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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 17th December, 2015

\+ **W.P.(C) 10096/2015 & CM No.28059/2015**

M/S JAIBHARAT TEXTILE AND REAL ESTATE LTD. ..... Petitioner

Through: Ms.Maneesha Dhir, Ms.Geeta Sharma and Mr.Nishant Piyush, Advs.

versus

REGIONAL PROVIDENT FUND COMMISSIONER-II ..... Respondents

Through: Mr.Keshav Mohan and Ms. Anindita Barman, Advs.

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. By virtue of Article 226/227 of the Constitution of India, the petitioner prays for issuance of a writ in the nature of certiorari or any other writ or order or directing or granting interim relief against the impugned order dated 08.09.2015 passed by the Presiding Officer, Employees' Provident Fund Appellate Tribunal, Delhi vide which the appeal bearing No.ATA 1346(9)2014 filed by the petitioner was dismissed due to non-compliance of the order regarding deposit of 50% of the assessed amount.

2. The Regional Provident Fund Commissioner, Employees Provident Fund Organisation, Nagpur passed an order under Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred as 'the Act') on 20.11.2014 for default in the payment of contribution to the fund for the period August, 2008 to May, 2012 for an amount of Rs.1,19,90,859/-. Being aggrieved, the establishment preferred an appeal before the learned EPFAT under Section 7I of the Act alongwith an application seeking waiver of the predeposit as required under Section 7O of the Act. While entertaining the appeal of the establishment, learned EPFAT directed the establishment to deposit 50% of the amount instead of stipulated 75% within 30 days as a precondition in terms of Section 7(O) of the Act. Being Aggrieved by the order dated 21.05.2015 of learned EPFAT, the establishment preferred W.P.(C) No.6595/2015 which was disposed of by this Court vide order dated 13.07.2015 while upholding the order dated 21.05.2015 of learned EPFAT, however, extending the time to deposit the awarded amount within six weeks. On 08.09.2015, EPFAT dismissed the appeal of the petitioner for non-compliance of order dated 21.05.2015. On 13.10.2015, the department issued a warrant of attachment of movable property for recovery of an amount of Rs.1,14,40,116/. The petitioner preferred the instant writ petition for restoration of the appeal of the establishment before learned EPFAT by quashing the order dated 08.09.2015 as well as predeposit order dated 21.05.2015 of EPFAT.

3. The counsel for the respondent appeared on advance notice and opposed the application for interim stay and operation of the impugned order dated 08.09.2015. On 27.10.2015, department executed the warrant of attachment dated 13.10.2015 whereby four machines of the establishment were attached. The petitioner filed a civil writ petition bearing No.10444/2015 *inter alia* seeking relief for quashing of the attachment order dated 13.10.2015 and the attachment executed on 27.10.2015 while reiterating the issue of financial hardship and reference being made to BIFR and its registration bearing No.57/2015 which was disposed of by the Division Bench of this Court vide order dated 05.11.2015 with the observation that the issue be raised before the Single Judge who is seized of the matter. Thereafter the petitioner filed CM No. 28059/2015 praying for setting aside/quashing of attachment order dated 13.10.2015 and attachment on 27.10.2015.

