

(2009) 05 GUJ CK 0067

In the Gujarat High Court

Case No : Special Civil Application No. 3347 of 2009

Rollwell Forge Ltd.

APPELLANT

Vs

Employees Provident Fund Organization and Another

RESPONDENT

Date of Decision : 01-05-2009

Acts Referred:

Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997 — Rule 7(2)
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B,
7A, 7I, 7Q, 8F

Citation : (2009) 123 FLR 953 : (2009) 3 GLR 1913 : (2010) 1 LLJ 397

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : Kishor M. Paul, for the Appellant; Niral R. Mehta and P.M. Dave, for the Respondent

Judgement

K.M. Thaker, J.—Heard Mr. K.M. Paul, learned Advocate for the petitioner and Mr. Niral Mehta, learned Advocate for the respondent No. 1.

2. Rule. Mr. Mehta waives service of rule on behalf of the respondent-authorities.

3. At the request and with consent of the learned Advocates appearing for the respective parties, the matter is taken up for final hearing today.

4. In this petition, the petitioner has brought under challenge order dated 30-1-2001 passed u/s 7A of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act") whereby, the respondent-authorities have quantified the petitioner's liability towards unpaid provident fund contribution for the period from April, 2001 to January, 2007. By the said order, the respondent-authorities determined that the total unpaid provident fund contribution came to Rs. 37,13,808/-. A separate order u/s 7Q of the Act came to be passed on 11-2-2009 whereby the department has claimed Rs. 11,21,385/- towards interest under the provisions of the Act. It is said that the amount has become payable on account of the non-payment of provident fund contribution for the period from April, 2001 to January, 2007. The said two

orders are under challenge in this petition.

5. Besides, the aforesaid challenge, the petitioner has also made a grievance against the respondent-authorities of compelling the Bankers to remit the amount in dispute directly to the department from the petitioner's account with the Bank. The petitioner has claimed that after having passed the order dated 30-1-2009 which was dispatched on 11-2-2009 and was received by the petitioner on 19-2-2009, the respondent-authorities addressed a letter dated 23-3-2009 to the Bank and asked the Bankers to remit the amount quantified by virtue of the aforesaid orders. It appears that upon receipt of the instructions from the respondent-authorities, the petitioner's Banker remitted the amount lying in the petitioner's account as on 25-3-2009 to the respondent-authorities. The amount so remitted was to the tune of Rs. 20,37,041-07 ps. The petitioner has made a grievance that by the said demand the department compelled the petitioner's Bank to bring down its account to "0" balance. The said arbitrary action of the respondent-authorities is also brought under challenge.

6. At the initial stage, this Court was not inclined to entertain the petition in view of the availability of the statutory alternative remedy against the order passed u/s 7A of the Act, however, during the hearing the petitioner highlighted the aforesaid action of the respondent-authorities, which prima facie demonstrated arbitrariness on the part of the respondent-authorities, more particularly, in light of the fact that the respondent-authorities had asked the Bankers to remit the amount even before the statutory period of appeal expired. Hence, this Court passed order dated 18-4-2009 taking into account the statement made by the petitioner's Advocate that the petitioner was always ready and willing to approach the appeal Tribunal against the impugned orders, however, the petitioner would not be able to ventilate its grievance against the action of authorities of requiring its Bankers to remit the amount even before completion of statutory period for filing appeal before the appeal Tribunal.

7. In response to the said order dated 8th April, 2009, Mr. Mehta, learned Advocate for the respondent-authorities entered his appearance. He has opposed the petition claiming, inter alia, that the petition against the impugned orders is not maintainable since there is statutory alternative remedy provided by the Act. He submitted that the petitioner is a defaulter inasmuch as the provident fund contribution was not paid by the petitioner continuously for 6 years from April, 2001 to January, 2007, and that therefore, the proceedings u/s 7A had to be initiated. Upon conclusion of the proceedings, after affording ample opportunity of hearing and defence, the adjudicating authority came to the conclusion, upon examining the evidence available on record, that the due and payable amount would come to Rs. 37,13,808/-. Mr. Mehta further submitted that during the course of proceedings, the petitioner had deposited/paid Rs. 13,57,244/-, and that therefore, the department has given credit of the said payment and final outstanding amount is quantified at Rs. 26,53,564/-. Mr. Mehta further submitted that in view of the default committed in making the payment of contribution,

proceedings u/s 7Q were also initiated and after considering the relevant facts and submissions of the petitioner, the adjudicating authority has quantified the amount payable u/s 7Q. The amount so quantified comes to the tune of Rs. 11,31,385/-. Mr. Mehta submitted that total due and payable amount (inclusive of orders under Sections 7A and 7Q of the Act) comes to Rs. 34,37,949/-.

