

(2012) 01 KL CK 0039

In the High Court Of Kerala

Case No : Writ Petition (C) No. 32393 of 2011

The Assistant Provident Fund Commissioner

APPELLANT

Vs

West Coast Petroleum Agency and Others

RESPONDENT

Date of Decision : 12-01-2012

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 5B, 7A, 7I, 7L(4)
Kerala Forest Act, 1961 — Section 61(C), 61(D)
Penal Code, 1860 (IPC) — Section 199, 228

Citation : (2012) 1 KLJ 738

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

Bench : Single Bench

Advocate : Thomas Mathew Nellimottil, SC, for the Appellant; E.K. Nandakumar, M. Gopikrishnan Nambiar, K. John Mathai, P. Benny Thomas and P. Gopinath, for the Respondent

Judgement

P.N. Ravindran, J.—The Assistant Provident Fund Commissioner, Employees Provident Fund Organisation, Kozhikode, who was the first respondent in ATA 167 (7) of 2007 on the file of the Employees Provident Fund Appellate Tribunal, New Delhi, has filed this writ petition challenging Ext.P4 order passed by the said Tribunal, whereby it set aside Ext.P1 order passed by him u/s 7A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act" for short) and directed him to pass fresh orders in accordance with law. The brief facts of the case are as follows: By Ext.P1 order passed on 11.1.2007 u/s 7A of the Act, the Assistant Provident Fund Commissioner, Employees Provident Fund Organisation, Kozhikode directed the first respondent herein to pay the sum of Rs. 1,85,649.40 by way of contribution under different heads for the period from 10/2002 to 11/2006. Aggrieved thereby, the first respondent herein filed Ext.P2 appeal before the Employees Provident Fund Appellate Tribunal, New Delhi, which was taken on file and numbered as ATA 167 (7) of 2007. In that appeal, the Assistant Provident Fund

Commissioner, Calicut was joined as the respondent. The officer who passed Ext.P1 order (Sri. P. Prasanth) had himself filed Ext.P3 counter affidavit in that appeal wherein after referring to the various contentions raised in the appeal memorandum, he contended that there is no merit in the appeal and therefore it is liable to be dismissed with costs. By Ext.P4 order passed on 23.3.2011, the Appellate Tribunal set aside Ext.P1 order and remitted the matter back to the authority which passed the original order with certain observations and directions. Hence this writ petition challenging Ext.P4 and seeking the following reliefs.

(a) Set aside Ext.P4 order dated 23.3.2011 of the Employees Provident Fund Appellate Tribunal, New Delhi, in ATA No. 167 (7)/2007.

b) Declare that the 1st respondent is liable to be covered under the provisions of the P.F Act and that the PF dues determined by the 7A authority as per Ext.P1 are sustainable in law.

2. When this writ petition came up for admission hearing on 6.12.2011, Sri. E.K. Nandakumar, Learned Counsel appearing for the second respondent, on whom a copy of the writ petition had been served, raised a preliminary objection to the maintainability of the writ petition. The Learned Counsel contended that as the petitioner had passed Ext.P1 order u/s 7A of the Act acting as a quasi judicial authority, the petitioner is not competent to maintain the writ petition. The issue regarding the maintainability of the writ petition was heard extensively today. Sri. E.K. Nandakumar, Learned Counsel appearing for the second respondent contended relying on the decisions of the Apex Court in *The Bhopal Sugar Industries Ltd. Vs. The Income Tax Officer, Bhopal*, *Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Another*, the decisions of this Court in *Divisional Forest Officer v. Pushpan* 1983 KLT 951, *District Executive Officer v. State of Kerala* 1991 (1) KLT 390, the decision of the Madras High Court in *Regional Provident Fund Commissioner, Tirunelveli v. Prabha Beverages Pvt. Ltd.* 2009 LLR 972 and the decision of the Bombay High Court in *Assistant Provident Fund Commissioner v. Nirmitee Holidays (P) Ltd.* 2011-II-LU-469 that the instant writ petition filed by the quasi judicial authority who passed Ext.P1 order, that was set aside by the Appellate Tribunal by Ext.P4 order, is not maintainable. The Learned Counsel also contended with reference to the averments in paragraph 1 of the statement of facts in the writ petition that the Assistant Provident Fund Commissioner who passed Ext.P 1 order which was set aside by Ext.P4 order has himself filed the writ petition and therefore the mere fact that a superior officer has affixed his signature to the writ petition and the affidavit accompanying it, is not a reason to hold that the Assistant Provident Fund Commissioner is not the petitioner and the Regional Provident Fund Commissioner should be treated as the petitioner. The Learned Counsel submitted with reference to the averments in the affidavit accompanying the writ petition that the Regional Provident Fund Commissioner who has sworn to the affidavit, has not stated that he is the petitioner in the writ petition, but has only

