(2010) 02 DEL CK 0051

In the Delhi High Court

Case No : Writ Petition (C) No. 930 of 1999

Promod Nath APPELLANT

Vs

The Regional Provident Fund Commissioner RESPONDENT

Date of Decision : 15-02-2010

Acts Referred:

Citation : (2010) 02 DEL CK 0051

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Kailash Vasdev, Sanjay K. Shandilya and Ekta Mehta, for the Appellant; R.C. Chawla, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—This writ petition seeks quashing of the order dated 6th November, 1998 of the respondent/Regional Provident Fund Commissioner (RPFC) dismissing the application dated 22nd August, 1998 of the petitioner for setting aside the ex parte order dated 20th February, 1998 u/s 7A of the Employees'' Provident Funds & Miscellaneous Provisions Act, 1952. The petitioner further seeks the relief of allowing the application of the petitioner for setting aside of the ex parte order dated 20th February, 1998 and direction to the respondent to hear the petitioner and thereafter pass a fresh order u/s 7A of the Act. This Court vide ex parte order dated 4th June, 1999 while issuing notice of the petition to the respondent stayed the operation of the recovery certificates issued by the respondent pursuant to the ex parte order u/s 7A of the Act. The writ petition was disposed of vide order dated 21st January, 2000 on the premise that the order u/s 7A of the Act is appealable u/s 7-I of the Act and giving liberty to the petitioner to approach the Appellate Authority. However, the said order so disposing of the writ petition was recalled on 26th May, 2000 finding that the order impugned in this petition i.e. of dismissal of the application for setting aside of the ex parte is not appealable. Subsequently on 6th September, 2000, the ex parte order dated 4th June, 1999 was made absolute during the pendency of the petition.

2. This Court is therefore in this petition only concerned with the validity of the order dated 6th November, 1998 of the respondent dismissing the application of the petitioner u/s 7A(4) of the Act for setting aside of the ex parte order dated 20th February, 1998 u/s 7A of the Act and not with the merits of the order dated 20th February, 1998 where against appeal lies before the Appellate Authority.

3. The petitioner as sole proprietor was carrying on business in the name and style of Promod Nath & Co. The senior counsel for the petitioner has informed that the petitioner is now over 80 years of age and has closed down the business and the present petition is being pursued only because of the claim raised by the respondent pursuant to the ex parte order dated 20th February, 1998. It is the case of the petitioner and not disputed by the respondent that the respondent vide letter dated 10th September, 1968 provisionally covered the establishment aforesaid of the petitioner under the provisions of the Act w.e.f. 1st January, 1968. It is the case of the petitioner that he made a representation to the respondent that it had acquired the premises for commencing the business only in August, 1963 and had commenced operations of the aforesaid establishment in or about December, 1963 and that the employees working in it were less than 50 in number; that for five years up to December, 1968 and or in any case till August, 1968 counted from the date of acquisition of the premises, the business was in a stage of infancy and exempt from operation of the Act. The petitioner contends that though he was assured by the officials of the respondent that the order covering the establishment of the petitioner under the provisions of the Act w.e.f. 1st January, 1968 would be revoked but though no revocation order was made but no action also was taken by the respondent and which led the petitioner to believe that the representation of the petitioner had been accepted. It is further the case of the petitioner that thereafter for the first time vide letter dated 2nd January, 1982 the respondent asked the petitioner to show records to examine the applicability of the Act and to which the petitioner responded that it was maintaining records for seven years only as required by law and did not have earlier records available with him.

4. It is further the case of the petitioner that he w.e.f. 10th September, 1986 voluntarily informed the respondent that number of his employees had increased to more than 19 and the petitioner voluntarily started deducting the PF from that date.

5. The dispute, subject matter of this petition, really started from 16th October, 1987 when the respondent, with reference to its earlier letter dated 10th September, 1968 (supra), informed the petitioner that the date of coverage earlier intimated of 1st January, 1968 may be amended to read as 11th December, 1966. The respondent simultaneously vide letter dated 9th October, 1987 also initiated inquiry u/s 7A of the Act for determining the amount payable by the petitioner for the period from 11th December, 1966 to July, 1986. The proceedings u/s 7A continued and the ex parte order dated 20th February, 1998

itself records the dates on which the petitioner appeared before the respondent and the responses/affidavits filed by the petitioner. Though in the ex parte order dated 20th February, 1998, the respondent has blamed the petitioner for the long delay of about 11 years for which the inquiry u/s 7A remained pending, it is the plea of the petitioner that it was the respondent who was delaying the proceedings. The petitioner in this regard also relies upon letters dated 25th May, 1995 & 29th November, 1996 served on the respondent complaining of the repeated adjournments and harassment being meted out to the petitioner who was advancing in age.

6. The petitioner was served with a notice dated 10th February, 1998 of hearing in the inquiry u/s 7A of the Act scheduled for 20th February, 1998. It is the case of the petitioner that being unwell he could not attend the hearing on 20th February, 1998; that he did not receive any communication of the next date of hearing and ultimately under cover of the letter dated 25th May, 1998 was served the ex parte order dated 20th February, 1998 made by the respondent determining a sum of Rs. 1,10,687/- to be due from the petitioner in respect of the period from January, 1967 to July, 1986. The petitioner on 22nd August, 1998, applied u/s 7A(4) for setting aside of the aforesaid ex parte order pleading that he was unwell on 20th February, 1998 and hence could not appear. Along with the application a medical certificate was also filed.

