

(2011) 07 KL CK 0047

In the High Court Of Kerala

Case No : Writ Petition (C) No. 10109 of 2011 (K)

Sreelakshmi Cashew Company

APPELLANT

Vs

Assistant Provident Fund and Others

RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17(B), 7A, 7B, 7I

Citation : (2012) 132 FLR 170 : (2012) 2 LLJ 99

Hon'ble Judges : P.N.Ravindran, J

Bench : Single Bench

Advocate : N.D. Premachandran, for the Appellant;

Final Decision : Allowed

Judgement

P.N. Ravindran, J.—Ext. P17 order passed by the Employees Provident Fund Appellate Tribunal on 8.2.2011 dismissing Ext.P12 appeal filed by the petitioner u/s 7-I of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 from Ext.P9 order passed by the first respondent u/s 7-A thereof, is under challenge in this writ petition. The brief facts of the case are as follows:

The petitioner, a partnership firm engaged in the business of processing raw cashew nuts and exporting cashew kernels, had taken on lease a cashew factory belonging to M/s. Kesav Cashew Company, Kunnicode. The lease was initially for a period of three years from 24.9.2005 and was later renewed for a further period of two years from 24.9.2008. Prior to the lease, the owner of the cashew factory itself was running it and for a short period from June 2008 to July 2008 yet another lessee was running it.

2. Shortly after the petitioner commenced operating the factory, the bank account of the petitioner was attached by the second respondent for realisation of past arrears of contribution payable to the employees provident fund. The petitioner thereupon deposited the sum of ` 3,86,119/- and the attachment was

lifted on 23.8.2007.

3. Shortly after the petitioner commenced operation, the first respondent issued Ext.P1 notice of enquiry u/s 7-A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act for short). Inter alia it was stated therein that information has been received by the first respondent to the effect that the petitioner has failed to remit fully the provident fund contribution in respect of the employees of its establishment during the period from June 2004 to May 2008 and that there was also non-enrollment of 30 employees from June 2006. The petitioner states that though after Ext.P1 notice was issued, a copy of Ext.P5 inspection report dated 9.7.2008 submitted by the Enforcement Officer was furnished, what was furnished was only a part of the report, namely Part II, and not the entire inspection reports. It is stated that along with Ext.P5, a list of employees, 30 in number, who according to the Enforcement Officer had not been enrolled, was also furnished. A copy thereof is Ext.P6. Ext.P5 inspection report was prepared pursuant to the inspection conducted by the Enforcement Officer on 19.6.2008. Exts.P5 and P6 were furnished to the Managing Partner of the petitioner firm by the first respondent along with letter dated 11.2.2009. The Managing Partner of the petitioner firm thereupon submitted Ext.P8 representation dated 18.2.2009 before the first respondent pointing out that though in the letter dated 11.2.2009 it was stated that the report dated 30.6.2008 and its enclosures are being forwarded, the envelop contained only a xerox copy of Part II of the inspection report with the date seal 9.7.2008 (Ext.P5) and the list of 30 persons mentioned therein (Ext.P6), but it did not contain the details based on which Ext.P5 report was prepared or a copy of the report dated 30.6.2008. The Managing Partner of the petitioner firm also pointed out that he has been repeatedly requesting for a copy of the said report and unless the entire materials are made available, he will not be in a position to cross-examine the Enforcement Officer. The Managing Partner of the petitioner firm also requested for a copy of the report dated 30.6.2008 and stated that the enquiry may be adjourned for the said purpose. He also prayed for an opportunity to cross-examine the Enforcement Officer who had conducted the inspection and prepared the report after furnishing a copy of the report to him. Ignoring that request, the first respondent passed Ext.P9 order dated 18.2.2009 assessing the amount due from the petitioner for the period from October 2005 to May 2008 at `7,98,365/-. The petitioner thereupon filed Ext.P10 application for review. The review petition was entertained and thereafter dismissed by Ext.P11 order dated 8.3.2010. Aggrieved thereby the petitioner filed Ext.P12 appeal before the Employees Provident Fund Appellate Tribunal. By Ext.P17 order passed on 8.2.2011 the appeal was rejected.

4. Ext.P17 order reads as follows:-

The appeal in this case is preferred against the order passed by the PF authority u/s 7-A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 directing the appellant to deposit the dues.

