

Andreza

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 36 OF 2020**

Mr. Anand Y. Phadte, S/o. Y. Phadte, Age 55
years, House No. 626, Mangeror, Karambolim,
Karmali, Goa.

...Petitioner

Versus

Provident Fund Inspector, Shri Rudal Prasad, age
47 years, Bhavishya Nidhi Bhavan, 24, Pato Plaza,
Panaji, Goa 403 001.

...Respondent

Mr. Vijay Palekar, Advocate for the Petitioner.

**Mr. C. A. Ferreira and Mr. S. Kamulkar, Advocates for the
Respondent.**

**CORAM: MANISH PITALE, J
Reserved on: 13th October 2021
Pronounced on: 21st October, 2021**

JUDGMENT

1. The Petitioner is proprietor of M/s. Swastik Enterprises and he has filed this Petition for quashing of a complaint filed by the Respondent-Provident Fund Inspector before the Judicial Magistrate First Class at Ponda, claiming that the said complaint initiated under the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, (the aforesaid Act), is not maintainable in the facts and circumstances of the present case.

2. In the present case, proceedings were initiated under the provisions of the said Act on the basis that the establishment of the Petitioner stood covered and that there was outstanding liability under the said Act, which the establishment had not deposited. The Petitioner does not dispute the fact that the establishment stood covered under the provisions of the said Act and that contributions towards provident fund are being made. The area of dispute is confined to the question as to whether a particular allowance to be paid to the employees of the aforesaid establishment is covered under the definition of 'wages' and consequently whether the contribution towards provident fund ought to be deposited by including the component of the said allowance. According to the Petitioner, the said allowance pertains to house rent payable to the employees, which is not covered under the provisions of the said Act. It is further brought to the notice of this Court that while submitting details to the concerned authority, the Petitioner had struck off the column of Dearness Allowance (DA) and instead written House Rent Allowance (HRA) in its place. While depositing contributions and submitting returns, the Petitioner excluded the component of HRA, which is the bone of contention in the present case.

3. It is in this backdrop, that the Assistant Provident Fund Commissioner initiated proceedings under Section 7A of the aforesaid Act. Pursuant to the said proceedings, an order dated 23.05.2012 came to be passed against the Petitioner. The Assistant Provident Fund Commissioner held that an outstanding amount of Rs.1,63,350/- was payable on the part of the Petitioner and his establishment in the respective accounts of the employees within a period of 15 days from the date of receipt of the order.

In the said order, it was recorded that none appeared on behalf of the establishment of the Petitioner on number of dates. The said authority proceeded on the basis of the documents available on record, to determine the outstanding amount at Rs.1,63,350/-.

4. The Petitioner filed an application for recall of the said order and he also filed Writ Petition no. 312 of 2015, before this Court to challenge the aforesaid order dated 23.05.2012.

5. On 22.04.2016, this Court disposed of the said Writ Petition No. 312 of 2015, by directing that the Assistant Provident Fund Commissioner shall dispose of the application filed by the Petitioner for recall of the order dated 23.05.2012. This Court took note of Section 7B of the said Act, which provides for review of orders passed by the said authority. It was made clear while disposing of the said Writ Petition that the order dated 23.05.2012, was not being disturbed.

6. It is significant that prior to the aforesaid developments, on 29.09.2014, an Enforcement Officer of the Employees Provident Fund Organisation i.e. Respondent-Inspector herein, filed a criminal complaint before the Court of Judicial Magistrate First Class at Ponda. The complaint was filed under Sections 14(1B) and 14(2A) of the aforesaid Act on the ground that the Petitioner had committed offence under Section 6C thereof by failing to comply with the order dated 23.05.2012.

