

(2014) 11 PAT CK 0014

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 6920 of 2010

The Employees Provident Fund Organisation

APPELLANT

Vs

Janta Cold Storage Mahnar

RESPONDENT

Date of Decision : 18-11-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35H

Constitution of India, 1950 — Article 226

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 15, 21, 7A, 7B, 7J

Limitation Act, 1963 — Section 5

Citation : (2015) 144 FLR 711 : (2015) 1 LLJ 319 : (2015) LLR 419 : (2015) 3 PLJR 652

Hon'ble Judges : Hemant Kumar Srivastava, J

Bench : Single Bench

Advocate : Prashant Sinha, Advocate for the Appellant; Harendra Pd. Singh, Sr. Advocate and Ramashray Roy, Advocate for the Respondent

Judgement

Hemant Kumar Srivastava, J.—This writ petition under Article 226 of the Constitution of India has been filed on behalf of the petitioner for quashing the order dated 15.06.2009 passed by Employment Provident Fund Appellate Tribunal, New Delhi in A.T.A. No. 281(3) of 2001 by which and whereunder Appellate Tribunal set aside the order dated 28.02.2001 passed by the Assistant Provident Fund Commissioner, Muzaffarpur under section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act").

2. Originally, this writ petition was filed for the above stated relief but during the pendency of this writ petition, I.A. No. 3185/2014 was filed praying therein for quashing the order dated 05.05.2009, contained at annexure A to the supplementary counter affidavit, passed by Employment Provident Fund Appellate Tribunal, New Delhi in A.T.A. No. 281(3) of 2001.

3. Admittedly, respondent is an Establishment covered under the Act and for the

purpose of assessment of dues an enquiry under section 7A of the Act was initiated and an opportunity was given to the respondent to represent his case. Thereafter, one Mr. Udai Shankar Jaiswal representing Establishment, filed a representation to this effect that the above stated Act was not applicable in respect of Establishment in question. After completion of enquiry, the Enquiry officer came to the conclusion that the Establishment was covered under the Act from March, 1988 and more than 20 workers were employed in the aforesaid Establishment. Accordingly, vide order dated 28.02.2001, Assistant Provident Fund Commissioner, Muzaffarpur directed the respondent to deposit the dues as per provision of the Act. Being aggrieved by assessment order dated 28.02.2001, respondent preferred A.T.A. No. 281(3) of 2001 before Employment Provident Fund Appellate Tribunal, New Delhi but the aforesaid A.T.A. No. 281(3) of 2001 was dismissed in default vide order dated 21.08.2007 against which restoration petition was filed which was, too, dismissed by the Tribunal vide order dated 25.02.2009. After dismissal of the above stated restoration petition, respondent filed CWJC No. 2848/2008 for quashing the dismissal order dated 25.02.2009 but in the meantime, respondent filed a fresh petition for recall of the order dated 21.08.2007 and 25.02.2009 before Appellate Tribunal and the aforesaid petition was allowed by the Appellate Tribunal vide order dated 05.05.2009. Accordingly, order dated 21.08.2007 was recalled and A.T.A. No. 281(3) of 2001 was restored to its original number. After restoring A.T.A. No. 281(3) of 2001, parties were heard and A.T.A. No. 281(3) of 2001 was allowed by the impugned order dated 15.06.2009.

4. As I have already stated that initially, the order dated 05.05.2009 passed by the Appellate Tribunal was not challenged before this court but in course of hearing, it was brought on record by the respondent that A.T.A. No. 281(3) of 2001 had already been restored vide order dated 05.05.2009 and photo stat copy of the order dated 05.05.2009 passed in A.T.A. No. 281(3) of 2001 was brought on record as annexure A to the supplementary counter affidavit. Thereafter, petitioner filed I.A. No. 3185/2014 for quashing the order dated 05.05.2009 passed in A.T.A. No. 281(3) of 2001 on the ground that the appellant was not aware about the above stated order dated 05.05.2009 and the appellant came to know about the above stated order when copy of the above stated order was brought on record before this court.

