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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

18 WRIT PETITION NO. 15694 OF 2023

M/s Siddhi Engineering,
Plot No. M-48,
MIDC Waluj,
Aurangabad

....PETITIONER

VERUS

The Regional Provident Fund Commissioner-II,
Sub-Regional Office,
Employees Procedure Fund Organization,
Town Centre, Cidco, Aurangabad

....RESPONDENT

....

Mr G. S. Telangre, Advocate for Petitioner;
Mr Nitin K. Chaudhari, Advocate for Respondent /sole

**CORAM : RAVINDRA V. GHUGE
AND
Y. G. KHOBRAGADE, JJ.**

DATE : 2nd January, 2024

ORAL JUDGMENT : (Per : Ravindra V. Ghuge, J.)

1. Rule. Rule made returnable forthwith and heard finally by the consent of the respective parties.

2. The Petitioner has put forth prayer clauses (b), (c), (d) and (e), which read as under :-

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“b) Call for the records and proceedings related to the Petitioner with Respondents;

(c) Quash and set-aside impugned orders No MH/AB/83952 dated 23/09/2021; Certificate under Section 8 of the Act; dated 05/04/2022, Notice dated 29/11/2023 of Recovery Officer;

d) Stay to the Impugned Orders No.MH/AB/83952 dated 23/9/2021; Certificate under Section 8 of the Act, dated 05/04/2022, Notice dated 29/11/2023 of Recovery Officer;

(e) The Respondent be directed stay the Recovery proceeding initiated against the Petitioner during pendency of the Petition;”

3. The Respondent Authority conducted the inquiry of the Petitioner/factory under Section 7(A) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'the 1952 Act'), for the non-payment of the PF contributions and non-submission of records, for the period from 05/2016 to 05/2019, on the basis of the Area Enforcement Officer's interim report dated 03/05/2019. There were several complaints by the employees of the factory as regards the deductions of the employees contributions from their salaries and failure to deposit the same alongwith the Employer's share, with the Provident Fund Department.

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4. Having considered the submissions of the learned Advocates for the respective sides in the light of the pleadings in the Petition memo and the affidavit-in-reply, the issue turns upon the law laid down by the Hon'ble Supreme Court in **Assistant Commissioner (CT) LTU, Kakinada and others Vs. Glaxo Smith Kline Consumer Health Care Limited, (2020) 19 SCC 681**, wherein the Hon'ble Supreme Court concluded that, when extraordinary jurisdiction cannot be exercised even by the Hon'ble Supreme Court under Article 142 of the Constitution of India, the High Court cannot deal with a case under Article 226 of the Constitution of India, when the cause of action cannot be raised on account of the expiry of the limitation period.

5. In paragraph Nos.18 to 26 of **Assistant Commissioner (CT) LTU, Kakinada and others v/s Glaxo Smith Kline Consumer Health Care Limited (supra)**, it has been concluded by the Hon'ble Supreme Court, as under :-

“18. A priori, we have no hesitation in taking the view that what this Court cannot do in exercise of its plenary powers under Article 142 of the Constitution, it is unfathomable as to how the High Court can take a different approach in the matter in reference to Article 226 of the Constitution. The principle underlying the rejection of such argument by this

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Court would apply on all fours to the exercise of power by the High Court under Article 226 of the Constitution.

19. We may now revert to the Full Bench decision of the Andhra Pradesh High Court in *Electronics Corpn. of India Ltd.*, which had adopted the view taken by the Full Bench of the Gujarat High Court in *Panoli Intermediate (India) (P) Ltd. v. Union of India* and also of the Karnataka High Court in *Phoenix Plasts Co. v. CCE*. The logic applied in these decisions proceeds on fallacious premise. For, these decisions are premised on the logic that provision such as Section 31 of the 2005 Act, cannot curtail the jurisdiction of the High Court under Articles 226 and 227 of the Constitution. This approach is faulty. It is not a matter of taking away the jurisdiction of the High Court. In a given case, the assessee may approach the High Court before the statutory period of appeal expires to challenge the assessment order by way of writ petition on the ground that the same is without jurisdiction or passed in excess of jurisdiction - by overstepping or crossing the limits of jurisdiction including in flagrant disregard of law and rules of procedure or in violation of principles of natural justice, where no procedure is specified. The High Court may accede to such a challenge and can also non-suit the petitioner on the ground that alternative efficacious remedy is available and that be invoked by the writ petitioner. However, if the writ petitioner chooses to approach the High Court after expiry of the maximum limitation period of 60 days prescribed under Section 31 of the 2005 Act, the High Court cannot disregard the statutory period for redressal of the grievance and entertain the writ petition of such a party as a matter of course. Doing so would be in the teeth of the principle underlying the dictum of a three-Judge Bench of this Court in *ONGC*. In other words, the fact that the High Court has wide powers, does not mean that it would issue a writ which may be inconsistent with the legislative intent regarding the dispensation explicitly

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prescribed under Section 31 of the 2005 Act. That would render the legislative scheme and intention behind the stated provision otiose.

