

(2011) 06 BOM CK 0173

In the Bombay High Court

Case No : Writ Petition No. 3659 of 2011

Writer Safeguard Private Limited

APPELLANT

Vs

Regional Provident Fund Commissioner-II and Assessing
Officer and Others

RESPONDENT

Date of Decision : 20-06-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14(B),
2, 7(0), 7(1), 7A

Citation : (2011) 130 FLR 1097 : (2012) 2 LLJ 34 : (2011) LLR 1193

Hon'ble Judges : K.K. Tated, J

Bench : Single Bench

**Advocate : A.V. Bukhari, Mr. P.M. Palshikar and Ms. Nilima Satope, for the
Appellant; Deepak Rai and Suresh Kumar, for the Respondent**

Final Decision : Allowed

Judgement

K.K. Tated, J.—Heard the learned counsel for the parties.

2. By this petition under Articles 226 and 227 of the Constitution of India, the petitioner original appellant challenges the order dated 11.2.2011 passed by the learned Presiding Officer Employees Provident Fund Appellate Tribunal, New Delhi in ATA No. 123(9)2011 directing the petitioner to deposit 30% of the assessed amount as per the order passed by Regional Provident Fund Commissioner-II and Assessing Officer in proceeding u/s 7C of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952.

3. The learned counsel for the petitioner submits that the impugned order passed by the Appellate Tribunal itself on the face of it is bad in law because there is no provision under the Act to deposit the assessed amount and or part thereof while preferring appeal. He submits that the Appellate Tribunal failed to consider that he has no power to issue such directions as far as section 7C of the said act of 1952 is concerned, as there is no such pre-condition to deposit the amount along

with the appeal.

4. The learned counsel for the petitioner submits that initially the Provident Fund Authority issued the summons u/s 7C of the said Act of 1952 calling upon the petitioner to submit copy of Audited Balance Sheet of the establishment from 2002-03 to 2008-09 and year wise details of trainee stipend paid from 2002-03 to 2008-09 on the ground that they noticed that there was failure on the part of petitioner to disclose fully and truly all material facts. Some amount had escaped notice of the authority during the enquiry u/s 7A of the said Act of 1952 and, therefore, they decided to re-open the case.

5. In reply to the said summons u/s 7C of the said Act of 1952, the petitioner submitted its interim submission by their letter dated 21.10.2010 and explained that they were not liable to pay the contribution of provident fund on the payment by way of stipend given to the trainees. Thereafter, they also submitted a detailed reply by their letter dated 14.1.2011 to the authority for enquiry u/s 7C of the said Act of 1952. In the said reply, they specifically stated that the amount reflected under the head of Personal Security Charges in Balance Sheet are paid to the various security agencies across India and the said security agencies have been duly registered with the Provident Fund Authority at the appropriate places and they have been paying the PF contribution in the local PF offices. Para 2 of the said letter reads as under:

2. Notwithstanding, we submit that the amount reflected under the head of Personnel Security Charges in Balance-sheet are paid to various security agencies across India and the said security agencies have been duly registered with your organization at the appropriate places and they have been paying the PF contribution in the local PF offices. Similarly, as per the agreement entered by us with such security agencies, they are liable to comply with all laws, rules, regulations, notifications and directives issued by the Government or any authorities under the law from time to time. It is therefore, our contention that in the first instance the said Security Agencies were/are liable for the payment of PF contribution of their employees and we were/are not liable to pay the said PF contribution of the persons, who are not our employees. Also, since the Security Agencies, the list of which is enclosed herewith, are duly registered under the EPF and Miscellaneous Provisions Act, 1952 and as an employer, they were/are liable to pay the PF contributions and inspite of the same, if this honourable Authority direct us to remit the PF contribution on the said Security Personnel Charges, it will be difficult to recover the said amount from the said Security Agencies, as they are no more working with us and due to financial constraint, we will not be in a position to pay the said purported PF amount, in this very stiff competition era, as we work on very marginal/meagre or no margin and any further stress on the finance may lead to collapse of the whole company and all the persons concerned with our Company, will be rendered jobless.

6. The learned counsel for the petitioner submits that they have disclosed the names and address of the contractor to whom they paid charges towards

personal security. The authority failed to issue summons to those agencies calling upon their explanation. Without issuing any summons to those authorities, the authority passed order dated 18.1.2011 u/s 7C imposing interest and damages on the petitioner to the tune of Rs. 9,30,48,311. He submits that as per the judgment of the Apex Court in the matter of Food Corporation of India Vs. Provident Fund Commissioner and Others, , the authority should exercise all their powers to collect all their material before coming to proper conclusion. The Apex Court held that it is the legal duty of the Commissioner to collect the evidence by taking proper steps:

9. It will be seen from the above provisions that the Commissioner is authorized to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person.

