IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.2436 OF 2019

M/s Asahi Infrastructure and Project Limited, a company registered under the Indian Companies Act, through its Managing Director Laxminarayan J. Rathi.

Vs.

Central Board of Trustees, Body Corporate, Constituted under Employees Provident fund and Miscellaneous Provisions Act and others.

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

Shri S. Ramaswamy, Advocate for petitioner.
Smt. M. A. Munshi, Advocate for respondent no.1.
Shri H. N. Verma, Advocate for respondent nos.2 and 3.

CORAM : A. S. CHANDURKAR, J.
DATE : DECEMBER 09, 2019.

1. The petitioner seeks to challenge the order passed under Section 7-A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short 'the said Act'). According to the petitioner after that order was passed an appeal under Section 7-I of the said Act could not be filed. The petitioner instead had filed Writ Petition No.1467 of 2016 challenging the order passed under Section 7-A of the said Act. That writ petition was withdrawn on 07.06.2017 by granting liberty to the petitioner to take appropriate steps as permissible in law. No steps were taken for filing of appeal under Section 7-I of the said Act. The petitioner then filed Miscellaneous Civil Application No.1518 of 2017 seeking review / recall of the order dated 07.06.2017 on the

ground that though such liberty was granted to the petitioner to take appropriate steps, the alternate remedy of filing an appeal was not available to the petitioner. The petitioner sought permission to withdraw the application in review with a liberty to file a fresh petition. However without granting any liberty the civil application was disposed of as withdrawn. It is in the aforesaid back drop that the present writ petition has been filed.

2. According to the learned counsel for the petitioner the impugned order passed under Section 7-A of the said Act suffers from various legal infirmities and especially that beneficiaries for whose benefit the contraband was sought had not been identified. Similarly the question of coverage of the establishment which was directed to be considered by the appellate Tribunal while remanding the proceedings by its order dated 07.12.2011 had not been gone into. In the light of various legal infirmities the order passed under Section 7-A of the said Act, it is submitted that the writ petition deserves to be entertained on merits and the grounds as raised deserve to be considered.

3. Shri H. N. Verma, learned counsel for the respondent nos.2 and 3 on the other hand submits that the earlier writ petition

had been filed without availing the statutory remedy of filing an appeal under Section 7-I of the said Act. That writ petition was withdrawn with liberty to take appropriate steps as permissible in law. Review of that order was sought and while seeking permission to withdraw the application for review, liberty to file a fresh writ petition was also sought. He submits that such liberty not having been granted the present writ petition does not deserves to be entertained. He also placed reliance on the decision in **M/s Balaji Ginning Factory through its Proprietor – Sunil Chiranjilal Bajaj. Vs. Assistant Provident Fund Commissioner Writ Petition No.2190 of 2016 decided on 03.09.2019** to submit that an order even if erroneous on merits when passed under Section 7-A of the said Act cannot be permitted to be questioned on merits without availing the statutory remedy under Section 7-I of the said Act.

4. The record indicates that when the order passed under Section 7-A of the said Act was passed on 08.07.2015 the petitioner failed to file the statutory appeal within the prescribed period of limitation. Instead the petitioner filed writ Petition No.1467 of 2016 which was withdrawn with liberty to take appropriate steps as permissible in law. The petitioner sought review of that order and prayed for grant of liberty to file a fresh writ petition. That

liberty was not granted and the application for review stood withdrawn. In effect the petitioner neither filed an appeal under Section 7-I of the said Act nor was the writ petition as filed pursued for challenging the order passed under Section 7-A of the said Act. In absence of any such liberty being granted the Court is precluded from entertaining the subsequent writ petition which raises challenge to the very same order that was challenged earlier.

5. The question as to the right of party to invoke jurisdiction under Article 227 of the Constitution of India for challenging an erroneous order passed by the Assistant Provident Fund Commissioner without availing the remedy of appeal has been considered in the decision in **M/s Balaji Ginning Factory** (supra). The observations in paragraphs 8 to 12 which are material are reproduced here under:

> "8. While it is well settled that there are exceptions to the rule of availability of alternate remedy, the situation that requires consideration in the present proceedings is in the context of such alternate remedy though available for a period of 120 days from the passing of the order under Section 7-A of the said Act not being availed of. In ***Chhabil Dass Agarwal*** *(supra)* it has been held by the Hon'ble

Supreme Court that some of the exceptions to the rule of alternate remedy are where the statutory Authority has not acted in accordance with the provisions of the enactment in question or in defiance of the fundamental principles of judicial procedure or when an order is passed in violation of the principles of natural justice or when the Authority has resorted to invoke the provisions of the statute that have been repealed. It is in these exceptions that the rule of alternate remedy is not insisted upon.