sworn to an affidavit on behalf of the petitioner and therefore nothing turns on the fact that signatures in the writ petition and in the affidavit accompanying it are that of the Regional Provident Fund Commissioner. The Learned Counsel contended that the writ petition is also liable to be rejected as defective for the reason that a person other than the person who figures as the petitioner, has affixed his signature to the writ petition.

3. Per contra, Sri. Thomas Mathew Nellimoottil, learned standing counsel appearing for the petitioner contended that though in the cause title of the writ petition, the name of the petitioner is shown as Assistant Provident Fund Commissioner, the officer who has signed the writ petition is Sri. Vijay Kumar Prasad, Regional Provident Fund Commissioner, Kozhikode, that the affidavits accompanying the writ petition is also sworn to by that officer and therefore the writ petition should be treated as one filed by the Regional Provident Fund Commissioner, Employees Provident Fund Organisation, Kozhikode and not by the officer who passed Ext.P1 order. The Learned Counsel also contended that as the Regional Provident Fund Commissioner is a member of the State Board of Trustees constituted u/s 5B of the Act and is enjoined with the duty to administer the Employees Provident Fund, the writ petition filed by the Regional Provident Fund Commissioner is maintainable.

4. I have considered the submissions made at the Bar by the Learned Counsel on both sides. The correctness of Ext.P1 order passed by the Assistant Provident Fund Commissioner, Calicut in exercise of the power conferred on him u/s 7A of the Act, was canvassed in Ext.P2 appeal filed by the first respondent, wherein the Assistant Provident Fund Commissioner, Calicut was joined as the respondent. Notice of the appeal was served on the respondent in the appeal, he entered appearance through counsel and filed Ext.P3 counter affidavit. Incidentally it is to be mentioned that Ext.P3 counter affidavit was sworn to by the very same officer who passed Ext.P 1 order. After hearing the Learned Counsel on both sides, the Appellate Tribunal allowed the appeal, set aside the impugned order and directed that fresh orders be passed in the manner directed therein. The preliminary objection raised by the Learned Counsel for the second respondent is that as the quasi judicial authority, whose order has been set aside in appeal, the Assistant Provident Fund Commissioner cannot maintain the writ petition.

5. In Divisional Forest Officer v. Pushpan (supra) a learned single Judge of this Court considered the question whether the Divisional Forest Officer who had passed an order of confiscation u/s 61 (C) of the Kerala Forest Act, 1961, which was later set aside by the District Judge in appeal u/s 61D of the Kerala Forest Act, can challenge the order of the District Judge by filing a writ petition. The learned single Judge held that the right to pass an order of confiscation under the Kerala Forest Act is vested in the Divisional Forest Officer who exercises quasi judicial functions, that before passing an order of confiscation he has to observe the principles of natural justice, conform to the procedure prescribed

under the Act, apply his mind and then decide whether on the evidence, confiscation is necessary in the circumstances of the case. It was held that for that purpose he functions as a Tribunal and has no personal or official interest in the cause, he has to be just and upright; fair and impartial, that after he issues the order, he has no more interest in the proceeding, that as far as the case is concerned he becomes functus officio, that his order is appealable u/s 61-D, that administrative discipline, judicial decorum and statutory safe guards demand that he abides by the decision in the appeal and therefore he cannot ignore or challenge it. The learned single Judge held that though the Divisional Forest Officer cannot maintain a writ petition, if the State of Kerala has a grievance it has to figure as the petitioner; but not though the quasi judicial tribunal constituted under the Kerala Forest Act. The relevant portions of the judgment are extracted below for easy reference.

