IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.229 of 2014
In
Civil Writ Jurisdiction Case No.9208 of 2010

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The Assistant Provident Fund Commissioner, Bhagalpur, P.S. - Adampur Chowk, Bhagalpur, District - Bhagalpur, Bihar

.. ... Appellant

Versus

1. The Presiding Officer Employees Provident Fund Appellate Tribunal, New Delhi
2. M/S Hotel Harsha Through Sri Sanjay Kumar Son Of Dr. K.K. Upadhyay Owner , Bhatta Bazar, P.S. - Purnea, District - Purnea

... ... Respondents

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Appearance :
For the Appellant : Mr. Prashant Sinha, Advocate
For the Respondent No.2: Mr. M. P. Srivastava, Advocate

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 02-05-2018

The Assistant Provident Fund Commissioner, Bhagalpur, had put to challenge an order dated 07.09.2009 passed by the Employees Provident Fund Appellate Tribunal, New Delhi (hereinafter referred to as 'the Tribunal'), whereby the Tribunal had quashed the order dated 22.01.2003, passed under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, by the Assistant Provident Fund Commissioner, assessing provident fund dues, after clubbing respondent No.2 establishment with M/s Harsha Restaurant; by filing a writ application giving rise to C.W.J.C. No. 9208 of 2010. The said writ application has been dismissed by a learned single Judge of this Court by an order dated 24.09.2013. The Assistant Provident Fund Commissioner, Bhagalpur, has put to challenge the said order dated 24.09.2013 in the present appeal under Clause 10 of the Letters Patent of this Court.

Be it noted, at the outset, that the writ application was preferred by the appellant questioning the order of the Tribunal passed under Section 7-I of the Act and not the Central Board of Trustees. In the present appeal, I.A. No. 4692 of 2016 was filed for amending memo of parties as occurring in the memo of appeal by substituting the parties, mentioned in paragraph 1 of the application. This Court, by order dated 10.04.2018, rejected I.A. No. 4692 of 2016 on the principle that the party, who initiates the proceeding, only has a right to maintain the appeal unless there is succession by substitution in accordance with law.

A question has arisen in the present proceeding, *inter alia,* as to whether the appellant, being the adjudicating authority under Section 7-A of the Act, could question the decision of his appellate authority, i.e. the Tribunal, by filing the writ application before this Court under Article 226 of the Constitution of India, merely because its order of adjudication has been set aside by the Appellate Tribunal.

We need to take note of certain facts, which are not in dispute and are relevant for adjudication of the present appeal: -

The respondent No. 2 (hereinafter referred to as 'the Establishment'), is a unit of M/s Raina Hotels (P) Limited, which it is said, had let out a portion of the hotel for running a restaurant to one Sanjay Kumar. Both the establishments have, admittedly, separate registration under Bihar Sales Tax Act, Bihar Shops and Establishments Act and are assessed separately under the Income tax Act. The Establishment was brought within the purview of the Act with effect from 08.05.1999, with the issuance of an order passed by the appellant. The Establishment raised applicability dispute on the ground that it was wrongly clubbed with another establishment, namely, M/s Harsha Restaurant. A plea was taken that M/s Hotel Harsha is a unit of M/s Raina Hotels (P) Limited and a portion of the premises had been let out to one Sanjay Kumar for the purposes of running a restaurant and whereas M/s Harsha Hotels was owned by M/s Raina Hotels (P) Limited, M/s Harsha Restaurant was owned by one Sanjay Kumar. The main contention of the Establishment was that it was a case of wrong clubbing of two establishments for the purpose of assessment under the Act. The appellant turned down the objection of the

Establishment against applicability of the Act by the order dated 22.01.2003, after reaching the following conclusions :-

(i) There was geographical proximity between two establishments, namely, Harsha Hotel and Harsha Restaurant.

(ii) The *de facto* management, control, supervision and ownership of Harsha Restaurant was in the hands of M/s Harsha Hotels (P) Limited.