9. In the present case the principal grievance sought to be raised on behalf of the petitioners is the absence of identification of beneficiaries in the impugned order. It is seen that this aspect would at the highest render the impugned order to be erroneous. Such order could be termed as being bad in law but it would be difficult to hold such order to be one passed in excess of jurisdiction of the said Authority. There is a distinction between an erroneous order passed in exercise of jurisdiction vested and an order which is passed exceeding the jurisdiction conferred on a Authority. In this regard reference can be made to the decision in ***Smt. Ujjam Bai vs. State of Uttar Pradesh and***

anr. AIR 1962 SC 1621 wherein S. K. Das J. observed in paragraph 15 as under :

15. … Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact. The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable "at the commencement, not at the conclusion, of the inquiry. …. A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e. has jurisdiction) to determine."

Similarly in ***Budhia Swain and ors. vs. Gopinath Deb and ors. AIR 1999 SC 2089,*** it has been observed in paragraph 9 as under :

"9. A distinction has to be drawn between lack of jurisdiction. The former strikes at every root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the

proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge subject to the law of limitation."

10. The scope for challenging an erroneous order passed within jurisdiction by the concerned Authority would therefore stand on a different footing and the considerations for entertaining challenge to an erroneous order passed within jurisdiction after expiry of the statutory period of limitation would have to be viewed from that aspect. Entertaining a challenge to an erroneous order passed within jurisdiction after the prescribed statutory period of limitation by entertaining the writ petition cannot be by way of a substitute for the statutory remedy that has been lost by a party. On the other hand if a case is made out for exercise of jurisdiction on grounds analogous to the exceptions as carved out in the decision in ***Chhabil Dass Agarwal*** (supra), such challenge would stand on a different footing. The present case therefore which raises a grievance of absence of identification of beneficiaries can be termed as a challenge to an erroneous order passed in exercise of jurisdiction vested. In ***Kerala State Drugs &***

Pharmaceuticals Ltd. and others (supra), which decision arose out of adjudication of demand for contribution made under the provisions of the Employees State Insurance Act, 1948, the observations made therein are relevant. It has been held that when contribution becomes due and payable, it is liable to be paid even if the employees concerned are no longer in employment. Whether the employees were identifiable as on date was irrelevant so long as contribution was liable to be paid on their behalf. Similar observations can also be found in ***M/s Harrison Malayalam Pvt. Ltd.*** (Supra)**.**

11. In so far as the decision in ***Shri Gurudeo Ayurved Mahavidyalaya*** (supra) is concerned, the observations made in paragraph 17 in fact run counter to the submission made on behalf of the petitioner. The order of the controlling Authority under the Payment of Gratuity Act, 1972 was challenged by filing an appeal after the period of 120 days. After that appeal was dismissed as being barred by limitation, the Establishment challenged the order of the Controlling Authority in a writ petition. It was urged that as the employee therein was drawing salary

exceeding Rs.1000/- between 1981 and 1994, he was not entitled for gratuity for that period. It was observed in paragraph 17 as under:

> *17. Shri Chandurkar, learned Counsel for the petitioners, also pointed out that the controlling authority had not properly calculated the amount of gratuity. According to him, the employee was drawing more than Rs.1000/- between 1981 and 1984 and, therefore, at least for that period, when his salary was above Rs.1000/-, the employee could not be said to be entitled to payment of gratuity. Shri Chandurkar, therefore, contended that for that period employee was not entitled to the payment of gratuity. He, therefore, contended that those years should have been excluded for the calculation of payment of gratuity. Firstly, such argument cannot be allowed to be raised on merits for the simple reason that the appeal has been dismissed and the controlling authority's order has been finalised. Even if there was any mistake in the calculation, such mistake could not have been corrected, unless it was a jurisdictional error by the controlling authority. This is not a jurisdictional error. Even if the contention were to be accepted, it would, at the most, amount to an error in calculation of the payment of gratuity. ....”*

However, the order of the Controlling Authority to the extent it awarded compound interest at 9 % per annum was set aside holding such direction to be beyond its jurisdiction.

12. In the case in hand, the order passed under Section 7-A of the said Act indicates grant of sufficient opportunity to the Establishment on about forty occasions to produce the relevant records but the same were not produced. In these facts therefore it would not lie in the mouth of the Establishment that in absence of identification of employees, the determination of contribution was an exercise in excess of jurisdiction. The reliance sought to be placed on the orders passed in Writ Petition No.1674 of 2016 *(Kaushik K. Chatterjee Engineers and Contractors vs. Assistant Provident Fund Commissioner)* in the light of the facts of the present case is misplaced. The report of the Enforcement Officer was prepared after verifying the records of the Establishment. Its copy was served on the proprietor of the Establishment. Despite grant of three opportunities to the Establishment, no objection was raised to counter that report. On these facts therefore the grievance as raised by the petitioner as regards absence of identification of workers does not hold good."

6. In the light of aforesaid discussion it is found that there is no justifiable reason given for failing to avail the statutory

remedy under Section 7-I of the said Act. Despite an earlier writ petition being filed it was withdrawn and no liberty has been thereafter granted to re-agitate the challenges. In that view of the matter, I am not inclined to entertain the writ petition on merits. Accordingly the Writ Petition stands dismissed. No costs.

JUDGE

Sarkate