5. The right to confiscate under the Forest Act is vested in the authorized officer, the Divisional Forest Officer. He exercises a quasi judicial function. He has to observe the principles of natural justice, conform to the procedure prescribed under the Act, apply his own mind and then decide on the evidence whether confiscation is necessary in the circumstances of the case. For this purpose he functions as a Tribunal. He has no personal or official interest in the cause. He has to be just and upright; fair and impartial. After he issues the order, he has no more interest in the proceeding. He becomes functus officio as far as the case is concerned. He is the lowest in the hierarchy under the Act. His decision is subject to revision under S. 61C of the act and appealable under S. 61D. The District Judge is the appellate authority. Administrative discipline, judicial decorum and the statutory safeguards demand that he abides by the decision in appeal. He cannot ignore or challenge the decision of the appellate authority. Challenge, if any, can be made by other aggrieved persons or authorities; but not by the Tribunal. If he cannot challenge the decision of the appellate authority, he cannot have recourse to writ proceedings to achieve the same object. The decision of the Supreme Court in *The Bhopal Sugar Industries Ltd. Vs. The Income Tax Officer, Bhopal*, is instructive :-

Where the income tax officer had virtually refused to carry out the clear and unambiguous directions which a superior tribunal like the Income Tax Appellate Tribunal had given to him by its final order in exercise of its appellate powers it is on the hierarchy of courts. In such a case a writ of mandamus should issue ex debito justifies to compel the Income Tax officer to carry out the directions given to him by the Income Tax Appellate Tribunal. The High Court would be clearly in error if it refused to issue a writ on the ground that no manifest injustice had resulted from the order of the Income Tax Officer in view of the error committed by the Tribunal itself in its order. Such a view is destructive of one of the basic principle of the administration of justice.

6. The Divisional Forest Officer cannot therefore maintain this writ petition at all. If the State has a grievance, it has to figure as the petitioner; but not through

the quasi judicial Tribunal, the Divisional Forest Officer constituted under the Act.

6. In coming to the said conclusion, the learned single Judge placed reliance on the decision of the Apex Court in *Bhopal Sugar Industries v. Income Tax Officer* (supra) wherein it was held that the Income Tax Officer whose order has been interfered with by the Income Tax Appellate Tribunal is bound to carry out the directions issued by the Income Tax Appellate Tribunal and refusal on his part to carry out the directions of the Income Tax Appellate Tribunal would amount to denial of justice and in such circumstances a writ of mandamus would issue to compel the Income Tax Officer to carry out the directions issued by the Income Tax Appellate Tribunal.

7. The very same view was reiterated by another learned single Judge of this Court in *District Executive Officer v. State of Kerala* (supra) wherein it was held that the District Executive Officer functioning under the Kerala Motor Transport Workers Welfare Fund Act, 1985 cannot challenge the appellate order passed by the State Government modifying the order passed by him under that Act. The relevant portions of the judgment are extracted below.

8. Since petitioners have acted as a quasi judicial authority, they cannot be permitted to act as parties, whatever be the sequence of events. Having fulfilled one role, the other role should not be available. That was justification enough for the appellate authority to have interceded.

9. There is another and an equally fundamental objection to permitting petitioners to maintain actions. If a subordinate authority is to challenge the decision of a superior authority, that would be an unwholesome state in areas of quasi judicial functions. In *The Bhopal Sugar Industries Ltd. Vs. The Income Tax Officer, Bhopal*, , the Supreme Court held that when a subordinate authority in the hierarchy does not adhere to, or abide by the decision of a superior authority, its action cannot be justified. That was a case where an Income Tax Officer failed to carry out the directions of a superior tribunal, namely the Income Tax Appellate Tribunal. The Court said:

Such refusal is in effect a denial of justice and is furthermore destructive of one of the basic principles in the administration of justice, based as it is, in this country, on a hierarchy of courts.

This principle has been accepted by English Courts also. In *Cassel v. Broome* 1972 A.C. 1027, Diplock L.J. observed:

It is inevitable in a hierarchal system of courts that there are decisions of the Supreme Appellate Tribunal which does not attract unanimous approval.....The judicial system works only if some one is allowed to have the last word.

10. If the petitioners are permitted to assume a dual role, that would be permitting them to abandon the core principle of fair adjudication and judicial discipline. Such a course cannot be assented to.

