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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 12th November, 2020

Date of decision: 26th November, 2020

+ W.P.(C) 8977/2020 & CM APPLs. 28985-86/2020

ZAS TELE SOLUTIONS PVT. LTD. & ANR. Petitioners
Through: Mr. Naresh K. Dash, Advocate.
(M:9810539912)

versus

THE ASSISTANT PROVIDENT FUNDS
COMMISSIONER Respondent
Through: Ms. Inderjeet Sidhu, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH
JUDGMENT

Prathiba M. Singh, J.

1. This judgment has been pronounced through video conferencing.
2. In the present petition, the relief prayed for by the Petitioners is that the review application before the Assistant Provident Funds Commissioner (*hereinafter* 'APFC') under Section 7B of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (*hereinafter*, 'EPF Act') ought to be decided as the same has not been decided till date.
3. The submission of Id. counsel for the Petitioners is that the APFC had determined the liability of the Petitioners under Section 7A by order dated 31st July, 2018, directing them to deposit a sum of Rs. 33,56,110/- for the period from 2012-2016. The Petitioners immediately filed a review application under Section 7B of the EPF Act, before the APFC, on 21st August, 2018.
4. Thereafter, under legal advice, the Petitioners also filed an appeal under Section 7I of the EPF Act, before the Central Government Industrial

Tribunal (*hereinafter*, 'CGIT'). The CGIT directed the Petitioner to comply with the condition of pre-deposit under Section 7O of the EPF Act, vide order dated 9th January, 2019. The Petitioners filed an application for recall/modification of the said order. However, on 11th September, 2019, due to the post of the Presiding Officer of the CGIT being vacant, the matter was adjourned to 31st October, 2019. On 31st October, 2019, the Petitioners were not present as they were under the assumption that the post of the Presiding Officer is still vacant. The matter was listed before another Bench and the application seeking extension of time for depositing the pre-deposit amount was dismissed as not pressed and the appeal was dismissed. Thereafter, on 27th February, 2020, the application for restoration of appeal was also rejected. Ld. Counsel submits that this order is in the process of being challenged by the Petitioner.

5. In the meantime, the review application under Section 7B has still not been considered by the APFC and instead, it has issued a Recovery Certificate dated 10th April, 2019 in terms of the assessment order. Two show cause notices dated 2nd November, 2020 and 5th November, 2020 have also been served on the Petitioner by the Recovery Officer.

6. It is the submission of Mr. Dash, ld. counsel for the Petitioner that independent of the proceedings in the appeal, the review application before the APFC ought to be decided as the same was filed prior to the filing of the appeal. Recovery proceedings have now been initiated despite the pendency of the review. Accordingly, the Petitioners pray for decision in the review application in a time-bound manner.

7. Ms. Inderjeet Sidhu, ld. counsel appearing for the Respondent submits that under Section 7B of the EPF Act, a review application would not be

maintainable, once the order has attained finality inasmuch as the language of Section 7B is very clear that it is only in respect of orders to which no appeal is preferred that a review is maintainable. Thus, since the original order has attained finality, the present petition is not maintainable.

8. The short question that arises for decision in this case is as to whether the review petition under Section 7B is liable to be decided even after the challenge to the Section 7A order has failed before the CGIT. The language of Section 7B is as under:

“7B. Review of orders passed under section 7A.—
(1) Any person aggrieved by an order made under sub-section (1) of section 7A, but from which no appeal has been preferred under this Act, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of such order may apply for a review of that order to the officer who passed the order.

Provided that such officer may also on his own motion review his order if he is satisfied that it is necessary so to do on any such ground.”

9. An order under Section 7A is an order passed by the PF Commissioner/APFC/RPFC, determining the monies which are due and payable by the employer to the employee. An appeal against this order would lie to the CGIT. However, under Section 7B, a review can also be sought of an order under Section 7A provided “*no appeal has been preferred*”. There are therefore various scenarios that can arise in a review

petition under 7B.