7. During the pendency of the said criminal complaint, and in pursuance of the direction of this Court given in Writ Petition No. 312 of 2015, the Regional Provident Fund Commissioner-II,

Regional Office at Goa, passed an Order dated 29.12.2016, holding that there was sufficient evidence on record to show that the Petitioner was indeed liable to pay the amount of Rs.1,63,350/-. He was granted time of 10 days to deposit the said amount. In this order, reference was made to the earlier order dated 23.05.2012 and it was found that the liability was correctly determined. Thereafter, the criminal complaint was amended, pursuant to an order dated 14.12.2019, passed by the learned Judicial Magistrate First Class, to include paragraph 10 in the complaint. It stated that the complainant i.e. Respondent herein, was also relying on revised order dated 29.12.2016 passed under Section 7A of the aforesaid Act.

8. The Petitioner filed an appeal before the Employees Provident Fund Appellate Tribunal to challenge the aforesaid order dated 29.12.2016, passed by the Regional Provident Fund Commissioner. On 13.03.2017, the Appeal stood admitted and the Tribunal granted interim stay of the operation of the order dated 29.12.2016. The Tribunal reduced the pre-deposit to 40% of the assessed amount and directed the Petitioner to deposit the said amount within three weeks. There is no dispute about the fact that such an amount was deposited and that the Appeal is still pending before the Tribunal, with interim stay operating in favour of the Petitioner.

9. The Petitioner had also filed an application for discharge before the Judicial Magistrate First Class, contending that since the order passed under Section 7A of the aforesaid Act was yet to attain finality, the Petitioner deserved to be discharged from any criminal liability in the matter. On 27.06.2019, the Judicial

Magistrate First Class, rejected the application for discharge, holding that the minute deposit of contribution was not made, the offence was committed and that the assessment under Section 7A of the said Act was immaterial.

10. Aggrieved by the said order of the Magistrate, the Petitioner filed Revision Application before the learned Sessions Court. By judgment and order dated 30.12.2019, the Revision Application was dismissed, holding that the Petitioner was not entitled to be discharged merely because the proceedings under the provisions of the said Act had not attained finality.

11. The Petitioner filed the present Writ Petition, initially challenging the order dated 30.12.2019, passed by the Court of Additional Sessions Judge, Panaji, dismissing his Revision Application. But later, the Writ Petition was amended to delete the aforesaid prayer and instead the Petitioner is now seeking quashing of the criminal complaint itself, on the ground that the adjudicatory process under the provisions of the said Act was yet to attain finality and that in such a situation, the criminal complaint could not proceed at all.

12. Mr. Vijay Palekar, the learned Counsel appearing for the Petitioner, submitted that under the scheme of the aforesaid Act, the concerned authorities including the Regional Provident Fund Commissioner or Assistant Provident Fund Commissioner have to pass an order regarding the very applicability of the Act to an establishment, in case a dispute arises as regards such applicability. The said authority then has the power to determine the amount due from the establishment under the provisions of the said Act.

An order passed under Section 7A can be reviewed under Section 7B of the said Act. Section 7I of the Act provides for an appeal to the Tribunal against an order passed under Section 7A thereof. According to the learned Counsel appearing for the Petitioner, unless the adjudicatory process specifically provided under the said Act attains finality, a criminal complaint, as in the present case filed by the Respondent, is not maintainable. It is contended that in the present case, both the orders passed under Section 7A of the Act by the authorities provided for specific time periods within which the determined amount was to be paid in to the respective accounts. While the initial order dated 23.05.2012 granted time of 15 days, the subsequent order dated 29.12.2016, provided time of 10 days to make such deposits.

13. According to the learned Counsel for the Petitioner, if the amount so determined was deposited by the Petitioner within the specified time period, there was no question of any criminal liability. Even otherwise, in the present case, the Petitioner approached the Tribunal before the expiry of the time period and the Tribunal granted interim stay to the order of the Regional Provident Fund Commissioner. On this basis, it was submitted that the question of criminal liability would not arise at all. Much emphasis was placed on the contention raised before the Tribunal and before this Court that, according to the Petitioner, a serious dispute has been raised by the Petitioner about the very applicability of the provisions of the said Act, in respect of the component of HRA paid to the employees. It is contended that when the very applicability of the provisions of the said Act to the said component is disputed and since the said dispute is yet to be decided finally, no criminal proceedings could be initiated against

