(2011) 07 P&H CK 0082

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 19619 of 1998 (O and M)

M/s Pathankot Janta Co-operative Labour and Construction Society Limited, Pathankot and Another — APPELLANT

Vs

State of Punjab and Others — RESPONDENT

Date of Decision : 06-07-2011

Acts Referred:
Employes Provident Fund Act, 1952 — Section 1(3), 16, 2, 7(1), 7A
Sales of Goods Act, 1930 — Section 64A

Citation : (2011) 131 FLR 169 : (2011) LLR 1162 : (2011) 163 PLR 532

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

K. Kannan, J.—The petitioners seeks for quashing of the order dated 22.09.1998 (Annexure P-4) issued by the 3rd respondent, who is the Executive Engineer, Ranjit Sagar Dam, conveying the fact of assessment of liability of Rs. 25,43,432/- as the employer''s provident fund contribution u/s 7-A of the EPF Act of 1952 under the orders of the Provident Fund (PF) Commissioner, Amritsar. Following the communication in the manner of settling the hills of various contractors employed by the chief functionaries of Ranjit Singh Dam (R.S. Dam), Shahpurkandi, amounts were sought to be deducted from out of the payments of the contractors. In a tender notice which was subsequently issued, the R.S. Dam declared that only those contractors, who had EPF allotment code or exemption certificate by the EPF Commissioner would be allowed to participate in the tender.

2. The 1st petitioner, who was admittedly one of the contractors for some of the works undertaken by R.S. Dam, is aggrieved against the recoveries made while settling some of the bills and challenges the letter issued by the 3rd respondent to the other officers of the R.S. Dam for effecting the recoveries.

3. In the objections filed on behalf of the R.S. Dam project, it is contended that the actual assessment made by the 4th respondent-PF Commissioner is itself not

in challenge and the petitioners cannot maintain the petition challenging the recoveries made pursuant to the original order of assessment by the PF Commissioner. The PF Commissioner has also filed written statement contending that the assessment u/s 7-A has been made after due enquiry and that the order has become final. There has been also a provision for an appeal u/s 7(1) under the Act and without challenging the order of assessment, the petitioners cannot have the recoveries stalled in collateral proceedings when actions are taken by respondents 1 to 3 for recoveries from the petitioners.

4. The learned counsel for the petitioners points out to the fact that u/s 1(3) of the EPF Act, the establishment that will be governed by the provisions shall only be such establishment which employ 20 or more persons of the classes mentioned in the notification in the official gazette. This Section is subjected to Section 16 of the Act which sets out the minimum number of employees as 50 instead of 20 in case of cooperative societies. The contention on behalf of the 1st petitioner, who was a contractor under R.S. Dam project is a Cooperative Society and it is exempted from the provisions of the Act and recoveries shall not become possible from the petitioners. At a more fundamental level, the objection is that the petitioners had not been at any point of time involved in the adjudication made by the 4th respondent with reference to the liability under the Act and, therefore, the recovery which is sought to be made on the basis of an order which was passed behind the back shall not be tenable in law.

5. It is clear from the pleadings of both the parties and what is definitely admitted that in terms of Section 7-A, the PF Commissioner is entitled to make an adjudication as regards any dispute regarding the applicability of the Act to an establishment and also determine the amount due from the employer. The "employer" is defined u/s 2(e) in relation to establishment as a person or authority, who has the ultimate control over the affairs of the establishment. Section 2(f) defines an "employee" and it is relevant to reproduce the same, which is as follows:

2(f) "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets, his wages directly or indirectly from the employer, and includes any person,-

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment.

6. It can be noticed immediately that a person, who is employed by or through a contractor in connection with the work of the establishment, shall be taken to be an employee on whose behalf the liability of the employer is attached and consequently, the contribution as contemplated will also apply to such an

employer on behalf of the employee employed through a contractor. There could be instances where the contractor himself is an exempted establishment and consequently, in respect of such employee, the principal employer will not become liable to make a contribution. In every adjudication where the principal employer contends that some of the contractors were themselves not attracted to the provisions of the Act, it shall become necessary for the PF Commissioner to render an adjudication regarding the applicability of the Act to such an establishment. In this case, it is seen that R.S. Dam authorities have taken a specific contention that many of their contractors are themselves not attracted to the provisions of the Act, but the PF Commissioner has made a sweeping statement that the liability of the employer shall be attracted also for the liability which has to be fastened on a contractor. This is not wholly correct, for, the Commissioner was considering the situation when a contractor could be an exempted establishment and the liability could not have been, therefore, fastened on the principal employer as well.