8. Mr. Mehta further submitted that so far as the petitioner's grievance against the action of the respondent-authorities of requesting its Bankers to remit the amount to the department is concerned, the said action is not unauthorized and/or contrary to the statutory provisions. He submitted that the said action, on the contrary, is in consonance with Section 8F of the Act. He submitted that there are departmental instructions, particularly Circular, which is part of internal operation manual, as per which, the adjudicating authority is required to inform the assessee to pay the quantified amount within a period of 15 days and if such amount is not paid as per the direction in the order, then the Recovery Officer or the adjudicating authority are entitled to take action u/s 8(F) of the Act. He submitted that the said action was taken by the adjudicating authority in bona fide exercise of his duties. He, however, could not dispute that normally the course of action should be to wait until the statutory period of appeal gets over. He submitted that there is no minimum time-limit prescribed under the Act for which the authority has to wait before demanding the payment or recovering the amount by taking recourse of Section 8F, however, it is under the provisions of regulations that the time-limit for appeal is prescribed which is of 60 days, and it would therefore, be the time for which normally the adjudicating authority or the recovery officer may wait before taking action. In backdrop of such submissions, Mr. Mehta urged that the action of the respondent-authority may not be construed as arbitrary and petition may not be entertained and the petitioner may be relegated to the statutory alternative remedy.

9. Mr. Paul, learned Advocate for the petitioner submitted that as given out earlier at the time of first hearing of the petition, the petitioner is ready and willing to avail the statutory alternative remedy. He submitted that, actually the petitioner has, during the pendency of the petition, already approached the appeal Tribunal and has filed the appeal. He submitted that the appeal is to come up for hearing as per the present schedule on 4th May, 2009. Mr. Paul further submitted that the petitioner has also preferred stay application seeking stay of the operation of the impugned orders along with application u/s 7Q praying for waiver and the condition of pre-deposit. He submitted that the said applications are also to come up for hearing on 4th May, 2009 as per the present schedule.

10. The aforesaid clarification by Mr. Paul, learned Advocate for the petitioner, leaves behind the petitioner's grievance against the action of the respondent-authorities of making petitioner's Banker remit the amount even before the completion of statutory appeal period and taking in their hands the amount which are still in dispute. Mr. Paul submitted that the recovery of Rs. 20,37,041-07 ps. is unauthorized collection, though purportedly under the

provisions of the Act.

11. Per contra, Mr. Mehta submitted that the action cannot be said to be unauthorized or de hors the provisions of the Act.

12. Mr. Mehta, however, could not dispute or defend that the recovery officer or the adjudicating authority should not act with undue haste, more particularly, even before the prescribed period of limit for filing appeal expires.

13. In the facts of the case, this Court is constrained to observe that the action of the respondent-authorities of compelling the Bankers of the assessee to remit the amount before the prescribed period of limit to file appeal expires, cannot be held as just and proper action. Although, the Act may not expressly provide for any time-limit for which the adjudicating authority or the recovery officer should refrain from taking coercive action and/or before exercising powers u/s 8F, it, however, flows from the conjoint reading of the provisions in the statute granting remedy of appeal and the provision in the Rules which prescribe period for filing appeal before the appeal Tribunal, that the assessee's right to prefer appeal should not be marginalized and should not be, in actual effect, frustrated and the appeal should not be rendered infructuous in spirit by recovering the entire or substantial part of the quantified amount so that the appeal becomes a formality. In light of the provision in the statute for appeal and for time-limit in the rules, such an action would amount to paralyzing, nullifying and frustrating a statutory provision and remedy. A statutory authority is not supposed to and expected to act in such manner. In case of the provisions under the Provident Fund Act, this is all the more relevant and necessary and important because even under the provisions of the Act, if the waiver is not granted u/s 70 of the Act then the assessee would be required to pay only 75% of the quantified amount as pre-deposit and that would also be a pre-deposit with a quasi-judicial authority namely with the Tribunal and not with the department. Considering the aforesaid aspects, this Court is not able to hold that the action of the respondent-authorities of recovering the amount before expiry of prescribed period of limitation is justified. Mr. Mehta has claimed that Section 8F, under which the authority takes such action, does not expressly prescribe any restriction or any time-limit before expiry of which the action contemplated u/s 8F cannot be taken. The respondent-authorities, however, overlook and ignore that it is implied that the action contemplated under said Section should not be taken in such a manner which would frustrate the effectiveness of remedy provided in the Statute against the adjudicating authority's order. It is pertinent that the legislature has, by virtue of Section 71 of the Act, made provision for remedy of Appeal and by virtue of Section 70 also conferred power on the Tribunal to waive, either fully or partially, the condition and requirement of "pre-deposit" and by virtue of Rule 7(2) of the E.P.F. Appellate Tribunal (Procedure) Rules, 1997 made provision for time-limit (and extension of time-limit) for filing appeal. All such provisions and their object and effectiveness would be lost or frustrated or scuttled if the authority under the Act recovers the amount [decreed u/s 7A or

14B] in exercise of power u/s 8F even before the minimum time-limit prescribed for filing appeal expires.