5. Learned counsel appearing for the appellant/ petitioner submitted that admittedly, A.T.A. No. 281(3) of 2001 was dismissed in default and for restoring the aforesaid A.T.A. No. 281(3) of 2001, a restoration petition was filed by the respondent but the aforesaid restoration petition was dismissed by the Appellate Tribunal on 25.02.2009 and the respondent, again, filed second restoration petition for restoration of A.T.A. No. 281(3) of 2001. He further submitted that second restoration petition was barred by the principle of res judicata because the first restoration petition had been dismissed on merit and it is well settled principle of law that second restoration petition is not maintainable in the eye of law. In support of his contention, he referred the decision of Sheo Lagan and

Another Vs. State of Bihar, . He further submitted that according to rule 15 of the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997, there is limitation of 30 days for filing restoration petition but admittedly, in the present case, the above stated A.T.A. No. 281(3) of 2001 was dismissed in default on 21.08.2007 and first restoration petition was also dismissed on 25.02.2009 and thereafter, second restoration petition was filed on 28.04.2009 i.e. after more than two years of dismissal order. Therefore, the aforesaid restoration petition was highly time barred and the Tribunal had got no jurisdiction to condone the delay as the Act is self contained Act and section 5 of the Limitation Act is not applicable in the above stated Act. In support of his contention, he referred decision of Popat Bahiru Govardhane etc. Vs. Special Land Acquisition Officer and Another, and submitted that the above stated decision was passed in case of Land Acquisition Act, 1984 but ratio of the aforesaid judgment is applicable in the present case also. He also relied upon the decision of Commissioner of Custom and Central Excise v. Hongo India Private limited and another reported in 2009 (5) SCC 791 page and submitted that though the aforesaid case relates to the Central Excise Act, 1944 but the Apex court held that the court is bound to respect legislative intention and not to extend limitation period by giving liberal interpretation and, therefore, provision of limitation Act is not applicable in the cases of the Central Excise Act, 1944 which is self contained Act.

6. He further submitted that the Act is self contained Act and the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997 has been framed by the Central Government exercising power conferred by subsection (1) of section 21 of the Act and furthermore, neither the aforesaid Act nor rules contains any provision of application of limitation Act in the dispute arose under the Act. He further submitted that neither the above stated Act nor the rule says that Tribunal has power to entertain the restoration petition beyond the period of 30 days as prescribed in the rule 15(2) of the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997. He further submitted that similarly, there is no provision of review either in the Act or in the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997 and, therefore, the Appellate Tribunal can not exercise the power of review, if the provision of review is not in the statute book. In support of his contention, he relied upon decision of Assistant Commercial Taxes Officer Vs. Makkad Plastic Agencies, in which Apex Court of this country held that in absence of any statutory provision for review, exercise of power of review under garb of clarification/modification/correction is not permissible.

7. He further submitted that moreover, when Appellate Tribunal once had already dismissed restoration petition on merit, there was no occasion before the Tribunal to entertain second restoration petition as second restoration petition was barred by the principle of res judicata. He further submitted that no doubt, there is no specific provision of res judicata in the Act but even if, in absence of any specific provision, the principle of res judicata is applied by the court for the purpose of deciding final litigation. He further submitted that, as a matter of fact,

the order dated 25.02.2009, by which first restoration petition was dismissed, had already attained its finality as CWJC No. 2848/2008, which had been filed by the respondent for quashing the order dated 25.02.2009, had already been withdrawn. Learned counsel for the petitioner relied upon decision of Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, .

8. The next submission of learned counsel for the petitioner is that when Tribunal was not competent to restore A.T.A. No. 281(3) of 2001 on the basis of filing of second restoration petition, the Tribunal had got no power to decide A.T.A. No. 281(3) of 2001 on merit passing the impugned order dated 15.06.2009 and, therefore, in the aforesaid circumstance, the order dated 15.06.2009 passed in A.T.A. No. 281(3) of 2001 shall be deemed to be nonexistence because A.T.A. No. 281(3) of 2001 had already been dismissed by the Tribunal vide order dated 25.02.2009. He further submitted that admittedly, an enquiry was conducted and it was found that more than 20 labourers were engaged in the aforesaid Establishment but the benefits prescribed in the Act were not given to all the labourers and, thereafter, Assistant Provident Fund Commissioner, Muzaffarpur passed order under section 7A of the Act. Therefore, the findings of the Tribunal are completely erroneous and against the materials available on the record.