4. With the consent of the parties, the matter is taken up for final hearing.

5. Learned counsel for the petitioner has challenged the order dated 08.09.2015 passed by EPFAT whereby the appeal preferred by the petitioner was dismissed for non-compliance of the condition of predeposit primarily on the ground that the appellate authority should have considered the financial difficulties and circumstances which were beyond the control of the petitioner and which prevented the petitioner from making predeposit and instead of dismissing the appeal, the appeal should have been heard on merits. Reliance was placed on ***M.I. Metal Sections Pvt. Ltd. vs. Collector of Central Excise, Bangalore*** 1995 (75) E.L.T 470 (KAR), ***Kishori Pujari Granite Pvt. Ltd. vs. Union of India*** 2005 (184) E.L.T.225 (M.P) for submitting that if the condition of predeposit is not complied with the only consequence would have been to reject the prayer of interim relief but not to dismiss the appeal itself on the ground of non-deposit of the assessed amount. Counsel further submits that the provisions of Section 7I of EPF Act are paramateria to Section 35 F of the Central Excise and Salt Act. The Tribunal under the proviso to Section 7(O) of the Employees Provident Fund and Misc. Provisions Act, 1952 has ample power to waive the condition of predeposit. The petitioner company was continuously suffering losses since 2011 and it is submitted that on 31.03.2011, the losses were 311.27 lacs which became 8542.41 lacs on 31.12.2014. As its net worth turned negative, the company filed its statutory reference before BIFR under Section 15(1) of SICA which was registered on 06.05.2015. Thus, the petitioner was unable to make the predeposit, as directed by the Tribunal and by this Court. By relying upon ***Bhavya Apparels Pvt. Ltd. vs. Union of India*** (2007) 10 SCC 129, it was submitted that the authority should have applied its mind to the question of hardship and further that the condition imposed should not be of such a nature which may, for all intent and purport, take away a vested right of appeal. In that case, the company continued to incur huge losses with the result it had no means for fulfilling the predeposit condition. It was held that in case no respite is granted to the petitioner, the first appeal before the Tribunal would be rendered infructuous. That being so, the matter was remanded back to the High Court for consideration afresh. Reliance was also placed on ***Swaraj Mazda Ltd. vs. Union of India*** (1995) 80 ELT 242 (Delhi) where the company was a sick industrial company where also it was held that the financial condition of the company should have been considered and direction was given to CEGAT to hear the appeal without there being any condition of predeposit of the duty.

6. Counsel further submitted that the petitioner has filed its reference before BIFR on 06.05.2015 and matter is pending consideration before the competent authority. By placing reliance on ***Maharashtra Tubes vs. State Industrial & Investment Corporation*, *Maharashtra*** (1993) 2 SCC 144, ***Jay Engineering Works Ltd. vs. Industry Facilitation Council*** (2006) 8 SCC 677, ***Raheja Universal Ltd. vs. N.R.C. Ltd.*** (2012) 4 SCC 148, ***KSL Industries Ltd. vs. Arihant Threads Ltd.*** (2015) 1 SCC 166, ***Saket India Ltd. vs. W.Diamond India Ltd.*** 2010 (119) DRJ 190, it was submitted that protection of Section 22(1) of SICA is available to the company from the date of filing the reference. The coercive action taken by the respondent on 27.10.2015 on the basis of warrant of attachment dated 13.10.2015 was against the mandate of Statute and the matter be remanded back to the Tribunal for hearing the appeal on merits.

7. The counsel further urged that the petitioner has a good prima facie case as no independent enquiry was held by the respondent for identifying the names of the employees or their entitlement of the fund. Even the respondent denied an opportunity to the petitioner to cross-examine the concerned enforcement officer. The impugned order is contrary to the circular dated 30.11.2012 of the respondent-corporation. In Para 8 of the circular, the Central Provident Fund Commissioner has deprecated the procedure of lump-sum assessment and provided that there shall be no assessment without identifying individual members in whose account the fund is to be credited. Reliance was placed on ***Food Corporation of India vs. RPFC*** (1990) 1 FLR 68, ***Himachal Pradesh State Forest Corporation vs. RPFC*** (2008) 5 SCC 756, ***Sandeep Dwellers Pvt. Ltd. Nagpur vs. Union of India*** 2006 III CLR 748 and ***Shrirampur Education Society vs. RPFC, Mumbai*** 2014 (142) FLR 477.

8. Lastly, the counsel submits that attachment of four machines by the respondent are preparatory machines which are crucial for the production line. The production of the company has been affected and will be detrimental to the interest of the company, banks, financial institutions, workers and the respondent department. It was submitted that the petitioner undertakes that it will not sell, alienate or in any manner dispose of the said assets without prior permission of the respondent. The attachment notice dated 13.10.2015 and consequent attachment on 27.10.2015 be lifted. The respondent has already attached the account of the petitioner in Bank of India and has taken Rs.5,50,743/- on 19.12.2014. The petitioner is further ready to deposit a sum of Rs.25 lacs with the appellate authority within two weeks and the matter may be heard on merits.

9. In response, counsel for the respondent submits that the issue of financial hardship raised by the establishment in its appeal under Section 7I of the Act was duly considered by EPFAT and after due consideration, the authority passed a reasoned order whereby it directed the establishment to predeposit 50% of the due amount instead of 75% predeposit amount, as mentioned under Section 7O of the Act. In the writ petition filed by the establishment, the order was not interfered with and only the time was extended by further six weeks to deposit the amount. The said order has attained finality.

