunal (Procedure) Rules, 1997 — Rule 7, 7(2), 21
Constitution Of India, 1950 — Article 226, 227

Citation : (2019) 09 BOM CK 0072

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : A.R. Deshpande, H.N. Verma

Final Decision : Dismissed

Judgement

1. RULE. Heard finally with consent of counsel for the parties.
2. The challenge raised in the present writ petition is to the order dated 25.09.2014 passed under Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short, the said Act). According to the petitioner it had initially filed an application under Section 7-A(4) of the said Act on the ground that the order dated 25.09.2014 was an ex-parte order. That application was rejected on 18.11.2014. The petitioner could not file an appeal under Section 7-I of the said Act within the stipulated period. It therefore has filed the present writ petition on 16.03.2016.
3. Shri A. R. Deshpande learned counsel for the petitioner submitted that though the petitioner has not availed the statutory remedy as prescribed under Section 7-I of the said Act, the facts of the present case are such that the writ petition deserves to be entertained. According to him after the order dated 18.11.2014 was passed under Section 7-A(4) of the said Act, the petitioner's parents were ill

and hence the appeal under Section 7-I of the said Act could not be filed within the prescribed period. Thereafter his son was required to undergo medical treatment which consumed considerable time. In that view of the matter the petitioner could not avail the statutory remedy under Section 7-I of the said Act and hence the order dated 25.09.2014 was being challenged in the present writ petition. It was submitted that in the impugned order the beneficiary employees had not been identified which aspect vitiates the impugned order. Placing reliance on the order passed in Public Interest Litigation No.1/2019 it was submitted that since there is no identification of the beneficiaries in the impugned order, the same is a good ground to entertain the writ petition. The learned counsel further placed reliance on the judgment of the Calcutta High Court in *C.D. Steel Pvt. Ltd. Vs. Assistant Provident Fund Commissioner and Ors.*, W.P.9729(W) of 2019 decided on 08.07.2019 and by referring to the provisions of Rule 21 of the Employees' Provident Fund Appellate Tribunal (Procedure) Rules, 1997 urged that proceedings filed beyond the period of limitation could be entertained on merits. He then referred to the decision in *Shirpur Shetkari Sahakari Sakhar Karkhana Ltd. Vs. The Regional Provident Fund Commissioner II, Nasik & Anr*, 2017(3) ALL MR 537 and submitted that the petitioner could be directed to deposit part of the amount adjudicated to test the bonafides of the petitioner. Appropriate conditions could be imposed for entertaining the writ petition. In that regard he also placed reliance on the decision in *Shri Gurudeo Ayurved Mahavidyalaya through its Principal & another Vs. Madhav s/o Narayan Mahakode & others*, 1995(2) Mh. LJ 50 and the judgment of the Delhi High Court in *Good Wrench Services Vs. Assistant Provident Fund Commissioner E P F Organization*, 2014 Law Suit (Del) 840. It was thus submitted that the challenges as raised should either be considered by this Court or the petitioner could be permitted to avail the remedy of file any appeal under Section 7-I of the said Act.

4. On the other hand Shri H. N. Verma learned counsel for the respondent opposed the aforesaid submissions and submitted that the grounds urged on behalf of the petitioner in requesting this Court to entertain the writ petition were insufficient. The averments made in paragraph 10 of the writ petition were vague and no details were given. The writ petition in question had been filed after more than fifteen months of the order passed under Section 7-A(4) of the said Act. Referring to the decision in *Commissioner of Income Tax and Others Vs. Chhabil Dass Agarwal*, (2014) 1 SCC 603, it was submitted that as a statutory remedy was available to the petitioner and the same was not availed within the prescribed period, the writ petition did not deserve to be entertained. No extraordinary circumstances had been pointed out by the petitioner on the basis of which the writ petition could be entertained. Due opportunity was given to the petitioner before the order under section 7-A of the said Act was passed. He then submitted that if the establishment did not produce all relevant records despite grant of opportunity it could not be said that the impugned order was liable to be set aside on the ground that the beneficiaries had not been identified. In that regard the place reliance on the decisions in *Employees' State Insurance*

Corporation Vs. M/s Harrison Malayalam Pvt. Ltd., AIR 1993 Supreme Court 2655 and Regional Director, E.S.I., Corporation Vs. Kerala State Drugs & Pharmaceuticals Ltd. and others, 1995 Supp (3) SCC 148. He therefore submitted that the writ petition was not liable to be entertained.