20. *The respondent had relied on the decision of this Court in K.S. Rashid & Son v. Income Tax Investigation Commission. This decision of the Constitution Bench, no doubt, deals with the extent of power of the High Court under Article 226 of the Constitution and the situation when the High Court can refuse to exercise its discretion, such as when alternative efficacious remedy is available to the aggrieved party. In para 4 (last paragraph) of this decision, however, the Court plainly noted that it was not necessary to express any final opinion on the question as to whether Section 8(5) of the Taxation on Income (Investigation Commission) Act, 1947 (Act 30 of 1947) is to be regarded as providing the only remedy available to the aggrieved party and that it excludes altogether the remedy provided for under Article 226 of the Constitution.*

21. *Reliance was then placed on a three-Judge Bench decision in ITC Ltd. v. Union of India. In that case, the High Court had dismissed the writ petition on the ground that the petitioner therein had an adequate alternative remedy by way of an appeal under Section 35 of the Central Excise Act. Concededly, this Court was pleased to uphold that opinion of the High Court. However, whilst considering the difficulty expressed by the petitioner therein that the statutory remedy of appeal had now become time-barred during the pendency of the proceedings before the High Court and before this Court, the Court permitted the petitioner therein to resort to remedy of statutory appeal and directed the appellate authority to decide the appeal on merits. This obviously was done on the basis of concession given by the counsel appearing for the Revenue as noted in para 2(1) of the order, which reads thus: (SCC pp. 610-11)*

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"2. The High Court has dismissed the writ petition filed by the petitioner on the ground that there is an adequate alternative remedy by way of an appeal under Section 35 of the Central Excise Act. The learned counsel for the petitioner submits that the petitioner will face certain difficulties in pursuing this remedy:

(1) This remedy may not be any longer available to it because the appeal has to be filed within a period of three months from the date of the assessment order and delay can be condoned only to the extent of three more months by the Collector under Section 35 of the Act. It is pointed out that the petitioner did not file an appeal because the Collector (Appeal) at Madras had taken a view in a similar matter that an appeal was not maintainable. That apart, the petitioner in view of the huge demand involved filed a writ petition and so did not file an appeal. In the circumstances of the case, we are of the opinion that the ends of justice will be met if we permit the petitioner to file a belated appeal within one month from today with an application for condonation of delay, whereon the appeal may be entertained. The learned counsel for the Revenue has stated before us that the Revenue will not object to the entertainment of the appeal on the ground that it is barred by time. In view of this direction and concession, the petitioner will have an effective alternative remedy by way of an appeal. (emphasis supplied)

In that case, it appears that the writ petition was filed within statutory period and legal remedy was being pursued in good faith by the assessee (appellant).

22. Suffice it to observe that this decision is on the facts of that case and cannot be cited as a precedent in support of an argument that the High Court is free to entertain the writ petition assailing the assessment order even if filed beyond the statutory period of maximum 60 days in filing appeal. The remedy of appeal is creature of statute. If the appeal is presented by the assessee beyond the extended statutory limitation period of 60 days in terms of Section 31 of the 2005 Act and is, therefore, not entertained, it is incomprehensible as to how it would become a case of violation of fundamental right, much less statutory or legal right as such.

23. Arguendo, reverting to the factual matrix of the present case, it is noticed that the respondent had asserted that it was not aware about the passing of assessment order dated 21-6-2017 although it is admitted that the same was served on the authorised representative of the respondent on 22-6-2017. The date on which the respondent became aware about the order is not expressly stated either in the application for condonation of delay filed before the appellate authority, the affidavit filed in support of the said application or for that matter, in the memo of writ petition. On the other hand, it is seen that the amount equivalent to 12.5% of the tax amount came to be deposited on 12-9-2017 for and on behalf of respondent, without filing an appeal and without any demur -- after the expiry of statutory period of maximum 60 days, prescribed under Section 31 of the 2005 Act. Not only that, the respondent filed a formal application under Rule 60 of the 2005 Rules on 8-5-2018 and pursued the same in appeal, which was rejected on 17-8-2018. Furthermore, the appeal in question against the assessment order came to be filed only on 24-9-2018 without disclosing the date on which the respondent in fact became aware about the existence of the assessment order dated 21-6-2017. On the other hand, in the affidavit of Mr

