

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.24591 of 2016

Date of Decision:-30.11.2016.

Panchayat Samiti, Nissing Block at Chirao, District Karnal

.....Petitioner

Versus

Saroj Rani and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

Present: Mr. Narender Pal Bhardwaj, Advocate for the petitioner.

P.B. BAJANTHRI, J. (Oral)

1.) In the instant writ petition, the petitioner has assailed the decision of the Controlling Authority dated 10.4.2015 passed under the Payment of Gratuity Act, 1972 (for short 'the 1972 Act') vide Annexure P-4. The petitioner has not exhausted the remedy of appeal before the Appellate Authority under the Payment of Gratuity Act, 1972 and he has rushed to this Court.

2.) Learned counsel for the petitioner contended that the petitioner need not exhaust the remedy of appeal before the Appellate Authority under the Payment of Gratuity Act, 1972 for the reasons that (i) Controlling Authority who has passed the order dated 10.4.2015 is not the Competent Authority (ii) Impugned order is *ex parte* proceedings, (iii) Violation of Section 205 of the Haryana Panchayati Raj Act, 1994, (iv) Misjoinder/non-joinder of party before the Controlling Authority, (v) RSA No.3857 of 2016

is pending consideration before this Court between the parties. Further learned counsel for the petitioner relied on decision of the Supreme Court reported in **1969 AIR (SC) 556 (M/s Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar)** to contend that where there is a violation of certain provision, one need not exhaust the remedy of appeal.

- 3.) Heard learned counsel for the petitioner.
- 4.) Admittedly, the petitioner has a remedy against the impugned order dated 10.4.2015 under the 1972 Act, learned counsel for the petitioner submitted that the Controlling Authority has no jurisdiction which is not substantiated by any law so as to say that the maintainability of application by the respondent before the Controlling Authority under the 1972 Act. Impugned order is *ex parte*. The petitioner has not been heard. It is not a ground for not exhausting the remedy of appeal. If Section 205 of the Haryana Panchayati Raj Act, 1994 is violated by the respondents in not giving notice is also not ground for not exhausting the remedy of appeal. So also misjoinder/non-joinder of respondent if the first respondent failed to implead second respondent before the Controlling Authority as an Executive Engineer. Such designated officer post is not existing in the petitioner-Panchayat Samiti. The petitioner can approach before the Appellate Authority and raise the ground that he has not been heard by the Controlling Authority. Pendency of RSA No.3857 of 2016 is nothing to do with the present issue. In the RSA gratuity is not the subject matter. Further it was noticed that before the Controlling Authority, the petitioner was represented by staff of the petitioner by producing necessary material like

Authority which is evident that the petitioner did surrender his rights before the Controlling Authority for the purpose of deciding the application before the Controlling Authority. The petitioner might have remained *ex parte*. However, admittedly, the Clerk of the petitioner submitted and requested Controlling Authority to not to proceed with the order in view of RSA No.3857 of 2016. Article 226 can be invoked even if the party has not exhausted the remedy of appeal only under the circumstances that if an order is passed contrary to statutory rules and without jurisdiction. Counsel has not satisfied the said point. Identical issue of alternative remedy recently decided in CWP No.1252 of 2014. Extract of the judgment reads as under-

“14) The petitioner has questioned the order dated 18.11.2013 and order dated 31.12.2013 by which 1st respondent assessed the contributions and determined the amount and the Appellate Authority declined to entertain appeal for non-compliance of Section 45-AA, in particularly not depositing of 25% of contributions assessed. Remedy for the petitioner is to deposit 25% of the contributions assessed as mandated under Section 45-AA of the ESI Act, 1948. The petitioner has rushed to this Court without complying statutory provision. One of the contention of the petitioner in approaching this Court is that he had contended before the Appellate Authority to relax the deposit of 25% of the contributions assessed. The same has not been considered by the Appellate Authority. The Appellate Authority has no power to relax in respect of depositing of 25% of the contributions assessed, since there is no power delegated to the

Appellate Authority to relax 25% of the contributions assessed for the purpose of entertaining appeal. Therefore, the petitioner has no option except to approach the Appellate Authority by complying mandatory requirement of deposit of 25% of the contributions assessed. The Supreme Court has held in the following cases, under what circumstances, writ can be entertained under Article 226 of the Constitution without exhausting the statutory remedy of appeal:-

*(1) **State Of Kerala & Ors vs M.K.Jose (2015) 9 SCC 433**, paragraph 14 reads as under:-*

“14. In State of Bihar v. Jain Plastics and Chemicals Ltd., a two-Judge Bench reiterating the exercise of power under Article 226 of the Constitution in respect of enforcement of contractual obligations has stated: (SCC p.217, para 3)

“3. ...It is to be reiterated that writ petition under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226.”

(2) Union of India s. Shri Kant Sharma (2015) 6**SCC 773**, paragraphs 22 and 36 reads as under:-

“22. Judicial review under Article 32 and 226 is a basic feature of the Constitution beyond the plea of amendability. While under Article 32 of the Constitution a person has a right to move before Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part III of the Constitution, no fundamental right can be claimed by any person to move before the High Court by appropriate proceedings under Article 226 for enforcement of the rights conferred by the Constitution or Statute.

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36. The aforesaid decisions rendered by this Court can be summarised as follows:

(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra and S.N. Mukherjee).

(ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).

(iii) When a statutory forum is

created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma).

(iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma).”

(3) *Zuari Cement Ltd. vs. Regional Director E. S.I.C. Hyderabad & Ors. (2015) 7 SCC 690*
paragraph 2 reads as under:-

“2. Brief facts which led to the filing of these appeals are as under:- The appellant is engaged in the business of manufacture and sale of cement situated at Yerraguntla in Cuddapah District. The said area was brought under the purview of ESI Scheme with effect from 1.03.1986. The Government of Andhra Pradesh granted exemption to the appellant-cement factory from the operation of the Act by various orders for the period from 1.03.1986 to 31.03.1993. The State Government rejected appellant’s application for exemption for the period from 1.04.1993 to 31.03.2001. Following rejection of claim for exemption, the Regional Director, ESI Corporation, issued various demand notices cumulatively demanding a sum of Rs. 65,38,537/- towards contributions for the period from 1.04.1993 to 31.03.1999. Challenging the order of appropriate government rejecting its claim for exemption and also challenging the demand notices, the appellant filed number of writ

petitions before the High Court. The High Court disposed of those writ petitions with direction to the appellant to approach the ESI Court constituted under Section 74 of the Act. The appellant filed the review petition before the High Court, interalia, praying to remit the matter back to the government to rehear the representation of the appellant-company pertaining to its exemption of ESI Scheme under Section 87 of the Act for the period from 01.04.1993 to 31.03.1999 by affording personal hearing to the appellant. The review petition was dismissed observing that the appellant has an alternative remedy before the ESI Court constituted under Section 74 of the Act and therefore the question of remanding the matter back to the State Government does not arise.”

5.) Petition stands dismissed reserving liberty to file appeal before the Appellate Authority under the 1972 Act.

(P.B. BAJANTHRI)
JUDGE

November 30, 2016.

sandeep sethi

Whether speaking/reasoned:-

Yes / No

Whether Reportable:-

Yes / No.