

(2016) 12 BOM CK 0047
In the Bombay High Court
Case No : Writ Petition No. 12511 of 2016

Shirpur Shetkari Sahakari Sakhar Karkhana Ltd T	APPELLANT
Vs	
Regional Provident Fund Commissioner II Nasik	RESPONDENT

Date of Decision : 19-12-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 227
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7I,
Section 70

Citation : (2017) 2 AIRBomR 228 : (2017) 3 ALLMR 537 : (2017) 2 CLR 53 :
(2017) 152 FLR 842 : (2017) LabLR 205 : (2017) LIC 1128

Hon'ble Judges : Ravindra V. Ghuge, J.

Bench : Single Bench

Advocate : Shri P.M. Shah, Senior Advocate a/w Shri Bagul, D.S, for the
Petitioner

Final Decision : Dismissed

Judgement

Ravindra V. Ghuge, J.(Oral) - The Petitioner is aggrieved by the order dated 02.11.2015 by which Respondent No.1/ Regional Provident Fund Commissioner has assessed the unpaid provident fund contributions under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "the EPF Act") to the tune of Rs.32,27,75,726/(Rupees Thirty Two Crore Twenty Seven Lac Seventy Five Thousand Seven Hundred Twenty Six).

2. Shri Shah, the learned Senior Advocate appearing on behalf of the Petitioner/ Sugar Factory, has addressed the Court primarily on the following two aspects:

a) There is cause for entertaining this petition directly despite the statutory remedy under Section 7I r/w 70 of the EPF Act being available by which a statutory appeal could be preferred before the Provident Fund Appellate Tribunal at New Delhi coupled with the liberty to seek reduction in predeposit amount.

(b) The impugned order, prima facie, indicates total non application of mind and

failure on the part of Respondent No.1 in discharging his functions as are expected of the office while dealing with the enquiry under Section 7A of the EPF Act.

3. Insofar as entertaining of this petition is concerned, Shri Shah has placed reliance upon the judgment of the Honourable Supreme Court in the matter of the State of U.P. v. Mohammad Nooh, AIR 1958 SC 86, and especially paragraph 10 reproduced as under:"

10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Ed., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

4. It is, therefore, contended that the learned Division Bench of this Court in the matter of Jet Airways (India) Limited v. Municipal Corporation of Greater Mumbai, 2012 (3) Mh.L.J. 841, has entertained the Writ Petition directly despite an alternate remedy being available.

5. Reliance is then placed upon the observations of the learned Single Judge of this Court in the matter of Navyug Steel Industries, Bombay v. Bombay Municipal Corporation, 1991 Mh.L.J. 556, and especially paragraph 5 which reads as under:"

5. The preliminary objection is to the effect that the Act vide Section 217 provides for the remedy of an appeal to the Chief Judge of the Small Causes Court at Bombay. Petitioners have not availed of this remedy and have come straightway to a writ Court. There is no excuse for the failure to avail of the statutory remedy. In fact having regard to the disputed questions of facts which arise it may be necessary to record evidence and that can be done only within the confines of the statutory remedy of an appeal. This petition was filed way back in the year 1984 and that will be a factor to be taken into consideration to appraise the contentions raised by the respondents. Now it is true that the mere fact of the petition having been admitted for hearing does not preclude the respondents from taking the objection that the petitioners have rushed to this Court without availing of an equally speedy and efficacious remedy provided

under Section 217 of the Act. But the passage of time and that too of 6 to 7 long years, would make a difference. Of course if the petition gives rise to such disputed facts which could not be resolved in a proceeding under Article 226 of the Constitution, this Court would have no option, but to direct the petitioners to exercise the remedy provided under the statute. If that remedy had been lost because of the lapse of time, a suitable order to ignore the bar of limitation could conceivably be passed in appropriate cases. Alternatively, the writ Court would leave the petitioner to suffer where there are no good reason for his rushing to this Court instead of going by the statutory provisions. It would all depend on the circumstances, and the position here is that the so-called dispute in relation to a question of facts is more or less of a cosmetic nature. The factual position is virtually indisputable and the quality and extent of dispute which survives is easily soluble. What arises is in substance a question of interpretation i.e. a question of law. For that as also the fact that petitioners would be put to undue expenditure and pressure if they had to prefer repeated appeals every time a consignment was refused exemption, I hold that the preliminary objection raised by the BMC must be negated."

