

(2003) 05 MP CK 0088

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2878 of 2002

M.P. Electricity Board, Jabalpur

APPELLANT

Vs

Regional Provident Fund Commissioner, Jabalpur and others

RESPONDENT

Date of Decision : 16-05-2003

Acts Referred:

Electricity (Supply) Act, 1948 — Section 5

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 8

Citation : (2004) 1 MPLJ 168

Hon'ble Judges : Arun Mishra, J

Bench : Single Bench

Advocate : M.L. Jaiswal, with Mohd. Ali, for the Appellant; S.C. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Arun Mishra, J.

Petitioner, Madhya Pradesh Electricity Board is challenging the order P.11 passed by the Employees Provident Fund, Commissioner, directing to transfer amount to the "Trust" for individual credit in employees accounts, failing which the Department shall be free to recover the amount as per section 8 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the EPF Act"). The order P.11 is passed on 13-5-2002.

The fact is not in dispute that MPEB is a statutory Corporation constituted u/s 5 of the Electricity (Supply) Act, 1948. The Board has framed the regulations u/s 79. The Board in exercise of the powers u/s 79 has framed the regulations P.1 called as Madhya Pradesh Electricity Board's Contributory and General Provident Fund Regulations, published on 27-3-1953, which came into force w.e.f. 1-4-1952. The provident fund shall be held by the Board and administered by the "Board of trustees". Direction has been made as per order P.11 as per scheme P.1 in the trust created by the Board to make the payment which liability is not in dispute. Board has to make such payments in accordance with the scheme P.1.

This fact is also not in dispute that Board has failed to carry out its obligation to make the payment into the trust and Regional Provident Fund, Commissioner has passed the order P.11 on the ground that the MPEB has defaulted in credit of provident fund accumulations to its employees to their accounts maintained with the "trust" constituted for the purpose which is recoverable against the establishment of MPEB towards withheld accumulations of its employees for the period 2000 to March 2001 is the tune of Rs. 1042733117/-. (One hundred four crores twenty seven lacs thirty three thousands one hundred seventeen).

It is averred in the petition by the MPEB that initially the provision of Employees Provident Fund and Miscellaneous Provisions Act, 1952 was not applicable to the Electricity Board since Schedule I of the Act was not covering industry engaged in Electricity (Generation, Transmission and Distribution). However, other industries were added w.e.f. 4-7-1956 and Electricity Generation, Transmission and Distribution was also included w.e.f. 31-1-1956. MPEB applied for exemption u/s 17 of EPF Act. Exemption was granted as per notification P.2 dated 25-6-1964 w.e.f. 1-6-1958. The nominal muster roll and work charge employees were made members of Employees Provident Fund under EPF Act and still the contribution is being paid, however, with respect to the permanent employees scheme P.1 has been framed run by Board of Trustees. There is failure on the part of the MPEB to make contribution of amount towards the scheme P.1 of the permanent employees which has been directed to be paid in the trust. Petitioner submits that by virtue of section 16(1)(c) of the EPF Act provision of the Act is not applicable to the Board as Board has been constituted under the Electricity (Supply) Act, which is a Central Act. It is further contended that State of M.P. is bifurcated w.e.f. 1-11-2000. Successors Boards have been formed: MPSEB and CSEB.

A notice P.3 u/s 7A of the EPF Act was issued to the Board by Assistant Commissioner. RPFC Jabalpur/respondent No. 2 Petitioner submits that Board had been remitting certain contributions towards provident fund and administrative charges on various codes allotted to certain class of employees, will not clothe the authorities with jurisdiction to initiate proceedings. Petitioner objected to the jurisdiction of respondent No. 2 Asstt. Commissioner to initiate the proceedings. The order P.6 was passed on 27-11-2001 on the ground that Board had wrongly withheld amount of provident fund of the employees which was recovered from their salaries for the past 20 months and has also diverted funds to the tune of Rs. 45 crores from the already existing corpus of provident fund of its employees.

It is averred in the petition that the Board has wrongly exempted established u/s 17. The Board has framed the regulations u/s 79 of the Electricity (supply) Act. Section 7A of the EPF Act is not applicable. Petitioner preferred W.P. No. 6402/2001. The order P.8 was passed on 23-1-2002 and it was directed to decide the objections. By the impugned order P. 11 the objections have been rejected. Hence, the present writ petition has been filed.

