(2011) 11 MAD CK 0167

Madras High Court (Madurai Bench)

Case No: Writ Petition (MD) No. 7272 of 2011 and M.P. (MD) No. 1 of 2011

S. Durgeshwaran	APPELLANT
Vs	
The Presiding Officer, Employees Provident Fund Appellate Tribunal, New Delhi, The Assistant Provident Fund Commissioner, Employees Provident Fund Organisation, Tirunelveli and The Recovery Officer, Employees Provident Fund Organisation, Sub-Regional Office, Bhavishyanidhi Bhawan, NGO 'B' Colony, Tirunelveli-627007	RESPONDENT

Date of Decision: Nov. 11, 2011

Acts Referred:

- Constitution of India, 1950 - Article 226
- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 7(A), 7(I), 7(O)

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: P. Pethu Rajesh, for the Appellant; K. Murali Shankar, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Honourable Mr. Justice K. Chandru

1. When the petitioner mentioned for extension of interim order, this Court was not inclined to grant extension of interim order and this Writ Petition is a clear abuse of

process of law. The very same petitioner earlier filed Writ Petitions in W.P(MD).Nos.6174, 11472 and 1700 of 2008 before this Court, challenging the order demanding dues including the distraint proceedings initiated. All the three Writ Petitions were dismissed by this Court stating that if the petitioner is aggrieved, the effective remedy by way of appeal u/s 7-I of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 [hereinafter referred to as "the Act"] before the Employees'' Provident Fund Tribunal alone is available and he cannot dispute before this Court regarding the partnership business liability as well as the status of the petitioner in the said partnership.

2. Even though the order was made as early as on 06.10.2010, the petitioner moved the Division Bench with Writ Appeals in W.A.(MD)Nos.221 to 223 of 2011. When the Writ Appeals themselves were taken up for hearing, for the reasons best known, the petitioner withdrew the Writ Appeals with liberty to file appeals u/s 7-I of the Act and he has also made an endorsement in the appeal bundles. Accepting the endorsement made by the counsel, the Division Bench dismissed the Writ Appeals with liberty to file appeals. The original order of assessment was also handed over and he was directed to file appeals within two weeks vide order dated 01.03.2011.

3. Thereafter, the petitioner exhausted the right of appeal u/s 7-I before the Employees'' Provident Fund Tribunal and the said appeal was taken on file as A.T.A.No.303(13)2011. As a pre-requisite for entertaining the appeal, the Tribunal directed the petitioner to deposit 40% of the assessed amount within two months and in case of such deposit, the respondents, Employees'' Provident Fund authorities were directed not to take any coercive measures till the disposal of the appeal presented. The counsel for the respondent Provident Fund Department opposed the admission of the appeal. However, in any event, the appeal was admitted and the interim order was granted on a conditional basis. It is once again the petitioner is before this Court challenging the interim order dated 25.04.2011. It is not clear as to how the petitioner can have a second round of litigation, that too, against the conditional interim order passed by the Tribunal. u/s 7-O of the Act, no appeal by the employer shall be entertained by a Tribunal, unless he has deposited 75% of the amount due from him as determined by an officer referred to in section 7-A. The proviso to Section 7-O gives liberty to the Tribunal, for reasons to be recorded in writing, to waive or reduce the amount to be deposited under the said Section.

4. In the present case, the Tribunal, in exercise of its discretion, had only directed the petitioner to deposit 40% and not the entire 75% and there cannot be any further judicial scrutiny on the conditional order of stay granted by the Tribunal. The petitioner cannot state that such an order is reviewable before this Court and raise once again the contentions, which weighed in the earlier round of litigation, for the purpose of getting further reduction. In essence, the petitioner cannot improve his terms of stay order, which is granted by the Tribunal, when the main appeal is

pending u/s 7-I, for which, he took permission from the Division Bench to move the Tribunal, even though, at the relevant time, the time for filing an appeal has already expired. Having exhausted the right of appeal and also having made the Tribunal to exercise its discretion in granting interim stay with reduced deposit, no further judicial review is permissible.