Counsel further submits that the delay in deposit of provident fund money cannot be allowed to link with the financial position of the establishment. Reliance in this regard was placed on ***Organo Chemical Industries vs. Union of India*** (1979) 4 SCC 573, ***Hindustan Times Ltd. vs. Union of India & Ors.*** (1998) 2 SCC 242 and, therefore, it is submitted that the establishment cannot escape from its statutory obligation of making contribution to the funds under the Act on the ground of financial hardship.

10. As regards the applicability of provisions of Section 22(1) of SICA is concerned, it was submitted that the establishment cannot escape its statutory liability under EPF Act in view of Section 22F of SICA. The employees contribution deducted from the wages of the employee or the employers contribution is a first charge on the assets of the establishment and has to be given priority to all other debts. Reliance was placed on ***Gowri Spinning Mills (P) Ltd. vs. Assistant Provident Fund Commissioner*** 2006 (5) CTC 1, ***Maharashtra State Cooperative Bank Ltd. vs. Provident Fund Commissioner*** (2009) 10 SCC 123. Counsel further submits that the order dated 13.07.2015 has attained finality and the establishment cannot raise the same issue again and again. Under the circumstances, it is submitted that the writ petition alongwith the application preferred by the petitioner are liable to be dismissed with cost.

11. It is not in dispute that feeling aggrieved by the order passed by the competent authority under Section 7A of the Act, an appeal was preferred by the establishment before learned EPFAT under Section 7I of the Act alongwith an application seeking waiver of predeposit, as required under Section 7(O) of the Act. While entertaining the appeal of the establishment, the competent authority directed the establishment to deposit 50% of the amount instead of stipulated 75% within 30 days as a precondition in terms of Section 7(O) of the Act. Being aggrieved, the establishment preferred a civil writ petition No.6595/2015 which was disposed of by this Court vide order dated 13.07.2015 extending the time to deposit the amount ordered by the appellate authority by six weeks. However, due to non-compliance of the order, the appeal was dismissed. Subsequently, warrant of attachment of movable property was issued by the department as a result of which, four machines of the petitioners establishments were attached.

12. The basic submission of learned counsel for the petitioner is that the petitioner company is suffering losses since the year 2011 with the result it could not comply with the order. A statutory reference before BIFR under Section 15(1) of SICA has also been filed by the company which is registered on 06.05.2015. Various decisions have been relied upon by learned counsel for the petitioner for submitting that due to continuous losses suffered by the petitioner company the petitioners have no means of fulfilling the predeposit condition. Moreover, if the petitioner was unable to comply with this condition, at the most the interim protection may not have been granted to the petitioner but the appeal should not have been dismissed on merits. Moreover, petitioner has a good prima facie case on merits as the beneficiaries have not been identified before fastening the liability upon the petitioner. In any case, the petitioner is ready to deposit a sum of Rs.25 lacs with the appellate authority over and above the amount of Rs.5,50,740/- already attached from the account of the petitioner in Bank of India by the respondent. The basic submission of learned counsel for the respondent, on the other hand, is that the dues under EPF Act are first charge on the assets of the establishment and mere fact that a reference has been made under SICA is not sufficient to negate the claim of the respondent.

13. Rival contentions of the parties require consideration. Keeping in view the special circumstances of the case, the writ petition is disposed of with the direction that subject to depositing a sum of Rs.25 lacs with the appellate authority within two weeks, the appeal bearing ATA No. 1346(9)2014 be restored by the appellate authority and be decided on merits. The petitioner is further directed to furnish an undertaking before the appellate authority that it will not sell, alienate or in any manner dispose of the four machines attached by the respondent without prior permission of the respondent. Subject to furnishing the undertaking by the respondent, the attachment dated 27.10.2015 be lifted. It is clarified that while doing so, I have not expressed any opinion on merits of the case and it will be open to both the parties to make their rival submissions before the competent authority on merits of the case and the appellate authority shall decide the appeal in accordance with law.

(SUNITA GUPTA)
JUDGE

DECEMBER 17, 2015/mb