7. No hearing was given to the petitioner on the aforesaid application for setting aside of the ex parte. The petitioner was under cover of letter dated 23rd November, 1998 forwarded the copy of the order dated 6th November, 1998 of the respondent dismissing the application of the petitioner for setting aside of the ex parte. The respondent in the said order has held that even if the petitioner was unwell on 20th February, 1998 he should have, after recovering from illness enquired about the proceedings of 20th February, 1998 but remained silent up to 22nd August, 1998 and which showed the unwillingness and non-cooperation of the petitioner. The order also refers to the past dilatory conduct of the petitioner.

8. The senior counsel for the petitioner has contended that u/s 7A(4), the application for setting aside of an ex parte order is permitted to be filed within three months from the date of communication of the ex parte order; in the present case, the ex parte order though dated 20th February, 1998 was communicated only under cover of letter dated 25th May, 1998 and the application for setting aside of the ex parte was filed within three months on 22nd August, 1998. He also contends that the petitioner had been appearing in the proceedings in the past and defaulted on one day only and the respondent ought not to have made the ex parte order on the same day. It is also contended that regard ought to have been shown for the petitioner being a sole proprietor.

9. The counsel for the respondent on the contrary, besides reiterating the reasoning given in the impugned order has also made submissions justifying the merits of the ex parte order and also cited certain judgments in that respect. However, this Court as aforesaid is not concerned with the merits of the ex parte

order and is only concerned with the validity of the order refusing to set aside ex parte and as such neither the said contentions nor the reply given thereto by the senior counsel for the respondent is recorded here.

10. The petitioner has in the petition pleaded that he had been expecting to receive intimation of the next date of hearing after 20th February, 1998 as per previous practice of the respondent and that the respondent in the past during the proceedings which remained pending for over 10 years as aforesaid had been sending intimation of the next date even if the petitioner had not appeared on any hearing. I have perused the counter affidavit of the respondent. The specific pleading of the petitioner of the past practice followed by the respondent has not been controverted. Even otherwise a perusal of the ex parte order dated 20th February, 1998 shows that the hearings were sometimes even several years apart. The ex parte order records the hearings on 26th October, 1988, 7th March, 1989, 3rd September, 1990, 16th January, 1991, September, 1992, 3rd March, 1993, 21st June, 1993, 29th November, 1996 & 13th December, 1996. The same also supports the plea of the petitioner of the practice of notice of each date being sent to the petitioner. It thus appears that the system as prevalent in some courts of giving the next date of hearing was not being followed. The respondent has also not produced any record in this regard. In the circumstances, the reasoning in the impugned order is erroneous. The petitioner could not be expected to, on regaining health after 20th February, 1998 to make enquiry. In any case even if that had been done, since the matter had been disposed of on 20th February, 1998 itself, the same would have served no purpose. The application was filed within the prescribed time and ought to have been considered on merits.

11. The respondent has not produced any records which could have shown any dilatory conduct in the past on the part of the petitioner. The fact remains that Section 7A proceedings with respect to the period from 1966 onwards though claimed to have been initiated in 1968 only, remained without any proceedings till 1987 and thereafter also were being proceeded with at a leisurely pace. In these circumstances the action of the respondent of passing an ex parte order on 20th February, 1998 itself when the petitioner defaulted in appearance is not found to be appropriate. The respondent does not appear to have been in any hurry. In the circumstances, upon non appearance of the petitioner on 20th February, 1998, before passing an ex parte, the respondent ought to have put the petitioner to notice that if on a subsequent date the default continues, the order will be made ex parte.

12. Section 7A(4) entitles a person against whom an ex parte order has been made, to an opportunity to satisfy the respondent that he was prevented by any sufficient cause from appearing when the inquiry was held. Ordinarily when such opportunity to satisfy is granted, an opportunity of personal hearing ought to have been granted. In the present case, the respondent dismissed the application u/s 7A(4) without giving any hearing and/or without even disbelieving

the reasons given by the petitioner which prevented him from appearing on 20th February, 1998. The respondent could have certainly given a hearing to the petitioner between 22nd August, 1998 when the application was filed and 6th November, 1998 when the same was dismissed.

13. The order dismissing the application is thus found to be perverse. The respondent appears to have seized the opportunity presented by the non-appearance of the petitioner to dispose of the matter which had been pending for 30 years, on a single date when the petitioner defaulted to appear and for which default prima facie there is plausible explanation. The respondent has failed to exercise the jurisdiction vested in him to set aside the ex parte order and/or has acted in the exercise of the said jurisdiction illegally.

14. The writ petition thus succeeds. The order dated 6th November, 1998 of the respondent dismissing the application of the petitioner for setting aside of the ex parte order dated 20th February, 1998 is set aside. The application of the petitioner is allowed and the ex parte order dated 20th February, 1998 and consequently the notices of the recovery issued in pursuance thereto are set aside and/or quashed. Considering that the matter has been pending for long, the petitioner is directed to appear before the respondent on 15th March, 2010 and/or on any subsequent date given by the respondent and the respondent is directed to, after giving an opportunity of hearing, dispose of the proceedings u/s 7A of the Act within three months thereof. No order as to costs.