
(2006) 05 KL CK 0025

In the High Court Of Kerala

Case No : W.A. No's. 1590 and 1591 of 2003 etc.

N. Vijayan and Others

APPELLANT

Vs

The Secretary to Govt. and another

RESPONDENT

Date of Decision : 23-05-2006

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 12, 17, 6
Industrial Disputes Act, 1947 — Section 9A

Citation : (2006) 3 ILR (Ker) 42 : (2006) 3 KLJ 34 : (2006) 3 KLT 291 : (2006) 3 LLJ 337

Hon'ble Judges : V.K. Bali, C.J.;J.B. Koshy, J

Bench : Division Bench

Advocate : Damodaran, K.R.B. Kaimal, P. Ramakrishnan, K. Ramkumar, P.K. Vijayamohan, P.V. Asha, N. Manoj Kumar, M. Rishikesh Shenoy, K.M. Sathyanatha Menon, Regi Ramachandran and I. Sheeladevi, for the Appellant; N.N. Sugunapalan (Sr.), B.S. Krishnan (Sr.), Latha Krishnan, T.R. Ravi, M.P.R. Nair, R. Sudir and K. Lakshmi Narayanan (G.P.), for the Respondent

Final Decision : Dismissed

Judgement

V.K. Bali, C.J.—By this common order we propose to dispose of this bunch of connected matters. The bare minimum facts as projected that need a necessary mention have been extracted from W.P. (C) No. 574 of 2004 and W.A. No. 435 of 2004. The question that needs adjudication is as to whether an employer who may have been contributing in excess of the minimum prescribed under the statutory limits even though on the basis of a joint application filed by the employer and employees before the concerned authorities under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act of 1952) can discontinue from the remittance of such excess share of provident fund.

2. The petitioners in W.P. (C) No. 574 of 2004 are employees and association of employees of the Kerala Co-operative Milk Marketing Federation Limited, second respondent herein, which consists of three regional co-operative milk producers

unions; the Trivandrum Regional Co-operative Milk Producers Union, the Ernakulam Regional Co-operative Milk Producers Union and the Malabar Regional Co-operative Milk Producers Union. As per the decision of the Board of Directors of the second respondent Federation held on 6-8-1984 it was decided to enroll those employees of the Federation whose monthly wages exceed Rs. 1600/- also to the Employees' Provident Fund Scheme and contribution be made at the rate of 8 1/3% of pay without imposing any upper limit with effect from 1-9-1984. The above decision was in accordance with clause 26(6) of the Scheme that then existed, Chapter IV of the Employees' Provident Funds Scheme 1952 (hereinafter referred to as the Scheme of 1952) deals with membership of the Fund. As per clause 26, every employee employed in or in connection with the work of a factory or other establishment to which the Scheme applies, other than excluded establishment, shall be entitled and required to become a member of the Fund. Sub-clause (6) of Clause 26 permits the enrollment and continuance of employees with monthly pay exceeding Rs. 6500/-. Clause 26A of the Scheme provides that a member of the Fund shall continue to be a member until he withdraws the amount standing to his credit in the Fund or is covered by an exemption notification. Sub-clause (2) mandates that every employee in an establishment covered under the Scheme shall contribute to the Fund and the contribution shall 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. The proviso to the sub clause provides that where the monthly pay of such a member exceeds Rs. 6500/-, 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. 6500/-. As per clause 29 of the Scheme of 1952 the contribution payable by the employer under the Scheme shall be at the rate of 10% of the basic wages, dearness allowance, including the cash value of any food concession and retaining allowance, if any, payable to such employee to whom the Scheme applied. As per Section 6 of the Act of 1952 the contribution which shall be paid by the employer to the Fund shall be 10% of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and if any employee so desires be an amount exceeding 10% of the basic wages, dearness allowance and retaining allowance, if any, 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 Section. The provision permits prescription of 12% of the monthly salary as the contribution. However, there is no stipulation of any ceiling limit on the salary based on which the percentage of contribution is to be reckoned. Clause 29 of the Scheme of 1952 also does not stipulate any ceiling limit of salary to be reckoned to work out the percentage of contribution to be effected on behalf of the employee as well as the employer under the Scheme. The second respondent is stated to be subject to the administrative control of the Agriculture (Dairy) Department of the State Government. The audit of the accounts of the Federation is by the auditor appointed by the Government. The