- a. Review is filed under Section 7B prior to the filing of the appeal under Section 7-I;
 - b. Review is filed under Section 7B after the appeal is filed under Section 7-I;
 - c. Review is filed before filing of the appeal but is not adjudicated and the appeal gets dismissed;
 - d. Review is filed under Section 7B but in the meantime, the appeal gets decided and the 7A order is set aside;
 - e. Review is filed after the appeal has been dismissed.
10. The language in the section “*but from which no appeal has been preferred under this Act*” is similar to the language under Order XLVII Rule 1 CPC which reads as under:

“1. Application for review of judgment. - (1) Any person considering himself aggrieved—
(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
(b) by a decree or order from which no appeal is allowed, or
(c) by a decision on a reference from a Court of Small Causes,
and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or

made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

[Explanation. – The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment.]

11. Both counsels have not cited any judgments under the EPF Act on the question whether, after the appeal against the order under Section 7A is dismissed, whether the review would still be liable to be adjudicated on its merits.

12. A bare reading of Section 7B shows that on the date of filing of the review, no appeal ought to have been preferred under the Act. Thus, in scenario no. (b) and (e) above, the review would not be maintainable after the filing or the decision in the appeal. However, insofar as scenarios, (a), (c), and (d), are concerned, the review has been filed prior to the filing of the appeal. Thus, the question that arises is should the review be decided irrespective of the decision in the appeal.

13. The language in Section 7B of EPF Act being almost identical to the language in Order XLVII Rule 1 CPC (a), the decisions under Order XLVII Rule 1 CPC (a) would be applicable.

14. A Full Bench of the Allahabad High Court in ***Behari Lal & Anr. v.***

Gobar-Dhan Lal & Ors., [AIR 1948 ALL 353] while considering Order XLVII CPC, way back in 1948, held that the filing of an appeal subsequent to the filing of an application for review does not make the review incompetent. The Court, reviewed the entire case law under Section 114 read with Order XLVII and by a 2:1 majority, held that there are no express words in the CPC to oust the jurisdiction of the Court hearing the review petition, after an appeal has been preferred, neither is there any implication to that effect. The Court concluded as under:

“...From the general scheme of the Code of Civil Procedure and the specific provisions contained in section 114 and Order XLVII. I feel satisfied that the preferring of an appeal subsequent to the filing of an application for review does not make the review application incompetent.”

15. The anomaly in Order XLVII Rule 1(a) CPC that no appeal should have been preferred at the time of filing of review is considered by the Bench and the following observations are made:

“...It seems that at times Courts have to some extent been oppressed by the fact that although an aggrieved party is provided with a double remedy if his review application precedes his appeal, he is, for no obvious reason, deprived of it if he happens to present an appeal first. The reason may perhaps be that it is the intention of the Legislature that the special remedy by way of review for which an application has usually to be made to the Judge who passed the decree, must be sought without any avoidable delay, and the provision that it must be sought not only before an appeal is presented by the aggrieved party, but, in most cases, also by any other party to the decree, may have been made with that object. But even if this is an anomaly, it is

for the Legislature to rectify it and Courts of law will not be concerned with it.”

16. In the concurring judgment, a further condition is added, that though the review filed prior to filing of the appeal, is competent to be adjudicated after the appeal is filed, the review ought to be heard and disposed of before the disposal of the appeal.

17. Subsequently, in ***Thungabhadra Industries Ltd. v. Government of Andhra Pradesh [AIR 1964 SC 1372]*** the question that arose was whether the review petition could be heard after the SLP was dismissed, as having been barred by delay. The Supreme Court held that if the SLP was dismissed due to non-condonation of the delay, the same would not bar the jurisdiction of the High Court to decide the review. In fact, the Supreme Court held that dismissal of the SLP due to delay would not even be a relevant matter while considering the review. The observations of the Supreme Court are as under:

“ ...
The next question is as regards the effect of the refusal of this court to condone the delay in filing the petition for special leave. Here again, it was not contended that the refusal of this Court to entertain the petition for special leave on the grounds just now stated was a bar to the jurisdiction or powers of the Court hearing the review petition. This position was not contested by the learned Advocate for the respondent either. In these circumstances, we are unable to agree with the learned Judges of the High Court that the refusal by this Court to condone the delay in filing the petition for special leave was a circumstance which could either bar the jurisdiction of the High Court to decide the petition for review or even could be relevant matter to be taken into account in deciding it. If therefore their original order

dated September 4, 1959 was vitiated by an error apparent on the face of the record, the failure of the special leave petition to be entertained in this Court in the circumstances in which it occurred, could not be any ground either of itself or taken along with others to reject the application for review.”