2. The case of the appellant is that the appellant is engaged in the business of processing raw cashew-nuts. It had taken on lease from M/s. Kesav Cashew Company in the year 2005 and since then it was making payment regularly. The EPF authority started a proceeding u/s 14-B and assessed the dues relating to 2005. The appellant is not liable to pay the default made by the previous M/s. Kesav Cashew company and the order is illegal one.

3. The case of the respondent is that both transferee and transferor are liable u/s 17-B. So the assessment was made correctly.

4. It is contended that the default relates prior to 2005. So the present appellant is not liable to pay the dues.

5. The officer of the respondent supported the order.

6. The applicability of the Act is not questioned. Admittedly, appellant took the establishment on lease on 3.10.2005. u/s 17(B) of the Act, the transferee and transferor both are jointly and severally liable. In the case of Dalgam Agro Industry v. Union of India 2004 (103) FLR 1176 (Cal.) the Hon"ble Court of Kolkata held that "a transferee would be liable for the damages jointly and severally in respect of default committed prior to date of transfer in terms of provision contained in section 17-B" and similar view was held in the case of Regional Provident Fund Commissioner Vs. Eveready Industries (India) Limited and Others, In this case, admittedly, no payment was made. So the assessment was made correctly. No infirmity is noticed in the order of authority.

7. Hence ordered, the appeal is dismissed. Copy of order be sent to the parties. File be consigned to record room.

(Emphasis supplied)

5. One of the main contentions raised in the writ petition is that the Appellate Tribunal has not adverted to the material contentions raised by the petitioner in Ext.P12 appeal memorandum and has proceeded on the basis that the petitioner has disputed its liability to pay the contribution determined by the first respondent on the ground that as the transferee, the petitioner is not liable. It is also contended that the Appellate Tribunal has not adverted to the merits of the contentions raised by the petitioner and therefore Ext.P17 order is liable to be set aside on that short ground. The petitioner has also contended that Ext.P9 order passed by the first respondent u/s 7-A of the Act and Ext.P11 order passed by the first respondent rejecting the application for review filed u/s 7-B of the Act are also liable to be set aside for the reason that all the materials relied on were not furnished to the petitioner notwithstanding the requests in that regard.

6. I heard Sri. N.D. Premachandran, learned Counsel appearing for the petitioner and Sri. V.V. Suresh, learned Standing Counsel appearing for respondents 1 and 2. Though the third respondent Tribunal has not been served, I am of the opinion that in the absence of any allegation of bias or malice against the Tribunal, it is not necessary to await service of notice on the Tribunal. The petitioner had in

paragraphs 7 and 9 of Ext.P12 memorandum of appeal and in grounds D and G thereof stated that only a part of the inspection report was furnished, that the full report was not furnished notwithstanding repeated requests and therefore, the entire proceedings is vitiated. A reading of Ext.P17 order passed by the Appellate Tribunal discloses that the Appellate Tribunal has proceeded on the basis that the sole contention of the petitioner is that as the default in payment of contribution relates to a period prior to 2005, the petitioner is not liable. A reading of Ext.P12 appeal memorandum would indicate that the petitioner had no case that it is not liable for the reason that it is a transferee. As a matter of fact in paragraph 2 of Ext.P12 appeal memorandum beneath the heading "Facts of the Case" the petitioner has stated that under the terms of the lease agreement the petitioner is liable to pay the contribution to the Employees Provident Fund though he is not liable to pay such contribution prior to 25.9.2005. Ext.P1 summons relates to the period from June 2004 to May 2008. Therefore, the contention of the petitioner that it is not liable for the period prior to 25.9.2005 will not absolve the petitioner of the liability for the period thereafter. The petitioner had in Ext.P12 appeal memorandum prayed that the order impugned in the appeal may be set aside and the petitioner may be afforded an opportunity to cross-examine the Enforcement Officer. From a reading of Ext.P17 order it is evident that no one of the material contentions raised by the petitioner in Ext.P12 appeal memorandum have been considered on the merits. Therefore, Ext.P17 is liable to be set aside on that short ground.