audit officer raised an objection that the payment of contribution at the rate prescribed u/s 6 of the Act of 1952 without keeping the ceiling limit prescribed under the proviso to clause 26A(2) of the Scheme of 1952 is illegal. The ceiling was initially Rs. 1600/- which was raised to Rs. 5000/- and now to Rs. 6500/-. Likewise, the percentage of contribution prescribed under clause 29 read with Section 6 of the Act of 1952 was initially 8.33% which was raised to 10% and now as 12%. The audit objection raised by the first respondent was challenged before the Court by a writ petition and there was stay to the implementation of the decision. However, the writ petition was finally disposed of by judgment dated 2-9-2003 rejecting the prayers. Writ Appeal No. 1590 of 2003 filed against the said judgment is pending consideration by the Division Bench. The managing committee of the second respondent Federation at its meeting held on 2-12-2003 resolved to limit the contribution payable to the Employees's Provident Fund to 12% on the eligible wages subject to the ceiling of monthly salary limited to Rs. 6500/-. The decision aforesaid is stated to have been arrived at upon the directions issued by the Government. The second respondent then issued an office order to that effect vide order dated 9-12-2003.

3. The grievance of the petitioner is that the managing committee of the second respondent at its meeting held on 2-12-2003 resolved to limit the contribution as mentioned above and the aforesaid decision of the second respondent is illegal, arbitrary and against the intention and spirit of the Act of 1952 as also the Scheme of the said Act as it virtually reduces the perquisites of the employees.

4. The appellant who has filed W.A. No. 435 of 2004 and who is first petitioner in the original lis is the North Malabar Gramin Bank Employees Union representing the employees of the North Malabar Gramin Bank. The officers and employees of the South Malabar Gramin Bank and the North Malabar Gramin Bank were contributing to the Scheme in excess of the contributions prescribed by law. The employer was also making equal contribution under the Scheme which was in excess of the statutory limits on the basis of the joint applications filed by the employer and employees before the concerned authorities. By Ext. P2 notification the management had withdrawn from the above agreement without notice to the employees and officers and had reduced and limited their share of contribution to the statutory limits. It is the case of the appellant that, as the management had already consented for making contribution in excess of the statutory limits they were not entitled to withdraw from the above agreement unilaterally and they were bound to continue to contribute the same amount.

5. Paragraphs 26(6), 26A and 29 of the Scheme of 1952 on which rests the controversy read as follows:

26. Classes of employees entitled and required to join the fund.-

(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 more than six thousand and five hundred rupees 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.

26A. Retention of membership (1): A member of the Fund shall continue to be 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 27 or paragraph 27A.

Explanation: In the case of claim for 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 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 this Scheme applied shall contribute to the Fund, and the contribution shall 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 sub-paragraph (1) of paragraph 27, or sub-paragraph (1) of paragraph 27A, where the monthly pay of such a member exceeds six thousand and five hundred 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 six thousand and five hundred rupees including dearness allowance, retaining allowance (if any) and cash value of food concession.

29. Contribution- (1) The contributions payable by the employer under the Scheme shall be at the rate of ten per cent of the basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any) payable to each employee to whom the Scheme applies:

Provided that the above rate of contribution shall be twelve percent 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 subsection (1) of Section 6 of the Act.

(2) The contribution payable by the employee under the Scheme shall be equal to the contribution payable by the employer in respect of such employee:

Provided that in respect of any employee to whom the Scheme applies, the contribution payable by him may, if he so desires, be an amount exceeding ten per cent or twelve per cent, as the case may be, of his basic wages, dearness allowance and retaining allowance (if any) 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.