5. I have heard the learned counsel for the parties at length and I have given due consideration to their respective submissions. It is not in dispute that after giving the due opportunity to the petitioner an order under Section 7-A of the said Act was passed on 25.09.2014. That order indicates that the initially summons had been issued to the petitioner on 02.11.2010 and the final order was passed after almost three years during which period sufficient opportunity was given to the petitioner. The report of the Enforcement Officer dated 25.06.2014 was supplied to the petitioner but despite granting three chances there was no affidavit filed to counter that report. It is thereafter that the order under Section 7-A of the said Act came to be passed. The application filed under Section 7-A(4) of the said Act was dismissed on the ground that the order dated 26.09.2014 was not an ex-parte order. That order dated 18.11.2014 after which the present writ petition has been filed on 16.03.2016.

6. An appeal for challenging the order passed under Section 7-A is required to be filed within a period of sixty days from the issuance of such order. An appeal filed after said period of sixty days but within further period of sixty days therefrom can be entertained subject to sufficient cause being shown. In other words, after the period of 120 days which includes the extended period of sixty days that can be condoned, no appeal can be entertained by the Appellate Tribunal.

The learned counsel for the petitioner by relying upon the decision in C.D. Steel Pvt. Ltd. (supra) submits that period of delay beyond 120 days can be condoned by the Tribunal in view of the provisions of Rule 21 of the Tribunal (Procedure) Rules, 1997. The facts of the case in C.D. Steel Pvt. Ltd. (supra) indicate that an order passed under Section 14B of the said Act was sought to be challenged beyond the period of 120 days by filing an application under Article 226 of the Constitution of India. It was held by learned Single Judge of the Calcutta High Court that under Rule 21 of the said Rules the Tribunal was empowered to make such orders or give such directions which would include extending the period of limitation. On that premise the petitioner therein was permitted to file an appeal and the Tribunal was directed to consider the application for condonation of delay in a liberal manner in the light of the principles of Rule 21 of the said Rules.

Rule 21 of the said Rules reads as under:

"21. Orders and directions in certain cases. - The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice."

The provisions of Rule 21 indicate that the Tribunal may make such orders or give such directions as are necessary to give effect to its orders or to prevent the abuse of its process or to secure the ends of justice. The scope of Rule 21 in my

view would not include the power to condone delay beyond the further period of 60 days as permitted by Rule 7(2) of the said Rules. Under Rule 7(2) the power to condone delay beyond the initial period of 60 days from the date of issuance of the notification or order is further extended by period of 60 days in view of the proviso to Rule 7(2). In view of the specific limitation of 60 days till which time the period for preferring an appeal can be extended, the provisions of Rule 21 of the said Rules cannot be read in such a manner empowering the Tribunal from further extending that period. The limitation for preferring an appeal and the period up to which the delay can be condoned having been specifically provided by Rule 7 of the said Rules, it is not permissible to construe Rule 21 as giving further powers to extend that period of limitation. Such interpretation would result in permitting an appeal to be filed even beyond 120 days which is not contemplated by Rule 7(2) of the said Rules. Hence, with respect it is not possible to agree with the view taken in the decision in *C.D. Steel Pvt. Ltd.* (supra).

7. The statutory remedy to challenge an order passed under Section 7-A of the said Act after expiry of 120 days is lost by the aggrieved party. As per provisions of the said Act after the period of 120 days, no remedy under the said Act is available to the aggrieved party. The question of entertaining a challenge to an order passed under Section 7-A of the said Act after a period of 120 days which challenge cannot be raised under the provisions of the said Act is thus sought to be raised under Article 227 of the Constitution of India. The challenge as sought to be raised will have to be examined in the aforesaid backdrop.

8. While it is well settled that there are exceptions to the rule of availability of alternate remedy, the situation that requires consideration in the present proceedings is in the context of such alternate remedy though available for a period of 120 days from the passing of the order under Section 7-A of the said Act not being availed of. In *Chhabil Dass Agarwal* (supra) it has been held by the Hon'ble Supreme Court that some of the exceptions to the rule of alternate remedy are where the statutory Authority has not acted in accordance with the provisions of the enactment in question or in defiance of the fundamental principles of judicial procedure or when an order is passed in violation of the principles of natural justice or when the Authority has resorted to invoke the provisions of the statute that have been repealed. It is in these exceptions that the rule of alternate remedy is not insisted upon.

9. In the present case the principal grievance sought to be raised on behalf of the petitioners is the absence of identification of beneficiaries in the impugned order. It is seen that this aspect would at the highest render the impugned order to be erroneous. Such order could be termed as being bad in law but it would be difficult to hold such order to be one passed in excess of jurisdiction of the said Authority. There is a distinction between an erroneous order passed in exercise of jurisdiction vested and an order which is passed exceeding the jurisdiction conferred on a Authority. In this regard reference can be made to the decision in

Smt. Ujjam Bai vs. State of Uttar Pradesh and anr. AIR 1962 SC 1621 wherein S. K. Das J. observed in paragraph 15 as under :

15. ... Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact. The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable "at the commencement, not at the conclusion, of the inquiry. A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e. has jurisdiction) to determine."