the Petitioner. In support of the said proposition, the learned Counsel for the Petitioner has relied upon the judgment of this Court in the case of *Matoshri Mudrualaya & Ors. vs. State of Maharashtra & Ors.*¹. The learned Counsel for the Petitioner has also relied upon the judgment of the Hon'ble Supreme Court in the case of *G. L. Didwani & anr. vs. Income Tax Officer*² and *K.C. Builders & anr. vs. The Assistant Commissioner of Income Tax*³.

14. On the other hand, Mr. C. A. Ferreira, the learned Counsel appearing for the Respondent (original Complainant), submitted that even if the contention raised on behalf of the Petitioner was to be accepted, that the adjudicatory process under the provisions of the said Act was yet to attain finality, the criminal complaint could not be quashed. It was pointed out that even before the Magistrate, in the reply filed on behalf of the Respondent in his application for discharge, it was specifically stated that since the matter was pending before the concerned authority under the provisions of the said Act in pursuance of the order passed by this Court in the earlier Writ Petition, the proceedings in the criminal complaint could be kept in abeyance. On this basis, it was submitted that thereafter the concerned authority had decided the matter and now the appeal is pending in before the Tribunal. Since there is an order of interim stay operating in favour of the Petitioner in the pending Appeal, it was submitted that the proceedings in the criminal complaint could be kept in abeyance and there was no question of quashing of the complaint. As regards the judgment of this Court in the case of *Matoshri*

¹ Criminal Writ Petition No. 359 of 1985 dt17.01.1991

² 1995 Supp2 SCC 724

³ (2004) 2 SCC 731

Mudrualaya (supra), it was submitted that in the said case, a representation of the Petitioner questioning the very applicability of the Act to the establishment was raised and pending, which resulted in quashing of the criminal complaint. According to the learned Counsel appearing for the Respondent, the said case is distinguishable on facts and, therefore, in the present case, only a direction of keeping the proceedings in abeyance can be passed and the criminal complaint cannot be quashed.

15. Heard learned Counsel for the rival parties and perused the material on record. In the face of admitted facts, the question that needs consideration is, as to whether the criminal complaint filed by the Respondent deserves to be quashed.

16. A perusal of the provisions of the said Act would show that under Section 7A, the concerned authority has the power to decide a dispute regarding the very applicability of the provisions of the Act to an establishment and also to determine the amount due from such an establishment, if the Act is found to be applicable. In the present case, there is no dispute about the fact that the provisions of the said Act have been made applicable to the establishment of the Petitioner. It has been depositing contributions towards provident fund. But the only dispute that has arisen is, whether the component of HRA can be included in the definition of wages and, consequently, whether contributions towards provident fund ought to be made by including the said component. While making contributions towards provident fund and submitting returns, the Petitioner excluded the component of HRA, claiming that it did not form part of the wages and that the provisions of the said Act would not apply to that extent, while

determining the liability of the establishment of the Petitioner. The dispute raised on behalf of the Petitioner is clearly a dispute as contemplated under Section 7A (1)(a) of the said Act. The Regional Provident Fund Commissioner has rejected the said contention and determined the liability of the Petitioner to the extent of Rs.1,63,500/-.

17. There is no dispute about the fact that the order passed by the said authority is subject matter of challenge before the Tribunal. The Appeal of the Petitioner has been admitted and there is an interim stay order operating in favour of the Petitioner. It is also not disputed that the criminal complaint was filed on the basis of the earlier order dated 23.05.2012 passed by the Assistant Provident Fund Commissioner and during the pendency of the complaint, the subsequent order dated 29.12.2016 was passed by the Regional Provident Fund Commissioner. Both the orders have been passed under Section 7A of the said Act and while the earlier order dated 23.05.2012 granted time of 15 days to the Petitioner to make the deposit, the subsequent order dated 29.12.2016 granted time of ten days to make such deposit. It is the case of the Petitioner that he preferred Appeal before the Tribunal within time and while admitting the Appeal, an interim order of stay was passed in his favour.

