

(2009) 04 GUJ CK 0012
In the Gujarat High Court
Case No : S.C.A. No. 1959 of 2009

Unitop Engineering (P) Ltd.

APPELLANT

Vs

Assistant Provident Fund Commissioner

RESPONDENT

Date of Decision : 29-04-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14(B),
6, 7(I), 7(Q), 8F

Citation : (2009) 2 GLH 706 : (2010) 1 LLJ 187

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : Avantik Patel, for the Appellant; Niral R. Mehta, for the Respondent

Judgement

K.M. Thaker, J.—Heard Mr. Patel learned senior counsel with Mr. J.M. Patel learned advocate for the petitioner and Mr. Mehta learned advocate for the respondent. Rule. Mr. Mehta learned advocate for the respondent waives service of notice of Rule. With the consent of learned advocates of both sides the petition is taken up for final hearing and decision today.

2. In this petition the petitioner has challenged order dated December 12, 2008 passed by the Employees Provident Fund Appellate Tribunal (hereinafter referred to as the Tribunal) dismissing the petitioner's appeal on the ground that the same, when filed, was time barred. The petitioner has also challenged order dated December 2, 2005 passed by the Asst. Provident Fund Commissioner, imposing damages u/s 14(B) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act) and also the order dated December 2, 2005 passed by Assistant Provident Fund Commissioner, Vadodara u/s 7(Q) of the Act.

3. The petitioner has claimed that the principal amount towards contribution has already been paid and the order under challenge are regarding damages and interest imposed by the respondent authority on account of alleged delay in

depositing the provident fund contribution.

4. The petitioner has claimed that after the order dated December 2, 2005 was passed the petitioner made representation to the Central Board under proviso of Section 14-B of the of the Act for waiver of damages and interest. While the said representation was pending an order dated August 13, 2008 came to be passed, u/s 8-F of the Act.

5. The petitioner has further submitted that the said order u/s 8-F of the Act was followed by another order dated April 19, 2007 which also was passed u/s 8-F of the Act. Against the said order dated April 19, 2007, the petitioner preferred a writ petition being Special Civil Application No. 18883/2007. The said petition was disposed of by an order dated December 27, 2007 and by the said order the Central Board was directed to decide the representation made by the petitioner. Pursuant to the said order dated December 27, 2007 passed in Special Civil Application No. 18883/2007, the Central Board passed an order dated August 13, 2008 whereby the representation made by the petitioner came to be rejected. After the order dated August 13, 2008 was passed, the petitioner preferred appeal before the Tribunal wherein the petitioner challenged initial order dated February 21, 2005 passed u/s 14-B of the Act. It is the said appeal which has been rejected by the appeal Tribunal as time barred. Aggrieved by the said order of the appeal Tribunal the petitioner is before this Court.

6. Mr. Patel learned senior counsel submitted that the petitioner company was facing severe financial crises and at one point of time it was registered as Sick Unit under Gujarat B.I.F.R. He submitted that in present case the issue involved is not about non-payment of contribution i.e. this is not a case where the principal amount towards P.F. is not paid, though some delay, in past, had occurred from time to time in depositing principal amount however, as of now the principal amount has already been paid. Mr. Patel learned advocate further submitted that despite the fact that the petitioner company was registered as sick undertaking before Gujarat B.I.F.R. the respondent authorities have imposed damages and interest u/s 14(B) and 7(Q) of the Act respectively. He submitted that the action or respondent authorities of imposing penalty as well as interest is unjustified and harsh in light of the fact that the petitioner company, was at the relevant time, registered as sick undertaking before the Gujarat B.I.F.R. and was facing severe financial crises. He also submitted that if the petitioner company had been afforded reasonable opportunity of hearing before the Tribunal it could have demonstrated before the Tribunal that there were sufficient reasons to set aside the order imposing damages, however the appeal preferred by the petitioner came to be rejected without affording any opportunity of hearing and merely on the ground that it was time barred. Even on that count the petitioner has not been afforded opportunity of hearing. He further submitted that if the respondent authority had taken into consideration the fact about representation made by the petitioner before the Central Board and if the Tribunal had taken into account the date on which the order by the Central Board

came to be passed, then in that event it would have appreciated that appeal preferred by the petitioner was within the period which could have been condoned by the Tribunal inasmuch as, the order by the Central Board was passed on August 13, 2008 and considering from that date the appeal was required to be filed within 60 days from the receipt of the order dated August 13, 2008 and further period of 60 days could have been condoned by the appeal Tribunal. Accordingly the appeal was filed within the period which could have been condoned by the appeal Tribunal inasmuch as the appeal came to be filed on December 4, 2008, thus it was within the period of 120 days and since the order of Tribunal has been passed without considering aforesaid aspect, the said order is bad in law and it is hit by the error of non-application of mind. He also submitted that even the order u/s 14(B) of the Act and Section 7(Q) of the Act have been passed in violation of principle of natural justice and the same are absolutely non-speaking order, which even otherwise deserve to be set aside.

7. Mr. Patel learned senior counsel further submitted that by virtue of orders passed u/s 8-F, the respondent authority has compelled the bankers of the petitioner to make the payment and pursuant to such notice/s bankers have, by now, remitted in all amount of about Rs. 2.20 lacs to the respondent.

8. Mr. Patel learned senior counsel submitted that the petitioner had preferred the appeal only against the order u/s 14(B) of the Act while with regard to the order u/s 7(Q) of the Act, the petitioner had asked for instalment and therefore, no appeal has been preferred, under the circumstances the present, dispute and prayer are restricted to the order passed u/s 14(B) of the Act in respect of which the appeal has been preferred.

