

(2000) 09 KAR CK 0028
In the Karnataka High Court
Case No : Writ Petition No. 14251 of 2000

Motor Industries Co. Ltd.

APPELLANT

Vs

Regional P.F. Commissioner and Another

RESPONDENT

Date of Decision : 13-09-2000

Acts Referred:

Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 6

Citation : (2001) 88 FLR 316 : (2000) 2 LLJ 1606

Hon'ble Judges : M.P. Chinnappa, J

Bench : Single Bench

Advocate : Kasturi, for Kasturi Associates, for the Appellant; V. Padmanabha Kedilaya, for the Respondent

Final Decision : Allowed

Judgement

M.P. Chinnappa, J.—The petitioner by this writ petition challenges the order and the interpretation sought to be put by the R-I in its Order No. MH/12053/PF/A/CS/SRO/NSK-1/1273/ 13352 dated January 31, 2000 whereby fastening it with an unwarranted demand/ liability as per Annexure-A.

2. Heard the learned senior counsel Sri. Kasturi for Kasturi Associates for the petitioner and Sri. V. Padmanabha Kedilaya, learned counsel for the respondents.

3. The learned counsel for the petitioner submitted that the order passed by the respondents is contrary to the provisions of law and therefore, it is liable to be set aside.

4. The learned counsel for the respondent submitted that this writ petition is not maintainable in view of the fact that an appeal u/s 7-C is provided. Therefore, the writ petition is liable to be dismissed summarily.

5. Controverting this argument, the learned counsel for the petitioner submitted that the order or direction issued by the respondent does not come within the purview of Section 7-A and therefore, this is the only remedy available to the

petitioner. Annexure-A is the order passed by the Regional Provident Fund Commissioner, Office - In charge, SRO, Nasik. The operative portion of that order dated January 31, 2000 reads thus:

"Further, an employee, who is deemed as an excluded employee since his total pay exceeds Rs. 5000/- per month at the time of joining the establishment itself is also entitled to join the fund. In this case I may quote Chapter 3.3.2 of Part II-A of the Manual of Accounting."

Procedure which reads as:

"Besides even an excluded employee whose pay per month exceeds Rs. 5,000/- can become a member of the Fund and contribute upto Rs. 5,000/- or on the entire pay, subject to his willingness in writing and employer's acceptance to pay his share or contribution and administrative charges."

Here in this case also the employer has to pay his share or contributions and administrative charges and the contributions will be at the statutory rates only as per para 29 of the E.P.F. Scheme. I hope the position is elucidated and I, therefore, request you to carry out the direction contained in this letter and the letters sent earlier and retransmit the Form 3-A & 6 duly rectifying the defect of recovery and remittance of contributions below the statutory rate of contribution (that is 10 instead of 12 on the pay) and making good the short amount paid early. From this it is clear that it is not an order passed as stipulated u/s 71 nor does it come in any other provisions wherein an appeal is provided. Therefore, as rightly pointed out by the learned counsel for the petitioner, the preliminary objection that this writ petition is not maintainable is unsustainable.

6. This order came to be passed in view of the admitted correspondence between the petitioner and the respondent as per Annexure-A to P which I have gone through carefully.

7. The respondents also filed objections contending inter alia that the writ petition is not maintainable on facts and on law. The amendment introducing definition of excluded employees in Section 2-f and amending Section 6, para 26 (6), para 26-A, para 29, of PF Scheme and chapter 3.3.1 of para 1 of Manual of Accounting Procedure, came into force w.e.f. September 22, 1997 obliging all the employers including the petitioner to calculate Dearness Allowance, Retaining Allowance, if any, and Cash Value of Food Consumption and such salaried employee is allowed to contribute 10 or 12% of the amount more than the limit of Rs. 5,000/- also. Administrative charges to be paid by employer. The employers cannot be forced to contribute more than the statutory limit of 10% or 12%. Therefore, the contention of the petitioner that there is no compulsion under law to pay contribution as per statutory rate over and above the pay of Rs. 5,000/- is not lawful as per the amendment as made by the respondents. Hence, the contention of the petitioner is against the provisions contained in Section 6 para 26 (6), para 26-A, para 29 of the Scheme, para 2 (f) and Chapter 3.3.1 of para 1 of Manual of Accounting Procedure, etc. Therefore, the respondents

contend that the petition is liable to be dismissed.

