
(2010) 03 BOM CK 0131
In the Bombay High Court
Case No : L.P.A. No. 134 of 2010

O.G. Bajaj Construction

APPELLANT

Vs

Assistant Provident Fund Commissioner

RESPONDENT

Date of Decision : 08-03-2010

Acts Referred:

Citation : (2010) 126 FLR 129 : (2010) 4 LLJ 749

Hon'ble Judges : Prasanna B. Varle, J; A.H. Joshi, J

Bench : Division Bench

Advocate : A.P. Wachasunder, for the Appellant;

Final Decision : Dismissed

Judgement

1. Heard learned advocate Shri Wachasunder at length. Perused the record annexed to appeal and on the record of writ petition.
2. The Respondent had done the assessment of amount of contribution dues recoverable from the employer by order dated October 23, 2008. An amount of Rs. 8,43,023/- was found due for a period October 2004 to March 2007.
3. The Appellant challenged the order of Assessment passed by the Respondent No. 1 before Employees Provident Fund Appellate Tribunal. In that appeal, the Appellant filed the application for waiver of deposit. The application for waiver was allowed by the authority by order dated November 17, 2008.
4. The order of grant of waiver of deposit was challenged by the Respondent before the single Judge of this Court.
5. It is seen that the Appellant had appeared in the writ petition and filed affidavit-in-reply/submission and participated in the hearing through advocate. The single Judge of this Court had thus heard the writ petition.
6. The learned single Judge accepted the contention of the writ Petitioner that though name of Shri R.R. Rajesh advocate has been mentioned as an advocate

appearing for the Respondent, and the application was allowed on February 25, 2009, when the said learned Standing counsel had not yet received the instructions. Learned single Judge, therefore, allowed the writ petition directing deposit of 75% of the amount.

7. The order impugned does not disclose, but it seems that learned single Judge found a just solution instead of delaying the proceedings further by remand etc., and hence directed prior deposit to the tune of 75% of the amount of dues which were demanded.

8. It appears that present Appellant felt dissatisfied by the order passed by learned single Judge and therefore filed a review application before learned single Judge. The review application has been dismissed by learned single Judge after hearing.

9. In this Letters Patent Appeal, orders passed by the learned single Judge in review as well as in writ petition are challenged.

10. The points which are pressed in service in this appeal are summarized as below:

(a) Learned single Judge ought to have issued Rule and thereafter only could have allowed the writ petition. Failure to hear and dispose of the writ petition without formally issuing Rule, gravely offends the process of justice being violative of Bombay High Court Appellate Side Rules.

(b) The assessment of demand is done by the Respondent without identification of the workers, and therefore, the assessment was not justified, and hence grant of prayer for waiver of deposit was just and reasonable and does not warrant any inference.

Reasons and Conclusions.

(a) As to need to issue Rule before final disposal of writ petition.

11. Appellant does not dispute that the Appellant firm was present before learned single Judge, represented through advocate. Appellant admits that it had participated in the hearing. A grievance is not made that fair and reasonable opportunity of hearing was refused. Record shows that this Court had issued notice before admission on September 17, 2009. The present Appellant had filed written submission/affidavit in reply which is on record at page 58 onwards, and thereby the writ petition was opposed.

12. Appellant's thrust and emphasis is upon the failure of learned single Judge to issue "Rule". This Court cannot connive at the principle under issue of Rule. Issue of Rule means notice. The Appellant had due and sufficient notice of writ petition. The hyper technical submission that "Rule" was not issued has no merit and it does not deserve any cognizance. Effort of Appellant is to adhere to and fall back on letter of law and not the spirit and principle underlying it.

(b) As to Merits of assessment and Justiciability of order for waiver of prior deposit.

13. On the request of the learned advocate for the Appellant, this Court has carefully perused the order of the Assessing Officer, and also of learned single Judge.

14. The labour component (total wage bill) towards period under assessment was disclosed from record, and was noted by the Assessing Officer. This amount is Rs. 33,92,828/-, correctness of this figure is not disputed by Appellant.

The dispute which is raised by Appellant is that each worker who was to be the beneficiary of the Provident Scheme should have been identified before assessment of amount of contribution due. It is not argued that the foundation of this submission in any rule or Law or precedent, nor it is shown or cited.

15. In para 12 of impugned order of assessing officer, he has observed as follows:

"72.... The establishment has furnished the list of 39 identified workers working since September 09, 2005 and onwards. It is certified by the Chartered Accountant in his certificate that Labour Payment, Site Expenses and Payment to sub contractors includes various payment viz. Material, transportation provided to the Labours, utensils and food grains etc. Hence, the Chartered Accountant has certified the Labour Component paid to the casual/Site workers. The squad have calculated the dues keeping in view the direction of the High Court. Relying upon the E.O's report and the documents produced by the establishment during enquiry, I determine a sum of Rs. 8,43,023/-as dues from the establishment for the period September 9, 2005 to March 31, 2008 in-respect of Regular staff and identified workers (39)...."

(Quoted from page 49-50 of appeal paper book)

These findings by assessing officer too are not disputed on the ground of being factually erroneous.

16. On the ground of above referred factual aspect which is not challenged by the Appellant, the contention that unless the workers are identified, no demands can be raised is a submission which is seen to be totally untenable, atleast as a ground for waiver of deposit.

17. Any party claiming waiver of prior deposit has to show:

(1) That the order under appeal is patently illegal or without jurisdiction.

(2) No liability whatsoever is attracted.

(3) Even if liability is attracted, on facts, the Appellant has no capacity or resource and liquidity of paying the dues so claimed.

18. On the last date of hearing, the learned advocate for the Appellant had agreed to place on record some evidence from which he would demonstrate

incapacity of the Appellant to make prior deposit, and shall urge for waiver based on such material. The learned advocate for the Appellant has today tendered an affidavit, which we have perused.

19. The affidavit tendered today does not disclose an iota of statement or evidence in support to demonstrate financial capacity of the Appellant and incapacity if it be so.

20. The effort of the Appellant is not to be candid and honest before the Court and to bring on record correct facts, but to bring "some vague assertions" which are in no way relevant for seeking an order of waiver of prior deposit. The effort of the Appellant of giving irrelevant and vague information is not fair. The Appellant is gaming "hide and seek" before the writ Court and before this Court hearing appeal against an order passed in a writ petition. The Appellant is forgetting a Petitioner's commitment to Court of being utmost truthful and fair before the Court.

21. The Appellant has thus utterly failed to show merit in challenge and grounds for waiver or his incapacity to make prior deposit.

22. The Appellant has failed to show either of the the essential ingredients indicated in paragraph No. 17 supra initially in the writ petition, then in the appeal and lastly in the affidavit filed today.

23. In these premises, the appeal has no merit and is dismissed with costs.