18. In ***Hari Singh v. Smt. S. Seth [AIR 1996 Delhi 21]***, a ld. Division Bench of the Delhi High Court dealt with various scenarios and after applying the ***Thungabhadra Industries Ltd. (supra)*** decision of the Supreme Court further clarified the position as under:

“6. Under Order 47 Rule 1(a) CPC, an application for review of a judgment lies by any person aggrieved by a decree or order “from which an appeal is allowed but from which no appeal has been preferred.” The propositions have been laid down by the Supreme Court in Thungabhadra Industries case, firstly that if before the making of an application for review, an appeal from the judgment sought to be reviewed has already been filed and is pending, then the Court has no jurisdiction to entertain the review application, secondly where the application for review is first made and thereafter an appeal is preferred (as done in this case), the review application can be disposed of provided the appellate Court has not disposed of the appeal before the review application is taken up for disposal. The present case falls within the second principle and the learned trial Judge rightly refused to hear the review application.

7. So far as the contention that the first appeal was dismissed in limine under Order 41 Rule 11(1) CPC and that too without giving reasons, and therefore it is no disposal in the eyes of law, is

concerned, we are of the view that the Supreme Court, in Thungabhadra Industries' case, has made no distinction between the disposal in limine or after notice or between a dismissal of the appeal with reasons and one without reasons. Nor is there any such specific provision in Order 47 Rule 1 CPC stating that a disposal in limine under Order 41 Rule 11 CPC or without reasons is to be ignored or that such a disposal will not come in the way of the disposal of the review application even it be after the disposal of the appeal.

8. Two other principles are also equally well settled. The dismissal of an appeal under Order 41 Rule 11 (1) CPC in limine precludes the Court from which the appeal is preferred, from entertaining an application for review of the decree because it cannot be said in such a case that no appeal has been 'preferred' within the meaning of Section 114 and Order 47 Rule (1) CPC (See Ramappa Bin Dareppa and another vs. Bharna Bin Rama ILR 30 Bombay 625 (1906) (3) Shivappa Parsa Savade vs. Ramachandra Narasinha Deshpande (AIR 1922 Bombay 130(4). There is no difference between an appeal disposed of on merits or under Order 41 Rule 11(1) CPC. The second principle is that a review application filed before an appeal is preferred, cannot be taken up for consideration in case the appeal against the judgment or order sought to be reviewed, has been disposed of in limine under Order 41 Rule 11(1) CPC before the review is disposed of."

19. From the above decisions, the following position is clear:

- 1) A review has to be filed prior to the filing of the appeal;
- 2) The pendency of an appeal does not bar the hearing in a review or the decision in a review;

3) If by the time the review is heard, the appeal is disposed of, even if it is dismissed *in limine* or under Order XLI Rule 11(1) CPC, then the review can no longer be heard.

20. The outstanding question however is if the appeal is dismissed for non-prosecution under Order XLI Rule 11(2) CPC or for non-compliance of a pre-condition to entertain the appeal, then is the review still to be heard on merits?

21. The scheme of Order XLI Rule 11 CPC is clear. A judgment under Order XLI Rule 11(1) is the judgment of the Appellate Court dismissing the appeal without notice to the Respondent. Thus, it is a judgment which has been passed after hearing the Appellant and has been pronounced on merits, even if the same is *in limine* i.e. without notice to Respondent. However, an order of dismissal under Order XLI Rule 11(2) CPC due to non-appearance of the Appellant, would not be a judgment on merits. The Appellate Court, would only be dismissing the appeal for non-prosecution. In those circumstances, it is the decree of the Lower Court that is enforced in execution and not the decree of the Appellate Court. The observations of *Sir Dinshaw Fardunji Mulla* in *The Code of Civil Procedure (2011, 18th edn.)* on Order XLI Rule 11(2) are as under:

“8. Dismissal of appeal for default under sub-rule (2) – *The Appellate Court has no jurisdiction to dismiss an appeal on merit in the absence of the appellant. However, if as a matter of routine in every appeal the opposite parties are called upon to appear in the High Court, this will be defeating justice and putting hardship on those poor persons who have either been injured in motor accident or the heirs of the deceased who are already imperilled due to the death of the bread-winner of*

the family. A special procedure provided under motor accidents claims and the rules framed thereunder show that the claim is to be decided by summary procedure.