8. In this case the only question that arises for consideration is in regard "to the interpretation sought to be put by the respondent No. 1 in the order referred to above. To interpret this order, it is required to refer to certain provisions of the Employees' Provident Fund Scheme, 1952, (hereinafter referred to as the Scheme), more particularly 26-A of the Scheme. In that connection, it is necessary to refer to Clause 2 (f) which reads: "excluded employee" means

(i) an employee who, having been a Member of the Fund, withdrew the full amount of his accumulations in the Fund under [Clause (a) or (c) of sub-paragraph (1) of paragraph 69;]

(ii) an employee whose pay at the time he is otherwise entitled to become a Member of the Fund, exceeds (five thousand) rupees per month;

Explanation: "Pay" includes basic wages with dearness allowance, [retaining allowance (if any) and cash value of food concessions admissible thereon;]"

Paragraph 26 of the Scheme reads:

"Classes of employees entitled and required to join the Fund. (1)(a) Every employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies, other than an excluded employee, shall be entitled and required to become a Member of the Fund from the day this paragraph comes into force in such factory or other establishment."

Sub-paragraph 6 of Paragraph 26 reads:

"(6) Notwithstanding anything contained in this paragraph [an officer not below the rank of an Assistant Provident Fund Commissioner] may, on the joint request in writing of any employee of a factory or other establishment to which this Scheme applies and his employer, enroll such employee as a Member or allow him to contribute on more than rupees (five thousand) of his pay per month if he is already a Member of the Fund and thereupon such employee shall be entitled to the benefits and shall be subject to the conditions of the Fund, provided that the employer gives an undertaking in writing that he shall pay the administrative charges payable and shall comply with all statutory provisions in respect of such employee."

Paragraph 26-A reads:

"Retention of membership: (i) A Member of the Fund shall continue to be a Member until he withdraws under Paragraph 69 the amount standing to his credit in the Fund or is covered by a notification of exemption u/s 17 of the Act or an order of exemption under Paragraph 7 or Paragraph 27-A.

Explanation: In the case of claim or refund by a Member under sub-paragraph (2) of paragraph 69, the membership of the Fund shall be deemed to have been terminated from the date the payment is authorised to him by the authority

specified in this behalf by the Commissioner irrespective of the date of claim."

(2) Every Member employed as an employee other than an excluded employee, in a factory or other establishment to which the Scheme applies, shall contribute to the Fund, and the contribution shall also be payable to the Fund in respect of him by the employer. Such contribution shall be in accordance with the rate specified in paragraph 29:

Provided that subject to the provisions contained in sub-paragraph (6) of paragraph 26 and (in paragraph 27), or sub-paragraph (1) of paragraph 27-A, where the monthly pay of such a Member exceeds (five thousand rupees) rupees, the contribution payable by him, and in respect of him by the employer, shall be limited to the amounts payable on a monthly pay of (five thousand rupees) rupees including [(dearness allowance), retaining allowance (if any) and] cash value of food concession."

Further it is also necessary to refer Paragraph 29 which reads:

"The contributions payable by the employer under the Scheme shall be at the rate of (8-1/3 per cent) of the [basic wages, dearness allowance (including the cash value of any food concessions) and retaining allowance (if any)] payable to each employee to whom the Scheme applies:

"[Provided that the above rate of contribution shall be [ten per cent] in respect of any establishment or class of establishments which the Central Government may specify in the Official Gazette from time to time under the first proviso to Sub-section (1) of Section 6 of the Act.]"

The rate of contribution has been now changed to 10% subsequently it was amended to 12%. Therefore, with this reference, it is now necessary to find out as to whether the petitioner is liable to pay 12% over and above the pay drawn by the employees or the employer is liable to pay only 12% upto Rs. 5,000/- and above with only 10%. It is not in dispute that the petitioner has voluntarily paid the P.F. contribution of 12% upto Rs. 5,000/-and for the remaining above Rs. 5,000/- the petitioner has been paying 10% but the respondent directed him to pay even above Rs. 5,000/- the contribution at 12%. This is all the question that has to be considered.