(iii) There was unity of purpose etc. between the two.

(iv) There was unity of employment in respect of the two establishments, which is one of the most important test for the purpose of clubbing the two establishments.

After arriving at the conclusions, noted above, the appellant, turning down the objection of respondent No.2, ordered the establishment to comply with the provisions of the Act. The Establishment, aggrieved by the decision of the appellant, preferred statutory appeal before the Tribunal giving rise to A.T.A. No. 49 (3) 2003.

The Tribunal upon considering the materials on record arrived at the following conclusions :-

(i) There was neither any finding by the enquiry officer that functional integrity existed between the Establishment and

Harsha Restaurant nor that existence/survival of M/s Harsha Restaurant depended upon the Establishment.

(ii) Ms/ Harsha Restaurant is engaged in the business of restaurant for its own gain without sharing any profit or loss with the Establishment.

(iii) The terms of lease executed by M/s Harsha Hotel did not indicate that Harsha Restaurant was a unit of the Establishment.

(iv) The nature of business of both the establishments was separate and distinct.

(v) There was no geographical proximity.

Based on the aforesaid conclusions and other aspects of the matter, the Tribunal held that the two different establishments could not be clubbed as one, for the purpose of applicability of the Act and accordingly set aside the order passed by the appellant herein by the order dated 07.09.2009.

As has been noted, at the outset, the appellant challenged the order of the Tribunal by filing writ application before this Court giving rise to C.W.J.C. No. 9208 of 2010, which has been dismissed by a learned single Judge by the impugned order dated 24.09.2013.

We have heard Mr. Prashant Sinha, learned counsel for the appellant and Mr. M.P. Srivastava, learned counsel representing the Establishment.

Submissions advanced on behalf of the appellant :

Learned counsel for the appellant has submitted that the findings recorded by the Tribunal that the two establishments did not have geographical proximity is apparently incorrect since admittedly both the establishments were located in the same premises. On the finding recorded by the Tribunal that there was no functional integrity between the two establishments he contends that the same is incorrect and has referred to an agreement executed by M/s Harsha Hotels and Sanjay Kumar dated 24.04.1998, which is there on record as Annexure-1 to the writ application to contend that functioning of the restaurant has been dictated in the agreement inasmuch as opening and closing time, frequency of changing table cloths and napkins, which demonstrate that Hotel Harsha was having deep and pervasive control over Harsha Restaurant. Further, both the units were using same telephone number, he asserts.

It is contended that the finding of the Tribunal that the appellant did not record any finding that Harsha Restaurant could not survive without Hotel Harsha is also incorrect. Learned counsel for the appellant contends and submits that the Tribunal completely ignored the aspect of unity of purpose and functional integrity, interchange of employees and unity of employment and other findings recorded by the appellant. Heavy reliance has been placed on Supreme Court's decision in case of ***L.N.Gadodia and sons and another v. Regional Provident Fund Commissioner***, reported in **(2011) 13 SCC 517**, with special reference to paragraphs 15, 16, 17, 23 and 24 of the said judgment.

He has next submitted that the lease agreement between the two establishments ought not to have been taken in evidence in view of Section 107 of the Transfer of Property Act, 1882 read with Sections 17 and 49 of the Registration Act, 1908. According to him, lease of immovable property from year to year or for any term exceeding one year can be made only by a registered instrument as required under Section 107 of the Transfer of Property Act, 1882 (hereinafter referred to as 'the T.P. Act'). Such registration is compulsory under Section 17 of the Registration Act and Section 49 of the Registration Act provides for effect of non-registration of documents required to be registered, which, *inter alia*, contemplates that the same shall not be received in evidence of any transaction affecting such property or conferring such power. In support of his contention, he has relied on Supreme

Court's decision in case of ***Dina Ji and Ors Vs. Daddi and Ors.***, **(AIR 1990 SC 1153)** and has contended that by virtue of unregistered lease deed, no relationship of any nature could be said to be created between the two establishments.