9. On the other hand, learned counsel appearing for the respondent refuted the above stated submissions of learned counsel for the petitioner arguing that, no doubt, A.T.A. No. 281(3) of 2001 was dismissed in default on 21.08.2007 and just after dismissal of the aforesaid A.T.A. No. 281(3) of 2001, restoration petition was filed before the Tribunal on 26.10.2007 but the aforesaid restoration petition was, too, dismissed in default as at the time of hearing of the aforesaid restoration petition, neither counsel for the respondent nor clerk of learned counsel could appear before the Tribunal as a result thereof, restoration petition was dismissed vide order dated 25.02.2009. He further submitted that after dismissal of restoration petition vide order dated 25.02.2009, the respondent filed review petition for review of order dated 25.02.2009 as well as for restoration of A.T.A. No. 281(3) of 2001. He further submitted that there is specific provision of review in the Act. He drew my attention towards section 7-L(2) of the aforesaid Act and submitted that the aforesaid section makes provision for review and the aforesaid section prescribes 5 years limitation for filing review. He further submitted that application of question of res judicata in the present case does not arise because the restoration petition was not heard on merit and it was summarily rejected and after dismissal of restoration petition, review petition was filed under the provision of the above stated Act and moreover, even if the second petition is treated as restoration petition, then also, second restoration petition was maintainable because first restoration petition was not dismissed on merit. In support of his contention, he referred the decision of Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others, wherein the apex court has held that before a plea can be held to be barred by the principle of res judicata that plea must have been heard and determined by the court. He also referred decision of Mathura Prasad Bajoo Jaiswal and Others

Vs. Dossibai N.B. Jeejeebhoy, wherein the apex court has held that question of relating to jurisdiction of court can not be deemed to have been finally determined by erroneous decision of court. He further submitted that so far as withdrawal of CWJC No. 2848/2008 is concerned, since A.T.A. No. 281(3) of 2001 had already been restored by the Tribunal on its original number for hearing, there was no occasion before the respondent to pursue the above stated CWJC No. 2848/2008 as the aforesaid writ petition had been filed by the respondent for quashing of dismissal order of the aforesaid A.T.A. No. 281(3) of 2001.

10. He further submitted that during the course of enquiry, it came to light that only 14 regular labourers were engaged in the Establishment and 7 labourers were engaged by the cultivators themselves for loading and unloading and the payment of the aforesaid 7 labourers had never been made by the Establishment and, therefore, the above stated 7 labourers were not labourers of the Establishment. He further submitted that mere counting of heads is not a criteria to determine the liability of the Establishment. He referred case of Sri L.N. Verma @ Lala Lakshi Narayan Verma v. The State of Bihar and another reported in 2013 (2) PLJR 931 wherein a bench of this court held that no collection can be made by the P.F. authorities for faceless, nameless or non-identifiable workmen on mere head-count or herd-count. Similar principle has been reiterated by the same bench of this court in the case of Raj Kumar Gupta Vs. The Assistant Provident Fund Commissioner and Another, .

11. On the strength of the aforesaid decisions learned counsel for the respondent submitted that even on merit the findings of Appellate Tribunal are not liable to be disturbed and interfered by this court. Accordingly, he prayed for dismissal of the present writ petition.

12. The next contention is that learned counsel of the appellant was heard by the Tribunal at the time of passing the order dated 05.05.2009 and now, at this stage, that is to after final disposal of A.T.A No. 281(3) of 2001, appellant can not say that he was not aware of the order dated 05.05.2009. He further submitted that even if it is assumed that there was no specific provision for application of limitation Act, then also the Tribunal had ancillary or accidental power to discharge its functions effectively for the purpose of doing justice between the parties. He referred decision reported in Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others, .

13. First of all, I would like to refer section 7L of the Act which runs as follows:

"Orders of Tribunal ---(1) A Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against or may refer the case back to the authority which passed such order with such directions as the Tribunal may think fit, for a fresh adjudication or order, as the case may be after taking additional evidence, if necessary.

(2) A Tribunal may, at any time within five years from the date of its order, with a

view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendment in the order if the mistake is brought to its notice by the parties to the appeal.

Provided that an amendment which has the effect of enhancing the amount due from, or otherwise increasing the liability of, the employer shall not be made under this subsection, unless the Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

(3) A Tribunal shall send a copy of every order passed under this section to the parties to the appeal.

(4) Any order made by a Tribunal finally disposing of an appeal shall not be questioned in any Court of law."

14. I also like to refer section 7J of the Act which runs as follows:

"7-J Procedure of Tribunals---(1) A Tribunal shall have power to regulate its own procedure in all matters arising out of the exercise of its powers or of the discharge of its functions including the places at which the Tribunal shall have its sittings."