By virtue of the provisions contained in sub-paragraphs (1) and (2) of paragraph 29 of the Scheme of 1952 the contribution payable by the employer under the Scheme would be at the rate of ten per cent of the basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any) payable to each employee to whom the Scheme applies. The contribution payable by the employee would be equal to the contribution payable by the employer in respect of such employee. However, by virtue of the proviso appended to sub paragraphs 1 and 2 the employee shall be at liberty to make contribution in excess of the rate prescribed under sub paragraph 1, but with regard to payment of the employer's share in excess of the statutory limits, in so far as the employer is concerned, he shall not be obliged to pay contribution in excess of the statutory limits, i.e. 10% of basic wages.

6. A combined reading of Paragraph 26A and Paragraph 29 of the Scheme of 1952 as reproduced above would clearly manifest that a member of the Fund shall continue to be a member until he withdraws the amount standing to his credit in the Fund and that every member employed as an employee other than an excluded employee, in a factory or other establishment with which this Scheme applies shall contribute to the Fund and the contribution shall be payable to the Fund in respect of him by the employer. The proviso to paragraph 26A (2) states that subject to the provisions contained in sub-paragraph (6) of paragraph 26 and in sub-paragraph (1) of paragraph 27, or sub-paragraph (1) of paragraph 27A, where the monthly pay of such a member exceeds six thousand and five hundred 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 six thousand and five hundred rupees. As per sub-paragraphs (1) and (2) of paragraph 29 of the Scheme contribution payable by the employer under the Scheme would be at the rate of ten per cent of the basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any) payable to each employee to whom the Scheme applies. The contribution payable by the employee would be equal to the contribution payable by the employer in respect of such employee. By virtue of the proviso appended to sub-paragraphs (1) and (2) of paragraph 29, employees shall be at liberty to make contribution in excess of the rate prescribed under sub-paragraph (1), but with regard to payment of employer's share in excess of the statutory limits, in so far as the employer is concerned, he shall not be obliged to make contribution in excess of the statutory limits, i.e. ten per cent of the basic wages. The proviso appended to sub-paragraph (2) of paragraph 29 whereas gives discretion to the employee to make contribution of an amount exceeding ten per cent or twelve per cent, as the case may be, of the basic wages, the employer in that event is not enjoined and is thus under no obligation to pay any contribution over and above his contribution payable under the Act. From a bare perusal of paragraphs 26(6), 26A and 29 of the Scheme of 1952 the learned Single Judge observed

thus:

The above provision would make it clear that permission has to be granted by the PF authorities to the employee for enrolling as a member and for making the contribution on more than Rs. 6500/- of his pay. Such permission has to be granted on the basis of a joint application by the employer and employee and an undertaking from the employer that the employer shall pay the administrative charges and shall comply with all statutory provisions regarding the employee. The above clause did not say that there should be pay an equal amount of contribution. But it says that there should be an undertaking from the employer regarding the payment of administrative charges. The above provision allows the PF authorities to permit the employee to make contribution and it does not empower the authorities to allow the employer also make such contributions in excess of the limits.

.....

Sub-paragraph (1) of paragraph 26A says that a member shall continue to be a member until he withdraws under paragraph 69, the amount standing his credit. Sub-paragraph (2) of paragraph 26A stipulates that a member shall contribute to the Fund and the member shall remitted by the employer and the amount of contribution shall be in accordance with the rate specified under paragraph 29. As per paragraph 29, an employee would be at liberty to contribute at more than the prescribed rate of percentage, but the employer shall not be obliged to contribute in excess of the prescribed rate. The proviso to paragraph 26A (2) says that if the wages of the member exceeds the prescribed limit, i.e. if it exceed Rs. 6500/- per mensem, the contribution payable by the employer and employee shall be limited to the amounts payable on a monthly pay of Rs. 6.5000/-. When the wages of the member exceeds the prescribed wage limits, in view of the provision to sub-para (6) of paragraph 26, the PF authorities can permit the employee to make contributions to the Fund in excess to make limits, if there is a joint application by the employer and employee and an undertaking by the employer that he shall meet the administrative charges. A consideration of all the above provisions would make it clear that the employer was not at all obliged to make contributions in excess of the statutory limits regarding the rate of contribution and also on the amount of contribution in excess of the wage limits. But, when the employee is permitted to make contributions in excess of the prescribed wage limits, there shall be an undertaking by the employer that he shall pay the administrative charges payable and shall comply with the statutory provisions in respect of such employee u/s 26(6) of the Act. The joint application filed by the employee and the employer shall be only with respect to an undertaking by the employer that the employer shall pay the administrative charges payable. Even if there was any agreement between the respondent Bank and the employees regarding the payment of the contribution in excess of the employer's contribution, it was not covered by sub-paragraph (6) of paragraph 26 of any provision under the Scheme. On the other hand, there is a specific