Similarly in Budhia Swain and ors. vs. Gopinath Deb and ors. AIR 1999 SC 2089, it has been observed in paragraph 9 as under :

"9. A distinction has to be drawn between lack of jurisdiction. The former strikes at every root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge subject to the law of limitation."

10. The scope for challenging an erroneous order passed within jurisdiction by the concerned Authority would therefore stand on a different footing and the considerations for entertaining challenge to an erroneous order passed within jurisdiction after expiry of the statutory period of limitation would have to be viewed from that aspect. Entertaining a challenge to an erroneous order passed within jurisdiction after the prescribed statutory period of limitation by entertaining the writ petition cannot be by way of a substitute for the statutory remedy that has been lost by a party. On the other hand if a case is made out for exercise of jurisdiction on grounds analogous to the exceptions as carved out in the decision in Chhabil Dass Agarwal (supra), such challenge would stand on a different footing. The present case therefore which raises a grievance of absence of identification of beneficiaries can be termed as a challenge to an erroneous order passed in exercise of jurisdiction vested. In Kerala State Drugs & Pharmaceuticals Ltd. and others (supra), which decision arose out of adjudication of demand for contribution made under the provisions of the Employees State Insurance Act, 1948, the observations made therein are relevant. It has been held that when contribution becomes due and payable, it is liable to be paid even if the employees concerned are no longer in employment. Whether the employees were identifiable as on date was irrelevant so long as contribution was liable to be paid on their behalf. Similar observations can also be found in M/s Harrison Malayalam Pvt. Ltd. (Supra).

11. In so far as the decision in Shri Gurudeo Ayurved Mahavidyalaya (supra) is

concerned, the observations made in paragraph 17 in fact run counter to the submission made on behalf of the petitioner. The order of the controlling Authority under the Payment of Gratuity Act, 1972 was challenged by filing an appeal after the period of 120 days. After that appeal was dismissed as being barred by limitation, the Establishment challenged the order of the Controlling Authority in a writ petition. It was urged that as the employee therein was drawing salary exceeding Rs.1000/- between 1981 and 1994, he was not entitled for gratuity for that period. It was observed in paragraph 17 as under:

"17. Shri Chandurkar, learned Counsel for the petitioners, also pointed out that the controlling authority had not properly calculated the amount of gratuity. According to him, the employee was drawing more than Rs.1000/- between 1981 and 1984 and, therefore, at least for that period, when his salary was above Rs.1000/-, the employee could not be said to be entitled to payment of gratuity. Shri Chandurkar, therefore, contended that for that period employee was not entitled to the payment of gratuity. He, therefore, contended that those years should have been excluded for the calculation of payment of gratuity. Firstly, such argument cannot be allowed to be raised on merits for the simple reason that the appeal has been dismissed and the controlling authority's order has been finalised. Even if there was any mistake in the calculation, such mistake could not have been corrected, unless it was a jurisdictional error by the controlling authority. This is not a jurisdictional error. Even if the contention were to be accepted, it would, at the most, amount to an error in calculation of the payment of gratuity."

However, the order of the Controlling Authority to the extent it awarded compound interest at 9 % per annum was set aside holding such direction to be beyond its jurisdiction.

12. In the case in hand, the order passed under Section 7-A of the said Act indicates grant of sufficient opportunity to the Establishment on about forty occasions to produce the relevant records but the same were not produced. In these facts therefore it would not lie in the mouth of the Establishment that in absence of identification of employees, the determination of contribution was an exercise in excess of jurisdiction. The reliance sought to be placed on the orders passed in Writ Petition No.1674 of 2016 (Kaushik K. Chatterjee Engineers and Contractors vs. Assistant Provident Fund Commissioner) in the light of the facts of the present case is misplaced. The report of the Enforcement Officer was prepared after verifying the records of the Establishment. Its copy was served on the proprietor of the Establishment. Despite grant of three opportunities to the Establishment, no objection was raised to counter that report. On these facts therefore the grievance as raised by the petitioner as regards absence of identification of workers does not hold good.

13. The reasons stated in paragraph 10 of the writ petition for not availing the statutory remedy hardly offer any justification or explanation in that regard. Bare statements as regards illness of the petitioner's parents and thereafter his son

without specific details are found to be insufficient in the facts of the present case to warrant entertaining the challenge raised in the present writ petition. A period of more than fifteen months had elapsed after the application under Section 7-A(4) of the said Act was rejected.

14. In that view of the matter it is found that there is no exceptional case made out by the petitioner to enable the Court to entertain the challenges as raised. The statutory remedy as provided has not been availed within the prescribed period. In absence of any such exceptional ground being made out, I am not inclined to entertain the writ petition. The same is accordingly dismissed. Rule stands discharged. No order as to costs.