8. In *Regional Provident Fund Commissioner, Tirunelveli v. Prabha Beverages Pvt. Ltd.* (supra) a learned single Judge of the Madras High Court considered the question whether the Regional Provident Fund Commissioner who had passed the assessment order u/s 7A of the Act is competent to maintain a writ petition challenging the order of the Employees Provident Fund Appellate Tribunal which interfered with the said order. Relying on the decision of the Apex Court in *Union Of India v. K.M. Sankarappa* AIR 2000 SC 3678 and the decision of the Division Bench of the Madras High Court in *Central Board of Film Certification v. Yadavalaya Films* 2007 (2) MLJ 604, the learned Judge held that the Regional Provident Fund Commissioner is not competent to maintain the writ petition, The relevant portions of the judgment are extracted below.

6. As to the right of the Provident Fund Commissioner in filing the writ petition and challenging the order of the Tribunal in the light of section 7L(4) of the EPF Act, Mr. Vibhishanan, Learned Counsel for the petitioner submitted that the bar u/s 7L(4) of the EPF Act may not apply to the writ proceedings. The Provident Fund Commissioner having passed an order u/s 7A can be an aggrieved party and challenged its reversal by the Tribunal before this Court.

7. In more or less similar circumstances, under the Cinematograph Act, the Supreme Court vide its decision in *Union of India v. K.M. Sankarappa* AIR 2000 SC 3678 : (2001) 1 SCC 582 : (2001) 1 MLJ 146 held in para 7, which is as follows at p. 148 of MLJ:

7. The executive cannot sit in an appeal or review or revise a judicial order. The Appellate Tribunal consisting of experts decides matters quasi-judicially. A Secretary and/or Minister cannot sit in appeal or revision over those decisions. At the highest, the Government may apply to the Tribunal itself for a review, in circumstances so warrant. But the Government would be bound by the ultimate decision of the Tribunal.

(Emphasis supplied)

9. When the Central Board of Film Certification came up before this Court challenging the order of the Tribunal, a Division Bench of this Court, to which I am (K. Chandru, J.) a party, had an occasion to consider the locus standi of the Central Board of Film Certification v. Yadavalaya Films (2007) 2 MLJ 604 (Mad.) In para 22, it was observed as follows at p. 613:

22. in our opinion, it is doubtful whether these appeals are maintainable, in view of the decision of the Supreme Court in *Union of India v. K.M. Shankarappa* AIR 2000 SC 3678 : (2001) 1 SCC 582 : (2001) 1 MLJ 146 (SC).

10. In the present case, except that the petitioner was very sensitive about his own order being reversed by the Tribunal, there is no case for them to come to this Court challenging the order of the Tribunal, which had given sound reasoning for reversing the order passed by the first respondent.

11. In *Assistant Provident Fund Commissioner v. Nirmitee Holidays (P) Ltd.*

(supra) a learned single Judge of the Bombay High Court considered the question whether the Assistant Provident Fund Commissioner is competent to maintain a writ petition challenging an order passed by the Employees Provident Fund Appellate Tribunal, interfering with the order passed by him u/s 7A of the Act. It was held that as the Assistant Provident Fund Commissioner was exercising quasi judicial functions, it is not permissible for him to challenge the order passed by the Appellate Tribunal reversing his order. The relevant portion of the judgment is extracted below.

4. Bare perusal of the provisions of the Act and particularly Section 7-A and Section 7-I of the Act discloses that while discharging jurisdiction u/s 7-A of the Act, the petitioner was discharging quasi-judicial functions and the said order was challenged by the respondent in an appeal filed u/s 7-I of the Act and the Appellate Authority by discharging quasi-judicial functions has allowed the appeal preferred by the respondent. Once it is clear that the petitioner was exercising quasi-judicial functions while passing the order which has been set aside by the Appellate Authority, in my considered opinion, it would not be permissible for the petitioner to challenge the order passed by the Appellate Authority reversing his order. Permitting such an exercise would be subversive of judicial discipline. It is well-settled that an authority while discharging quasi-judicial functions cannot challenge the order passed by the Appellate Authority, reversing his/her order. In my considered opinion, the ration laid down in the case of Village Panchayat of Velim v. Shri. Valentine S.K.F. Rebello and Another (Supra) and in the case of Village Pachayat of Sancoale and Another v. M-Tech Developers Ltd. (supra), relied upon by the Learned Counsel for the respondent would be squarely applicable. I do not find any merit in the submission of Mr. Singh, Learned Counsel appearing for the petitioner that the petition is maintainable since the petitioner himself is not benefited by challenging the order passed by the Appellate Authority and he has filed the present petition only to protect the interest of the employees of the respondent. In my opinion, this issue does not arise in the present petition. An authority exercising judicial or quasi-judicial functions; is not even supposed to defend its own order when challenged before higher forum. In this connection, it would be appropriate to refer to the judgment of the Apex Court in the case of Syed Yakoob Vs. K.S. Radhakrishnan and Others, . in which the Apex Court has held that the Tribunals are not suppose to defend his own orders unless allegations are made against them. It is therefore well-settled that the Tribunal discharging quasi-judicial functions is not supposed to defend its action even when its order are challenged before the higher forum, as has been held in the case of Syed Yakoob v. K.S. Radhakrishnan and Others (supra).