6. Reliance is then placed upon the judgment of the learned Division Bench of this Court in the matter of *Hero Cycles Limited v. Union of India*, 2009 (5) BCR 128, to support the contention that though this Court ought to be slow in entertaining the petition which bypasses the statutory remedy, the petition can be entertained if the order impugned, on the face of it, is erroneous or raises a question of jurisdiction or infringes the fundamental rights of the Petitioner. Paragraph 9 of the said judgment reads as under:"

"9. The first question that we are called upon to consider is, whether in the absence of impugning the original order of assessment by preferring a statutory appeal which was available, should this court, ought to exercise its the extra ordinary jurisdiction. From the averments in the Petition, it is clear that the Petitioners have not challenged in their petition the orders rejecting the applications for refund. The Petitioners though had statutory remedy of an appeal against the order of assessment, did not invoke that remedy, but instead directly filed the applications for refund. The law is well settled that mere statutory remedy even of an appeal by itself, will be no bar to the exercise of the extra ordinary jurisdiction of this court. This court if it finds that there has been a breach of the fundamental principles of justice, would certainly not hesitate to issue a writ of certiorari and the fact that the alternative remedy is available would be no answer. See *State of U.P. v. Mohammad Nooh*, AIR 1958 SC 86. The law has since then been reiterated. In *Champalal Binani v. Commissioner of Income Tax, West Bengal and Others*, 1970 (76) ITR 692 (SC) though the statutory remedy was available, the assessee chose not to avail of that remedy. While dismissing the Petition, the court noted that where the party feels aggrieved by an order of the authority and has adequate alternative remedy which it may resort to and if it does not avail of that remedy, the High Court will require a strong case to be made for entertaining the petition in its writ

jurisdiction. The High Court in such cases would be slow to entertain the petition challenging the order of the taxing authorities which is ex facie within jurisdiction. Having so said the court then observed as under :

"A Petition for a writ of certiorari may lie to the High Court, where the order is on the face of it erroneous or raises the question of jurisdiction or of infringement of fundamental rights of the Petitioner."

7. Reliance is then placed upon the judgment of the learned Division Bench in the matter of Kantilal Dharsi Desai v. Karmala Nagar Palika, AIR 2000 Bom. 484 : (2003) 2 Bom CR 851, in support of the contention that where the interest of justice requires the hearing of the petition in order to adjudicate upon the validity of an unsustainable order, the Writ Petition can be directly entertained by this Court.

8. My attention is drawn to certain documents placed on record in the petition paper book whereby, it is contended that for the assessment period of March, 2003 till April, 2011, the Petitioner has paid all contributions towards the provident fund subscription. The contributions paid year-wise are indicated from the documents placed on record, which are as under:

2002-2003

Rs.91,74,831/-

2003-2004

Rs.5,07,231/-

2004-2005

Rs.43,105/-

2005-2006

Rs.47,00,799/-

2006-2007

Rs.67,72,694/-

2007-2008

Rs.78,51,733/-

2008-2009

Rs.61,48,112/-

2009-2010

Rs.1,02,54,968/-

2010-2011

Rs.63,80,632/-

Total

Rs.5,18,34,105/-

9. It is strenuously contended that though a detailed order has been passed on 02.11.2015 impugned in this petition, the amounts deposited have not been taken into account by the Provident Fund Authorities and based on erroneous conclusions, an amount of Rs.32,27,75,726/has been assessed as outstanding provident fund contributions under Section 7A of the EPF Act.

10. Insofar as the second issue as regards the validity of the order is concerned, Shri Shah has placed reliance upon the judgment of the Honourable Supreme Court in Food Corporation of India v. Provident Fund Commissioner, 1990(1) SCC 68. Paragraph 9 of the said judgment reads as under:"

"9. It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person."

11. Considering the view expressed by the Honourable Supreme Court in Food Corporation of India case (supra), Shri Shah submits that the onus and burden lies on the Authority examining the matter under Section 7A. The Authority has to decide all questions of facts and law and not just abstract questions. Actual concrete difference in payment of contributions has to be arrived at by the Authority after identifying the beneficiary workmen as well as collate the entire documentary and oral evidence available so as to make a proper assessment under Section 7A.

12. Shri Shah then relies upon the judgment of the learned Single Judge of this Court in the matter of Sandeep Dwellers Pvt. Ltd. v. Union of India, 2006 (6) ALL MR 736, to support his contention that unless the beneficiary workmen are not identified, an exercise under Section 7A is fruitless.

13. I have considered the submissions of the learned Senior Advocate and have gone through the reports cited.

14. Insofar as exercising the jurisdiction of this Court in the backdrop of a statutory remedy available is concerned, there can be no dispute and I have no doubts that in an appropriate case where the bonafides of the employer are visible and in order to ensure that ends of justice are met, a petition could be

entertained. The view expressed by the Honourable Supreme Court in the State of U.P. judgment (supra), which has been considered by the learned Division Bench of this Court in Jet Airways Limited case (supra), would indicate that a petition could be entertained without exhausting the statutory remedy.

15. In Navyug Steel Industries case (supra), the petition was admitted and pending for seven years. This Court did not consider the objections put forth for the reason that the matter was admitted and after pendency of seven years when the matter was taken up for final hearing, this Court felt that the objection with regard to the alternate remedy ought not to be entertained.

