

Divisional Controller Vs. Jethabhai Govabhai Vankar

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Court : Gujarat

Decided On : May-12-2011

Judge : H.K.Rathod

Acts : [Payment of Gratuity Act 1972](#) - Section 7, 7(4)(a) to (e), 7(7), 7(4); Provident Fund Act (PF) 1925 - Sections 14B, 7(I); [Constitution of India](#) - Articles 226, 227

Appeal No. : SPECIAL CIVIL APPLICATION No. 6368 of 2011

Appellant : Divisional Controller

Respondent : Jethabhai Govabhai Vankar

Judgement :

1. Heard learned advocate Mr.H.C.Raval for petitioner GSRT Corporation.
2. In this group of petitions, prayer is made by petitioner Corporation in Para.8(B) to quash and set aside the order passed by Controlling Authority, Mehsana under Payment of Gratuity Act,1972 and pending admission, stay may be granted against order passed by Controlling Authority.
3. Therefore, in this group of petitions, only order passed by Controlling Authority is under challenge.
4. The petitioner Corporation has not filed appeal before appellate authority under provisions of Payment of Gratuity Act,1972. Present order which has been passed

by Controlling Authority under Section 7(4) of Payment of Gratuity Act,1972. Relevant Section-7(4)(a) to (e) of Payment of Gratuity Act,1972 is quoted as under :

(4) (a) If there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.

(b) Where there is a dispute with regard to any matter or matters specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.

(c) The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.

(d) The controlling authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person entitled thereto.

(e) As soon as may be after a deposit is made under clause (a), the controlling authority shall pay the amount of the deposit--

(i) to the applicant where he is the employee; or

(ii) where the applicant is not the employee, to the [nominee or, as the case may be, the guardian of such nominee or] heir of the employee if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity."

5. The petitioner Corporation is having alternative effective statutory remedy of appeal against order passed by Controlling Authority under Section 7(4) of

Payment of Gratuity Act,1972 to prefer appeal to appropriate Government or such other authorities as may be specified by appropriate Government in this behalf. Therefore, a separate and independent provision of appeal is made under Section 7(7) of Payment of Gratuity Act,1972, which is also relevant and quoted as under :

7(7) Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days:

[Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the appellate authority such amount."

6. In view of the fact that under Section 7(7) of Payment of Gratuity Act,1972 wherein it is provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produce a certificate of controlling authority to the effect that appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section(4) or deposit with the appellant authority such amount.

7. Learned advocate Mr.Raval has fairly admitted before this Court that against the order passed by controlling authority which is under challenge, no appeal is preferred by petitioner Corporation to appellate authority under Section 7(7) of Payment of Gratuity Act,1972. Therefore, according to my opinion, when petitioner Corporation is having alternative effective statutory remedy of appeal under the provisions of Payment of Gratuity Act,1972, then present group of petitions cannot be entertained by this Court. The view taken by this Court in SCA No.2839 of

2011, decided on 15.3.2011 in matter of Employees' Provident Funds Act in case of GSRT Corporation v. Regional Provident Fund Commissioner & Anr., which is quoted as under :

" Heard learned advocate Mr. G.M. Joshi appearing on behalf of petitioner.

Looking to prayer made in Para 6(A) in this petition, petitioner has challenged order dated 10th November, 2008 passed by PF Authority under Section 14B of PF Act as well as decision of Central Board of Trustees dated 17th February, 2009 directing to pay interest. Except that, it is made clear looking to prayer, no other order is under challenge.

Section 14B of PF Act is quoted as under :

"Sec.14B. Power to recover damages Where an employer makes default in the payment of any contribution to the Fund [the [Pension] Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, [the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme :]

[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard :]

[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 91 of 1986), subject to such terms and conditions as may be specified in the Scheme.]"

Section 7(Q) of PF Act is also quoted as under :

"Sec.7Q : Interest payable by the employer The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment.

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.]"

Section 7(I) and 7(O) are also quoted as under :

"Sec.7(I) - Appeals to Tribunal (1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section (4) of section 1, or section 3, or sub-section (1) of section 7A, or section 7B [except an order rejecting an application for review referred to in sub-section (5) thereof], or section 7C, or section 14B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed.]

Sec.7(O) Deposit of amount due, on filing appeal No appeal by the employer shall be entertained by a Tribunal unless he has deposited with it seventy-five per cent of the amount due from him as determined by an officer referred to in section 7A:

Provided that the Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.]"

It is necessary to note that order under Section 14B of PF Act dated 10th November, 2008 is not immediately challenged by petitioner Corporation before higher forum and decision of Central Board of Trustees dated 17th February, 2009 is also not challenged in time before higher forum by petitioner and waited for a period of about more than two years and in other case about more than one year.

The petitioner is having alternative remedy against order passed by PF Authority under Section 14B of PF Act to prefer appeal to Tribunal and at the time of

preferring appeal under Section 7(O), 75% amount is required to deposit by petitioner from amount due.

In light of these facts, petitioner is having statutory effective remedy of appeal challenging aforesaid order dated 10th November, 2008, therefore, this petition is not entertained only on this ground by this Court.