9. From the reading of amendment to Section 6 which came into force by notification dated October 27, 1997 amending para 20 of the scheme, the earlier words and figures 8-1/3% and 10% respectively have also been amended to read as 10% & 12%. The procedure contemplated in the proviso to Section 6 of the main Act is that in this application to any establishment or class of establishments which the Central Government, after making such Inquiry as it deems fit, by notification in the Official Gazette specify, the Section shall be subject to the modification in that for the words "eight and one-third percent" and "ten percent" at both the places where they occur, the words "ten" and twelve "per cent" shall be substituted. According to proviso to Section 6, the

procedure contemplated i.e. issuing of Notification after making such enquiry is necessary, till then contribution @ 12% cannot be automatic for any establishment.

10. Paragraph 26-A of the Scheme speaks about retention of membership. Sub-para (2) of paragraph 26-A provides that every member employed as an employee other than excluded employee in a factory or other establishment to which the Scheme applies, shall contribute to the fund and the contribution shall also be payable to the fund in respect of him by the employer. Such contribution shall be in accordance with the rate specified in para 29. The proviso to sub-para (2) of paragraph 26-A further clarifies that where the monthly pay of a member exceeds Rs. 5,000/- the contribution payable by him and in respect of him by the employer, shall be limited to the amounts payable on a monthly pay of Rs. 5,000/- including Dearness Allowance, Retaining Allowance (if any) and cash value of food concession.

11. In paragraph 29 the rate of contribution prescribed is 8-1/3% and 10% in respect of establishment notified for that purpose. The proviso to sub-para (2) of paragraph 29 also provides that the contribution payable by the employee if he so desires, be an amount exceeding 8-1/3% or 10% as the case may be of the basic wages etc. subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Act. The wording in sub-para (2) of paragraph 26-A and 29 read together would show that such contribution shall be in accordance with the rate specified in paragraph 29. But as to what extent of the salary such contribution shall be paid by the employer, sub-para (2) of paragraph 26-A alone can be resorted to. Therefore, the rate of contribution could be 12% now as specified by the Act, but, however that rate of contribution on a reading of proviso to paragraph 26-A could be limited to monthly of Rs. 5,000/- only and there is no compulsion under the Act, that the rate of contribution shall be at 12% even on salary over and above Rs. 5,000/- per month. Just because the rate of contribution is increased to 10% & 12% respectively, u/s 6 such an increase first of all can apply only to establishment which the Central Government after making such enquiry as it deems fit, specify in the Official Gazette. No such notification was issued so far by the Central Government for the relevant period specifying the establishment to which the increased rate of contribution shall apply. The rate of interest is only subject to para 26-A of the Scheme. Therefore the remittance even otherwise is in accordance with law. The petitioner however has stated that the rate of contribution mentioned in para 26 of the Scheme is subject to other provisions of the Scheme viz. Para 26-A of the Scheme. As the contribution is limited to a monthly pay of Rs. 5,000/- only, over and above which amount the employee would be an excluded employee. Therefore, the question of there being any compulsion under law to pay contribution at the rate of 12% over and above the monthly salary of Rs. 5,000/- cannot arise. The contribution made by the petitioner Company is perfectly in accordance with law and therefore, the argument of the learned counsel for the respondent before me in this regard is

liable to be rejected. It is clear that the P.F. Scheme has not suffered any short payment due to the alleged short amount paid. For the foregoing reasons, I have no hesitation to hold that this petition deserves to be allowed.

12. Accordingly, the petition is allowed. The direction of the respondent dated January 30, 2000 is held to be contrary to law and Annexure-A stands quashed holding that the petitioner is not obliged in law to make the employees' contribution at 12% of the total monthly salary and that the payment of contribution at 12% is liable to be paid upto the monthly salary of Rs. 5,000/- only. Consequently, the respondent is directed not to implement its directions in the impugned order dated January 3, 2000 and I also direct the respondent No. 1 to accept the returns (3A & 6A) submitted by the petitioner company for the year 1997-1998 & 1998-1999 and issue balance confirmation slips to the individual members of the PF scheme and also direct the 2nd respondent to accordingly finalise the members' accounts.

13. However, there is no order as to costs.

14. Further, it is also made clear that the petitioner shall contribute the amount as it has been contributing as per the returns (3A & 6A) already submitted.