16. In the matter of Hero Cycles Limited case (supra), this Court has noted in paragraph 9 that this Court should require a strong case to be made out for entertaining the petition and normally it should be slow in entertaining petitions challenging the orders of imposition of taxes if the said orders are exfacie within jurisdiction.

17. In the facts of the case in hand, there is no dispute that the Respondent Provident Fund Authorities have jurisdiction to be exercised under Section 7A of the EPF Act. It is the said Authority which has to initially conclude as regards the amounts unpaid towards provident fund contributions. In doing so, the Authorities are obliged to conduct a proper enquiry, collect adequate material and collate the information available so as to arrive at an exact amount of unpaid provident fund contributions. In the impugned order, it appears that the enquiry was going on for three years. On several dates, the Petitioner had sought adjournments. Summons were issued on 23.11.2012. The report of the Enquiry Officer was dated 07.10.2012. The impugned order is dated 02.11.2015 which evidences the fact that the enquiry was conducted for three years and after 23 hearings.

18. As has been rightly stated by Shri Shah that number of hearings would not be relevant as regards the business transacted in the hearing. However, it cannot be ignored that when certain documents were in possession of the Petitioner, the same were not produced for the reason that the Sugar Factory was in the charge of the Dhule Nandurbar Districts Central Cooperative Bank Limited and as such, they had no scope of producing the documents as the entire Sugar Factory as well as the documents were in custody of the said Bank.

19. Notwithstanding the above, the grievance of the Petitioner could have been entertained if it was visible that the Petitioner was inclined to deposit some amounts in this Court as is expected under Section 71 r/w 70 of the EPF Act while preferring a statutory appeal before the Appellate Provident Fund Tribunal. Considering the assessment made by the Respondent Authority at Rs.32,27,75,726/, even if the amount deposited by the Petitioner of Rs.5,18,34,105/is adjusted, going by the impugned order, the outstanding amount would be Rs.27,09,41,621/. Shri Shah submitted, on instructions, that it would be impossible for the Petitioner to deposit any amount since it is in great

financial crisis and it was facing the proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Petitioner factory is in custody of Respondent No.2/ Bank as an Official Liquidator is appointed.

20. In my view, while considering the petition filed directly in this Court, an impression ought not to be created by the Petitioner that the object of filing the petition is to avoid the 75% deposit mandated by the EPF Act under Sections 7I r/w 7O, which read as under:"

"7-I. Appeals to Tribunal :-

(1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to subsection (3), or subsection (4), of section 1, or section 3, or subsection (1) of section 7A, or section 7B [except an order rejecting an application for review referred to in subsection (5) thereof], or section 7C or section 14B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under subsection (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed."

"7O. Deposit of amount due, on filing appeal: No appeal by the employer shall be entertained by a Tribunal unless he has deposited with it seventy five per cent. of the amount due from him as determined by an officer referred to in section 7A:

Provided that the Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this Section."

21. Taking the contention of the Petitioner at its best that an amount of Rs.5.18 crore approximately has been deposited, yet there would be a shortfall of about Rs.27.09 crore approximately. Considering this huge amount, even if an amount of Rs.5 crore could have been deposited by the Petitioner in this Court, I would have entertained the petition keeping in view the law laid down by the Honourable Supreme Court on which the Petitioner has placed reliance.

22. I cannot ignore that an FIR was registered by the EPF Authorities against the Petitioner Factory for having deducted an amount of Rs.24,38,852/ from the salaries of the employees towards the provident fund contributions during the period of October, 2010 to February, 2011 and the said amount was not deposited with the EPF Authorities, which led to the registration of the FIR on 13.12.2012.

23. There can be no dispute that the EPF Act is a beneficial piece of legislation involving the object of social security. When the Petitioner is not inclined to deposit any amount in this Court and prays for a blanket stay to the impugned order of assessment by which the Authority seeks to recover Rs.32.28 crore approximately, I am of the view that this Writ Petition cannot be entertained for the above reasons.

24. In the light of the above, this Writ Petition is dismissed. Needless to state, if the Petitioner prefers an appeal under Section 7I and moves an application for reduction of predeposit in appeal under Section 7O, the Appellate Tribunal may consider the contentions of the Petitioner that the amount of Rs.5.18 crore approximately was deposited during the assessment periods of March, 2003 to April, 2011.

25. At this juncture, Shri Shah submits, on instructions from the Petitioner, that an appeal under Section 7I r/w 7O of the EPF Act would be preferred before the Provident Fund Appellate Tribunal. He prays that the observations in this order should not come in the way of the Petitioner while adjudicating upon the said appeal.

26. I have no hesitation to accept the said request for the reason that my observations in this order are purely at a prima facie stage and are set out only for the reasons which I need to assign for not entertaining this Writ Petition. The Provident Fund Appellate Tribunal, while dealing with the appeal if filed by the Petitioner, shall not be influenced by these observations while considering such appeal, as well as, the application under Section 7O shall be considered on it's merits.