15. Section 21 of the Act gives power to make rules to carry out the provisions of the Act and admittedly, by exercising the power conferred by sub-section (1) of section 21 of the Act, Central Government made the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997. For the purpose of better appreciation of facts of this case, rule 15 of the above stated Rules is relevant. The said rule runs follows:-

"15. Action on appeal for appellant" default--- (1) Where on the date fixed for hearing of the appeal or on any other date to which such hearing may be adjourned, the appellant does not appear when the appeal is called for hearing the Tribunal may, in its discretion either dismiss the appeal for default or hear and decide it on merit.

(2) Where an appeal has been dismissed for default and the appellant files an appeal within thirty days from the date of dismissal and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called for hearing, the Tribunal shall make an order setting aside the order dismissing the appeal and restore the same:

Provided, however, where the case was disposed of on the merits, the decision shall not be reopened except by way of review."

16. From perusal of the above stated provisions, it is obvious that if any order is passed by the Central Government or any authority under subsection (1) of section 7A or section 7B of the Act (except an order rejecting application for review referred to in sub-section (5) thereof), the aggrieved person may refer an appeal to Tribunal against such order. Furthermore, it is also obvious that a Tribunal shall have power to regulate its own procedure in all matters arising out

of the exercise of its powers or of the discharge of its functions including the places at which the Tribunal shall have its sittings.

17. The procedure adopted by the Tribunal has been given in the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997 and section 15 of the aforesaid rules gives power to Tribunal to dismiss appeal for default or hear and decide on merit in absence of appellant. Furthermore, sub-clause (2) of Rule 15 of the Act gives an opportunity to the appellant for filing restoration petition within thirty days from the date of dismissal of appeal in default. The proviso of the aforesaid rule says that if the appeal has been disposed of on merit in absence of appellant, the decision can only be opened by way of review petition. There is no provision in the aforesaid rule for filing review petition in respect of dismissal of restoration petition except the proviso of sub-rule (2) of Rule 15 which says that if appeal is disposed off on merit in absence of appellant, the appeal can be reopened only by way of review but the above stated proviso is of no help to the respondent because the aforesaid proviso comes into play when the appeal is disposed off on merit in absence of appellant. Admittedly, in the instant case, Tribunal dismissed the appeal in default in absence of appellant and the aforesaid appeal was not decided on merit and, therefore, respondent had no right to file review petition against dismissal order dated 21.08.2007 as well as against dismissal of restoration petition.

18. Now, question arises as to whether Tribunal has got jurisdiction to extend the period of limitation as prescribed in rule 15 of the Rules. A similar question arose before Apex Court in the case of Commissioner of Custom and Central Excise (supra). The aforesaid case was of Central Excise Act and there was provision in section 35H of the Central Excise Act that appeal and reference to High court should be made within 180 days from the date of communication of the decision of the order. The Apex Court took note of the aforesaid provision and held that time limit prescribed for making reference to the High court is absolute and unextendable by the court under section 5 of the Limitation Act is to be judged from the terms of the special law and in the very terms of Limitation Act. It has further been held that the court is bound to respect legislative intention and not to extend limitation period by giving liberal interpretation.

19. Admittedly, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 has been brought into existence to protect the interest of the employees of the factories and other Establishments and the aforesaid Act is self contained Act. The aforesaid Act prescribes 30 days limitation for filing restoration petition, if any appeal is dismissed in default. There is no provision in the above stated Act or Rules which gives power to court to extend the period of limitation beyond 30 days. If Legislature had intention to give such power to Tribunal, the Legislature certainly would have framed the aforesaid provision either in the Act or in the Rules. Therefore, in my view, the Tribunal had no jurisdiction to extend the period of limitation beyond the period of 30 days to entertain restoration petition against the order of dismissal of appeal in default.

It is well known maxim that, however, a law is hard but after all, it is the law and, therefore, in the aforesaid circumstance, Tribunal was bound to entertain restoration petition against the order of dismissal of appeal in default within the prescribed period of 30 days and in no case, Tribunal has got power to extend the aforesaid period of 30 days in entertaining restoration petition against the order of dismissal of appeal in default making the provision of Limitation Act applicable to the case.