(Emphasis supplied)

12. The question whether the Special Director appointed under the Foreign Exchange Regulation Act, 1963 can file an appeal before the High Court challenging the order passed by the Foreign Exchange Regulation Appellate

Board whereby the Board set aside the order passed by him. was considered by the Apex Court in *Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate and Another* (supra). The Apex Court held that the adjudicating authority who exercises quasi-judicial functions is bound by the appellate order passed by the Foreign Exchange Regulation Appellate Board and is not empowered to prefer an appeal on behalf of the Central Government. The relevant portion of the judgment is extracted below.

16. An adjudicating authority exercises a quasi-judicial power and discharges judicial functions. When its order had been set aside by the Board, ordinarily in absence of any power to prefer an appeal, it could not do so. The reasoning's of the High Court that he had general power, in our opinion, is fallacious. For the purpose of exercising the functions of the Central Government, the officer concerned must be specifically authorised when an officer is so specifically authorised, he can act on behalf of the Central Government and not otherwise. Only because an officer has been appointed for the purpose of acting in terms of the provisions of the Act, the same would not by itself entitle an officer to discharge all or any of the functions of the Central Government. Even ordinarily a quasi-judicial authority cannot prefer an appeal being aggrieved by and dissatisfied with the judgment of the appellate authority whereby and whereunder its judgment has been set aside. An adjudicating authority, although an officer of the Central Government, should act as an impartial tribunal. An adjudicating authority, therefore, in absence of any power conferred upon it in this behalf by the Central Government, could not prefer any appeal against the order passed by the Appellate Board.

(Emphasis supplied)

13. The principle that emerges from the decisions referred to above is that an adjudicating authority which exercises quasi judicial powers and discharges quasi judicial functions cannot in the absence of any specific conferment of power, challenge an order passed by the Appellate Authority. It is evident from the provisions contained in section 7A of the Act that before passing an order thereunder, the officer conducting the enquiry has to issue notice to the parties against whom the proceedings are initiated and afford them an opportunity of being heard. The officer holding the enquiry is also vested with the powers of a civil court. An enquiry u/s 7A of the Act is also deemed to be a judicial proceedings within the meaning of Section 199 and 228 of the Indian Penal Code. Such being the situation, applying the principles laid down in the decisions referred to above, it has to be necessarily held that the Assistant Provident Fund Commissioner, who passed Ext.P 1 order, is not competent to maintain this writ petition. That takes me to the question as to whether as contended by the Learned Counsel for the petitioner this writ petition can be treated as one filed by the Regional Provident Fund Commissioner. It is evident from the opening paragraph of the writ petition and the cause title of the writ petition that the petitioner is none other than the Assistant Provident Fund Commissioner and not

the Regional Provident Fund Commissioner. The mere fact that the Registry of this Court numbered the writ petition without noticing the fact that the Regional Provident Fund Commissioner has signed the writ petition, though the Assistant Provident Fund Commissioner is shown as the petitioner, it cannot be said that the writ petition is one filed by the Regional Provident Fund Commissioner. Even assuming that the Regional Provident Fund Commissioner is the petitioner, as the jurisdiction u/s 7A of the Act is concurrent and the Regional Provident Fund Commissioner himself could have passed the order u/s 7 A of the Act, merely because of the fact that he is a superior officer, it cannot be said that he is not disabled from filing the writ petition.

I accordingly uphold the preliminary objection raised by the Learned Counsel for the second respondent and hold that the writ petition is not maintainable. The writ petition fails and is dismissed.