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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9430 OF 2014

HDFC Ergo General Insurance Company Ltd. .. Petitioner

Vs.

Union of India and others .. Respondents

Mr.Sudhir Talsania, Senior Advocate a/w Mr.H.S.Khokhawala and Ms.Janaki Garde i/b M/s.Nankani & Associates, for the Petitioner.
Ms. Shehnaz V.Bharucha, Advocate for Respondents No. 1, 2A, 3 & 4.

CORAM : R.G.KETKAR, J.
DATE : 18th February, 2015

P.C.

. Heard Mr.Sudhir Talsania, learned Senior Counsel for the petitioner and Ms.Shehnaz Bharucha, learned Counsel for the respondents No.1, 2A, 3 & 4 at length. Rule. Ms.Bharucha waives service on behalf of the respondents No. 1, 2A, 3 & 4. At the request and by consent of the parties, rule is made returnable forthwith and the petition is taken up for final hearing. Notice of rule on respondent No.2- Employees Provident Funds Appellate Tribunal (for short 'Tribunal') is dispensed with as being a formal party, no relief is claimed against it.

2. By this petition under Articles 226 & 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 25/04/2014 passed by the Tribunal in A.T.A 529 (9) of

2010. By that order, the Tribunal dismissed the appeal preferred by the petitioner challenging the order dated 06/07/2009 passed by the Assistant Provident Fund Commissioner, Mumbai(for short 'A.P.F.C.') under section 7-A of the Employee's Provident Funds Miscellaneous Provisions Act, 1952 (for short 'Act') and the order dated 11/08/2010 passed under section 14B of the Act levying damages. The relevant and material facts, briefly, stated are as under :

3. On 04/01/2007, the petitioner received a summon from the respondent No.3- A.P.F.C. under section 7-A of the Act. On 22/08/2008, the petitioner filed reply. On 12/03/2009, the Enforcement Officer (E.O) filed a counter reply. By the order dated 06/07/2009, the A.P.F.C. determined Rs.8,38,418/- as provident fund dues on the differential amount for the period 04/2005 to 12/2006 under various account heads as detailed therein. It is not in dispute that on 07/10/2009, the petitioner remitted amount of Rs.8,38,418/- and remitted interest amount of Rs.3,65,323/- on 18/02/2010.

4. On 29/12/2009, the petitioner received a summon to show cause as to why action should not be taken against it for delay in remittance on statutory dues. On the same day, the notice from the Enforcement office was received by the petitioner with regard to the payment of interest of Rs.3,65,323/- and purported damages of Rs.8,38,418/-. It is the case of the petitioner that without prejudice to their rights and contentions, it had remitted amount of Rs.8,38,418/-

by cheques dated 29/09/2009. The interest amount was also paid under protest on 18/02/2010.

5. On 02/07/2011, the petitioner filed interim reply against the proposed payment of penalty amount. On 11/08/2010, the Commissioner levied damages Rs.8,38,418/- under section 14-B and interest Rs. 3,65,323/- under section 7-Q for the period 04/2005 to 12/2006.

6. The petitioner challenged the order dated 06/07/2009 passed under section 7-A of the Act and order dated 11/08/2010 passed under section 14-B of the Act by filing appeal before the Tribunal. Along with the appeal, the petitioner filed two applications i) for condoning the delay and ii) for waiver of the amount to be deposited. By order dated 03/09/2010, the Tribunal admitted the appeal and also waived condition of pre-deposit. By the impugned order, the Tribunal dismissed the appeal on two grounds namely i) the petitioner cannot file one appeal challenging two orders and ii) under rule 7(2) of the Employee's Provident Fund Appellate Tribunal (Procedure) Rules, 1997 (for short 'Rules'), the appeal is to be preferred within 60 days. The proviso thereto lays down that the Tribunal, on satisfaction, is empowered to extend the period of 60 days by further period of 60 days. The Tribunal held that appeal against order dated 06/07/2009 is barred by limitation. Accordingly, by the impugned order, the Tribunal dismissed the appeal. It is

against this order, the petitioner has instituted the present petition.