20. In course of hearing, learned counsel for the respondent has drawn my attention towards sub-section (2) of section 7-L of the Act which gives power to Tribunal to amend any order passed by it under sub-section (1) within five years from the date of its order with a view to rectifying any mistake apparent from the record. On the strength of above stated provision, it has been submitted by learned counsel for the respondent that the Tribunal rightly entertained the review petition filed on behalf of the respondent and rectified its defect occurred in dismissal order but I am unable to accept the above stated contention of learned counsel for the respondent because subsection (2) of section 7-L of the Act says that the Tribunal can only rectify its mistakes apparent from the record and the aforesaid section does not permit the Tribunal to review its earlier order. There is wide difference between rectification and review. Rectification implies correction of error and removal of defect or imperfection and while exercising power rectification, the court can not exercise the power of review or revision. It is well settled principle of law that review is creature of statute and in absence of any statutory provision for review, exercise of power of review under garb of rectification, modification, correction is not permissible. In the Assistant Commercial Tax officer, (supra) the Apex Court of this country has held at para 14 as follows:-

"The scope and ambit of the power which could be exercised under Section 37 of the 1994 Act is circumscribed and restricted within the ambit of the power vested by the said section. Such a power is neither a power of review nor is akin to the power of revision but is only a power to rectify a mistake apparent on the face of the record. Rectification implies the correction of an error or a removal of defects or imperfections. It implies an error, mistake or defect which after rectification is made right".

21. Therefore, in view of the aforesaid dictum of law, I am of the opinion that sub-section (2) of section 7-L of the Act does not give power to Tribunal to review its own order.

22. In the instant case, admittedly, A.TA. No. 281(3) of 2001 was dismissed in default on 21.08.2007 and thereafter, respondent filed restoration petition on 26.10.2007 for setting aside the above stated order dated 21.08.2007 and admittedly, the aforesaid restoration petition was dismissed on 25.02.2009. Although at the time of dismissal of the aforesaid restoration petition, respondent was not represented by his learned counsel but the Tribunal very, categorically, observed in the order dated 25.02.2009 that no satisfactory explanation was

assigned for non-appearance of the appellant and, therefore, the aforesaid observation of the Tribunal clearly indicates that restoration petition dated 26.10.2007 was dismissed on merit. It is an admitted position that respondent challenged the order dated 25.02.2009 before this court by filing CWJC No. 2848/2008 but subsequently, he withdrew the aforesaid CWJC No. 2848/2008 and, therefore, it is apparent from the aforesaid fact that the order dated 25.02.2009 had already attained its finality. It is also an admitted position that respondent filed review petition for review of the order dated 25.02.2009 and for restoration of ATA. No. 281(3) of 2001. No doubt, the aforesaid petition was entertained by learned Tribunal and subsequently, the aforesaid petition was allowed by the Tribunal vide order dated 05.05.2009 which has been challenged by the appellant by filing I.A. No. 3185/2014. In my view, when there was no provision for filing review, the Tribunal had got no jurisdiction to entertain the above stated review petition nor was empowered to restore A.T.A. No. 281(3) of 2001 and, therefore, in my view, the order dated 05.05.2009 was without jurisdiction and has no sanctity in the eye of law. Similarly, when the Tribunal had got no power to restore A.T.A. No. 281(3) of 2001 on the basis of review petition filed on behalf of the respondent, the subsequent order dated 15.06.2009 by which the aforesaid A.T.A. No. 281(3) of 2001 was disposed of on merit was also without jurisdiction and non-existence.

23. A question regarding application of res judicata has been raised on behalf of the petitioner. The plea of the petitioner has been refuted by learned counsel for the respondent arguing that the principle of res judicata is applied only when the previous matter is decided on merit. The submission of learned counsel for the petitioner appears to be correct because in the present case, Tribunal dismissed restoration petition on merit observing that there was no sufficient explanation for non-appearance and, therefore, it can not be said that first restoration petition filed on behalf of the respondent was not decided on merit and, therefore, principle of res judicata is also applicable in this matter.

24. Since the orders dated 05.05.2009 and 15.06.2009 have been passed by the Tribunal against the provision of law and the aforesaid orders do not have any sanctity or existence in the eye of law, in my view, there is no need to go into the claims of the parties and the impugned orders dated 05.05.2009 and 15.06.2009 passed by the Tribunal are liable to be quashed on the basis of the above stated discussions.

25. Thus, in view of the aforesaid discussions, both the above stated impugned orders dated 05.05.2009 and 15.06.2009 passed by the Tribunal in A.T.A. No. 281(3) of 2001 are, hereby, quashed. Accordingly, this writ petition stands succeed.