Submissions advanced on behalf of the respondent No.2 :

Mr. M.P. Srivastava, learned counsel appearing on behalf of the Establishment, has, on the other hand, raised preliminary objection over maintainability of the writ application itself and the present Letters Patent Appeal preferred by the Assistant Provident Fund Commissioner, Bhagalpur, against the order of his appellate authority (i.e., the Tribunal). He has drawn our attention to a Supreme Court's decision in case of ***Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Ors.***, reported in **(2007) 8 SCC 254**. Relying on the aforesaid decision of the Supreme Court, a Division Bench of Calcutta High Court, in case of ***Regional Provident Fund Commissioner vs. Employees' Provident Funds Appellate Tribunal and Another,*** reported in **2014 LLR 1242**, has held that the authority exercising *quasi* judicial power under Section 7-A of the Act could not challenge the order passed by the appellate authority. He further contends that the appellant cannot be an aggrieved party to the dispute and, therefore, could not have challenged the decision of the appellate authority.

In reply to the said submission of Mr. Srivastava, Mr. Prashant Sinha, learned counsel for the appellant, has relied on a Division Bench decision of this Court, in case of ***M/s S.K. Nasiruddin Biri Merchants Pvt. Ltd. vs. Assistant Provident Fund Commissioner, Regional Office, Employees Provident Fund Organisation & Anr.***, reported in **2016(4) PLJR 499**, to strengthen his plea that the writ petition as well as the Letters Patent Appeal preferred by the Assistant Provident Fund Commissioner are maintainable.

Mr. Srivastava has further submitted with reference to the materials available on record that this Court exercising power of judicial review under Article 226 of the Constitution of India is not required to examine the correctness of the findings recorded by a *quasi* judicial authority. According to him, in the absence of any procedural or jurisdictional defect pointed out in disposal of the appeal by the Tribunal, the learned single Judge has rightly dismissed the writ application. He also contends that since the decision rendered by the learned single Judge, which is under challenge in the present appeal, does not suffer from any perversity, this Court should not interfere in Letters Patent

Appellate jurisdiction in view of the law laid down by the Supreme Court in case of ***The Management of Narendra and Company Private Limited Vs. The Workmen of Narendra and Company***, reported in **(2016) 3 SCC 340**.

Having considered the rival submissions, we are persuaded to first consider the question of maintainability of the writ petition and the Letters Patent Appeal preferred by the appellant, whose order, passed under Section 7-A of the Act, came to be set aside by the Tribunal.

The law, that a *quasi* judicial authority cannot prefer an appeal being aggrieved by and dissatisfied with the judgment of the appellate authority whereby and whereunder its judgment has been set aside, has been clearly laid down by the Supreme Court in case of ***Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Ors.*** (supra), paragraph 16 of which reads thus :-

> **"16. An adjudicating authority exercises a quasi-judicial power and discharges judicial functions. When its order had been set aside by the Board, ordinarily in absence of any power to prefer an appeal, it could not do so. The reasonings of the High Court that he had general power, in our opinion, is fallacious. For the purpose of exercising the functions of the Central Government, the officer concerned must be specifically authorized. Only when an officer is so specifically authorized, he can act on behalf of the Central Government and not otherwise. Only because an officer has been appointed for the purpose of acting in terms of the**

provisions of the Act, the same would not by itself entitle to an officer to discharge all or any of the functions of the Central Government. Even ordinarily a quasi-judicial authority can not prefer an appeal being aggrieved by and dissatisfied with the judgment of the appellate authority whereby and whereunder its judgment has been set aside. An adjudicating authority, although an officer of the Central Government, should act as an impartial Tribunal. An adjudicating authority, therefore, in absence of any power conferred upon it in this behalf by the Central Government, could not prefer any appeal against the order passed by the Appellate Board."