7. In support of this petition, Mr.Talsania submitted that the A.P.F.C. has committed serious error in including 'Special Allowance' in “basic wages” and accordingly determined the amount as provident fund dues. He invited my attention to definition of expression “basic wages” in section – 2(b)(ii) and submitted that “basic wages” does not include any other similar allowance payable to the employee in respect of his employment or of work done in such employment. In short, he submitted that the special allowance falls in (i) any other similar allowance payable to the employee in respect of his employment or of work done in such employment as specified under section 2b(ii). A.P.F.C. committed error in including special allowance in basic wages. That apart, if the special allowance is included in the basic wages, in that event, no provident fund will be payable in view of paragraph 2(f)(ii) of the Employee's Provident Funds Scheme, 1952 which defines expression 'excluded employee' as an employee whose pay at the time he is entitled to become a Member of the Fund, exceeds Rs.6500/- per month. He submitted that this aspect was not considered by A.P.F.C. while passing order under section 7-A. He further submitted that the petitioner had paid amount of Rs.8,38,418 on 07/10/2009 without prejudice to their rights and contentions and further paid interest amount of Rs.3,65,323/- on 18/02/2010 under protest. The Tribunal was, therefore, not justified in dismissing the

appeal challenging the order dated 06/07/2009. He submitted that section 7-B of the Act provides for remedy of review of orders passed under section 7-A to any person who has not preferred appeal challenging that order. In any case, he submitted that the Tribunal committed error in dismissing the appeal against order dated 11/08/2010, as admittedly, it was filed on 28/08/2010 which was well within a period of limitation. At any rate, the Tribunal ought to have decided the appeal against the order dated 11/08/2010 on merits.

8. On the other hand, Ms.Bharucha submitted that after the order under section 7-A was passed on 06/07/2009, the petitioner remitted the amount of Rs.8,38,418/-. The interest amount was also paid on 18/02/2010 without reserving any liberty to challenge the order under section 7-A. In other words, she submitted that the petitioner accepted the order passed under section 7-A and therefore, it is not open for them to file appeal challenging the order dated 06/07/2009. That apart, admittedly, the appeal is filed on 28/08/2010 against orders dated 06/07/2009 and 11/08/2010. As far as challenge to order dated 06/07/2009 is concerned, the same is clearly barred by limitation. She, therefore, submitted that no case is made out for invoking powers under Articles 226 & 227 of the Constitution of India.

9. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, on 06/07/2009, A.P.F.C. passed order under section 7-A of the Act calling upon the petitioner to remit amount of Rs.8,38,418/- within 15 days from the receipt of the said order. It is also apparent from the record that the petitioner paid that amount by cheques dated 29/09/2009. Though the petitioner came with the case that the said amount was remitted without prejudice to their rights and contentions, this plea is not substantiated. On the other hand, perusal of the letter dated 28/10/2009 addressed on behalf of the petitioner to A.P.F.C., clearly shows that without reserving any liberty to challenge the order dated 06/07/2009, the petitioners have remitted amount of Rs.8,38,418/-. That apart, the petitioner had also remitted amount of Rs.3,65,323/- towards interest on 18/02/2010. Though the petitioner contends that it was paid under protest, no material is produced in order to substantiate that the payment was made under protest. I, therefore, find substance in the submission of Ms.Bharucha that the petitioner accepted order dated 06/07/2009 passed under section 7-A and in fact, they have complied the order by remitting the amount as also by paying the interest subsequently. In view thereof, in my opinion, the petitioner cannot challenge the order dated 06/07/2009 passed under section 7-A of the Act.

10. This brings me to challenge raised by the petitioner to the order dated 11/08/2010. As noted earlier, admittedly, the appeal is filed on 28/08/2010. The Tribunal dismissed the appeal on the ground that one appeal cannot be filed challenging two separate and independent orders and that appeal challenging order dated 06/07/2009 is barred by limitation. In my opinion, the Tribunal committed error in dismissing the appeal in entirety and that too against the order dated 11/08/2010. The Tribunal ought to have considered whether the petitioner could have challenged order dated 06/07/2009, having complied the said order. The Tribunal, therefore, ought to have restricted challenge in the appeal only against order dated 11/08/2010 passed under section 14-B of the Act. The Tribunal was not justified in dismissing the appeal in its entirety and at the highest could have precluded petitioner from raising the challenge to order dated 06/07/2009. In view thereof, the impugned order deserves to be quashed and set aside. Petition succeeds. Rule is made absolute in the following terms.

i) The impugned order dated 25/04/2014 is quashed and set aside. A.T.A No. 529 (9) of 2010 is restored to the file of the Tribunal.

ii) The appeal preferred by the petitioner shall be restricted only against order dated 11/08/2010 passed by A.P.F.C. under section 14-B read with section 7Q of the Act.

iii) The Tribunal shall decide the appeal on the basis of the material on record and in accordance with law and shall not dismiss the same on the ground that it is barred by limitation. Order accordingly.

(R.G.KETKAR, J.)