18. It is significant that the cause for initiating the criminal proceedings against the Petitioner and his establishment would accrue if the Petitioner fails to deposit the amount determined by the said authority within the time stipulated for such deposit. If the Petitioner deposits the amount, there would be no question of a criminal prosecution. Similarly, during the pendency of the

Appeal and the stay operating in favour of the Petitioner, there is no question of any cause for initiating criminal proceedings against the Petitioner. To that extent, the learned Counsel for the Petitioner is justified in contending that so long as the Petitioner has time to deposit the amount determined under Section 7A of the said Act and the adjudicatory process under the provisions of the said Act is yet to attain finality, filing of a criminal complaint is premature and unsustainable. In this context it is evident that the Magistrate committed an error in holding that the assessment under Section 7A was immaterial for initiating the criminal proceeding, for the reason that criminal prosecution would lie only after ascertainment of the applicability of the provisions of the said Act, determination of quantum of liability and then failure on the part of the employer/establishment to deposit the amount within stipulated time.

19. Thus, it becomes clear that when the very applicability of the provisions of the said Act, as in this case to the component of HRA, is subject matter of dispute, which is pending adjudication, filing and pursuing a criminal proceeding would amount to an abuse of the process of law.

20. The judgment of this Court in the case of ***Matoshri Mudrualaya*** (supra) covers the position of law in favour of the Petitioner. In the said case, the very applicability of the provisions of the said Act was disputed by the Petitioner by filing a representation before the Central Government. It was during the pendency of such a representation that criminal proceedings were initiated. During the pendency of the Writ Petition, the representation came to be rejected, yet, this Court held that even

in the facts of the said case, where the representation came to be rejected, the criminal complaint deserved to be quashed because the Court would have to address itself also to cases where such a representation could have been upheld, in which case the prosecutions would be wholly unjustified. The relevant portion of the said judgment reads as follows:

“5. The second submission canvassed by Sri Bhonsale is to the effect that under the provisions of Section 19A of the Act, the petitioners had addressed a representation, dated 25 April 1978, to the Secretary, Ministry of Labour, New Delhi, which, admittedly, has reached the concerned authority because, we have on record, the subsequent decision of the authority, who came to reject that representation on 7 January 1980, long after the present prosecutions were commenced. What is material is that the petitioners had forwarded a copy of the representation to the prosecuting authority i.e. the Regional Provident Fund Commissioner at Bombay, and had requested him not to initiate any proceedings till the matter is decided by the competent authority, i.e. the Government or India. This application appears to have been ignored and the prosecution was commenced. The objection canvassed by Sri Bhonsale is not academic but it is a real one for the reason that the decision as to whether the provisions of the Act applied to the petitioners or not was referred to the competent authority or the authority designated under the Act i.e., to the Secretary to the concerned Ministry. Had that authority upheld the petitioner's contentions, the

prosecution itself would have become redundant. It could, therefore, never be argued that the Provident Fund Commissioner was justified in proceeding regardless of the decision that was to be taken by that authority and I am, therefore, inclined to uphold the submission of Sri Bhonsale to the effect that the prosecutions were premature.

6. Sri Mehta, in reply to this submission, has drawn my attention to the order passed by the Secretary of the Ministry on 7 January 1980, wherein the representation in question has been rejected. It is Sri Mehta's contention that this submission of Sri Bhonsale is of no consequence. Unfortunately, I am unable to agree with this submission because, it may be that on the facts of the present case the representation came to be rejected but this Court will have to address itself also to those cases where the representation could have been upheld, in which case, the prosecutions would have been wholly unjustified.

7. My attention has been drawn to a decision of the Madras High Court in the case of Raghuram Textiles v. Regional Provident Fund Commissioner, Madras (1979-I L. L. N. 490), wherein the Madras High Court has also endorsed the view that where proceedings under Sections 7A and 19A are pending, the prosecution must be deferred.