The Supreme Court, in case of ***Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Ors.*** (supra), has noted with approval, the following passage from the Madras High Court decision rendered in ***Director of Enforcement v. Rama Arangannal*** **(AIR 1981 Mad 80),** dealing with the issue of the *locus standi* of the initial adjudicating authority to question the order of the appellate authority merely because order of adjudication was set aside by the Appellate Board **:-**

"4. On the question as to the maintainability of the appeal, it is seen that the Explanation to Section 54 of the Foreign Exchange Regulation Act 1973 treats only the Central Government as an aggrieved party for the purpose of filing an appeal to the High Court in respect of orders passed by the Foreign Exchange Regulation Appellate Board under that section. therefore, only the Central Government can file and prosecute an appeal against the order of the Appellate Board, and not any other authority, In this case, the appeal has been filed by the Director of Enforcement, who is the initial authority

who passed the adjudication order against the respondents and whose order has been set aside by the Appellate Board on an appeal filed by them. therefore, the Director of Enforcement cannot be said to be aggrieved by the order of the Appellate Board merely because its order of adjudication has been set aside by the Appellate Board."

A decision of the Punjab and Haryana High Court in case of ***Director of Enforcement v. Lal Chand*** **(1985) 6 ECC 55,** which followed the Madras High Court decision in ***Director of Enforcement v. Rama Arangannal*** (supra) also finds reference with approval by Supreme Court in ***Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Ors.*** (supra).

Relying on the aforesaid decision, in case of ***Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Ors.*** (supra), a Division Bench of Calcutta High Court, in case of ***Regional Provident Fund Commissioner vs. Employees' Provident Funds Appellate Tribunal and Another*** (supra), dealing with a challenge made by the authority exercising power under Section 7-A of the Act against the order of the appellate authority whereby its order was interfered with, has taken a view that the order passed by the appellate authority reversing the order passed by the *quasi* judicial authority could not be challenged by the said *quasi* judicial authority by filing a writ petition, since he could not be termed to be an aggrieved party, because no interest of the said appellant/petitioner could be affected by the order passed by the appellate Tribunal.

We are in respectful agreement with the view taken by the Division Bench of Calcutta High Court following the Supreme Court's decision in the case of ***Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Ors.*** (supra). The appellant, in our view, could not have questioned the decision of his appellate authority against any proceeding in which his order was reversed by the appellate authority. The appellant was not a contesting party in the proceeding rather he was exercising his *quasi* judicial functions and his decision merged with the decision of the appellate authority, after passing of the order by the appellate authority. The order of the appellant, as an authority under Section 7-A of the Act, is, in fact, subject to any decision of the appellate authority under the provisions of the Act. Reliance placed by Mr. Sinha, appearing for the appellant, on this Court's decision in case of ***M/s S.K. Nasiruddin Biri Merchants Pvt. Ltd. vs. Assistant Provident Fund Commissioner, Regional Office, Employees Provident Fund Organisation & Anr.*** (supra) is wholly misconceived. In case of ***M/s S.K. Nasiruddin Biri Merchants Pvt. Ltd. vs. Assistant Provident Fund Commissioner, Regional Office, Employees Provident Fund Organisation &***

Anr. (supra), the Assistant Provident Fund Commissioner (Legal) was the person, who was authorised by the Central Board of Trustees, to institute proceedings for and on behalf of the Board and, therefore, it was found not to have been filed by the adjudicating authority, but by a delegatee of the Central Board of Trustees. Paragraph 20 of the decision in case of ***M/s S.K. Nasiruddin Biri Merchants Pvt. Ltd. vs. Assistant Provident Fund Commissioner, Regional Office, Employees Provident Fund Organisation & Anr.*** (supra) is complete answer to the submission made by Mr. Sinha, appearing for the appellant.

We are, therefore, of the considered view that the writ application and the Letters Patent Appeal filed by the appellant are completely misconceived. The writ application deserved to be dismissed on this ground and for the same reason, in our view, this Letters Patent Appeal is also incompetent.