Recently, Apex Court has considered this aspect in case of Transport & Dock Workers Union & Ors. v. Mumbai Port Trust & Anr. reported in 2011 AIR SCW 220. The relevant observation is made in Para 14 which is quoted as under :

"14. In our opinion the writ petition filed by the appellants should have been dismissed by the High Court on the ground of existence of an alternative remedy under the Industrial Disputes Act. It is well settled that writ jurisdiction is discretionary jurisdiction, and the discretion should not ordinarily be exercised if there is an alternative remedy available to the appellant. In this case there was a clear alternative remedy available to the appellant by raising an industrial dispute and hence we fail to understand why the High Court entertained the writ petition. It seems to us that some High Courts by adopting an over liberal approach are unnecessarily adding to their load of arrears instead of observing judicial discipline in following settled legal principles. However, we may also consider the case on merits."

The Jammu and Kashmir High Court has decided issue of alternative remedy in case of Sanjay Aggarwal v. Union of India & Ors. reported in AIR 2011 Jammu and Kashmir 20. The relevant Para 13 and 17 are quoted as under :

"13. The Apex Court in Kunga Nima Lepeha v. State of Sikkim, (2010) 4 SCC 513 : (AIR 2010 SC 1671) and Hindustan Petroleum Corporation Ltd. v. Super Highway Services, (2010) 3 SCC 321 : (2010 AIR SCW 1781) has held that when alternate remedy is available that should be exhausted at the first instance.

17. The Apex Court in State Pollution Control Board, Orissa v. Jagannath Store Crusher & others, Civil Appeal No.4958/2010, decided on 6-7-2010 (reported in 2010 (2) Orissa LR 522 (SC)), held that when efficacious remedy is available, then

appropriate orders should be passed facilitating availing of such remedy. It is apt to reproduce last para of the judgment herein :

"At the rehearing, the appellant herein shall be free to raise the objection to the maintainability of the writ petition on the ground that the respondent herein did not avail the statutory remedy of appeal under Section 31 of the Air Act. If the High Court accepts the objection that an effective alternative remedy is available to the writ petitioners, then it should pass appropriate order facilitating availing of such remedy.""

In view of observations made by Apex Court as well as made by Jammu and Kashmir High Court as referred above and considering fact that more than two years have passed from order dated 10th November, 2008 under Section 14B of PF Act and more than one year has passed from decision of Central Board of Trustees dated 17th February, 2009, therefore, it is not a fit case where this Court can exercise extra-ordinary jurisdiction and this Court can use discretionary powers for entertaining this petition. Therefore, this petition is not entertained by this Court only on the ground that petitioner is having alternative effective statutory remedy under provisions of PF Act.

In view of above observation, present petition is disposed of without expressing any opinion on merits as not entertained by this Court."

8. In view of aforesaid view taken by this Court, not entertaining petition filed by GSRT Corporation only on the ground that Corporation is having remedy of appeal under Section 7(I) of PF Act. Therefore, this Court has not entertained petition filed by petitioner.

9. The order which has been passed by this Court in SCA No.2839/2011 dated 15.3.2011 was challenged by GSRT Corporation before the Division Bench of this Court by way of LPA No.590 of 2011 wherein Division Bench of this Court has also dismissed appeal preferred by GSRT Corporation by order dated 6.4.2011, which is quoted as under :

"1. We have heard learned counsel Mr. G.M. Joshi for the appellant.

2. Intra-court this Letters Patent Appeal has been filed challenging judgment dated 15.3.2011 passed in Special Civil Application No.2839 of 2011, by which the writ petition filed by the appellant has been dismissed on the ground of availability of statutory alternative remedy under the provisions of the Provident Fund Act.

3. The learned counsel for the appellant has urged that he has applied for waiver before the Central Board of Trustees under second proviso of Section 14-B of the P.F. Act. This second proviso applies to SICK Industrial Unit and not to the appellant who has not yet been declared as 'SICK'. Therefore, the application filed by the appellant before the Central Board of Trustees is not maintainable.

4. The Hon'ble Apex Court time in number has said that, 'when there is statutory remedy available, High Court should not exercise its jurisdiction under Article 226 of the [Constitution of India](#)'.

5. For the aforesaid reasons, we do not find any illegality in the order passed by the learned Single Judge. This appeal fails and is accordingly dismissed."

10. Similar view has been taken by Larger Bench of Apex Court in case of Sadhna Lodh v. National Insurance Co. Ltd. & Anr., reported in 2003 (3) SCC 524. Relevant observations of aforesaid decision are in Para.6, 7 and 8 which are quoted as under :

"6. The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act (see National Insurance Co. Ltd, Chandigarh vs. Nicolletta Rohtagi and others 2002(7) SCC 456). This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an

appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 of CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of an illustration, where a trial Court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115 C.P.C., in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State legislature has barred a remedy of filing a revision petition before the High Court under Section 115 C.P.C., no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of High Court under Article 226 of the Constitution.

7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an Appellate Court or the Tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or re-weigh the evidence upon which the inferior court or Tribunal purports to have passed the order or to correct errors of law in the decision.

8. For the aforesaid reasons, we are of the view that since the insurer has a remedy by filling an appeal before the High Court, the High Court ought not to have entertained the petition under Article 226/227 of the Constitution and for that reason, the judgment and order under challenge deserves to be set aside. We, accordingly, set aside the judgment and order under appeal. The appeal is allowed. There shall be no order as to costs. However, it would be open to the insurer to file an appeal if it is permissible under the law."

11. In view of aforesaid decisions of this Court which has been confirmed by Division Bench of this Court in LPA and Apex Court, as referred above, in facts of this case undisputedly order passed by controlling authority under Section 7(4) of Payment of Gratuity Act is not challenged before appellate authority under Section 7(7) by petitioner. Therefore, only on that ground, present group of petitions are not entertained by this Court. Accordingly, this group of petitions are disposed of without expressing any opinion on merits.

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