7. In Ext.P1 summons issued u/s 7-A of the Act, the first respondent had alleged that the petitioner had not remitted fully the provident fund contribution in respect of his employees and that 30 employees who had been employed from March 2006 were not enrolled. There were other allegations also. Such a notice was issued based on the report of inspection submitted by the Enforcement Officer. After receipt of Ext.P1 notice, the petitioner had sent Ext.P3 letter dated 3.11.2008 and Ext.P4 letter dated 9.12.2008 wherein the Managing Partner of the petitioner firm requested the first respondent to furnish him with a copy of the report of inspection dated 9.7.2008. Though later, along with the letter dated 11.2.2009, the first respondent had furnished Ext.P5 inspection report dated 9.7.2008 and Ext.P6 list of employees numbering 30, who according to the first respondent were not enrolled with effect from March 2006, the inspection report dated 30.6.2008 was not furnished. The Managing Partner of the petitioner firm therefore submitted Ext.P8 representation dated 18.2.2009 wherein he requested for the details based on which Ext.P5 report was prepared and for a copy of the report dated 30.6.2008. He also requested for an opportunity to cross-examine the Enforcement Officer after a copy of the report is furnished. It is evident from page No. 3 of Ext.P9 order that the Managing Partner of the petitioner firm had on 18.2.2009 requested for an adjournment of the hearing by submitting Ext.P8 representation dated 18.2.2009 which was received by the first respondent that day itself. The Managing Partner of the petitioner firm had in Ext.P8 specifically requested the first respondent to furnish a copy of the

report dated 30.6.2008 and its enclosures which were forwarded to the first respondent by the Enforcement Officer. The Managing Partner of the petitioner firm had in that letter specifically pointed out that though Ext.P5 report was furnished to him, the report dated 30.6.2008 which preceded Ext.P5 was not furnished to him. The Enforcement Officer has not however, in Ext.P9 order referred to that aspect of the matter. Though the first respondent has in Ext.P9 order stated that Ext.P8 representation dated 18.2.2009 was received in response to the first respondent's letter dated 11.2.2009 forwarding a copy of the Enforcement Officer's report, the first respondent has not stated in Ext.P9 that the request made by the petitioner in Ext.P8 for a copy of the inspection report dated 30.6.2008 is not sustainable either for the reason that there is no such report or for any other reason. The first respondent has also not stated that the report forwarded to the Managing Partner of the petitioner firm along with the first respondent's letter dated 11.2.2009 is the only report submitted by the Enforcement Officer and that though it bears the date 9.7.2008 it is actually a copy of the inspection report dated 30.6.2008. Instead, as regards that aspect the only reason stated in Ext.P9 is that the employer did not attend the hearing even after repeated adjournments and did not make any attempt to have his doubt about the Enforcement Officer's report cleared by appearing before the first respondent in person or through authorised representative.

8. The Apex Court has in *Kanwar Natwar Singh Vs. Director of Enforcement and Another*, held that the right to fair hearing is a guaranteed right and that nothing should be used against a person which has not been brought to his notice. It was held that the concept of fairness requires the adjudicating authority to furnish those documents upon which reliance has been placed and that it is only in cases where disclosure of evidential material might inflict serious harm on the person directly concerned or other persons or where disclosure would be in breach of confidence or might be injurious to public interest that an exception to the said rule can be taken. In the instant case, it is evident from Ext.P9 order passed by the first respondent that he had accepted the report submitted by the Enforcement Officer without furnishing to the petitioner a copy of the report dated 30.6.2008. In the light of the principles laid down by the Apex Court in *Natwar Singh v. Director of Enforcement* (supra) it cannot be said that a fair procedure was followed by the first respondent before passing the order of determination u/s 7-A of the Act. The first respondent who was in possession of the report dated 30.6.2008 furnished by the Enforcement Officer should have furnished a copy thereof to the petitioner along with Ext.P5 report dated 9.7.2008. Ext.P5 itself shows that it is Part II of the report meaning thereby that there was another Part to it. That having not been done, I am of the opinion that a fair hearing was not afforded to the petitioner before Ext.P9 order was passed. Though a review was attempted and it was entertained even at the stage of review, the first respondent did not furnish the said material to the petitioner. I am therefore of the opinion that Exts.P9 and P11 orders are also liable to be set aside.

I accordingly allow the writ petition, quash Exts.P9, P11 and P17 and direct the first respondent to pass revised orders in the matter after furnishing the petitioner a copy of the report dated 30.6.2008 and the accompanying papers. Needless to say the petitioner should be afforded an opportunity to cross examine the Enforcement Officer who prepared and submitted the report.

Revised orders in the matter shall be passed expeditiously and in any event within three months from the date on which a copy of the report dated 30.6.2008 is furnished to the petitioner.