

(2011) 08 MAD CK 0249

In the Madras High Court

Case No : Writ Petition No. 8386 of 2011 and M.P. No. 1 of 2011

Vadivel Textiles

APPELLANT

Vs

The Assistant Regional Commissioner Employees Provident
Fund Office, The Regional Provident Fund Commissioner
Employees Provident Fund Office and The Employees
Provident Fund Appellate Tribunal

RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 7A,
7A(3), 7A(4), 7B, 7I

Citation : (2011) 08 MAD CK 0249

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : L. Mouli, for the Appellant; V. Vibhishanan, for R1 and R2, for the
Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—The Petitioner is a Power loom factory. They have filed the present writ petition, challenging an order passed by the third Respondent Employees Provident Fund Appellate Tribunal made in ATA. No. 55(13)2002 dated 11.10.2010. By the aforesaid order, the Tribunal dismissed the appeal filed by the Petitioner firm.

2. The writ petition was admitted on 05.04.2011. Pending the writ petition, in the application for grant of interim stay, only notice was given to the Respondents. On notice from this Court, on behalf of Respondents 1 and 2, a counter affidavit dated 31.05.2011 has been filed. The Petitioner has also filed an additional typed set of papers.

3. The case of the Petitioner was that the firm had originally engaged 10 Power Looms, making Gada cloth. Subsequently, it became a partnership firm and it was a Small Gada Weaving Unit having four workers for operating the Power

loomMs. Thereafter, the business of the company gradually declined. Since the factory license was not renewed, it was completely closed down in the year 1998. For the entire operational period, the firm had only employed 5 persons and there were No. permanent employees. Even the employees were engaged depending upon the work orders. Though it was claimed that two notices dated 03.07.2000 and 04.08.2000 were addressed to the firm, due to insufficiency of the address, the same was not served on them and was pasted on the door of a third party. Therefore, No. one had appeared from the firm for the hearing and the matter was adjourned to 23.08.2000. As the Petitioner was ill, he sent a letter dated 23.08.2000 together with a Medical Certificate. Despite his request for adjournment, he was shocked to receive a postal cover dated 02.11.2000, in which an ex parte order dated 23.08.2000 was passed against the Petitioner firm.

4. By the ex parte order, the Respondent PF Department had computed a sum of Rs. 72,592.30 together with interest at Rs. 2,512.50 as due and payable by the Petitioner firm to them. It was claimed that the Petitioner firm viz., M/S. Vadivel Textiles Tiruppur is an establishment covered by the provisions of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (for short PF Act) and Scheme with effect from 01.02.1982. Despite being covered, they had not sent any notice.

5. Challenging the said order, the Petitioner filed an appeal u/s 7-I of the PF Act before the third Respondent Tribunal. Once again the Petitioner had raised the same grounds namely the Act not being applicable to them as they had employed only 5 persons but operating 10 Power loomMs. It was claimed that a single employee can operate all the 4 Power loom machines. The letter sent by registered post was not received by them and their request for adjournment was not considered.

6. In the appeal memo filed, the Petitioner had enclosed several Annexures including a copy of the letter dated 20.08.2000 and the telegram dated 28.08.2000. The Tribunal by curious reasons held that if there is an allegation that the provisions of the PF Act is applicable, then it is for the establishment or the employer who alleges that they are not covered by the Act to prove the same by placing sufficient cogent and convincing material before the designated authority u/s 7-A of the PF Act. It also held that the report of the Enforcement Officer had revealed that they had engaged 20 employees. Since the Petitioner has been given all reasonable opportunities, they cannot question these facts.

7. The learned Counsel for the Petitioner also produced copies of the documents enclosed along with the memo. Certainly, by the letter dated 20.08.2000, the Petitioner had sought for an adjournment on the ground that he is undergoing treatment and the medical certificate was also enclosed. This was followed by a telegram. It is also seen that they have filed an application to set aside the ex parte order supported by an affidavit running into 20 pages dated 25.01.2001. Notwithstanding these facts, Respondents 1 and 2 had not cared to take note of the same and proceeded to conduct the proceedings ex parte. It is claimed that

by a letter dated 13.07.2011, their application to set aside the ex parte order was disallowed and it was communicated to the Petitioner on 27.03.2001 by registered post. When these grounds have been made as a part of the grounds of appeal, the Tribunal should have adverted to these facts. In the counter affidavit, except by stating various dates of adjournment, there is No. averment that the request made for adjournment was not bonafide. It was also stated that the letters sent to the Petitioner had come back unclaimed, but there is No. averment that it contained an endorsement that they had refused those communications.

8. u/s 7-A(3) of the PF Act, it has been made clear that an employer should be given a reasonable opportunity of representing his case. u/s 7-A(4) of the PF Act, if an application is filed within three months from the date of communication of the order setting the employer ex parte and that that there was sufficient cause for not appearing, the Officer should make an order setting aside his earlier order and should give a fresh date for enquiry. Apart from this, Section 7-B of the PF Act also provides for a review by the same officer not only on an application by an aggrieved party but also on his own motion.

9. In the present case, the contention of the Petitioner was that they never had workers beyond 5 as sought to be dealt with by relying upon the report of the Enforcement Officer. Unless such a report is put before the employer and is confronted with, that by itself can become the sole material for determination of the application of the Act. When these facts were raised before the Tribunal, the Tribunal merely stated that when an order u/s 7-A has been passed, the same cannot be interfered with. The Tribunal did not even advert the application filed for setting aside the ex parte order and the appeal itself arose out of the order refusing to set aside the ex parte order. When Section 7-A(4) of the PF Act provides for provision for setting aside an ex apte order if there are sufficient reasons and when the authority refused to exercise the said power, the appellate authority should gone into the merits of the reasons adduced for setting aside the ex parte order.

10. As to what should be the approach in understanding the sufficient cause has been set out by the Supreme Court vide its judgment in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, . Though the said judgment was rendered in relation to the matter arising out the land acquisition Act, yet the spirit behind Section 51 of the Limitation Act is also discussed therein. In paragraph 3, it was held as follows:

3. The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice - that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal

approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. and such a liberal approach is adopted on principle as it is realized that:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day"s delay must be explained" does not mean that a pedantic approach should be made. Why not every hour"s delay, every second"s delay? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is No. presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.
11. If looked at this angle, the Petitioner has made out a case for setting aside not only the order of Tribunal dated 11.10.2010, but also the order dated 19.10.2000 passed by the second Respondents viz., the Regional Provident Fund Commissioner, Coimbatore made in D9/TN/CB/16065/ENF.D/TPR/II/2000.
12. In the light of the above, the writ petition stands allowed and the matter is remanded back to the second Respondent for fresh disposal in accordance with law after affording opportunity to the Petitioner. However, there will be No. order as to costs. Consequently, connected miscellaneous petition is closed.