14. In this regard, it is appropriate to refer, at this stage, to the judgment of Hon"ble High Court of Judicature at Bombay in the case between Ocean Driving Center Ltd. Vs. Union of India (UOI), The Commissioner of Customs, The Asstt. Commissioner of Customs and Dena Bank, Indl. Finance Branch, wherein the authorities constituted under the Excise Act, 1944 sought to encash Bank guarantee before expiry of appeal period and in background of such facts, the Hon"ble High Court observed thus:

14. Having heard the parties, it is not in dispute that the appeal period is yet to expire. It is not in dispute that the order is an appealable order. It is not in dispute that the policy of the respondents is not to resort to coercive recovery during the appeal period. In this view of the matter, judgments relied upon by Mr. Shah are squarely applicable to the facts of the case in hand. So far as the judgment of the Apex Court in the case of Daewoo Motors (supra) is concerned, the facts involved in that case were the plant of the appellant-company had been closed. The production of the appellant-company had come to an end. The order extending the export obligation had already been revoked. Under the circumstances, even on facts, Daewoo Motors had no case to seek injunction to prevent encashment of the Bank guarantees. So far as the present case is concerned, a statutory remedy of appeal is still available to the petitioner. The petitioner can very well file an appeal and move an application for seeking waiver of pre-deposit. The Appellate Authority has a power to waive pre-deposit or pass suitable order in that behalf.

15. The terms of Bank guarantee reads, "The bond and Bank Guarantee shall be kept valid until the assessment has been finalized by the concerned department". Mr. Rana submitted that so far as this clause is concerned, it unequivocally makes it clear that upon the finalization of the assessment of the concerned department, it would be open for the department to invoke the Bank guarantee. As against this, learned Counsel for the petitioner submits that finalisation of assessment means finalisation of assessment by the appellate authority under the Act. We do not propose to enter into this debatable issue as the same is not necessary to decide this petition.

16. The petitioner has statutory right to appeal. Appeal period is yet to expire. Declared policy of the respondents is not to resort to coercive recovery during the appeal period. In this view of the matter, it was not proper on the part of the respondents to encash the Bank guarantee before the expiry of the statutory period provided for filing appeal. The action of the respondents is contrary to their declared policy.

(Emphasis supplied)

15. In another case, viz. in the case between Charak Pharmaceuticals Vs. Union of India (UOI), the Hon"ble High Court of Karnataka has observed while dealing

with the grievance of the petitioner that against the order of original adjudicating authority, an appeal along with a stay application was preferred and though the request for hearing of stay application was made, it was not granted and on the other hand, the department sought to recover the amount decreed by the adjudicating authority, which reads thus:

2. We have heard learned Counsel for the appellant and the learned Counsel for the respondents and in our judgment, it is not permissible for the Assistant Commissioner to commence the recovery proceedings even while the stay application filed by the appellant is pending before respondent No. 2 and is not disposed of. The appellate authority cannot decline to consider the stay application, and thereby, permitting respondent No. 3 to proceed with the enforcement of the order of adjudication. It is, therefore, necessary to direct that the respondent No. 3 shall not proceed with the recovery in pursuance of the adjudication order as long as respondent No. 2 has not disposed of the stay application.

3. Accordingly, appeal is allowed and the order dated December 22, 1995 passed by the learned single Judge in Writ Petition No. 44569 of 1995 is set aside and the respondent No. 3 is directed not to proceed with the recovery of amount from the appellant in pursuance of the adjudication order as long as stay application filed by the appellant is not finally disposed of by respondent No. 2. In the circumstances of the case there will be no order as to costs.

16. Hence, in this particular case and particularly upon overall consideration of the circumstances and facts of present case, this Court is inclined to pass the following order.

Mr. Mehta, in view of the instructions from respondent No. 1-adjudicating authority, submits that the respondent department is ready and willing to deposit, without prejudice to the rights and contentions, the amount received from the petitioner's Bankers in this Court until the order is passed by the learned appeal Tribunal on petitioner's stay application and waiver application under Sections 7I and 7Q respectively. He submitted that the amount may be retained in this Court with the Registry until such order is passed by the appeal Tribunal. Thus, the respondent-authority is directed deposit the entire amount of Rs. 20,37,041-07 ps. which has been received by the department from the petitioner's Banker in the Registry of this Court on or before 12-00 p.m. of 2nd May, 2009. The respondent No. 1 shall ensure that the amount gets deposited in the Registry of this Court before the aforesaid time-limit.

The aforesaid amount will be subject to the orders which may be passed by the learned appeal Tribunal in the appeal and/or the waiver application preferred by the petitioner. If the appeal Tribunal directs, any pre-deposit, then, out of the amount deposited in this Court, such amount as may be determined by the Tribunal, shall be remitted to the Tribunal. As and when such order is passed by the Tribunal, it will be open for the petitioner to make appropriate application for

appropriate direction to remit the amount to the Tribunal and if any amount remains in balance, for refund of such amount.

17. Mr. Mehta also submitted that he will, during the course of the day, place on record reply affidavit.

18. The officer who has attended the proceedings will not be entitled for any T.A. and/or D.A.

19. With the aforesaid clarification and direction, present petition is disposed of. Rule is made absolute to the aforesaid extent. No order as to costs.