direction under paragraph 26A (2), that the contribution payable by the employer shall be limited to the amount payable on the monthly pay of Rs. 6500/-. It appears that in the joint application, the employer Bank also had agreed to make contribution in excess of the statutory limits. As per the provisions of the Scheme, the EPF Authorities can grant permission to the employees alone to make contribution in excess of the wage limits. So, even if the permission was granted by the EPF Authorities to the employer to make contributions in excess of the wage limits, it was unauthorised.

6. When the employer had agreed for making contribution in excess of the statutory limits, it did not mean that it was forever. When the salary was revised or when the ceiling limits had been enhanced or modified, naturally the employer was also entitled to reconsider or revise or withdraw from its earlier decision. Hence, I do not think that there was any prohibition under the Scheme for the management to withdraw from their earlier decision making the employer's share of contribution in excess of the statutory limit or limiting the contribution to the statutory limits.

7. Section 12 of the Act of 1952 on which rested the next contention of the learned counsel reads as follows:

12. Employer not to reduce wages, etc.

No employer in relation to an establishment to which any Scheme or the insurance Scheme applies shall, by reason only of his liability for the payment of any contribution to the Fund or the Insurance Fund or any charges under this Act or the Scheme or the Insurance Scheme, reduce whether directly or indirectly, the wages of any employee to whom the Scheme or the Insurance Scheme applies or the total quantum of benefits in the nature of old age pension, gratuity, provident fund or life Insurance to which the employee is entitled under the terms of his employment, express or implied.

The contention of the learned counsel before the learned Single Judge was that there is prohibition from reducing the benefit which the employees were enjoying. The learned Single Judge repelled the contention by observing as follows:

Section 12 prohibit the employer from reducing the wages of the employee for avoiding his liability to pay contributions to the E.P.F. Scheme. It says that the employer should not reduce whether directly or indirectly, the benefits of the old age pension, gratuity, provident fund, life insurance, etc. to which the employee was entitled under the terms of his employment express or implied. The learned counsel for the petitioners submitted that there was a prohibition u/s 12 of the EPF Act that the employer should not reduce the benefits enjoyed by the employee either directly or indirectly and by reducing the employer's share of contribution, the benefits which the employees were enjoying would be reduced. Section 12 imposes a prohibition from reducing the wages with an intent to, by reason only of his liability for the payment of contribution to the Scheme. It

further says that the employer cannot reduce it directly or indirectly if by the terms of employment, the employee shall be entitled to such benefits. The petitioners had no case that the terms of employment was such that the employer had agreed to contribute to the EPF Scheme in excess of the statutory limits. There was no case for the petitioners that the wage was reduced or that the terms of employment included such a concession that the employer shall make contributions to the absence of any such allegation, I do not think that Section 12 can have any application.

8. The contention raised by the appellant in W.A. No. 435 of 2004 with regard to change of conditions of service based upon Section 9A of the Industrial Disputes Act was repelled by the learned Single Judge by observing that there was no change in the conditions of service by limiting the contribution from the part of the employer to the statutory limits and as such there was no violation of Section 9A of the Industrial Disputes Act and further that if at all it would be treated as a change in the conditions of service, the circular could well be considered as a notice contemplated by law to all the employees regarding the intention of the employer to reduce the contribution to the statutory limits.