7. The adjudication made by the 4th respondent surely has a bearing to the 1st petitioner''s liability. The counsel for the respondents 1 to 3 would contend that the contractors were not giving cooperation to adduce appropriate evidence before the PF Commissioner when the enquiry was undertaken u/s 7A. I do not find any basis for such a contention as well, for, it has not come through any record that any notice had been given by respondents 1 to 3 to any of the contractors requiring them to participate in the enquiry to help respondents 1 to 3 establish that the contractor establishment itself was not attracted to the provisions of the Act. If ultimately an order was passed making the principal employer liable, under normal circumstances, the right of recovery from the contractor is certainly available u/s 8-A of the EPF. Section 8A reads as follows:

8A. Recovery of moneys by employers and contractors.-

(1) The amount of contribution (that is to say the employer''s contribution as well as the employee''s contribution in pursuance of any Scheme and the employer''s contribution in pursuance of the Insurance Scheme), and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of an employee employed by or through a contractor may be recovered by such employer from the contractor, either by deduction from any amount payable to the contractor, under any contract or as a debt payable by the contractor.

(2) A contractor from whom the amounts mentioned in sub-section (1) may be recovered in respect of any employee employed by or through him, may recover from such employee the employee''s contribution [under any Scheme] by deduction from the basic wages, dearness allowance and retaining allowance (if any) payable to such employee.

(3) Notwithstanding any contract to the contrary, no contractor shall be entitled to deduct the employer''s contribution or the charges referred to in sub-section

(1) from the basic wages, dearness allowance, and retaining allowance (if any) payable to an employee employed by or through him or otherwise to recover such contribution or charges from such employee.

8. The recoveries made by the petitioner would have been certainly tenable if an adjudication had been made in the presence of the contractor or with notice to the contractor. If the contention is that the contractor himself is not liable, then the issue of tunneling of liability by the respondents 1 to 3 against the contractor cannot be just or proper. The objection that has to be still met is whether the petitioner could object to the assessment made indirectly by stating that no recovery shall be done by the respondents 1 to 3 without actually challenging the assessment made by the PF Commissioner on 28.04.1998. So long as the 1st petitioner itself was not joined in the enquiry u/s 7A, an order cannot bind the 1st petitioner. The 1st petitioner can take notice of the same only when the effect of this adjudication was reflected through recoveries made by respondents 1 to 3. If the recovery by the employer could not be justified for a liability as sought to be fastened on the petitioner without an adjudication whether the 1st petitioner was liable for the employee''s contribution in the first place, then I would find that the petitioner can, by challenging the recoveries, also urge that the basis of recovery itself was rendered by a process which was not tenable in law. The situation of whether such an indirect challenge would be possible has come in a slightly different situation in M/s. I.D.L. Chemicals Ltd. Vs. Union of India and others, , under the provisions of Section 64-A of the Sales of Goods Act before the Hon''ble Supreme Court, where a change in classification for excise tax levy was permitted to be challenged not merely by the manufacturers but a buyer, who was affected by such a levy. I will apply the same principle and hold that the adjudication made on 28.04.1998 in so far as the petitioner''s interest is concerned cannot survive to be enforced against the petitioner by the respondents 1 to 3. The PF Commissioner shall serve a notice to the 1st petitioner afresh and join the enquiry along with respondents 1 to 3 and take a fresh decision on appropriate materials whether the 1st petitioner was an exempted establishment or not at the relevant time when the works were carried out by the 1st petitioner as a contractor with respondents 1 to 3. The recoveries already made shall be liable to be refunded to the 1st petitioner within 8 weeks from the date of receipt of copy of this order. I will find no reason to interfere with the tender condition which requires every contractor to give the EPF code or a certificate of exempted establishment in order to participate in the tenders.

9. The impugned communication is quashed in so far as the 1st petitioner is concerned. The PF Commissioner will issue a fresh notice and take the decision u/s 7A in accordance with law and in the light of the observations made above.

10. It also contended that the 2nd petitioner was not competent or a necessary party to the proceeding. Having regard to the fact that the case is dealt with on an error of procedure established by law and the benefit will go to the contractor and the joining of the petition by the Labour and the Construction Union as 2nd

petitioner cannot be said to have deflected or embarrassed the proceedings. I will, therefore, reject the contention that the case must fail for joining of the 2nd petitioner along with the 1st petitioner.

11. The writ petition is allowed in the light of the above.

