Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 1076 OF 2018

Resort Mello Rosa,
A unit of Darisa Resorts Pvt Ltd.
Registered under the Companies Act, 1956, Mainat, Bardez, Goa ….. Petitioner

Versus

(1) The Regional Provident Fund Commissioner,
having office at Bhavishya Nidhi Bhavan, 24, Patto Plaza, Panaji - Goa 403 001.

(2) The Assistant Provident Fund Commissioner, having office at Bhavishya Nidhi Bhavan, 24, Patto Plaza, Panaji - Goa 403 001. …. Respondents.

Mr G.K. Sardessai, Advocate *for the Petitioner.*

CORAM : M. S. SONAK, J.

DATED : 10th FEBRUARY 2023

ORAL ORDER :

1. Heard Mr G.K. Sardessai, learned Counsel for the Petitioner. The Respondents are served.

2. The challenge in this Petition is to the order dated 12/7/2018, made by the Employees Provident Fund Appellate Tribunal (Tribunal), declining to condone the delay that exceeded the 60-day time limit prescribed under Rule 7 (2) of the Tribunal (Procedure) Rules, 1997 (said Rules) on the ground that it had no jurisdiction to do so. This was the delay on the part of the Petitioner in instituting an appeal in terms of Section 7-I of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (said Act).

3. Upon hearing Mr Sardessai and perusing the material on record, ordinarily, there would not have been any difficulty in condoning the delay of 161 days in instituting the appeal. The sufficient cause was certainly made out to explain the period of delay. The delay was due to health issues since one of the main directors of the Petitioner had cancer, and the entire family was involved in hospitalization and other issues. However, the Tribunal has held that it has no power to condone the delay beyond 60 days in terms of Rule 7(2) of the said Rules.

4. Mr Sardessai pointed out that Section 7-I of the said Act provides no limitation for instituting an appeal. However, the section states that such a period is to be provided by framing rules. Accordingly, the rules have been framed.

5. Rule 7 of the said Rules, reads as follows :

*"7. **Fee, time for filing appeal, depsoit of amount due on filing, appeal.** - (1) Cheery appeal filed with the Registrar shall be accompanied by a fee of two thousand rupees to be remitted in the form of cross demand draft on a nationalized bank in favour of the Registrar of the Tribunal and payable at the main branch of that Bank at the station where the seat of the said Tribunal is situated.*

(2) Any person aggrieved by a notification issued by the Central Government or an passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/ order, prefer an appeal to the Tribunal:

Provided that the Tribunal may if it is satisfied that the appellant was prevented by sufficient cause from referring the appeal within the prescribed period, extend the said period by a further period of 60 days:

(3) Provided further that no appeal by the employer shall be entertained by a Tribunal unless he has [deposited with the Tribunal a Demand Draft payable in the Fund and bearing 75 per cent of the amount due from him as determined under section 7-A:

Provided also that the Tribunal may for reasons to be recorded in writing waive or reduce the amount to be deposited under section 7-O."

6. The Division Bench of this Court in ***The Mangana Sahakari Sakhar Karkhana Ltd. Vs The Assistant Provident Fund Commissioner***[1] comprising A.S Oka (as His Lordship then

1 WP No. 2101/2014 decided on 5th November 2014 was) and A.S. Gadkari, JJ, has considered the provisions of Rule 7(2) of the said Rules, and concluded as follows in paragraphs 5, 6, 7, 8 and 9 :

> *"5 We have carefully considered the submissions. Sub-Rule 2 of Rule 7 of the said Rules reads thus:*
>
> > *"(2) Any person aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/order prefer an appeal to the Tribunal.*
> >
> > *Provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days.*
> >
> > *Provided further that no appeal by the employer shall be entertained by a Tribunal unless he has [deposited with the Tribunal a Demand Draft payable in the Fund and bearing] 75 per cent of the amount due from him as determined under section 7A.*
> >
> > *Provided also that the Tribunal may for reasons to be recorded in writing, waive or reduce the amount to be deposited under section 7-0."*
>
> *6 Thus, Sub-Rule 2 of Rule 7 confers power on the Appellate Tribunal to condone the delay provided the period of delay does not exceed 60 days. Reliance is Placed on section 29 of the Limitation Act and in particular sub-section 2 thereof. Sub-section 2 reads thus:*

> *"(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law."*

7 The submission is that neither in the provisions of the said Act nor in the provisions of the said Rules, there is an express exclusion of the provisions of sections 4 to 24 of the Limitation Act.