5. The Supreme Court, vide its judgment in Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, , has held that if an appeal is provided under the special enactment, it has to be exhausted by an aggrieved party and merely because the appeal provides for a pre-deposit, that will not make the appeal illusory and on that ground, the High Court under Article 226 of the Constitution of India cannot entertain any Writ Petition. In paragraph Nos.30 to 35, 39 and 40, the Supreme Court had observed as follows:

30. The argument that writ jurisdiction of the High Court under Article 226 of the Constitution is a basic feature of the Constitution and cannot be ousted by parliamentary legislation is far too fundamental to be questioned especially after the judgment of the Constitution Bench of this Court in L. Chandra Kumar v. Union of India. However, that does not answer the question of maintainability of a writ petition which seeks to impugn an order declining dispensation of pre-deposit of penalty by the Appellate Tribunal.

31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the appellant''s counsel to demonstrate why the appellate jurisdiction of the High Court u/s 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

33. Reference may be made to the Constitution Bench decision of this Court rendered in Thansingh Nathmal v. Supdt. of Taxes, which was also a decision in a fiscal law. Commenting on the exercise of wide jurisdiction of the High Court under Article 226, subject to self-imposed limitation, this Court went on to explain:

(AIR p. 1423, para 7)

7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for

obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.

(emphasis added)

The decision in Thansingh is still holding the field.

34. Again in Titaghur Paper Mills Co. Ltd. v. State of Orissa in the background of taxation laws, a three-Judge Bench of this Court apart from reiterating the principle of exercise of writ jurisdiction with the time honoured self imposed limitations, focused on another legal principle on right and remedies. In para 11, at AIR p. 607 of the Report, this Court laid down: (SCC pp. 440-41, para 11)

11. ... It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford in the following passage: (ER p. 495)

''... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.''

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd. and Secy. of State v. Mask and Co. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.

35. In this case, liability of the appellant is not created under any common law principle but, it is clearly a statutory liability and for which the statutory remedy is an appeal u/s 35 of FEMA, subject to the limitations contained therein. A writ petition in the facts of this case is therefore clearly not maintainable.

39. In the instant case none of the aforesaid situations are present. Therefore, principle laid down in Ratan case15 applies in the facts and circumstances of this case. If the appellant in this case is allowed to file a writ petition despite the existence of an efficacious remedy by way of appeal u/s 35 of FEMA this will enable

him to defeat the provisions of the statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fee or deposit of some amount of penalty or fulfilment of some other conditions for entertaining the appeal. (See para 13 at SCC p. 408.) It is obvious that a writ court should not encourage the aforesaid trend of bypassing a statutory provision.

40. The learned counsel for the appellant relied on a decision of this Court in Monotosh Saha v. Enforcement Directorate. That was a decision entirely on different facts. In that decision Saha preferred an appeal before the Appellate Tribunal with a request for dispensing with requirement of pre-deposit, but the Tribunal directed the deposit of 60% of the penalty amount before entertaining the appeal. When an appeal was preferred before the High Court u/s 35 of FEMA, the same was dismissed by the High Court holding that no case for hardship was made out either before the Tribunal or before it. In the background of those facts, this Court observed that since pursuant to this Court''s interim order Rs 10 lakhs have been deposited with the Directorate, the appellant was directed to furnish further such security as may be stipulated by the Tribunal and directed that on such deposit the Tribunal is to hear the appeal without requiring further deposit.

6. In the present case, this Court is satisfied that the petitioner had invoked the Tribunal''s discretion for the reduction of the pre-deposit. He cannot have any further concession, as it is the second round of litigation and the earlier attempt was terminated by this Court. Hence, there is no case made out to entertain the present Writ Petition. Hence, the Writ Petition stands dismissed. Consequently, the connected miscellaneous petition is closed. No costs.