A return has been filed by the respondents. It is contended by the respondents in the return by way of preliminary objections that the Board is having the remedy of appeal before the appellate Tribunal, thus, writ petition is liable to be dismissed. The full facts have not been set out in the writ petition. Opportunity of hearing has been afforded as was directed. Section 16(1)(c) of the EPF Act provides that Act shall not apply to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits. The establishment is a progeny of section 5 of the Act of 1948 is not disputed. The Board has also framed Rules P.1 called Madhya Pradesh Electricity Board's Contributory and General Provident Fund Regulations, 1952 under the provisions of section 79 of the Act of 1948. Precondition for exclusion from operation of Act requires that employees of the establishment should be entitled to benefits of contributory provident fund or old age pension. The word "employee" has been defined in section 2(f) of the EPF Act. The Act has been enacted to extend to all the employees, whether permanent, temporary or piece rated or casual or hired through contractors the social security as envisaged under the Act. The provisions of the Regulations framed u/s 79 of the Act of 1948, extend the benefits of contributory provident fund or old age pension to certain classes of employees of the petitioner Board, as would be clear from the provisions of Regulations 7 of the Regulations P.1 dealing with membership of the Provident Fund Scheme of the Establishment. An employee appointed on probation to a post, in which if confirmed, he will become a permanent employee shall be deemed to be a permanent employee for purpose of the regulations from the date of his first appointment. A temporary employee, if subsequently made permanent with retrospective effect, will be entitled to all the benefits contemplated in the rule from the date of his confirmation. An employee appointed on a contract for a period of five years or more; or serving an extended contract on the expiry of the first contract; or engaged on a new contract without break of service whereby the total period of the two or more contracts signed exceeds 5 years, where no period is specified in the contract, shall be deemed for purpose of those regulations as permanent employee, provided he is not eligible to any pension under the Board's Regulations. Thus, the benefit is limited only to permanent employees of the establishment and those on contract as specified in Regulation 7. There is no membership provided under the scheme P.1 to employees hired through contractors working as muster roll employees as also to the work charged employees. Board is complying with the provisions of the Act with respect to NMR and work charged employees. Though the petitioner Board has a Contributory Provident Fund Scheme for its employees, however, since the membership of the Scheme is not open to entire population of employees as envisaged in section 2(f) of the Act, 1952, it does not qualify the test as laid down in section 16(1)(c) and therefore not entitled for exclusion from the purview of the Act. Reliance is placed on Himachal Pradesh Nagar Vikas Pradhikaran Vs. Regional Provident Fund Commissioner and

Another, , in which it has been held that in case daily wager employees are not entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by such Government. Petitioner cannot claim the benefit of section 16(1)(b) of section 16(1)(c) of the EPF Act. The Board has defaulted in payment after having deducted the amount from the salaries of the individual employees to deposit it in trust. The direction has been given to the Board to transfer the amount to the trust for individual credit in employees accounts otherwise the Department shall be at liberty to resort to the provisions of section 8 to recover amount and credit it in employees account from which it has been deducted.

A rejoinder has been filed by the petitioner. It is submitted that there is no statutory bar in exercise of power under Article 226/227 of the Constitution of India in spite of the availability of the alternative remedy of appeal. As the appeal is maintainable on deposit of 75% of the amount, sum of Rs. 76 crores will have to be deposited before the appeal is entertained. Appeal cannot be said to be, thus, effective remedy. The provision has been misinterpreted. Board has complied with the provisions of the Act and admittedly remitted the amount so far as the hired, muster roll and work charge employees are concerned though the same was done inadvertently. As per regulation 11 of the Regulations the Board can merge the amount with the funds of the Board. The Board shall credit the fund with the interest. The Board has been paying interest as per the scheme and making advances and payments to the subscriber from time to time. During the period from April 2000 to March 2001 amount has been disbursed to employees who are entitled for the benefit.

Shri. M.L. Jaiswal, learned Sr. counsel appearing for the petitioner, has submitted that the preliminary objections as to the maintainability of the writ petition in view of the availability of the alternative remedy of appeal is not tenable as remedy of appeal is onerous: 75% of the amount has to be deposited and direct interference is called for in the writ petition considering the ground raised to challenge the impugned order P. 11. He has further submitted that section 16(1) of the EPF Act make it inapplicable to the Board established under the Electricity (Supply) Act, 1948. The Board is having its own scheme P.1: though the Board has been complying with the provisions of the EPF Act with respect to NMR and work charged employees but that was erroneously done. The compliance is being made still with respect to NMR and work charged employees. The Act is not applicable as a whole and the notices based thereon are without jurisdiction. Thus, the impugned order deserves to be quashed.