The Supreme Court has held that where the counsel for the appellants did not appear despite adequate opportunity, the only course open to the High Court is to dismiss the appeal for non-prosecution. But where the High Court considered the merits of the case and dismissed the appeal on merits, it was held to be improper.

Sub-rr (1) and (2) of r 11 govern different kinds of cases and it cannot be said that any conflict exists between the two. Where an appeal is dismissed for default, it is the decree of the lower court alone that can be enforced in execution.

The words ‘make an order that the appeal be dismissed’ show that the dismissal under this rule is not a decree and is not appealable as such.”

22. Ld. counsel for the Petitioner has cited the judgment of the Supreme Court in ***Khoday Distilleries Ltd. & Ors. v. Sri Mahadeshwara Shahkara Sakkare Karkhane Ltd, Kollegal [2019 (4) SCALE 113]***, which affirmed and reiterated the conclusions rendered in paragraph 44 of ***Kunhayammed & Ors. v. State of Kerala and Anr. [(2000) 6 SCC 359]*** as follows:

"(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a

speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC.”

23. The Supreme Court in ***State of Orissa & Ors. v. Krishna Stores [AIR 1997 SC 871]*** observed as under on the doctrine of merger:

“In the case of State of Madras v. Madurai Mills

Co. Ltd. MANU/S/0225/1996: [1967]1SCR732, this Court, however, observed that the doctrine of merger was not a doctrine of rigid and universal application. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provision conferring the appellate or revisional jurisdiction. Basically, therefore, unless the appellate authority has applied its mind to the original order or any issue arising in appeal while passing the appellate order, one should be careful in applying the doctrine of merger to the appellate order."

24. Thus, the settled position in law is that the doctrine of merger does not apply in all circumstances. The Appellate Forum ought to have applied its mind to the order impugned before it. If the Appellate Forum has not applied its mind and the appeal has been dismissed or rejected due to delay, non-compliance of some pre-condition or formality etc., the doctrine of merger would not apply and the order impugned remains an order of the Forum which passed the same. It does not merge with the order of the Appellate Forum. The CGIT having dismissed the appeal for non-compliance of Section 7-O, which is a condition for entertaining of the appeal itself, the order by the Appellate Forum is not an order on merits of the appeal and cannot be said to have merged with the order under Section 7A.

25. In the facts of the present case, the CGIT has dismissed the appeal of the Petitioner due to non-compliance of the pre-deposit condition i.e. the Petitioner did not appear on the date when the appeal was fixed and such a dismissal would be like a dismissal for non-prosecution. The CGIT has not considered the matter on merits. Thus, the order of the CGIT would be akin to an order under Order XLI Rule 11(2) CPC. Since the Appellate Forum

did not give any consideration on merits to the case of the Appellant and the review was filed prior to the filing of the appeal, the review deserves to be heard on merits. The observations of *Sir Mulla on CPC (supra)* on Order XLVII Rule 1 CPC are as under: -

“22. Filing of appeal pending application for review. – Where an application for review has been presented by a party to the suit, and an appeal is afterwards preferred from the same decree, whether by the same party or by the other party to the suit, the court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application.

But that power exists so long as the appeal is not heard because once the appeal is heard, the decree on appeal is the final decree in the case, and the application for review of judgment of the court of first instance can no longer be proceeded with. And this is so even if the appeal is dismissed under O 41, r 11. An appeal dismissed as presented out of time is no bar to the hearing of a petition for review which had been filed before the appeal. On the other hand, if the application for review is granted, and a new decree is passed, the appeal cannot be heard and it must be dismissed for the decree appealed from is superseded by the new decree. The decree merges with the order of the Supreme Court.”

26. Under these circumstances and in view of the judgments and authorities cited above, the review of the Petitioners filed under Section 7B of the EPF Act is maintainable and deserves to be heard on merits. Accordingly, it is directed that the review petition of the Petitioner shall be heard by the APFC and the same shall be disposed of within 3 months from today. The recovery proceedings initiated on the basis of the Section 7A

order shall accordingly await the decision in the Review Petition.

27. The writ petition, along with all pending applications, stands disposed of in the above terms.

PRATHIBA M. SINGH, J.

NOVEMBER 26, 2020

Rahul/DJ/A