After having held so, we would have ordinarily dismissed this appeal without going into the other aspects of the matter. However, in the background of the manner in which the matter has been argued on behalf of the appellant, we need to take into account certain aspects of the submissions advanced on behalf of the appellant. As we have noted above, it has been strenuously argued that the unregistered lease deed could not have been received as evidence of any transaction between the two establishments. The records would show that it was the appellant, which had taken the said document in evidence. The contents of the said agreement between the two establishments has been in fact the basis for the appellant to record his finding that M/s Hotel Harsha is the *de facto* owner of the Harsha Restaurant as is evident from the order passed under Section 7-A of the Act. The stand in this regard, which has been taken on behalf of the appellant, is preposterous and deplorable. We have completely failed to understand the purpose behind taking such a plea relying on requirement of registration of the document for the purpose of being taken as evidence. We further find learned counsel for the appellant to be confused over the nature of document, which, according to him, is a lease agreement. If we come to the findings recorded by the appellant as an authority under Section 7-A of the Act, we notice that there is finding of geographical proximity in respect of which there cannot be any dispute since, admittedly, both the establishments are located in the same premises. On the question of ownership, management and control, relying on the agreement (Annexure-1 to the writ application), which, according to Mr. Sinha, could not have been taken in evidence, has held as follows :

"Hence, though prima facie it appears that Harsha Hotel is independent entity, de facto management, control, supervision and ownership is in hands of M/s Harsha Hotels."

There is absolutely no finding of unity of functional integrity, which aspect has been taken note of by the Tribunal. There is no finding, except that the *de facto* management, control, supervision and ownership is in the hands of M/s Harsha Hotel; that Harsha Restaurant is a unit of the Establishment that too based on a document which could not have been taken in evidence.

After having taken these aspects of the matter into consideration, the Tribunal refused to uphold the clubbing of the two establishments. We do not find any force in submission made on behalf of the appellant, while placing reliance on Supreme Court's decision in case of ***L.N.Gadodia and sons and another v. Regional Provident Fund Commissioner*** (supra). A decision of clubbing two establishments for the purpose of applicability of provisions of the Act is to be based on facts and circumstances available on record in each case. In the present case, the Tribunal has found clubbing to be unjustified. The said findings, in our view, does not suffer from any illegality or perversity, requiring this Court's interference. We, therefore, do not find any reason to interfere with the impugned order of the learned single Judge.

Situated thus and in view of above noted discussions, we hold as follows: -

(i) That the appellant, being the adjudicating authority, under Section 7-A of the Act was not competent to question the decision of his appellate authority, i.e. the Employees Provident Fund Appellate Tribunal, New Delhi, by filing writ application before this Court under Article 226 of the Constitution of India. The writ application, itself being incompetent, deserved to be dismissed.

(ii) That the order of the Tribunal reversing the findings of the Assistant Provident Fund Commissioner, Bhagalpur, does not suffer from any illegality or perversity.

(iii) The geographical proximity of the two establishments read with the lease agreement between the two establishments could not be the legal and valid basis for clubbing the two establishments together for the purposes of the Act.

(iv) In any event, there being no procedural error in the decision taking process of the Tribunal, the correctness of findings recorded by the Appellate Tribunal cannot be gone into.

This appeal is accordingly dismissed.

Considering the manner in which this litigation has been fought by the appellant by filing writ application to defend his own order passed in adjudicatory capacity by filing writ application and subsequently this Letters Patent Appeal, we consider it to be a fit case for imposition of cost.

We, thus, impose a cost of Rs. 50,000/- to be paid by the appellant to respondent no. 2 within a period of two months from today.

Before we close this judgment, we consider it appropriate to direct the Regional Provident Fund Commissioner, Patna, to enquire into the circumstance in which the writ application and the present Letters Patent Appeal came to be filed. He will consider *bona fide* of the then Assistant Provident Fund Commissioner of his action to file writ application before this Court against the order of the Appellate Authority. If his conduct is found to be wanting *bona fide*, he shall take appropriate steps for initiation of a disciplinary action against him by a competent authority in accordance with law.

(Jyoti Saran, J)

(Chakradhari Sharan Singh, J)

Pawan/-

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