Sreedhar Routh, Site Director of the respondent Company (filed in support of the application for condonation of delay before the appellate authority), it is stated that the Company became aware about the irregularities committed by its erring official (Mr P. Sriram Murthy) in the month of July 2018, which presupposes that the respondent must have become aware about the assessment order, at least in July 2018. In the same affidavit, it is asserted that the respondent Company was not aware about the assessment order, as it was not brought to its notice by the employee concerned due to his negligence. The respondent in the writ petition has averred that the appeal was rejected by the appellate authority on the ground that it had no power to condone the delay beyond 30 days, when in fact, the order examines the cause set out by the respondent and concludes that the same was unsubstantiated by the respondent. That finding has not been examined by the High Court in the impugned judgment and order at all, but the High Court was more impressed by the fact that the respondent was in a position to offer some explanation about the discrepancies in respect of the volume of turnover and that the respondent had already deposited 12.5% of the additional amount in terms of the previous order passed by it. That reason can have no bearing on the justification for non-filing of the appeal within the statutory period. Notably, the respondent had relied on the affidavit of the Site Director and no affidavit of the employee concerned (P. Sriram Murthy, Deputy Manager-Finance) or at least the other employee [Siddhant Belgaonker, Senior Manager (Finance)], who was associated with the erring employee during the relevant period, has been filed in support of the stand taken in the application for condonation of delay. Pertinently, no finding has been recorded by the High Court that it was a case of violation of principles of natural justice or non-compliance of statutory requirements in any manner. Be that as it may, since the statutory period specified for filing of appeal had expired long back in August 2017 itself and the appeal came

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to be filed by the respondent only on 24-9-2018, without substantiating the plea about inability to file appeal within the prescribed time, no indulgence could be shown to the respondent at all.

24. *Reverting to the contention that the respondent having failed to assail the order passed by the appellate authority, dated 25-10-2018 rejecting the application for condonation of delay, the assessment order passed by the Assistant Commissioner, dated 21-6-2017 stood merged, need not detain us in view of the exposition of this Court in Raja Mechanical Co. (P) Ltd. v. CCE. It is well settled that rejection of delay application by the appellate forum does not entail in merger of the assessment order with that order.*

25. *Taking any view of the matter, therefore, the High Court ought not to have entertained the subject writ petition filed by the respondent herein. The same deserved to be rejected at the threshold.*

26. *Accordingly, we allow this appeal and set aside the impugned judgment and order passed by the High Court and dismiss the writ petition. There shall be no order as to costs. Pending interlocutory applications, if any, shall stand disposed of."*

6. The Petitioner/factory is now represented by a Proprietor, whose husband was the earlier Proprietor of the said factory. He passed away on 25/08/2020 during the Covid-19 period. The factory was represented by a Senior Officer of the rank of Chief Executive Officer alongwith an Advocate, in the Section 7(A) inquiry. The representatives of the Petitioner

remained present before the Provident Fund Authorities on 11.11.2019 and on 26.08.2021. On rest of the dates viz. 20.06.2019, 04.07.2019, 18.07.2019, 03.09.2019, 03.10.2019, 22.10.2019, 25.11.2019, 09.12.2019, 13.01.2020, 27.01.2020, 10.02.2020, 02.03.2020, 05.02.2021, 01.07.2021, 22.07.2021, 05.08.2021, 09.09.2021, 16.09.2021 and 23.09.2021, none remained present before the Authorities. On 26.08.2021, the Petitioner participated in the inquiry and was aware of the next dates in the proceeding.

7. The impugned order dated 30/09/2021 has been passed by the Regional Provident Fund Commissioner-II, Regional Officer, Chhatrapati Sambhajanagar, by relying upon the photostat copies of the record and salary sheets, which were produced by the Employer. This was pursuant to an FIR that was registered against the Petitioner under Section 406 and 409 of the Indian Penal Code. By taking into account the records tendered by the Petitioner Management itself, the calculations of the dues under Section 7(A) were arrived at in the impugned order, as under :-

Sr.No.	Account Description	Amount Due (Rs.)
1	A/c No. 1-Employee Share	Rs.6,01,880/-