7. The learned counsel for the petitioner submits that though they provided the names and addresses of all their agencies to whom they made payment towards the security charges and other payments. Authority failed and neglected to issue summons to them and or to collect the information from those authorities.

8. The learned counsel for the petitioner submits that they are not liable to pay contribution to the authority on payment of stipend to their trainees. He submits that the trainees are not covered by the definition of employee, and therefore, there is no question of any contribution towards their provident fund. In support of his submissions, he relies on the judgment in the matter Regional Provident Fund Commissioner, Mangalore v. Central Areca nut & Coca Marketing & Processing Co-op. Ltd., Mangalore reported In 2006 I CLR 861. In this case, the Apex Court held that trainees have paid stipend and have no right of employment, nor any obligation to accept any employment if offered by the employer are excluded from the definition of employee u/s 2(f) of the said Act. Para 12 of the said judgment reads thus:

12. Above being the position, it cannot be said that the concerned 45 trainees were employee in terms of section 2(f) of the Act. In other words, an apprentice engaged under the Apprentices Act or under the Standing Orders, is excluded from the definition of an "employee" as per section 2(f) of the Act.

9. He submits that being aggrieved by the order passed by authority u/s 7C of the said Act, they preferred appeal before the appellate authority. He submits that in the said appeal, they preferred application u/s 7(0) of the said Act of 1952 for exempting the petitioner from depositing the amount on the said

application. The tribunal directed the petitioner to deposit 30% of the assessed amount as pre-deposit.

10. The learned counsel for the petitioner submits that there is no provision under the Act to pre-deposit amount while preferring the appeal against the order passed by the authority u/s 7C. He submits that if the authority passes order u/s 7A of the said Act, then only Appellate Tribunal can insist for pre-deposit of the assessed amount. These facts are not considered by the Appellate Tribunal. In support of his submissions, he relies on the judgment in the matter of the Old Village Industries, Ltd. v. Assistant Provident Fund Commissioner, Employees' Provident Fund Organization and another reported in 2005 (3) L.L.N. 572. In this case, Delhi High Court held that if the appeals preferred against the order u/s 14B, then the Tribunal cannot insist for pre-deposit of assessed amount. Paras 6 and 7 of the said judgment reads as under:

6. The power to waive or reduce the amount to be deposited is relatively to the amount determined by the Officer u/s 7A of the Act. In other words the pre-requisite of deposit of 75% of the demanded amount applicable to an order passed u/s 7A and not to other provisions. The Legislature in its own wisdom has restricted the application of the provisions of Section 7(1) to the order passed u/s 7A. Such provisions are to be construed strictly and cannot be given a wider meaning so as to create a liability which is intended to be correct to the entertainment of an appeal. The liability to deposit arises in the situation strictly contemplated under the provisions of this section. There is nothing in the section so as to extend its application to an order passed u/s 14B of the Act. An employer has a right to prefer an appeal against an order u/s 14B, u/s 7(1) of the Act but the pre-condition of deposit for entertainment of such an appeal is not covered u/s 7-0 of the Act. Thus, have no hesitation in rejecting the contention of the respondents that it would be mandatory for the employer to deposit 75% of such amount before appeal can be entertained or even that there cannot be stay of recovery of the said amount by the Appellate Authority. The argument raised on behalf of the respondents would be untenable even for another reason that damage is the consequence of the demand raised u/s 7A of the Act. The provisions of Section 14B of the Act attracted only if there is default on the part of the employer. It being a consequential liability essentially must fall in a category of not the principal liability to attract stringent provisions of pre-deposit to the hearing of the appeal. Such provisions being related to revenue would be construed strictly whether to the advantage or disadvantage of the person upon whom the liability is sought to be fastened. Once the provisions of Section 7-0 does not include an appeal against an order u/s 14B then it would be in no way permissible to include such an order by implication or otherwise.

7. In regard to the pendency of the appeal before the appropriate Forum it is clear that no fault can be attributed to the petitioner employer. He has preferred an appeal in the prescribed Forum u/s 7(1) which is admittedly pending before the Appellate Tribunal. The obligation to hear an appeal lies upon the Tribunal

and if for any reason whatsoever it is not able to hear the appeal, it will be most unfair to enforce its demand particularly when the validity of such a demand is challenged by the employer on various legal as well as computation basis. In this regard it will be appropriate to refer to a detailed order passed by this Court in W.P. (C) No. 16137/ 2004.

It is a known fact that the post of the Presiding Officer of the Tribunal is lying vacant now for more than a year. Its repercussions are serious and must invite attention of all concerned at the relevant quarters of the Government of India. Where this is hampering the administration and justice there it equally and adversely affects the recovery of State revenue and distribution of funds to its rightful claimants. The employers who are fastened with the liability for contribution of fund under the provisions of the Act are not able to take benefit of the statutory remedy provided to them in law and are compelled to file writ petitions before the High Court which certainly is an avoidable litigation.