Shri. S.C. Sharma, learned counsel for the respondents has submitted that in view of the availability of the alternative remedy and also the fact that amount has been admittedly deducted from the employees salaries to whom scheme P.1 is applicable. There is a simply direction issued to deposit the amount in the "trust" which has been deducted which Board is duty bound to deposit, thus, raising of objection by the Board is wholly understandable. There is efficacious

remedy of appeal available, scheme P.1 is applicable only to the permanent employees of the kind specified in Regulation 7 of the scheme P.1 not to NMR and work charged employees and the employees working under the contractors. The Board is complying with the provisions of the Act with respect to the NMR and work charged employees. Exemption is only on the precondition that, there is operative a contributory provident fund and pension scheme and as the deposit of amount has been ordered u/s 8 of the EPF Act which can be ordered with respect to an establishment which has been exempted from operation of EPF Act. In any case as the whole body of the employees is not covered and Board is not complying with its obligation, the Board is not entitled for the benefit of section 16(1)(c). The exemption P.2 was granted u/s 17(1) of EPF Act to the Board. The Board has absolutely no right to usurp the employees valuable money after deducting it from their salaries and is bound to deposit the same in provident fund "trust" created by it. Direction is simpliciter to deposit the said amount into the trust, failing which action has to be taken u/s 8 to recover the amount for the benefit of individual employees accounts. Order is innocuous and it is not open to Board to contend that it would not comply with precondition for inapplicability of EPF Act and claim that Act is not applicable.

Before I take up the preliminary objections as to the maintainability of the writ petition owing to the availability of the alternative remedy of appeal the few material facts be noticed. It is not in dispute that petitioner Board is liable to deposit the amount in the "trust" created under the scheme P.1. This fact is also not in dispute that the Board has deducted amount of provident fund from the individual employees salaries to whom the membership has been given under clause 7 of the scheme. It is also not in dispute that NMR and work charged employees are the members of the scheme P.1 and with respect to them the Board is complying with the provisions of EPF Act. The dispute is with respect to the non-deposit of the amount by the Board of provident fund under regulations P.1 after deducting it from employees salary. The precondition from exclusion of Act is that scheme of provident fund is available as provided in section 16(1)(c). The provision of section 16(1) of EPF Act is quoted below :

16. Act not to apply to establishments belonging to Government or local authority and also to infant factories.-- (1) This Act shall not apply

(a) to any establishment registered under the Co-operative Societies Act, 1912, or under any other law for the time being in force in any State relating to co-operative societies, employing less than fifty persons and working without the aid of power; or

(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any Scheme or rule framed by the Central Government or the State Government governing such benefits; or

(c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits off contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits; or

(d) to any other establishment newly set up, until the expiry of a period of three years from the date on which such establishment is, or has been, set up.

It is clear that to make inapplicable the provision of Act compliance with the provision of section 16(1)(c) is necessary that employees are entitled to contributory provident fund scheme. The power exist u/s 8 of the EPF Act to recover amount even from an exempted establishment section 8 of EPF Act is quoted below:

8. Mode of recovery of monies due from employers.--

(a) from the employer in relation to (an establishment) to which any (Scheme or the Insurance Scheme) applies in respect of any contribution payable (to the fund or as the case may be, the Insurance Fund), damages recoverable u/s 14B, accumulations required to be transferred under sub-section (2) of section 15 (or under sub-section (5) of section 17) or any charges payable by him under any other provision of this Act or of any provision of the (Schemes or the Insurance Scheme) or (b) from the employer in relation to an exempted (establishment) in respect of any damages recoverable u/s 14-B or any charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified (under section 17 or in respect of the contribution payable by him towards the Family Pension (Scheme or the Insurance Scheme) under the said section 17.)

