
(2015) 01 KL CK 0128
In the High Court Of Kerala
Case No : WP (C). No. 25771 of 2014 (V)

Indian Chamber of Commerce and Industry	APPELLANT
Vs	
The Regional Provident Fund Commissioner-1 and Others	RESPONDENT

Date of Decision : 30-01-2015

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 13, 14, 14(B), 17, 17(1)

Citation : (2015) 147 FLR 284 : (2015) 1 KHC 715 : (2015) LabIC 2230 : (2015) 3 LLN 719 : (2015) LLR 577

Hon'ble Judges : K. Vinod Chandran, J.

Bench : Single Bench

Advocate : Anil S. Raj, K.N. Rajani, Radhika Rajasekharan P., Anila Peter, J. Vivek George and C. Prabitha, for the Appellant; N.N. Sugunapalan (Sr.) Advocate and T.N. Girija, Adv., SC, Advocates for the Respondent

Final Decision : Allowed

Judgement

K. Vinod Chandran, J.—The petitioner, an establishment which enjoyed exemption under Section 17(1) of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952 (EPF and MP Act), impugned Ext. P5 recommendation made by the 2nd respondent to the 1st respondent for forwarding the same to the 3rd respondent; for consideration of cancellation of exemption.

2. The petitioner challenges the same on the ground that, there is absolutely no consideration of the materials placed before the authority and the order discloses a total lack of application of mind. Further, the reasons stated in Ext. P5, which has been issued in pursuance to Ext. P2 show cause notice, are facts which were not put to the petitioner in the notice. The discrepancy noticed in the monthly return for the month March 2014 (Annexure-A), is subsequent to the issuance of the show cause notice and long after the matter was kept for hearing by the authority as is evident from Ext. P5, is the argument.

3. The learned Standing Counsel for the respondents 1 and 2 however would contend that no writ would be maintainable at this juncture since Ext. P5 is only a recommendation which has to be forwarded to the 1st respondent and only on approval by the Central Provident Fund Commissioner and the Board of Trustees would the Government be addressed, on the question of cancellation of exemption. The writ petition is premature and the petitioner seeks pre-emption of a valid consideration by the authorities, goes the defence of the respondent.

4. The inspection which led to the impugned order was on 21.11.2011 as is evidenced by Ext. P1. On the basis of such inspection, Ext. P2 show cause notice was issued. Four defects were noticed in the said show cause notice which are as follows:

1. No investment has been made during the year 2010-11 and majority of the deposits are with the bank.

2. The securities are not in demat form and script wise register has not been maintained.

3. Audited balance sheet for the year 2010-11 has not been submitted.

Further, the statutory monthly return in Annexure A for the wage month from Sep. 2011 has not been submitted.

5. The petitioner submits that Ext. P3 was the audited balance sheet for the year 2010-2011 and hence the 3rd objection raised in the show-cause notice would not have survived. With respect to the other discrepancies, Ext. P4 series of representations were made before the authorities which were not considered by the authority when passing Ext. P5.

6. Primarily it is to be noticed that in Ext. P5, though it is indicated that many opportunities were granted from the date of issuance of show-cause notice being 28.06.2012, the matter was adjourned for reason of either the petitioner seeking an adjournment or the administrative exigencies of the respondent organization. Evidently on 31.10.2012, the counsel representing the petitioner had appeared and requested an adjournment which was granted and the matter posted to 02.11.2012. Though it is stated that none appeared for enquiry on 02.11.2012, nothing obviously was done on the said date nor on a reasonably proximate date. Subsequently after about 2 years on 16.09.2014, Ext. P5 recommendation has been made. Interestingly none of the discrepancies noticed in Ext. P2, find a place in Ext. P5.

7. The learned Standing Counsel appearing for the respondent organization would invite the attention of this Court to the counter affidavit filed wherein detailed reasons are said to have been stated. It is trite that, what has not been stated in the order cannot be substituted by a counter affidavit filed in the writ petition, in which the order itself is challenged.

8. With respect to the contention that Ext. P5 order is only a recommendation

and final orders will have to be passed, by the State Government after the recommendation is approved by the Central Provident Fund Commissioner, as also the Central Board of Trustees; that would be of no consequence, since the scheme does not contemplate an opportunity to the petitioner at the stage of approval by the Central Provident Fund Commissioner or the Central Board of Trustees. Hence, Ext. P5, though styled as a recommendation, is the recommendation on which the Central Provident Fund Commissioner as also the Central Board of Trustees would be obliged to act under the provisions of the Act and Scheme.

9. The power to exempt the provisions of the EPF and MP Act, 1952 is conferred on the appropriate Government by Section 17 of the Act. The appropriate Government under Sub-Section (1) has the power to exempt, by a notification in the official gazette, all or any of the provisions of the scheme to any establishment to which the Act applies and by Sub-Section (1C), such powers may be exercised to exempt any establishment from the operation of the Pension Scheme also. Such exemption granted would only apply to the provisions of the scheme and despite such exemption by Sub-Section 1(A), the provisions of Sections 6, 7(A), 8 and 14(B) as also the penal provisions under Section 14 would be applicable to such an exempted establishment.

