(2022) 02 DEL CK 0095

In the Delhi High Court

Case No : Civil Writ Petition No. 2718 Of 2022, Civil Miscellaneous Application No. 7779, 7780, 7781 Of 2022

Tenneco Automotive India Private Limited APPELLANT

Vs

Regional Provident Fund Commissioner (C And R) Gurugram RESPONDENT

Date of Decision : 11-02-2022

Acts Referred:

Employees? Provident Funds And Miscellaneous Provisions Act, 1952 — Section 7A, 7O, 14B

Citation : (2022) 02 DEL CK 0095

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : S.P. Arora, Rajiv Arora, Manish Dembla, Ishita Satyajit, B. B. Pradhan, Kishor Kumar

Final Decision : Disposed Of

Judgement

Prathiba M. Singh, J

1. This hearing has been done through video conferencing.

2. The present petition challenges the impugned order dated 1st February, 2022, in Appeal No. D-2/01/2022 titled M/s. Tenneco Automotive India Pvt.

Ltd. v. APFC/RPFC, Gurugram, by which the CGIT has directed pre-deposit of 30% of the assessed amount as a pre-condition for filing the appeal.

The said appeal challenged the order dated 28th October, 2021, in Ref:No.HR/GGN-West/C-31/10325/5045, passed by the Regional Commissioner

(C&R), Employeesâ?? Provident Fund Organization, under Section 7A of the Employeesâ?? Provident Funds and Miscellaneous Provisions Act,

1952 (hereinafter â??EPF Actâ??).

3. The submission of Mr. Arora, ld. counsel for the Petitioner, is that the

impugned order shows that there is a complete non-application of mind by the

CGIT, in as much as there is already a sum of Rs.45,31,313/-, which stood deposited by the Petitioner with the Respondent/RPFC, Gurugram

(hereinafter â??RPFCâ?), which was well within the knowledge of the CGIT. However, the impugned order does not factor in this already deposited

amount of Rs.45,31,313/-, into the 30% pre-deposit amount directed to be deposited, under Section 7-O of the EPF Act. In fact, even a reference to

an amount of Rs.11 lakhs having been already deposited by the Petitioner was made in the order, which amount is also completely incorrect. He

further submits that the CGIT has been passing identical orders in various such matters, and there is hardly any case where waiver on the pre-deposit

amount is being considered or granted by the CGIT under Section 7-O of the EPF Act.

4. Mr. Pradhan, ld. Counsel who appears on advance notice for the Respondent, submits that it is not in dispute that the sum of Rs.45,31,313/- has

already been deposited by the Petitioner.

5. Heard and perused the record. The initial order under Section 7A of the EPF Act was passed on 28th October, 2021. Vide said order, the Petitioner

was directed to deposit a sum of Rs.1,14,59,596/- as the assessed amount. Pursuant to this order, the Petitioner deposited a sum of Rs.45,31,313/-,

without prejudice to its right and contentions. Subsequently, the order dated 28th October, 2021, was challenged by the Petitioner by way of

proceedings under Section 7-O of the EPF Act and in the said appeal, the CGIT has directed the Petitioner to deposit 30% of the assessed amount as

under:

â??Considering the submissions advanced by the counsel for both the parties an order need to be passed on the compliance/waiver of the

conditions laid under the provisions of sec 7-O of the Act. There is no dispute on the facts that the persons in respect of whom the

establishment has not complied the PF contribution had joined as Trainees. At this stage no opinion can be formed on their status after

completion of the Training. At the same time it need to be considered that the period in respect of which inquiry was initiated are from 7/18

to 9/2019 and the amount assessed is 1,14,59,596/- and a part there of amounting to eleven lakh has already been deposited by the appellant. Without going to the other detail s as pointed out by the appellant for challenging the order as arbitrary, and at this stage of

admission without making a roving inquiry on the merits of the appeal, it is felt proper to extend protection to the appellant pending

disposal of the Appeal. Thus on hearing the argument advanced, it is felt proper and desirable that pending disposal of the appeal, the said

amount be protected from being recovered from the appellant as the judicial approach requires that during the pendency of the appeal the

impugned order having serious civil consequence must be suspended.

In view of the said principle as has been laid down by the Appex court and considering the grounds taken in the appeal, the period of

default, the amount assessed, it is felt that the circumstances do not justify total waiver of the condition of pre deposit. But the ends of

justice would be met by reducing the amount of the said pre deposit from 75% to 30%. Accordingly the appellant is directed to deposit 30%

of the assessed amount within 6 weeks from the date of this order towards compliance of the provisions of sec 7-O of the Act by way FDR in

the name of the Registrar CGIT initially for a period of one year with provision for auto renewal. On compliance of the above said

direction, the appeal shall be admitted and there would be stay on execution of the impugned order till disposal of the appeal. There would

be an interim stay on the impugned order till the next date. Call the matter on 22-March-2022 for compliance of the direction.â??

6. From the record, it is seen that a sum of Rs.45,31,313/-, stands already deposited by the Petitioner with the RPFC and the total amount assessed

itself is Rs.1,14,59,596/-. This Court also takes note of the fact that in the interim impugned order passed by the CGIT, the deposited amount of

Rs.45,31,313/- was not given credit for and instead only a deposit of Rs.11 lakh was recognized, which was also not factored into while directing the

deposit of 30%. If the CGIT had noticed that Rs.45,31,313/- stood already deposited by the Petitioner, there was no occasion to pass the pre-deposit

order, as 30% of the assessed amount would in fact be less than Rs.45,31,313/-, i.e., the amount already lying deposited.

7. Section 7-O of the EPF Act reads as under:

â??7-O. 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.â??