8. In this view of the matter, the petition deserves to be allowed. The prosecutions viz. - Criminal Case No. 762 to 768 of 1978 on the

file of the learned Metropolitan Magistrate, 23rd Court, Esplanade, Bombay are quashed. Interim stay stands vacated.”

21. In the present case, the distinction sought to be made on behalf of the Respondent cannot be accepted because even if in the case of ***Matoshri Mudrualaya*** (supra), a representation was filed with regard to the very applicability of the said Act to the establishment concerned, in the present case, the Petitioner contends that the provisions of the said Act would not apply to the component of HRA and that, to that extent, no liability could be foisted on the Petitioner. A dispute is specifically raised on behalf of the Petitioner to the very applicability of the said Act to that extent and, therefore, the judgment in the case of ***Matoshri Mudrualaya*** (supra) squarely applies even to the facts of the present case.

22. Insofar as the judgment of the Hon’ble Supreme Court in the case of ***G.L. Didwani & anr.*** (supra) and ***K.C. Builders & anr.*** (supra) are concerned, it would be appropriate to note that in those cases, the adjudicatory process had attained finality in favour of the assessee and, in such circumstances, the Court held that the criminal proceedings deserved to be quashed.

23. In the present case, the adjudicatory process is still pending in the form of the Appeal filed by the Petitioner before the Tribunal, wherein an interim stay is operating. But, that in itself would not make any difference because firstly, the judgment in the case of ***Matoshri Mudrualaya*** (supra) covers the position in favour of the Petitioner and, secondly because, filing and

continuance of criminal proceedings, cannot be left dependent on the contingency of the manner in which the adjudicatory process would finally terminate. The scheme of the aforesaid Act shows that it is a self-contained, complete and special Code concerning the liability of establishments to whom the Act applies. It is only after the process of adjudication of the very applicability of the said Act and determination of liability reaches finality, that the question of initiation of criminal proceedings would arise.

24. There is substance in the contention raised on behalf of the Petitioner that the cause to initiate criminal proceedings, would accrue after the time period stipulated for depositing the amount expires and if the establishment deposits the amount before expiry of such time period, there would be no cause to initiate criminal proceedings. In the present case, in the face of interim stay granted by the Tribunal, it cannot be said that the criminal complaint could be pursued by the Respondent.

25. Insofar as the contention regarding keeping the criminal proceedings in abeyance is concerned, such a criminal complaint proceeding cannot be allowed to hang like a sword of Damocles on the Petitioner, when the very applicability of the provisions of the said Act is in dispute, insofar as the component of HRA is concerned. It would amount to an abuse of the process of law if such a proceeding is permitted to be kept in abeyance, when the adjudicatory process is yet to reach finality. Nothing prevents the Respondent from initiating a criminal complaint proceeding against the Petitioner establishment upon final adjudication of the question regarding applicability of the provisions of the said Act, determination of quantum of liability and failure of the Petitioner

and his establishment to deposit the amounts finally adjudicated, within the stipulated period of time. There could be a situation where the adjudicatory process may culminate in reduction or substantial reduction of the quantum of liability, which would again show that criminal liability would arise only upon failure of the Petitioner and his establishment to deposit such finally determined reduced quantum of liability. These factors clearly indicate that the contention raised on behalf of the Respondent to keep the said criminal complaint in abeyance is without any substance and it deserves to be rejected.

26. In view of the above, this Court finds that the present Petition deserves to be allowed. Accordingly, the Writ Petition is allowed in terms of prayer clause (a), which reads as follows:

“(a) That this Honourable Court be pleased to call for the records and proceedings of case No 84/AOA/2014/A pending before the learned Judicial Magistrate First Class, Ponda Goa and after pursuing the same, be pleased to quash the complaint and the criminal proceedings registered under case No. 84/AOA/2014/A.”

27. Ordered accordingly.

MANISH PITALE, J.

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