Mr. Patil also conceded that different Benches of this Court have passed orders and directions requiring the authorities to effectively and expeditiously deal with this problem. Today even orders of other High Courts have been brought to the notice of Mr. Patil. Despite of these orders the matter has lingered for too long, may be for one reason or the other. Furthermore, it also amounts to loss to Government revenue as the Courts are normally inclined to grant stay in such cases because there is hardly any fault attributable to the employer at least prima facie.

In the above circumstances it is clear that nobody stands to gain by this inaction on the part of the Government. To provide expeditious justice is not a concept confined to Courts only but it must equally apply to the Institutions/Tribunals performing quasi-judicial functions.

The Court must take judicial notice of the fact that large number of writ petitions are being filed in this Court as well as other High Courts, where the petitioners pray for grant of interim orders only on the ground that the Tribunal is not constituted and the appeals filed by them in the Office of the Tribunal have not been heard till date. It is their contention that they cannot be asked to pay huge amounts and their properties be attached by the Department without even granting them an opportunity of being heard. The remedy of appeal before the Tribunal is a statutory remedy and thus every person affected adversely by the order of the lower authorities must be granted an opportunity to substantiate his contentions before the Tribunal. In the case of Arihant Threads Ltd. v. Union of India, in WP(C) No. 3331 of 2004 a Division Bench of the Punjab and Haryana High Court while disposing of number of writ petitions vide its order dated 25th March, 2004 passed the following directions:

Learned Counsel appearing for the Union of India also assures the Court that all steps will be taken by the concerned Ministry to have the appointments finalized expeditiously and without any unnecessary delay.

In view of the statements made on behalf of the Union of India as well as the Provident Fund Commissioner, we do not consider it necessary to go into the merits of the various contentions raised before us. Suffice it to say that the stand taken by the respondents is fair, just and equitable.

On the basis of the statements made on behalf of the respondents, we dispose of this writ petition with directions that the petitioner can file appeal(s) accompanied by a stay application, if not already filed, within two weeks from today. If such appeal(s) are filed proof thereof is shown to the Recovery Officer, then said Officer would not affect recovery of the demand issued u/s 7-A of the Act till decision of the stay application, as stated by the learned Counsel appearing for the respondents. We make it clear that the direction would obviously operate only till the disposal of the stay application by the competent authority. We have pious hope that Union of India shall expeditiously make the appointment of the Presiding Officer of the Appellate Tribunal and Regional Provident Fund Commissioner exercising jurisdiction over Punjab and Haryana would not compel the people to approach the Court. Such litigation, obviously, is avoidable by timely action on the part of the official respondents. We expect that State of Haryana, State of Punjab which also exercises powers over Union Territory of Chandigarh would take due notice of this order and take appropriate measures at their own level to achieve the public purpose to avoid unnecessary litigation. Obvious result thereof would be less burden on the State exchequer which the State would incur in filing and defending avoidable litigation.

All these writ petitions are accordingly disposed of with the above directions. It appears that the request of the Court made in the above order was not sufficient indication for the authorities to act expeditiously as even now and undisputedly the file for appointment to these posts is shuffling from one department to another. The Court is unable to appreciate such an approach. At this stage I would refrain from commenting any further in this regard or from taking serious view of the inaction on the part of the authorities concerned. I express pious hope that authorities would act now at least with a specific direction to the Secretary, Ministry of Labour and Employment; Secretary, Department of Personnel and Secretary, in-charge of Appointment Committee of Cabinet, to ensure that the matter in relation to appointment of Presiding Officer of the Tribunal is finalized as expeditiously as possible, and in any case not later than 45 days from the date of this order. Mr. Patil shall submit a compliance report to the Court before the next date of hearing. The above case is fixed on 25.11.2004 for directions.

11. On the basis of these submissions, the learned counsel for the petitioner submits that the impugned order passed by Tribunal directing petitioner to deposit 30% of the assessed amount as per order passed by the authority be set aside and the application filed by petitioner for exemption from pre-deposit be allowed.

12. The learned counsel for the respondent vehemently opposed the present

petition. He submits that the order passed by the authority is according to law. When the court called upon him to explain is there any provision for pre-deposit of the amount if the appeal is preferred against the order passed by the authority u/s 7C of the said act of 1952, he failed to point out any provision under the Act.

13. Considering the facts of the present case, the submissions made by the learned counsel for the petitioner and the authority cited by him, it is crystal clear that the petitioner made out a prima facie case for exemption from pre-deposit in the present case. Therefore, petition is allowed with the following directions:

14. The impugned order dated 11.2.2011 passed by Employees' Provident Fund Appellate Tribunal in ATA No. 123(9)2011 is set aside. Tribunal is directed to proceed with hearing of appeal without insisting pre-deposit as per section 7(0) of the Provident Fund Act. Hearing of appeal is expedited.