8 The first proviso to Sub-Rule 2 of Rule 7 confers power on the Appellate Tribunal to condone the delay. The very fact that a provision has been made in the Rule conferring a power on the Appellate Tribunal to condone the delay shows that the legislature intended to exclude the applicability of section 5 of the Limitation Act. Moreover, the legislature specifically provided that the Appellate Tribunal can condone the delay provided has it is of a period of maximum 60 days. In any event, this provision shows that legislature specifically intended to exclude the power conferred under section 5 of the Limitation Act to condone delay or to extend the period of limitation beyond the period of 60 days. Therefore, on plain reading of the provisions of the said Act and the said Rules the Petitioner cannot rely upon sub-section 2 of section 29. Thus, the applicability of the relevant provisions of section 5 of the Limitation Act to an appeal under section 7 (I) of the said Act stands excluded.

> *Therefore, we find no merit in the challenge to the impugned order of the Appellate Tribunal. We accordingly reject the Petition.*
>
> *9 We make it clear that we have made no adjudication on merits of the order which is subject matter of challenge before the Appellate Tribunal ."*

7. Mr Sardessai pointed out that the Division Bench has not considered Rule 21 of the said Rules, which reads as follows :

> "*21.* ***Orders and directions in certain cases.*** *- The Tribunal may make such orders or give such directions as may be necessary to expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice."*

8. Further, Mr Sardessai placed reliance on ***Sarada Jute Mills Private Ltd. vs. Regional Provident Fund***[2] decided by the learned Single Judge of the Calcutta High Court (Appellate Side), in which a divergent view has been adopted. The reasoning of the learned Single Judge of the Calcutta High Court was as follows:

> *"Even if it was shown, the appeal was filed beyond the further period of sixty days, there is no provision in the Act or the said Rules to suggest that any period beyond sixty days cannot be condoned. The rule does not say "by a further period of sixty days and not thereafter" as is*

2. WP No.19322(W) of 2015 dated 8th September 2015 *provided in the Arbitration and Conciliation Act, 1996 prescribing the period to prefer an application to set aside the award. If such an expression was used no court would have had the power to condone the delay, as the period of limitation would be special (see Union of India Vs. Popular Construction Co. reported in 2001 8SCC 470). So, as the expression "not thereafter" or something similar is not mentioned in the rules, this Court would not be in breach of any statutory provision if it extends the time to file an appeal before the appellate Tribunal. It has the power to do so under Article 226 of the Constitution of India, even if, the appellate Tribunal feels constrained to extend the time beyond the period sixty days.*

For those reasons the order of the Tribunal dated 15th May, 2015 is set aside. The Tribunal is directed to admit the appeal and hear out the same on merits, within a period of six months from the date of communication of this order. This order will not in any way affect the discretion of the Tribunal to order pre deposit to be made on such terms as it deems fit pending hearing of the appeal."

9. Mr Sardessai also referred to the decision of a Division Bench of the Madhya Pradesh High Court in ***Prasad Contractor and Fabricators vs. Assistant Provident Fund Commissioner***[3]. He submitted that in the context of Rule 7(2) of the said Rules, the Division Bench of the Madhya Pradesh High Court, relying upon two earlier decisions of the said Court, factually condoned the delay beyond the consolidated period of 120 days.

---

3. WP No.345/2017 DATED 27/1/2017

10. Since this Court is bound by the decision of the Division Bench in *The Mangana Sahakari Sakhar Karkhana Ltd.* (supra), based upon the divergent views of the Calcutta High Court and the Madhya Pradesh High Court, the delay beyond the consolidated period of 120 days or the delay exceeding 60 days, cannot be condoned. Therefore, the Tribunal's order cannot be faulted because the Tribunal has only followed the view taken by the jurisdictional High Court in this matter.

11. For the above reasons, and despite this Court sympathizing with the plight of the Petitioner, no relief can be granted to the Petitioner in this matter. Accordingly, this Petition is dismissed without any order for costs.

12. Mr Sardessai points out that the Petitioner has deposited the disputed amount in this Court. Accordingly, he requests a restraint on the Respondents from withdrawing the said amount for eight weeks from today. In the peculiar facts of the present case, this request is found to be reasonable and is granted.

13. Accordingly, the interim order granted by this Court is extended by a period of eight weeks from today. However, it is clarified that if the Petitioners do not obtain any interim relief from the Hon'ble Supreme Court during this period of eight weeks, then the Provident Fund authorities are at liberty to withdraw this amount deposited by the Petitioner.

14. Therefore, the Registry is to transfer this amount into the bank account of the Provident Fund authorities, after eight weeks and in the absence of any such interim relief being secured by the Petitioner.

M. S. SONAK, J.