9. On the other hand Mr. Mehta learned advocate for the respondent submitted that the appeal is grossly time barred and that the learned appeal Tribunal has no authority to condone delay beyond the period of 60 days after expiry of period of limitation and that therefore, the order of the Tribunal is neither incorrect nor contrary to statutory provisions nor unjust. He submitted that the petitioner had committed defaults in making payments of contribution at the relevant time and therefore, the petitioner is liable to pay damages and interest. Mr. Mehta learned advocate for the respondent further submitted that there is illegality in the order dated December 2, 2005 passed u/s 14(B) of the Act or order dated December 2, 2005 u/s 7(Q) or order dated December 4, 2008 passed by the appeal Tribunal.

10. From the record of the petition and submission of contesting parties it comes out that dispute is in connection with the demand for damages. This is not the case where the principal amount toward contribution has not been paid and it remains unpaid. There is no dispute between the parties that the principal amount of the contribution has been paid, however at the material point of time delay had occurred in depositing the contribution. It is the case of the petitioner that delay occurred in respect of payment of contribution on account of severe financial crises in view of which the petitioner company had to be registered as sick undertaking under the provision of Gujarat B.I.F.R. The appeal Tribunal itself

has, in some of its orders relied upon a judgment by the Honourable Kerala High Court in the case of Ernakulam Dist. Co-operative Bank Vs. Regional Provident Fund Commissioner, and Bharat Plywood and Timber Products (P) Ltd. Vs. Employees' Provident Fund Commissioner and Others, and the P.F. Tribunal has reproduced, in its order passed in case between Jai Corporation Ltd. v. Assistant Provident Fund Commissioner and Anr. following Para from the aforesaid judgment at p. 1664:

5. ... Section 14-B clearly indicates that an employer is liable to pay damages if he has made default in payment of the contribution. Merely, because of the amount had been paid earlier to the order u/s 14-B, it cannot be contended that there was no default in payment on the due date if the amount was paid only subsequent to the due date. Any delay in paying the amount u/s 6 causes loss to the beneficiaries of the scheme : such as loss of interest and the like. This is the loss that is sought to be recovered from the defaulter for the purpose of indemnifying the beneficiaries of the scheme namely, the employees to the extent of the loss suffered. The defaulter u/s 14-B, is therefore, liable to pay damages which represent the loss, but not anything more, as such recovery would amount to penalty and that is not permitted under the Section.

11. It also transpires that since 2006, barring the delay on part of the petitioner from December 2005 to May 2006 and some delay thereafter the petitioner was pursuing one or another remedy in connection with the impugned order. The petitioner had also approached the board for waiver of damages. Of course board rejected the representation by order dated August 13, 2008.

12. Further out of the amount demanded i.e. about Rs. 8.91 lacs, the respondent authorities have, by now, as claimed by petitioner, received about Rs. 2.20 lacs after the orders came to be passed u/s 8-F of the Act.

13. In backdrop of such facts and circumstances it appears to this Court that if the petitioner is afforded opportunity of hearing before the appeal Tribunal, interest of justice would be served. There is no doubt about the legal position that the order passed by the appeal Tribunal cannot be held to be erroneous or incorrect inasmuch as the appeal Tribunal does not have jurisdiction to condone delay beyond the period of 60 days after expiry of prescribed period of limitation. However, as held by the Hon'ble Division Bench in case between D.R. Industries v. Union of India and Ors. 2008 (3) GLH 662, the High Court, in exercise of jurisdiction under Article 226 of the Constitution of India, can condone delay in rare cases of hardship. In the facts of present case, it prima facie appears, so far as the claim of damages is concerned, that the petitioner's plea against demand and/or quantification of damages deserves to be tried before and examined by the appeal Tribunal and it deserves the decision on merits by appeal Tribunal. It would be of course for the appeal Tribunal to pass appropriate orders strictly in accordance with law on merits of the case, including the request to stay the impugned order and/or the request for waiver of condition for pre-deposit etc., after hearing the petitioner. However depriving the petitioner of an opportunity of

hearing before the Tribunal only on the ground that appeal was time barred would be, in facts of present case too harsh and it prima facie appears that it may result into injustice to the petitioner. Instead, if the petitioner is afforded an opportunity of hearing before the appeal Tribunal, interest of justice would be served, more particularly because at that time it would be open for the Tribunal to require the petitioner to make pre-deposit of the amount as required u/s 7(I) of the Act.

14. Hence, following order is passed:

15. The order dated December 12, 2008 passed by the Employees Provident Fund Appellate Tribunal in A.T.A. No. 860(5) 2008 is set aside. The appeal is remanded to the appeal Tribunal for being decided on merits, after hearing the present petitioner and respondent. The remand and subsequent hearing will be subject to the further statutory requirement like pre-deposit of the decreed amount in accordance with Section 7(I) of the Act and other relevant provisions. The Tribunal will decide the appeal within reasonable time in accordance with law but without being influenced by this order and after affording opportunity of hearing to the petitioner. The petitioner shall pay cost of Rs. 3,500/- to the respondent authority. The petitioner will cooperate in hearing before the Tribunal and shall not seek any adjournment before the Tribunal.

16. With the aforesaid clarification and directions the petition is disposed of. Rule made absolute to the aforesaid extent. No order as to cost.