2	A/c No. 1-Employer Share	Rs.1,84,075/-
3	A/c No. 1-Total	Rs.7,85,955/-
4	A/c No. 2	Rs.36,138/-
5	A/c No. 10	Rs.4,17,805/-
6	A/c No. 21	Rs.25,080/-
7	A/c No. 22	Rs.2,200/-
	Total	Rs.12,67,178/-

8. The contention of the Petitioner is that, since the Provident Fund Appellate Tribunal, which now functions in the form of Central Government Industrial Tribunal cum Labour Court (CGIT), was not available, the Petitioner did not file an Appeal under Section 7-I of the 1952 Act. The learned Advocate for the Respondent/Provident Fund Department submits that, the Petitioner could have put forth an arguable case if the Petitioner had approached this Court within the Appeal period. He refers to Rule 7(2) read with three proviso thereunder, of the Employees' Provident Fund Appellate Tribunal (Procedure) Rules, 1997 (for short 'the 1997 Rules'), which read 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

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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 the Tribunal unless he has deposited with the Tribunal a Demand Draft payable in the Fund and bearing 75% 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.”

9. He, therefore, submits that the Petitioner should have taken some steps within the limitation of 60 days or even within the further period of 60 days, which was the grace period available for preferring an appeal after showing cause, as to why the appeal was not filed within the period of limitation of 60 days. He further submits that Section 5 of the Limitation Act would not be applicable to the ‘Tribunal’, since the Provident Fund Appellate Tribunal (now the CGIT), is not a ‘Court’. He relies upon Assistant Commissioner (CT) LTU, Kakinada (supra), in support of his case.

10. We find from the pleadings in the Petition that, there is no explanation, as to why the Petitioner did not file an appeal

within the limitation period, in order to get the appeal registered in the office of the CGIT. In the absence of the Presiding Officer, the Petitioner could have approached this Court for urgent orders. Non-availability of the Presiding Officer would not mean that the CGIT has been closed down or abolished. There are several cases before us, wherein the aggrieved parties lodged their appeals under Section 7-I of the 1952 Act, read with Rule 7 of the 1997 Rules and approached this Court for urgent reliefs/interim reliefs on the ground that the Presiding Officer is not available.

11. The impugned order is passed on 30/09/2021 and this Petition has been preferred on 13/12/2023. Considering the law laid down in **Assistant Commissioner (CT) LTU, Kakinada** (supra), just because the limitation period of 60 days and the further period of 60 days (120 days), is exhausted, that, this Court cannot exercise its extraordinary jurisdiction under Article 226 of the Constitution of India. The Hon'ble Supreme Court has recorded in paragraph No.18 reproduced above that *“the principle underlying the rejection of such argument by this Court would apply on all fours to the exercise of the powers of the High Court under Article 226 of the Constitution.”*

12. In paragraph 19 in **Assistant Commissioner (CT) LTU, Kakinada** (supra), the Hon'ble Supreme Court concluded that, the view taken by the Full Bench of the Andhra Pradesh High Court in **Electronics Corporation of India Ltd. Vs. Union of India, (2018) SCC Online Hyderabad 21**; the view of the Full Bench of the Gujarat High Court in **Panoli Intermediate (India) (P) Ltd. Vs. Union of India, AIR (2015) Gujarat 97**, and the view of the Karnataka High Court in **Phoenix Plasts Co. Vs. CCE, (2013) SCC OnLine Karnataka 10432**, are applied to the proceedings on fallacious premises. While concluding paragraph No.19, the Hon'ble Supreme Court holds that, if the Writ Petitioner chooses to approach the High Court within the limitation period, the said challenge could have been considered by the High Court. However, if the Writ Petitioner chooses to approach the High Court after expiry of the maximum limitation period of 60 days (120 days in case before us), the High Court cannot disregard the limited statutory period for redressal of the grievance and entertain the Writ Petition of such party as a matter of course, only because the appeal before the CGIT is barred by limitation. It is further held by the Hon'ble Supreme Court that 'doing so would be in the teeth of the principle underlying the

dictum of the three Judge Bench of the Hon'ble Supreme Court in **ONGC Vs. Gujarath Energy Transmission Corporation, (2017) 5 SCC 42'**.

13. Considering the above, since the Petitioner has approached this Court beyond the period of 120 days, effectively with a delay of 24 months there beyond, we would not be justified in entertaining this Writ Petition in the light of the law laid down by the Hon'ble Supreme Court in **Assistant Commissioner (CT) LTU, Kakinada** (supra).

14. In view of the above, **this Writ Petition is dismissed.**

15. Rule is discharged.

(Y. G. KHOBRADE, J.)

(RAVINDRA V. GHUGE, J.)

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