As apparent from regulation 7 of Regulation P.1 that every permanent employee of the Board including employees on contract shall be eligible to subscribe to the fund. Explanation makes it clear that an employee appointed on probation to a post in which if confirmed, he will become a permanent employee shall be deemed to be a permanent employee for purpose of the regulations from the date of his first appointment. A temporary employee, if subsequently made permanent with retrospective effect, will be entitled to all the benefits contemplated in the rules from the date of his confirmation. An employee appointed on a contract for a period of 5 years or more; or serving an extended contract on the expiry of the first contract; or engaged on a new contract without break of service whereby the total period of the two or more contracts signed exceeds 5 years where no period is specified in the contract shall be deemed for purpose of those regulations as permanent employee, provided he is not eligible to any pension under the Board's Regulations. On specific query being put whether NMR and work charged employees are the members of the scheme P.1; on facts learned counsel for the petitioner was unable to refute the submission of the counsel for the respondents that they are not the members of this scheme. It is clear that scheme is applicable to the permanent employees and contract

employees as mentioned of particular category in Regulation 7 and is not applicable to NMR and work charged employees and the Board is complying with the provisions of EPF Act with respect to such class of employees. Even at present with respect to the NMR and work charged employees, the provision of EPF Act is being complied with.

Now I advert to the preliminary submission raised by the learned counsel for the respondents. The first question for consideration is whether the remedy of filing an appeal can be said to be onerous in the facts of this case. When the amount is admittedly due is to be paid by the Board to individual employee fund and has been deducted from salary, in my opinion filing of appeal cannot be said to be an onerous remedy when it requires 75% of the deposit of the amount which is admittedly due to the individual employees credit as amount has been deducted from the salaries of the employees and has not been credited to the funds of the individual employee concerned. In my opinion, it is not open to the Board to contend that by depositing the said amount, which is due and ought to have been credited any additional liability is to be incurred by it as that liability has not been disputed in this writ petition or in arguments. Thus, in my opinion the submission raised that remedy of appeal is onerous is totally baseless. Even otherwise, when the statute has provided the remedy on certain conditions, it cannot be said that remedy of appeal is in any way onerous.

It is submitted that remedy of appeal is onerous. In *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, the Apex Court considered the provision under Customs Act and observed that right of appeal contemplated u/s 129A and 129E is a conditional one and the legislature in its wisdom has imposed that condition of depositing duty demanded or penalty levied. The right is a conditional one and the legislature in its wisdom has imposed that condition. No question of bypassing it by an alternative procedure arises. The appeal is neither an absolute right nor an ingredient of natural justice. The principles of natural justice must be followed in all judicial and quasi-judicial adjudication, right of appeal is a statutory right and it can be circumscribed by the condition and the grant. In *Shyam Kishore and others Vs. Municipal Corporation of Delhi and another*, , the Apex Court considered the provision of appeal u/s 170(b) of Delhi Municipal Corporation Act and observed that the resort to Arts. 226 and 227 should be discouraged when there is an alternative remedy. When the appellate authority is having authority to deal with the appeal, the provision requires certain deposit to be made cannot make it onerous.

As in the instant case, in my opinion, when the provisions of EPF Act are being complied with, with respect to the NMR and work charged employees that is also not in dispute as liability under order P.11 is not with respect to those employees. Thus, in my opinion, with respect to the employees covered under scheme P.1 direction has been made to deposit the amount, in the circumstances, it cannot be said that case is such which requires interference in the writ petition.

Direction is made in order P.11 to the following effect:

20. After having resolved the dispute regarding applicability of the Act, I think it is time to reiterate that the establishment is still in default of transfer of provident fund accumulations of its employees which are yet to be credited to their individual accounts after having been deducted from their salaries. The establishment is hereby directed, once again, to transfer amount as detailed below within fifteen days from today to the Trust for individual credit in employees accounts, failing which the Department shall be free to recover the amount as per provisions of section 8 of the Act.

The liability to make deposit in the trust in the individual credit in employees accounts is multiplying, in my opinion, case is not such which requires interference in the writ petition and Board may if advised may prefer an appeal. As present writ petition was filed in May 2002. In case an appeal is to be preferred may be preferred within one month from the date of decision of this writ petition. In case same is filed within one month. Same be treated in period of limitation and dealt with accordingly. Suffice is to observe, it would be open to the petitioner to seek the waiver of the amount u/s 7(o) of the EPF Act on which I express no opinion. If such an application is made, question has to be considered by the appellate Tribunal.

Resultantly, writ petition is dismissed with the directions made above. No order as to costs.