9. A bare perusal of Section 12 of the Act of 1952 and paragraph 26A and 29 and in particular the provisos appended to the same and the findings returned by the learned Single Judge as reproduced above would leave no scope for raising a contention with regard to non-entitlement of the employer to limit share to the provident fund to the maximum provided in the statute. The learned counsel appearing for the petitioners in W.P. (C) No. 574 of 2004 and in W.A. No. 435 of 2004, it appears, are conscious that there is no scope for even a pin to go in the findings returned by the learned Single Judge based upon the provisions of the Act and the Scheme. That being so, all that has been urged before us by Mr. M.K. Damodaran learned counsel appearing for the petitioners in W.P. (C) No. 574 of 2004 is that the management may withdraw from its earlier decision for making the employer's share of contribution in excess of the statutory limits or limit the same to statutory limits, but once an employer may take a decision to make his share of contribution in excess of the statutory limits, the Government cannot issue directions to reduce it to the statutory limits as has been done in the present case. It is further urged that the limit mentioned in the statute is minimum and therefore it shall always be in the discretion of the employer to make contributions in excess of the minimum as mentioned in the statute.

10. In the counter affidavit that has been filed on behalf of the first respondent in W.P. (C) No. 574 of 2004 it has been averred that the auditors of the second respondent made some objections with respect to the payment of employer's contribution to the provident fund. Based upon the audit report the Government issued letter Ext. P10 to the second respondent wherein it was directed that in future the employer's contribution towards employee's provident fund be limited strictly in accordance with the relevant provisions in the Employees Provident Funds Scheme, 1952. The Government direction in the letter Ext. P10 was placed

before the Board of Directors of the Federation and the Board of Directors in its 167th meeting held on 2-12-2003 decided to comply with the directions issued by the Government. It has further been pleaded that the Government has got supervision and control over the affairs of the society and therefore the second respondent is bound to comply with the directions given by the government as per Ext. P10. The learned counsel representing the respondents on instruction states that irrespective of the order of the Government, the respondents, in view of the changed circumstances where the salary of the petitioners has increased many-fold, would not like to give its contributions towards provident fund more than what is statutorily required. There is no further reply to the counter affidavit filed by the respondents on behalf of the petitioners. The pleadings made in the counter affidavit, thus manifest that the second respondent is bound by the directions given by the Government and therefore, choice of the employer to give share of its contribution towards provident fund in excess of the maximum mentioned in the statute would be of no meaning and consequence, as the second respondent will be bound to carry out the directions issued by the Government. That apart, independent of the order passed by the Government, the second respondent in view of the changed circumstances as mentioned above, is not prepared to pay more than what is required under the statute. The contention of the learned counsel as noted above, has thus to be repelled. In so far as the contention of the learned counsel as regards prescription of minimum and not the maximum in the statute is concerned, it may be mentioned that a combined reading of the provisions mentioned above and in particular proviso to sub-paragraph (2) of paragraph 29 of the Scheme of 1952 would make it clear that the employer is not obliged to make contributions in excess of the statutory limits regarding the rate of contribution and also on the amount of contribution in excess of the wage limits. The employee may be permitted as per the decision to make contributions in excess of the prescribed wage limits and in that event, as mentioned above, all that the employer has to do is to give an undertaking that he shall pay the administrative charges. It is clearly mentioned that the mere fact that the employee may make contributions in excess of the statutory limits would not create a corresponding duty with the employer to match such contributions. Having said so, we may however, hasten to add that in a given case where an employer on his own volition may like to pay more than what is an embargo under the statute so as not to pay less than what is mentioned therein, but there is no embargo to pay more than what is mentioned therein. Learned counsel appearing for the appellant in W.A. No. 435 of 2005 and other connected matters contends that the benefit granted to the petitioners could not be unilaterally withdrawn and before such an order could be passed, the petitioners were entitled to a hearing. We do not find any merit in the aforesaid contention of the learned counsel as the petitioners attained a benefit to which they did not have any right. It was at the most a concession emanating from the gratuitous act of the employer. The withdrawal of a concession not based on any right as mentioned above requires no notice for its withdrawal.

Finding no merit whatsoever either in the writ petitions or in the writ appeals, the same are dismissed, leaving however the parties to bear their own costs.