10. Under Sub-Section 4, the authority which granted the exemption under any of the Sub-Sections of Section 17 would be entitled to cancel such exemption for failure to comply with any of the conditions imposed by the statutory provisions governing exemption. Section 13 speaks of the inspectors under the Act and the power conferred on them for inspection to enquire into the correctness of any information furnished in connection with the Act or with any scheme and inter alia to determine whether the conditions subject to which exemption was granted under Section 17 are being complied with by the employer in relation to an exempted establishment. Hence the inspection conducted by the respondent organization to verify compliance of the condition of exemption cannot be faulted. The inspector appointed under Section 13 has been conferred with the authority to exercise such other powers as the scheme or insurance scheme provides by sub-clause (e) of Sub-Section (2).

11. The terms and conditions of exemption as per the Employees Provident Fund Scheme, 1952 have been enumerated in Appendix-A to Paragraph 27 (AA) of the Employees Provident Fund Scheme, 1952. Paragraph 24 of Appendix-A speaks of audit of the accounts of Provident Fund maintained by the Board of Trustees of an exempted establishment and supply of a copy of the auditor's report alongwith the audited balance sheet to the Regional Provident Fund Commissioner, within the stipulated period of six months after the close of the financial year. Paragraph 25 speaks of withdrawal of exemption on reporting of loss for three consecutive financial years or erosion in the capital base. Paragraph 26 mandates that the employer in relation to an exempted establishment shall provide for such facilities for the inspection under Section 17

of the Act. The withdrawal of exemption after issuance of a show-cause notice is spoken of in paragraph 27. Though specific power is not conferred on any authority to make a recommendation as stipulated herein, a composite reading of the aforesaid provisions would indicate that the exemption of an establishment does not take it away from the supervisory powers of the respondent organisation.

12. The provisions mandate regular inspection to be carried out and the compliance of the conditions of exemption alone would, confer a right on the exempted establishment to continue enjoying the benefit of such exemption. The power to grant exemption and the cancellation of the same is specifically conferred on the appropriate Government. Hence as rightly pointed out by the learned Standing Counsel for the respondent organisation, the cancellation of exemption cannot be carried on only by the appropriate Government. However, the appropriate Government proceeds on the basis of the recommendation made by the respondent organisation, on the basis of the enquiry conducted on inspection in the exempted establishment. The recommendation though has to be approved by the Regional Provident Fund Commissioner and Central Board of Trustees, sprouts at the hands of the Inspector who conducts the enquiry and issues a show-cause notice. The recommendation hence is based on the materials revealed on the enquiry and the explanation offered by the exempted establishment to the specific charges of non-compliance of the terms and conditions of exemption. It goes without saying that this requires a fact adjudication on the basis of the materials recovered and explanations offered and in such circumstance, a satisfaction of non-compliance should precede a recommendation. The necessary trappings of a quasi-judicial enquiry should govern such exercise. An application of mind is absolutely necessary especially since an exemption granted by the appropriate Government is sought to be cancelled on such recommendations made by the inspecting authority.

13. A reading of Ext. P5 indicates that there is nothing stated therein as to the grounds on which such recommendation, for withdrawal of exemption is issued. The only ground as is evident from Ext. P5 is that there are discrepancies noticed in the monthly return in Annexure A, for the month March 2012. As was rightly pointed out by the petitioner, that is not an issue which was covered in the show cause notice. None of the discrepancies which were noticed in Ext. P2 show-cause notice have been discussed on the basis of the inspection or on the basis of the subsequent enquiry having been conducted as against the show-cause notice issued against Ext. P2.

14. Ext. P5 recommendation, on the ground of the monthly return of March 2012 not being in the prescribed format, was not a ground which was put to the petitioner before Ext. P5 recommendation was issued. As noticed above, Ext. P5 has to be arrived at only after a satisfaction of the reasons existing for the cancellation of the exemption, granted by the Government under Section 17(1) of the EPF and MP Act. Such satisfaction has to be arrived at on the basis of

specific instances of violation of the terms and conditions of exemption. Ext. P5 recommendation discloses no such consideration. The operative portion of the order discloses absolutely no reason nor even specific instances of non-compliance. The laconic statement that the monthly return in Annexure-A for the month of March, 2012 discloses the details not being furnished in the prescribed format, is the only basis for such recommendation. Ext. P5 for all the above reasons is set aside.

Considerable time has passed from the date of issuance of the show-cause notice to the order passed; specifically more than two years. The hearing is also said to have been last held in the year 2012. There will be no purpose in directing consideration of the issue afresh as initiated by the show-cause notice. The respondent authority will have to conduct a fresh inspection of the establishment as provided under the Act and enquire into the compliance of the terms of exemption and on any failure revealed; would be entitled to issue a fresh show-cause notice. Needless to say on issuance of such show cause notice, the petitioner would be granted sufficient opportunity to put forth their defence, on a consideration of which alone the recommendation should be made. The Writ Petition is allowed setting aside Ext. P5; but however reserving liberty to the authority to proceed under the provisions of the Act as directed herein.