8. The factors to be considered while passing pre-deposit orders under Section 7-O of the EPF Act, are well laid down by a ld. Division Bench of this

Court in Escorts Limited and another v. Union Of India, 43 (1991) DLT 207. It was held herein that apart from financial hardship, the standards of

prima facie case and balance of convenience can be considered for granting of a waiver of pre-deposit. The observations therein read as under:

â??(12) The conclusion of the Collector (Appeals), according to the learned counsel, is quite contrary to the latest law laid down in case

re: Jayashree Insulators Ltd., Rishra v. Collector of Central Excise, Calcutta-11 MANU/CE/0285/1986 : 1987 (28) E.L.T. 279 (Tri)(2). While

dealing with the question of waiver of pre-deposit of duty u/s. 35F of the Act, the Bench after taking Into consideration the entire case law

on the subject, in para 84 of the Judgment held:

â??AFTER very careful consideration it appears to me that a practicable manner of applying the guidelines given by the Supreme Court

and the High Courts would be to consider that where financial hardship has been established, that should suffice for (whole or partial)

waiver of pre-deposit, subject to whatever conditions the appellate authority may deem fit to impose. Where financial hardship is not

established or not pleaded, it would still be open to the applicant to justify waiver on other adequate grounds. These grounds would be the

existence of a prima facie case in his favor, plus balance of convenience. This would normally happen where the applicant lies shown that

even on the face of it he has a case which is not merely a prima facie case as ordinarily understood, but something much stronger. One

example, which was put to Shri Ajwani (vide para 54 supra), would be where there has been an evident error in calculation of the penalty

amount. Another would be as in the case which was before the Allahabad High Court in the case of Hari Fertilizers, (para 42 supra), where

the demand is obviously barred by limitation. (Where questions arise as to whether there has been suppression, collusion etc. and as to

whether the normal time limit or the extended time limit would apply, the time-bar may not be accepted as ""obvious"". Other cases would be

where there is a decision of the Courts, or of the Tribunal itself, clearly in favour of the applicant. In all these cases it could be said that the

balance of convenience is clearly in granting wavier of pre-deposit. Where on the very face of it, it is clear that an amount is not due from

the applicant, the balance of convenience would not appear to lie in requiring him to deposit that amount, only so that it may be refunded to

him a week or a month later. Therefore, where the applicant's case is so strong that it is apparent without laboured exposition, it may well

be a case where the balance of convenience, over and above a mere prima facie case, calls for the waiver of pre-deposit, notwithstanding

that financial hardship is not established or has not been pleaded.â??

9. Similarly, a ld. Division bench of this Court in Girdhar Silk Mills (P) Ltd. v. Presiding Officer, 101 (2002) DLT 139, upheld the non-waiver of pre-

deposit amount by the tribunal when on a complete examination of the facts in that case, no prima facie case could be established. In O.G. Bajaj

Construction v. Assistant Provident Fund Commissioner, 2010 (3) ALLMR 633, a ld. Division Bench of the Bombay High Court also held that

evidence demonstrating incapacity would have to be placed on record in each case to ascertain whether the pre-deposit amount could be waived. This

position has also been reiterated by this Court in Riding Consulting Engineers India Limited vs. Assistant P.F. Commissioner, Delhi (North), [2021

(171) FLR 162].

10. The Supreme Court in Shiv Harbal Research Laboratory v. Assistant P.F. Commissioner, 2016 LLR 55 has also held that Section 7-O provides

discretion to the Tribunal in directing pre-deposit. The said decision reads as under:

â??2. Having heard learned Counsel for the respective parties, we are unable to accept the submissions made on behalf of the Respondent,

having regard to the fact that had it been the intention of the legislature to also include the principles incorporated in Section 7-O of the

above Act, the same would have been indicated in the provision relating to filing of appeals against such orders. Section 7-O makes specific reference to orders passed in terms of Section 7A where it has been laid down that no appeal by the employer shall be entertained unless he

has deposited 75% of the amount due from him as determined by an officer referred to in Section 7A . The provison to Section 7O ,

however, grants the Tribunal discretion for reasons to be recorded in writing, to waive or reduce the amount to be deposited under the said

section. There is no such provision as far as Section 14B is concerned.â??

11. Therefore, the settled legal position is that whenever directions for pre-deposit are made, the concerned tribunal has to assess the case made out

by the petitioner concerned as to whether a prima facie case is made out by the petitioner for seeking a reduction in the pre-deposit amount or not. If

a prima facie case is made out, there has to be application of mind, as to how much pre-deposit amount should be directed, given the peculiar facts

and circumstances in each case. Passing standard orders in the form of templates, in all matters, without giving due consideration to the facts of each

case, would not be appropriate. It is clear that each individual case would have to be considered on its own merits and only thereafter, a pre-deposit

ought to be directed.

12. In view of the facts of this matter and the settled legal position discussed above, considering the amount already lying with the RPFC qua this very

notice issued to the Petitioners under Section 7A of the EPF Act, it is directed that no further pre-deposit needs to be made by the Petitioner before

the CGIT in this matter and the appeal shall proceed on its merits.

13. Since the said amount of Rs.45,31,313/- is now lying deposited with the RPFC and not with CGIT, it is made clear that if the CGIT finds merit in

the appeal of the Petitioner, and any refund is directed in the said appeal, the same shall be directed to be refunded with some reasonable amount of

interest, as it is submitted that the amount of Rs.45,31,313/- has not been kept by the department, in a fixed deposit.

14. It is made clear that this Court has not gone into the merits of the appeal before the CGIT. Accordingly, the proceedings before the CGIT shall

proceed on merits without being affected by the observations of this Court, except to the extent of the issue of pre-deposit.

15. With these observations, the present writ petition along with all the pending applications is disposed of.